



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

Case No. 1D13-1355

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

Appellant,

v.

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

Appellees.

APPENDIX TO RESPONSE TO MOTION FOR REVIEW
OF ORDER VACATING AUTOMATIC STAY AND
REQUEST FOR EXPEDITED TREATMENT

On Appeal from an Order of the Second Judicial
Circuit, in and for Leon County, Florida

Luke Charles Lirot, Esq.
Florida Bar No. 714836
2240 Belleair Road, Suite 190
Clearwater, Florida 33764
(727) 536 – 2100 [Telephone]
(727) 536 – 2110 [Facsimile]
luke2@lirotloaw.com
jimmy@lirotlaw.com
Co-Counsel for the Plaintiffs

Adam S. Levine, M.D., J.D.
Florida Bar No. 78288
11180 Gulf Boulevard, Suite 303
Clearwater, Florida 33767
(727) 512 – 1969 [Telephone]
(866) 242 – 4946 [Facsimile]
aslevine@msn.com
alevine@law.stetson.edu
Co-Counsel for the Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the instant motion is made in compliance with the general requirements for font standards of Fla. R. App. P. 9.100(l).

Respectfully submitted,

/s/ Luke Lirot
Luke Lirot, Esquire
Florida Bar Number 714836

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished in accordance with Florida Rule of Judicial Administration 2.516 to C. Timothy Gray, Esquire and J. Bruce Culpepper, Esquire, of the Florida Office of Insurance Regulation, at tim.gray@flor.com and bruce.culpepper@flor.com; to Pamela Bondi, Esquire, Timothy Osterhaus, Esquire, Allen Windsor, Esquire, and Rachel Nordby, Esquire, of the Office of the Attorney General, at pam.bondi@myfloridalegal.com, timothy.osterhaus@myfloridalegal.com, allen.winsor@myfloridalegal.com, rachel.nordby@myfloridalegal.com, allenwinsor@yahoo.com, and barbara.durham@myfloridalegal.com, this 6th day of May, 2013.

/s/Luke Lirot
Luke Lirot, Esq.
Florida Bar Number 714836

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- 1) Docket Sheet – *Mooneyham, et al., v. McCarty*, Case No. 37 2012 CA 003060, Leon County Circuit Court.
- 2) Email communication between Plaintiffs’ Counsel and the Judge’s Office from November 5, 2012 to November 20, 2012.
- 3) FedEx Shipment Slip for Notice of Voluntary Dismissal - *Mooneyham, et al., v. McCarty*, Case No. 37 2012 CA 003060, Leon County Circuit Court.
- 4) Docket Sheet - *Myers, et al., v. McCarty*, Case No. 8:12-cv-02660-RAL-TBM, United States District Court for the Middle District of Florida.
- 5) Plaintiff’s Motion for Reconsideration - *Myers, et al., v. McCarty*, Case No. 8:12-cv-02660-RAL-TBM, United States District Court for the Middle District of Florida.
- 6) Order Denying Plaintiff’s Motion for Reconsideration - *Myers, et al., v. McCarty*, Case No. 8:12-cv-02660-RAL-TBM, United States District Court for the Middle District of Florida.
- 7) Transcript of Hearing on Plaintiff’s Emergency Motion to Vacate Defendant’s Notice of Automatic Stay, held on April 1, 2013. *Myers, et al. v. McCarty*, Case No. 2013-CA-000073, Leon County Circuit Court.
- 8) Plaintiffs’ Notice of Filing Affidavit and Supplemental Memorandum of Law in Support of Vacating the Notice of Automatic Stay - . *Myers, et al. v. McCarty*, Case No. 2013-CA-000073, Leon County Circuit Court.

Tab 1



Leon County Clerk of Courts
CourtView 2000 Search Engine

Summary Parties Events Dockets Disposition Costs

37 2012 CA 003060 MOONEYHAM, LAMAR vs MCCARTY, KEVIN M

Docket Date	Docket Text	Amount	Amount Due	OR_Book	OR_Page
9/21/2012	CIVIL FEE LATE LETTER CIVIL FEE LATE LETTER Sent on: 09/21/2012 15:30:06				
9/21/2012	CIVIL COVER SHEET				
9/21/2012	SUMMONS ISSUED (TO CAPS) KEVIN M MCCARTY (DEFENDANT); Receipt: 696147 Date: 09/21/2012	\$10.00			
9/21/2012	COMPLAINT Receipt: 696147 Date: 09/21/2012 Receipt: 697853 Date: 09/27/2012	\$400.00			
9/25/2012	COPIES Receipt: 697170 Date: 09/25/2012	\$104.00			
10/8/2012	COPIES Receipt: 702230 Date: 10/08/2012	\$27.00			
10/12/2012	DEFENDANTS NOTICE OF APPEARANCE CLIFFORD TIMOTHY GRAY (Attorney) on behalf of KEVIN M MCCARTY (DEFENDANT)				
10/23/2012	AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF LUKE C LIROT (Attorney) on behalf of LAMAR MOONEYHAM, ERIC L FRANK, WILLIAM SPAIN, ROBERT A MURRAY, SHERRY SMITH, ROBIN ANDREW MYERS, JOHN DOE (PLAINTIFF)				
10/25/2012	PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION WITH INCORPORATED MEMEORANDIM OF LAW LUKE C LIROT (Attorney) on behalf of LAMAR				

Exhibit 4

MOONEYHAM (PLAINTIFF)

10/31/2012 COPIES Receipt: 710724 Date: \$143.00
10/31/2012

11/6/2012 COPIES Receipt: 712947 Date: \$142.00
11/06/2012

11/13/2012 SUMMONS RETURNED
EXECUTED

11/13/2012 NOTICE OF FILING
AFFIDAVIT OF SERVICE

11/13/2012 PLAINTIFFS' NOTICE OF
SUBSTITUTION OF PARTIES

11/13/2012 SUMMONS RETURNED
EXECUTED KEVIN MCCARTY
9/24/12

11/20/2012 NOTICE OF VOLUNTARY
DISMISSAL LUKE C LIROT
(Attorney) on behalf of
ROBERT A MURRAY,
SHERRY SMITH, ROBIN
ANDREW MYERS, JOHN
DOE, JASON D RABINOWITZ,
DAVID W FULTON
(PLAINTIFF)

[[Previous Page](#)] [New Search](#)

[View Help](#)

Tab 2

Office of Luke Lirot

From: Luke Lirot <luke2@lirotlaw.com>
Sent: Tuesday, November 20, 2012 1:37 PM
To: 'Maryann Rybnicky'
Cc: 'Jimmy McComas'; 'Office of Luke Lirot'; 'Traci Lirot'; 'Timothy Gray'
Subject: RE: Case No: 2012-CA-3060 ;Rabinowitz, et al., v. McCarty. FL OIR (formerly Mooneyham, et al. v. McCarty, et al.)

We filed a Notice of Voluntary Dismissal Without Prejudice. Thank you for your efforts and have a Happy Thanksgiving->LL

Luke Lirot, Esq.
LAW OFFICES OF LUKE LIROT, P.A.
Florida Bar No. 714836
2240 Belleair Road., Suite 190
Clearwater, FL 33764
727-536-2100 Office
727-536-2110 Facsimile
E-mail: Luke2@lirotlaw.com

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From: Maryann Rybnicky [mailto:RybnickyM@leoncountyfl.gov]
Sent: Tuesday, November 20, 2012 9:47 AM
To: Luke Lirot
Cc: 'Jimmy McComas'; 'Office of Luke Lirot'; 'Traci Lirot'
Subject: RE: Case No: 2012-CA-3060 ;Rabinowitz, et al., v. McCarty. FL OIR (formerly Mooneyham, et al. v. McCarty, et al.)

Judge Carroll would like to set this for a one hour hearing.

I have Dec 5 at 2:30.

Does this date work for everyone?

Maryann C. Rybnicky
*Judicial Assistant to
Circuit Judge Kevin J. Carroll*

Phone : 850.577.4311

Exhibit 2

>>> "Luke Lirot" <luke2@lirotlaw.com> 11/5/2012 4:41 PM >>>
Yes- the docket shows it was clocked in 10/25/2012-

I will forward you the copy of the e-mailed service copy to Mr. Gray, Counsel for the Office of Insurance Regulation.
Thank you very much for your much appreciated assistance!

Luke Lirot, Esq.
LAW OFFICES OF LUKE LIROT, P.A.
Florida Bar No. 714836
2240 Belleair Road., Suite 190
Clearwater, FL 33764
727-536-2100 Office
727-536-2110 Facsimile
E-mail: Luke2@lirotlaw.com

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From: Maryann Rybnicky [mailto:RybnickyM@leoncountyfl.gov]
Sent: Monday, November 05, 2012 2:37 PM
To: Luke Lirot
Cc: 'Jimmy McComas'; 'Office of Luke Lirot'; 'Traci Lirot'
Subject: RE: Case No: 2012-CA-3060 ;Rabinowitz, et al., v. McCarty. FL OIR (formerly Mooneyham, et al. v. McCarty, et al.)

Has your Motion for Temporary Injunction been filed with the clerk?

Maryann C. Rybnicky
*Judicial Assistant to
Circuit Judge Kevin J. Carroll*

Phone : 850.577.4311

>>> "Luke Lirot" <luke2@lirotlaw.com> 11/5/2012 12:55 PM >>>

Dear Ms. Rybnicki,

Is there any possible way we can get a slot before the end of the year? The motion for temporary injunction is essentially an emergency motion, since we are alleging "irreparable harm." Is there a "duty judge" we can present our arguments on the injunction to? W

I would deeply appreciate any scheduling consideration we can get- Thank you very much!

Luke Lirot, Esq.
LAW OFFICES OF LUKE LIROT, P.A.
Florida Bar No. 714836
2240 Belleair Road., Suite 190

Clearwater, FL 33764
727-536-2100 Office
727-536-2110 Facsimile
E-mail: Luke2@lirotlaw.com

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From: Maryann Rybnicky [mailto:RybnickyM@leoncountyfl.gov]
Sent: Monday, November 05, 2012 11:42 AM
To: Office of Luke Lirot
Cc: Jimmy McComas; luke2@lirotlaw.com
Subject: Re: Case No: 2012-CA-3060 ;Rabinowitz, et al., v. McCarty. FL OIR (formerly Mooneyham, et al. v. McCarty, et al.)

For an hour and half time slot, we are looking at end of January.

Would this work?

Maryann C. Rybnicky
*Judicial Assistant to
Circuit Judge Kevin J. Carroll*

Phone : 850.577.4311

>>> "Office of Luke Lirot" <office@lirotlaw.com> 11/2/2012 2:23 PM >>>
Good Afternoon Ms. Rybnicky ,

I left you a voicemail this afternoon but perhaps e-mail may be an equally acceptable form of communication. I am writing you to request proposed Hearing Dates on Mr. Lirot's Amended Complaint for Declaratory and Injunctive Relief filed on October 19, 2012. Mr. Lirot requests a 1.5 hour hearing if that meets the approval of Judge Carroll. Please respond with available dates or give me a call back at your earliest convenience. Thank You!

Vicky Puente
Legal Assistant
LAW OFFICES OF LUKE LIROT, P.A.
2240 Belleair Road., Suite 190
Clearwater, FL 33764
727-536-2100 Office
727-536-2110 Facsimile
E-mail: office@lirotlaw.com

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Tab 3

FedEx Express NEW Package US Airbill

1 From: Please print and press hard. Sender's FedEx Account Number: 8009 0363 1300
 Date: 11/19/2012 Sender's FedEx Account Number: 1891-9719-5

2 Sender's Name: Luke Liroto, Esq. Phone: 727.536-2100
 Company: Luke Charles Liroto, P.A.
 Address: 2240 Belleaire Rd., Ste. 190
 City: Clearwater State: FL ZIP: 33764

3 Your Internal Billing Reference: PIP Act
 Recipient's Name: Clerk of the Court
 Company: Leon Co. Clerk of the Court
 Address: 301 South Monroe St.
 City: Tallahassee State: FL ZIP: 32301

4 Express Package Service: *In most locations. For packages over 150 lbs, use the new FedEx Express Freight Airbill.
 FedEx First Overnight: Monday through Saturday delivery. Delivery is subject to availability.
 FedEx Priority Overnight: Delivery by 10:00 AM the next business day.
 FedEx Standard Overnight: Delivery by 3:00 PM the next business day.
 FedEx 2Day AM: Monday through Saturday delivery. Delivery is subject to availability.
 FedEx 2Day: Monday through Saturday delivery. Delivery is subject to availability.
 FedEx Express Saver: Monday through Saturday delivery. Delivery is subject to availability.
 FedEx Envelope: FedEx Pak: FedEx Box: Other:

5 Packaging: *Included value limit only.
 FedEx Signature Required: Direct Signature: Indirect Signature:
 Does this shipment contain dangerous goods? No Yes Yes, except for Dry Ice Dry Ice, UN 1845 Cargo Aircraft Only

6 Special Handling and Delivery Signature Options
 SATURDAY Delivery: All residential FedEx Signature Service, FedEx Mail, or FedEx Express Service.
 No Signature Required: Direct Signature: Indirect Signature:
 Payment \$110: Sender's Account Recipient Third Party Credit Card Cash/Check

7 Total Packages: Total Weight: Total Declared Value: \$ 644
 The ability to track a package online is subject to the service selected. Service not available for certain services. For more information, visit FedEx.com. ©2012 FedEx. Printed in U.S.A.



POSTED
 FedEx Signature Required
 FedEx Signature Required

4 Express Package Service: *In most locations. For packages over 150 lbs, use the new FedEx Express Freight Airbill.
 FedEx First Overnight: Monday through Saturday delivery. Delivery is subject to availability.
 FedEx Priority Overnight: Delivery by 10:00 AM the next business day.
 FedEx Standard Overnight: Delivery by 3:00 PM the next business day.
 FedEx 2Day AM: Monday through Saturday delivery. Delivery is subject to availability.
 FedEx 2Day: Monday through Saturday delivery. Delivery is subject to availability.
 FedEx Express Saver: Monday through Saturday delivery. Delivery is subject to availability.
 FedEx Envelope: FedEx Pak: FedEx Box: Other:

5 Packaging: *Included value limit only.
 FedEx Signature Required: Direct Signature: Indirect Signature:
 Does this shipment contain dangerous goods? No Yes Yes, except for Dry Ice Dry Ice, UN 1845 Cargo Aircraft Only

6 Special Handling and Delivery Signature Options
 SATURDAY Delivery: All residential FedEx Signature Service, FedEx Mail, or FedEx Express Service.
 No Signature Required: Direct Signature: Indirect Signature:
 Payment \$110: Sender's Account Recipient Third Party Credit Card Cash/Check

7 Total Packages: Total Weight: Total Declared Value: \$ 644
 The ability to track a package online is subject to the service selected. Service not available for certain services. For more information, visit FedEx.com. ©2012 FedEx. Printed in U.S.A.

Tab 4

CLOSED

**U.S. District Court
Middle District of Florida (Tampa)
CIVIL DOCKET FOR CASE #: 8:12-cv-02660-RAL-TBM**

Myers et al v. McCarty
Assigned to: Judge Richard A. Lazzara
Referred to: Magistrate Judge Thomas B. McCoun III
Cause: 42:1983 Civil Rights Act

Date Filed: 11/23/2012
Date Terminated: 12/28/2012
Jury Demand: Plaintiff
Nature of Suit: 950 Constitutional -
State Statute
Jurisdiction: Federal Question

Plaintiff

Robin A. Myers
*A.P., an individual person and
Acupuncture Physician*

represented by **Adam Scott Levine**
The Florida Legal Advocacy Group, PA
Suite 303
1180 Gulf Blvd
Clearwater, FL 33767
727/512-1969
Fax: 866/242-4946
Email: aslevine@msn.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Luke Charles Lirot
Luke Charles Lirot, PA
Suite 190
2240 Bellair Rd
Clearwater, FL 33764
727/536-2100
Fax: 727/536-2110
Email: luke2@lirotlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Gregory S. Zwirn
*D.C., an individual person and
Chiropractic Physician*

represented by **Adam Scott Levine**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Luke Charles Lirot
(See above for address)

Exhibit 4

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Plaintiff

Sherry L. Smith
*L.M.T., an individual person and
Licensed Massage Therapist*

represented by **Adam Scott Levine**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Luke Charles Lirot
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Plaintiff

Carrie C. Damaska
*L.M.T., an individual person and
Licensed Massage Therapist*

represented by **Adam Scott Levine**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Luke Charles Lirot
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Plaintiff

John Doe
*on behalf of all similarly situated health
care providers*

represented by **Adam Scott Levine**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Luke Charles Lirot
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Plaintiff

Jane Doe
*on behalf of all those injured by motor
vehicle collisions*

represented by **Adam Scott Levine**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Luke Charles Lirot
(See above for address)
LEAD ATTORNEY

ATTORNEY TO BE NOTICED

V.

Defendant

Kevin N. McCarty
*in his Official Capacity as
 Commissioner of the Florida Office of
 Insurance Regulations*

represented by **Clifford Timothy Gray**
 Florida Office of Insurance Regulation
 Room 647B
 200 E Gaines St
 Tallahassee, FL 32399-4206
 850/413-2122
 Fax: 850/922-2543
 Email: tim.gray@flair.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
11/23/2012	<u>1</u>	COMPLAINT against Kevin N. McCarty with Jury Demand (Filing fee \$ 350 receipt number TPA14502) filed by Gregory S. Zwirn, Robin A. Myers, Sherry L. Smith, John Doe, Jane Doe, Carrie C. Damaska. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Exhibit A, # <u>3</u> Exhibit B, # <u>4</u> Exhibit C, # <u>5</u> Exhibit D, # <u>6</u> Exhibit E, # <u>7</u> Exhibit F)(SAH) (Entered: 11/26/2012)
11/23/2012	<u>2</u>	Summons issued as to Kevin N. McCarty. (SAH) (Entered: 11/26/2012)
11/26/2012	<u>3</u>	RELATED CASE ORDER AND NOTICE of designation under Local Rule 3.05 - track 2. Notice of pendency of other actions due by 12/10/2012. Signed by Judge Richard A. Lazzara on 11/26/2012. (MSS) (Entered: 11/26/2012)
11/28/2012	<u>4</u>	CERTIFICATE of interested persons and corporate disclosure statement re <u>3</u> Related case order and notice of designation of track 2 by Carrie C. Damaska, Jane Doe, John Doe, Robin A. Myers, Sherry L. Smith, Gregory S. Zwirn identifying Corporate Parent Gregory S. Zwirn, Other Affiliate Luke Charles Lirot, Other Affiliate Adam Scott Levine for Gregory S. Zwirn; Other Affiliate Luke Charles Lirot, Other Affiliate Adam Scott Levine for Carrie C. Damaska, Jane Doe, John Doe, Robin A. Myers, Sherry L. Smith.. (Levine, Adam) (Entered: 11/28/2012)
11/28/2012	<u>5</u>	NOTICE of pendency of related cases re <u>3</u> Related case order and notice of designation of track 2 per Local Rule 1.04(d) by Carrie C. Damaska, Jane Doe, John Doe, Robin A. Myers, Sherry L. Smith, Gregory S. Zwirn. Related case(s): yes (Levine, Adam) (Entered: 11/28/2012)
11/28/2012	<u>6</u>	RETURN of service executed on 11/24/2012 by Gregory S. Zwirn, Robin A. Myers, Sherry L. Smith, John Doe, Jane Doe, Carrie C. Damaska as to Kevin N. McCarty. (Attachments: # <u>1</u> Affidavit of Service)(Lirot, Luke) (Entered: 11/28/2012)

		11/28/2012)
11/30/2012	<u>7</u>	MOTION for preliminary injunction <i>with Memorandum of law</i> by All Plaintiffs. (Liro, Luke) (Entered: 11/30/2012)
12/03/2012	<u>8</u>	ORDER directing response to motion for preliminary injunction and scheduling hearing. Defendant to file a response to the motion on or before 12/11/2012. Hearing scheduled Thursday, December 13, 2012, at 1:30 p.m. Clerk: See special mailing instructions. Signed by Judge Richard A. Lazzara on 12/3/2012. (SKH) (Entered: 12/03/2012)
12/03/2012	<u>9</u>	NOTICE of Hearing on <u>7</u> Motion for Preliminary Injunction:Motion Hearing scheduled THURSDAY, DECEMBER 13, 2012, at 1:30 p.m. in Courtroom 15B, United States Courthouse, 801 North Florida Ave., Tampa, Florida, before Judge Richard A. Lazzara. (SKH) (Entered: 12/03/2012)
12/03/2012	<u>10</u>	NOTICE of compliance re <u>8</u> Order by Carrie C. Damaska, Jane Doe, John Doe, Robin A. Myers, Sherry L. Smith, Gregory S. Zwirn (Levine, Adam) (Entered: 12/03/2012)
12/03/2012	<u>11</u>	NOTICE by Carrie C. Damaska, Gregory S. Zwirn re <u>1</u> Complaint <i>Filing Affidavit of Verification</i> (Levine, Adam) (Entered: 12/03/2012)
12/04/2012	<u>12</u>	NOTICE of Appearance by Clifford Timothy Gray on behalf of Kevin N. McCarty (Gray, Clifford) (Entered: 12/04/2012)
12/04/2012	<u>13</u>	ORDER ATTACHED directing the parties to advise the Court on or before 12/12/2012 of any other pending cases in accord with the attached order. Signed by Judge Richard A. Lazzara on 12/4/2012. (CCB) (Entered: 12/04/2012)
12/06/2012	<u>14</u>	NOTICE of compliance <i>with Fed. R. Civ. P. Rule 5.1</i> by Carrie C. Damaska, Jane Doe, John Doe, Robin A. Myers, Sherry L. Smith, Gregory S. Zwirn (Attachments: # <u>1</u> Exhibit)(Levine, Adam) (Entered: 12/06/2012)
12/07/2012	<u>15</u>	NOTICE of pendency of related cases re <u>13</u> Order per Local Rule 1.04(d) by Kevin N. McCarty. Related case(s): yes (Gray, Clifford) (Entered: 12/07/2012)
12/07/2012	<u>16</u>	NOTICE of pendency of related cases re <u>3</u> Related case order and notice of designation of track 2 per Local Rule 1.04(d) by Kevin N. McCarty. Related case(s): Yes (Gray, Clifford) (Entered: 12/07/2012)
12/07/2012	<u>17</u>	CERTIFICATE of interested persons and corporate disclosure statement re <u>3</u> Related case order and notice of designation of track 2 by Kevin N. McCarty. (Gray, Clifford) (Entered: 12/07/2012)
12/11/2012	<u>18</u>	RESPONSE in opposition re <u>7</u> MOTION for preliminary injunction <i>with Memorandum of law</i> filed by Kevin N. McCarty. (Attachments: # <u>1</u> Appendix PIP Act, # <u>2</u> Appendix Summary of PIP Act, # <u>3</u> Affidavit Defendant McCarty's Affidavit)(Gray, Clifford) (Entered: 12/11/2012)

12/12/2012	<u>19</u>	ORDER ATTACHED denying <u>7</u> Motion for preliminary injunction and cancelling hearing scheduled for Thursday, December 13, at 1:30 p.m. Defendant shall file his response to Plaintiffs' complaint within twenty-one (21) days of service of the complaint. Signed by Judge Richard A. Lazzara on 12/12/2012. (SKH) (Entered: 12/12/2012)
12/12/2012	20	NOTICE cancelling Motion for Preliminary Injunction hearing scheduled for 12/13/2012 at 1:30 p.m. (SKH) (Entered: 12/12/2012)
12/17/2012	<u>21</u>	MOTION to dismiss Complaint by Kevin N. McCarty. (Gray, Clifford) (Entered: 12/17/2012)
12/21/2012	<u>22</u>	First MOTION for reconsideration re <u>19</u> Order on motion for preliminary injunction by Carrie C. Damaska, Jane Doe, John Doe, Robin A. Myers, Sherry L. Smith, Gregory S. Zwirn. (Attachments: # <u>1</u> Exhibit Plaintiffs' Exhibit A, # <u>2</u> Exhibit Plaintiffs' Exhibit B)(Levine, Adam) (Entered: 12/21/2012)
12/27/2012	<u>23</u>	ORDER ATTACHED denying <u>21</u> Plaintiffs' Motion for Reconsideration; denying as moot <u>22</u> Defendant's Motion to Dismiss; dismissing count one of the Complaint with prejudice and directing the Clerk to enter judgment for Defendant on that count; dismissing without prejudice to being refiled in state court counts two through ten of the Complaint; and directing the Clerk to close this case. Signed by Judge Richard A. Lazzara on 12/27/2012. (DMB) (Entered: 12/27/2012)
12/28/2012	<u>24</u>	JUDGMENT in favor of Kevin N. McCarty against Carrie C. Damaska, Gregory S. Zwirn, Jane Doe, John Doe, Robin A. Myers, Sherry L. Smith (Signed by Deputy Clerk) (SAH) (Entered: 12/28/2012)

PACER Service Center			
Transaction Receipt			
05/06/2013 17:16:13			
PACER Login:	110442	Client Code:	PIP ACT 2
Description:	Docket Report	Search Criteria:	8:12-cv-02660-RAL-TBM
Billable Pages:	4	Cost:	0.40

Tab 5

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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,
Plaintiffs,

v.

CASE NO: 8:12-cv-2660-T-26TBM

KEVIN N. McCARTY, in his Official
Capacity as Commissioner of the Florida
Office of Insurance Regulation,
Defendant. _____ /

PLAINTIFFS' MOTION FOR RECONSIDERATION

PLAINTIFFS, by and through undersigned counsel, most respectfully apply to this Honorable Court to Reconsider the Court's Denial [Doc. 19] of the Plaintiff's Motion for Preliminary Injunction [Doc. 7] and, in the alternative, allow resolution of "unsettled issues of state law," through the invocation of the *Pullman* Abstention doctrine. In support thereof, Plaintiffs would state as follows:

I. Introduction

1. Because enforcement of the challenged provisions of the 2012 Personal Injury Protection (PIP) Act are scheduled to begin on January 1, 2013, and because Plaintiffs will each suffer irreparable harm, the Plaintiffs' beg the Court's indulgence to reconsider its ruling because the assertions set forth in the Defendant's Response to the Plaintiff's Motion [Doc. 18], to the extent relied on by the Court, contain several inaccuracies.

2. While the gist of the Court's finding is that, "Plaintiffs' utterly failed to demonstrate that there is a substantial likelihood they will eventually prevail on the merits,"

since the Plaintiffs have no “fundamental right” to be protected, thus no basis to be in Federal Court, it is respectfully asserted that Plaintiffs availed themselves of the Federal Court because of their belief that their medical and healthcare licenses were tantamount to “property rights,” and Plaintiffs sincerely believed that the harm and destruction of the benefits they derived from earning a living *with* their state licenses, even under a state statutory scheme, was a sufficient “fundamental” basis to bring a meritorious federal action.

3. Plaintiffs respectfully maintain that their injuries *do* far outweigh any damage to the state resulting from a preliminary injunction and the maintenance of the *status quo*, and also believe that a preliminary injunction would not be adverse to the public interest. Having rejected the Plaintiffs’ requested relief on the perceived absence of any viable federal claim, the Court did not address these components of the test for injunctive relief.

II. This Rehearing is Not Sought to Abuse this Court and is Sought in Good Faith

4. Rather than being seen as “beating a dead horse,” it is respectfully requested that the Court accept this effort in the good faith in which it is tendered. Relief pursuant to a motion for reconsideration is proper where, as here, it is requested to prevent or correct clear error of law *or prevent manifest injustice*. *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla.1994); *and Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 686 (M.D.Fla.1996) (emphasis added).

5. This action for declaratory and injunctive relief challenged the constitutionality of Florida’s 2012 PIP Act because Plaintiffs’ allege that, beginning January 1, 2013, enforcement of the 2012 PIP Act will dramatically limit and/or deprive both healthcare providers and healthcare consumers of their constitutional rights to due process

and equal protection guaranteed both by the Constitutions of the United States and of Florida. Further, on its face, the 2012 PIP Act violates multiple provisions of the Constitution of the State of Florida, such as the single subject rule.

6. Defendant essentially alleged that Plaintiffs possessed no property right in a statutorily defined right – specifically the right to reimbursement for medical care provided covered by personal injury protection insurance. However, Defendant failed to consider that although a potential licensee possesses no inherent property right in a professional license, once a state grants that professional license, such as either a Massage Therapy License or an Acupuncture License, the licensee possesses a property right in that license. Plaintiffs did not argue that they possessed a *property right in PIP*. Rather, Plaintiffs argued that they possessed *a property right in their professional licenses*.

7. By totally excluding and severely limiting only *some* professional licensees, but not others, the state improperly denied these licensees from their property rights.

8. Defendant alleged that no issues alleged related to a denial of the Plaintiffs' rights under the equal protection of the law. However, for the same reasons as above, the state's exclusion and limitation of only some of its professional licensees subjected these excluded and limited licensees from equal protection under the law. Plaintiffs *did not* suggest that they were part of a protected class. Plaintiffs only suggested that there must exist some rational basis for denying *their* rights as medical professionals, and not the rights of other medical professionals.

9. Although this Court set an extremely high bar for pleading against a state's rational basis, the Plaintiffs respectfully assert that there can be no rational basis for

excluding all Licensed Massage Therapists, all Acupuncture Physicians (and limiting all Chiropractic Physicians) from providing medical evaluation and care for those injured as a result of *only* motor vehicle accidents, and not any other acute or non acute, traumatic or atraumatic injury, when absolutely no data exists demonstrating that the care provided is not effective or harmful, especially care that has been provided for years, with proven benefits.

10. Plaintiffs merely argue that Plaintiffs possess a property interest in their professional licenses. In a laudatory effort to combat fraud, the legislature passed the 2012 PIP Act. Unfortunately, in addition to facially violating a large number of state constitutional provisions, it is respectfully asserted that the 2012 PIP Act denies the Plaintiffs their due process and equal protection rights guaranteed by the Constitution of the United States.

11. Because there exists no rational basis to treat only *some* licensed health professionals differently, those affected are being denied their right to equal protection under the law, and because *some* licensed health professionals are being denied their right to due process, the Plaintiffs most respectfully request that this Court permit a rehearing on Plaintiffs' Motion for Preliminary Injunction before Plaintiffs suffer irreparable harm.

III. Professional Licensure as a *Fundamental* Property Right

While property rights are protected under the Fifth and Fourteenth Amendments to the Constitution of the United States, the source of those property rights is state law: "Whether First Assembly has a protectable property interest is a matter of state law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 ... (1985)." cited in *First Assembly of God v. Collier County*, 20 F.3d 419, 422 (11th Cir. 1994), mod. other grounds *First Assembly of God v. Collier County*, 27 F.3d 526 (11th Cir. 1994).

The fact that the right to practice medicine is a property right has long been the law of the State of Florida: Upon the granting of the certificate a right of property vested in the holder. This Court said in *State ex rel. Sbordy v. Rowlett*, 138 Fla. 330, 190 So. 59: ". . . We cannot overlook the fact that the right to practice medicine is a valuable *property right* and must be protected under the Constitution and laws of Florida." *State ex rel. Estep v. Richardson*, 3 So. 2d 512 (Fla. 1941).

The property right in a license to practice medicine was extended to dentistry: *Engle v. Rigot*, 434 So.2d 954 (Fla. 3d DCA 1983). Similarly, and in a case similar to the instant matter, Florida's First District Court of Appeal ruled that an ophthalmologist had standing to challenge a rule that would have permitted optometrists to write certain prescriptions. The Court, relying on *Sbordy* and *Estep* noted that the right to practice their professions conferred standing to challenge regulations extended to: "physicians, dentists, chiropractors, and optometrists." *Florida Medical Association, Inc., v. Department of Professional Regulation*, 426 So.2d 1112, 1116, (Fla. 1st DCA 1983).

Beyond the specified property right that Plaintiffs enjoy in their right to practice their branches of the healing arts, Plaintiffs have a more general property right in the business portions of their practices:

The federal constitution and laws passed within its authority are by the express terms...the supreme law of the land. The Fourteenth Amendment protects life, liberty, and property from invasion by the state without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. *Holden v. Hardy*, 169 U.S. 366, 391, 18 S.Ct. 383, 42 L.Ed. 780. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1. Blackstone's Commentaries (Cooley's Ed.) 127)

Buchanan v. Warley, 245 U.S. 60, 74, 38 S.Ct. 16 (1917). This theory of property has been expanded:

... The definition of "property" under the Fifth Amendment, however, is not narrowly limited and applies to rights in the use of property as well as the title to it. *Kaiser Aetna v. United States*, 444 U.S. 164, 178 n. 8, 100 S.Ct. 383, 392 n. 8, 62 L.Ed.2d 332 (1979).

[T]he Court has frequently emphasized that the term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [owner-ship]." *United States v. General Motors Corp.*, 323 U.S. 373 [65 S.Ct. 357, 89 L.Ed. 311] (1945). The term is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.*, at 377-78 [65 S.Ct. at 359-360].

Penn Central Transportation, 438 U.S. at 142-43, 98 S.Ct. at 2668-69 (Rehnquist, J., dissenting); see also *Pruneyard Shopping Center*, 447 U.S. at 82 n. 6, 100 S.Ct. at 2041 n. 6.

Barbian v. Panagis, 694 F.2d 476, 483 (7th Cir. 1982). The *General Motors* case sets out an even broader definition of property:

... In other words, it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is a "fee simple" or it may be the interest known as an 'estate or tenancy for years', ... The constitutional provision is addressed to every sort of interest the citizen may possess.

United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357 (1945).

Just as Florida law has clearly established a protected property right in a license to practice medicine, the Second Circuit noted:

... This decision of Maine's highest court, in the First Circuit's words, "would seem to have conferred upon Roy a property interest in the license. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982) ('The hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except "for cause.')." 712 F.2d at 1522. No such entitlement by order of the court...exists in the present case.

Similarly, when a person seeking the right to practice law has passed the bar examination and there is no indication that he is not a person of good moral character, his property interest, as distinguished from the absence of one in the present case, is readily apparent. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957).

Yale Auto Parts v. Johnson, 758 F.2d 54, 60 (2nd Cir. 1985).

Recognition of economic property, such as the businesses portion of the healing arts operated by Plaintiffs came in a 1982 decision of the United States Supreme Court. "The hallmark of property... is an individual entitlement grounded in state law, which cannot be removed except "for cause." ...Once the characteristic is found, the...interest protected as 'property' are varied and, as often as not, intangible, relating to the whole domain of social and economic fact." *Logan v. Zimmerman Brush Co.*, 455 S.Ct. 422, 430 (1982).

Therefore, the definition of "property" which is constitutionally protected extends to intangible, economic property, such as the value of the businesses which Plaintiffs operate and all of their intrinsic parts. Applying *Logan, supra*, Judge Presnell of this Court recently held:... an authorized, intentional deprivation of property is actionable pursuant to the Due Process Clause. *Hudson*, 468 U.S. at 532 n. 13; *Parratt*, 451 U.S. at 543-44. An authorized or intentional deprivation is one carried out pursuant to established state procedures, regulations, or statutes. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436-37 (1982).

The essential basis of the Plaintiffs' lawsuit is that the State of Florida Licenses all healthcare providers, including Acupuncture Physicians, Licensed Massage Therapists, and Chiropractic Physicians and allows that each practices his or her profession in accordance within the limitations of their respective licenses. Although a license does not have to be

given, once issued, a license becomes a property right. This license may not be taken away *or restricted* provided that the licensee practice his or her profession within the limits allowed by the licensing statutes.

Respectfully, the undersigned would urge the Court to reconsider its strident criticisms predicated on the Eleventh Circuit's opinion in *Leib v. Hillsborough County Public Transportation Commission*, 558 F.3d 1301 (11th Cir. 2009). Mr. Leib had a Toyota Prius that had as spacious, as safe, and as "leathered" an interior, and was, specification wise, as comfortable as the Lincoln Town cars consistently found to be "luxury" vehicles worthy of the Hillsborough County Public Transportation Commission's (HCPTC) special "badge" to be used as a limousine in Hillsborough County. While Mr. Leib felt that preserving the planet was, at least to some degree, a "luxury" worth pursuing, there were no impediments to him operating his vehicle as a limousine *anywhere else in Florida*. There were no other Hybrids that had gotten the "badge," so there were really no "similarly situated" individuals Mr. Leib could point to, and the "entitlement" at issue was a special permit, and Mr. Leib had no "property" right at issue.

The Plaintiffs never argued that Personal Injury Protection (PIP) is a right. The Plaintiffs argued that PIP insurance is the same as any other third party payor for healthcare services. The Plaintiffs believe that the absolute exclusion of all Acupuncture Physicians and all Licensed Massage Therapists from the only third party payor for injuries arising out of a motor vehicle accident violates their right both to due process and to equal protection. Similarly, the Plaintiffs believe that the limitation of all Chiropractic care to only manual manipulation, only for patients injured in a motor vehicle accident also violates the due

process and equal protection rights of all Chiropractors and their patients. The Plaintiffs believe that there can be no logical argument possible to support the outcome of the 2012 PIP Act that allows the Plaintiffs to treat neck and back pain from any cause except when that neck and back pain is related to a motor vehicle accident.

IV. Plaintiffs' Property Rights Are Being Impermissibly Taken or Restricted

The Defendant argued that the Plaintiffs' fatal flaw is that they identified no property right being taken, [Doc. 18, P. 2], without due process or any recognized status entitling them to equal protection. Defendant fails to recognize that licensed medical professionals possess a property right in their licenses to practice their respective professions once that license is issued. Plaintiffs were not provided with any due process because they are either being completely excluded or severely limited from any compensation by the *only* third party payor for medical injuries arising out of motor vehicle accidents – PIP insurance. Plaintiffs' never claimed any PIP rights – Plaintiffs merely claim that once issued a license, they possess a property right and the Defendant's exclusion or limitation of compensation by the *sole* source available for motor vehicle injuries provided no due process for this apparent "taking."

The right of a properly qualified and licensed healthcare provider to practice a particular branch of the healing arts is a valuable property right in which the healthcare provider is entitled to be protected and secured. *State ex rel. Estep v. Richardson*, 148 Fla. 48, 3 So. 2d 512 (1941). Equally, the preservation and protection of the public health is one of the duties that devolve on the state in the exercise of its inherent police power. See Fla. Jur. 2d, Health and Sanitation § 1.

Plaintiffs do not claim to be a protected class. Rather, Plaintiffs' claim that the Defendant's exclusion from or limitation of any compensation from the only third party payor for motor vehicle injuries impermissibly infringes on their fundamental liberty right to practice their profession without any rational basis. Rationally, how can there be any conceivable basis to support an outcome of the 2012 PIP Act allowing Plaintiffs to treat neck and back pain from any cause *except* when that neck and back pain is related to a motor vehicle accident, likely the greatest source of such injuries.

Plaintiffs allege that there can exist no possible rational basis to exclude any person injured as a result of a motor vehicle collision from receiving care from an Acupuncture Physician, a Licensed Massage Therapist, or a Chiropractic Physician when those persons have been receiving this same care for many years in the absence of any harm and with valid scientific support for positive outcomes. The professions have proven benefits for the exact injuries the Plaintiffs can no longer be compensated for treating. Plaintiffs allege that excluding all Acupuncture Physicians, all Licensed Massage Therapists, and severely limiting chiropractic care will not impact PIP insurance fraud.

Defendant also incorrectly argued that Plaintiffs seek a reinstatement of Florida's No-Fault Law. In fact, Plaintiffs only seek not to be singled out and excluded by the only third party healthcare payor providing coverage for injuries resulting from motor vehicle collisions. How can there be any rational basis, any conceivable rational basis for allowing a licensed healthcare provider to provide care for neck pain from any cause except those related to a motor vehicle injury?

V. An Exposition of the Violation of Plaintiffs' Due Process

Having established that Plaintiffs have a protected property right in the practice of their respective healing arts, the Court should now consider “what process is due?” In the instant case, Plaintiffs are due both substantive due process that the statute is not arbitrary and capricious and procedural due process for the notice of the enactment of the PIP Act in a log-rolled statute.

"Substantive due process protects a general right of an individual to be free from the abuse of governmental power." *Rymer v. Douglas County*, 764 F.2d 796, 802 n. 4 (11th Cir. 1985). Procedural due process begins with Article III, Section 6 of the Constitution of the State of Florida providing, "... Every law shall embrace but one subject and matter properly connected therewith ...". The purpose of this requirement has been explained:

The single subject requirement in article III, section 6, of the Florida Constitution has three well-recognized purposes: (1) to prevent hodge podge or "log rolling" legislation, *i.e.*, putting two unrelated matters in one act; (2) to prevent surprise or fraud by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and (3) to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon.

State ex rel. Flink v. Canova, 94 So.2d 181, 184 (Fla. 1957) (citing Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 141-46 (3d ed. 1874); see also *State v. Thompson*, 750 So.2d 643, 646 (Fla. 1999) ...

State v. Rothauser, 934 So.2d 17, 19, (Fla. 2d DCA 2006).

Further demonstrating the procedural due process problem created by a multi-subject statute, the Supreme Court of Florida held:

In *Colonial Investment Co. v. Nolan*, 100 Fla. 1349, 131 So. 178 (1930), this Court explained the historical backdrop for the constitutional mandate:

It had become quite common for legislative bodies to embrace in the same bill incongruous matters having no relation to each other, or to the subject specified in the title, by which means measures were often adopted without attracting attention. And frequently such distinct subjects, affecting diverse interests, were combined in order to unite members who favored either in support of all. And the failure to indicate in the title the object of the bill often resulted in members voting ignorantly for measures which they would not knowingly have approved. And not only were the members thus misled, but the public also; and legislative provisions were sometimes pushed through **which would have been made odious by popular discussion and remonstrance if their pendency had been seasonably demonstrated by the title of the bill.** *Id.* at 179

Franklin v. State, 887 So.2d 1063, 1072, (Fla. 2004) [Emphasis Added].

Although the violation of the single subject rule is a supplemental claim, *it is also cognizable as a federal claim due to the lack of notice in the multi-subject statute.* Federal Courts have also dealt with the due process requirements for notice: “Procedural due process imposes constraints on government decisions which deprive individuals of ‘liberty’ or ‘property’ interest within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893 (1976).

An older opinion of this Court applied *Mathews* and provides an excellent demonstration as to how Plaintiffs have pled a procedural due process claim:

There are four essential elements which must be met before the Due Process Clause of the Fourteenth Amendment applies. In order, therefore, to be guaranteed the safeguards of the Due Process Clause, one must inquire initially whether those four essential elements are present. First, a person must have a recognized liberty or property interest at stake... *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18, 31 (1976); (*citations omitted*) Second, even a temporary deprivation of that liberty or property will satisfy the required element of the Due Process Clause. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606, 95 S.Ct. 719, 722, 42 L.Ed.2d

751, 757 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 86, 92 S.Ct. 1983, 1997, 32 L.Ed.2d 556, 573 (1972); *Stypmann v. San Francisco*, 557 F.2d 1338, 1342 (9th Cir. 1977). Third, there must be some form of state action which deprives an individual of his liberty or property. Fourth, there must be some legitimate governmental or public reason asserted for depriving an individual of his liberty or property.

Once those elements of the Due Process Clause are present, the next step in the analysis is to determine what kind of procedural due process safeguards is required in the particular context. *Smith v. Organization of Foster Families*, 431 U.S. at 847, 97 S.Ct. at 2111, 53 L.Ed.2d at 37. The right to due process is absolute, *Mathews v. Eldridge*, 424 U.S. at 333, 96 S.Ct. at 901, 47 L.Ed.2d at 32; but the kind of due process varies in different factual situations. *Id.* at 334, 96 S.Ct. at 902, 47 L.Ed.2d at 33. See also *Smith v. Organization of Foster Families*, 431 U.S. at 847, 97 S.Ct. at 2111, 53 L.Ed.2d at 37. Nonetheless, the fundamental safeguards of procedural due process must be real, and present. There are basic, elementary safeguards of procedural due process, which while having varying forms in different contexts, must be present. The absence of some form of those basic protections or procedural due process is a fatal deficiency. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. at 607, 95 S.Ct. at 722, 42 L.Ed.2d at 757. The fundamental, indispensable protections of procedural due process are (1) a hearing (2) before an impartial decision-maker, after (3) adequate notice of the reason for the deprivation, with (4) an opportunity for the individual to present his case. *Mathews v. Eldridge*, 424 U.S. at 333, 96 S.Ct. at 901, 47 L.Ed.2d at 32; *Boehning v. Indiana Employees Ass'n*, 423 U.S. 6, 7 n. *, 96 S.Ct. 168, 46 L.Ed.2d 148, 150 n. * (1975); *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. at 606, 95 S.Ct. at 722, 42 L.Ed.2d at 757; *Fuentes v. Shevin*, 407 U.S. at 80, 92 S.Ct. at 1994, 32 L.Ed.2d at 569; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865, 873 (1950).

Craig v. Carson, 445 F.Supp. 385, 390 - 391 (M. D. Fla. 1978).

VI. Denial of Plaintiffs' Equal Protection

To make it more difficult for a person to operate one form of lawful business than to operate another form of lawful business, denies the person who finds it more difficult to operate his business, equal protection of the law. Here, the 2012 PIP Act discriminates

against three sets of healthcare professionals: if a healthcare professional has an A.P. or LMT after his or her name (he or she cannot treat patients under this Act); and a D.C. may only provided limited treatment. Compare that a M.D., a D.O. or a D.D.S., or even a physical therapist (who may provide massage and acupuncture under their statute!) can treat under the Act and be compensated for his or her services, many of which may be similar or exactly the same. Statutes cannot discriminate between different forms of business or different classes of persons:

The Fourteenth Amendment provides that “[n]o State ... shall deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws**”.

... The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a “suspect class” or that impinge upon the exercise of a “fundamental right.” With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State. [Footnotes omitted]

Plyler v. Doe, 457 U.S. 202, 210, 213 - 217, 102 S.Ct. 2382 (1982)

Less than four months ago, the United States District Court applied *Plyler* to Florida’s invidious discrimination against children of undocumented immigrants seeking higher education in the Florida university system. The Court held: “The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall deny

"any person within its jurisdiction the equal protection of the laws." U.S. CONST, amend. XIV, § 1. Thus the Equal Protection Clause reflects a fundamental tenant that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 217 (1982) (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).[fn5]

Legislative classifications that impinge access to a fundamental right; distribute burdens of benefits inconsistent with a fundamental right; or prejudice groups based on, inter alia, immutable qualities, are subject to "strict scrutiny." See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (holding that a state statute that restricted voting in school district elections to those who had children enrolled in the local public school or owned or leased taxable property in the district violated the Equal Protection Clause); *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (holding that denial of welfare benefits based on duration of residency "constitutes an invidious discrimination" and violates the Equal Protection Clause).

The Equal Protection Clause of the Fourteenth Amendment "requires the State to treat all persons similarly situated alike or, conversely, to avoid all classifications that are 'arbitrary or irrational' and those that reflect 'a bare ... desire to harm a politically unpopular group.'" *Glenn v. Brumby*, 663 F.3d 1312, 1315 (11th Cir. 2011) (citation omitted); *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The Supreme Court has treated as "presumptively invidious those classifications that disadvantage a 'suspect class, or that impinge upon the exercise of a 'fundamental right.'" *Id.* at 216-217.

Simply stated, the gist of the Plaintiffs' equal protection argument focuses on the fact that "similarly situated" medical professionals, all holding a property right in a state license,

if they have an A.P. or LMT after his or her name, they cannot treat patients under the 2012 PIP Act, and a D.C. may only provide limited treatment. Compare that to a M.D., a D.O. or a D.D.S., or even a physical therapist who, as emphasized above, *may* provide massage and acupuncture under their licenses, and be compensated under the Act, for his or her services, many of which may be similar or exactly the same. It is hard to discern how this could not be an equal protection violation.

VII. Plaintiffs Urge the Court to Reconsider the Preliminary Injunction

Even under Florida law, an injunctive remedy is appropriate, on proper showing of injury, to *restrain the enforcement of an invalid law*. *Daniel v. Williams*, 189 So. 2d 640 (Fla. Dist. Ct. App. 2d Dist. 1966); *Board of Com'rs of State Institutions v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67 (Fla. Dist. Ct. App. 1st Dist. 1958). The injury may consist of the infringement of a property right. See *Louisville & N.R. Co. v. Railroad Com'rs*, 63 Fla. 491, 58 So. 543 (1912). It may also exist in the right to earn a livelihood and continue practicing one's employment. *Watson v. Centro Espanol De Tampa*, 158 Fla. 796, 30 So. 2d 288 (1947).

Entry of a Preliminary Injunction is predicated upon a four-factor test wherein the moving party must: A) establish a substantial likelihood of success on the merits; B) that the moving party will suffer irreparable harm unless the injunction issues; C) that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and D) that the injunction would not be adverse to the public interest. [*Siebert v. Allen*, 506 F. 3d 1047, 1049 (11th Cir. 2007) see also *McDonald's Corp. v. Robertson*, 147 F. 3d 1301, 1306 (11th Cir. 1998)].

As stressed to this Court in the original Motion, “The possibility of success on the merits will vary according to the Court’s assessment of other factors.” [*Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005)]. Plaintiffs believe that they demonstrated that enforcement of the 2012 PIP Act will impermissibly deny or abrogate Plaintiffs’ due process and equal protection rights protected by the Constitution of the United States. [Document 1 ¶¶ 90 – 97]. Further, Plaintiffs’ Verified Complaint also offered *prima facie* proof that Plaintiffs possess a substantial likelihood of success on the merits of this action because Plaintiffs unequivocally prove that enforcement of the 2012 PIP Act impermissibly denies or abrogates the Plaintiffs’ rights protected by the Constitution of the State of Florida including: 1) Plaintiffs’ right to work. [*Id.* at ¶ 99]. 2) Plaintiffs’ right of access to the courts. [*Id.* at ¶ 103]. 3) Plaintiffs’ right to equal protection. [*Id.* at ¶ 105]. 4) Plaintiffs’ right to due process. through imposition of strict liability for innocent business activities. [*Id.* at ¶ 110].

On its face, the 2012 PIP Act provisions are arbitrary, oppressive and capricious, [*Id.* at ¶ 106], and represent an unlawful exercise of Florida’s police power because there is no substantial relationship to the protection of the public health and welfare, or to any legitimate governmental objective, and the provisions of the 2012 PIP Act. [*Id.* at ¶ 108]. On its face, the 2012 PIP Act violates both single subject rule for state statutes, [*Id.* at ¶ 101], and the separation of powers doctrine by blending criminal, civil, and administrative penalties; by imposing inconsistent and unnecessary regulations conflicting with existing statutes and regulations; and by impermissibly limiting damages an injured party may obtain. [*Id.* at ¶ 112]. Unfortunately, the 2012 PIP Act provisions are specifically and narrowly defined to

protect certain private business (PIP insurance carriers) to the detriment of other private businesses and Florida's citizens at large. [*Id.* at ¶ 114].

Plaintiffs will suffer irreparable harm because the 2012 PIP Act will either cause them not to be able to work and earn a living (Acupuncture Physicians and Licensed Massage Therapists) or will severely restrain their ability to provide effective care (Chiropractors). Effective January 1, 2013, unless a Preliminary Injunction is ordered, no effort to mitigate the Plaintiffs' resulting damages or irreparable harms can possibly be successful because the 2012 PIP Act absolutely prevents all Acupuncture Physicians and all Licensed Massage Therapists from providing any reimbursable medical care to all Florida citizens injured during motor vehicle collisions. The 2012 PIP Act Dramatically reduces Chiropractic care by seventy five percent (75%) because insurance coverage will be limited to \$2,500 in the absence of an emergency medical condition – despite citizens being required to purchase \$10,000 of PIP insurance coverage.

Although, historically, Chiropractors evaluated and treated those injured by motor vehicle collisions, under the 2012 PIP Act, Chiropractors may not diagnose emergency medical conditions; this is left to Medical Doctors, Osteopathic Doctors, Dentists, and other healthcare extenders like Physician's Assistants. Chiropractic Physicians primarily treating motor vehicle accident victims will no longer be compensated to provide care and will be forced to close or limit their businesses.

VIII. A Preliminary Injunction Will Maintain the *Status Quo* and Prevent Injury

Respectfully, the *status quo* should be maintained until this case reaches trial. Here, the *status quo* means that Plaintiffs be allowed to continue in their lawful medical and

business practices, pursuant to the licenses already granted them by the State of Florida – the very State seeking to terminate or severely limit their ability to earn a living. Plaintiffs 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 few if any licensed healthcare providers.

Plaintiffs' other constitutional rights and the maintenance of the status quo require the issuance temporary injunction:

... The status quo preserved by a temporary injunction is the last peaceable non-contested condition that preceded the controversy, *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. *Lewis v. Peters*, 66 So.2d 489 (Fla. 1953). ... *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 should be preserved by the issuance of a temporary Injunction.

IX. Defendants Argument That Plaintiffs Lack a Case or Controversy is Not Correct

The 2012 PIP Act manifests a clear and present danger to the continued operations of the Plaintiffs' businesses and livelihoods resulting in an irreparable harm that vastly exceeds any monetary compensation. The loss of any constitutional right or freedom, in and of itself,

constitutes irreparable harm. See *Tampa Sports Authority v. Johnston*, 914 So.2d 1076 (Fla. 2d DCA 2005). Even more importantly, the loss of customers, loss of business goodwill and the threats to a business' vitality all represent irreparable harms justifying injunctive relief.

Plaintiffs fear not just the loss of business, but they also fear of the loss of business goodwill, patient referral, the doctor patient relationship, and the loss of the ability to continue to engage in a lawful enterprise and enjoy the fruits of one's enterprise without undue governmental interference and attack. Fear of enforcement has already resulted in a loss of employee morale and customer confidence. Plaintiffs are suffering irreparable harm from declinations in the type of treatment they are allowed to provide their patients, and the extent of such care. Plaintiffs have already lost business and have already had to turn down clients because their care will likely extend beyond January 1, 2013.

Accordingly, Plaintiffs may not mitigate their damages without a preliminary injunction. If the 2012 PIP Act is permitted to become effective on January 1, 2013, Plaintiff Myers, Plaintiff Smith, Plaintiff Damaska, Plaintiff John Doe Acupuncture Physician, and Plaintiff John Doe Licensed Massage Therapist will all lose a significant amount of their ability to work and earn a living. Such a significant loss of work will rapidly result in a devastating downwards financial spiral that will result in the permanent loss of their businesses and business relationships and good will. Plaintiffs possess no adequate remedy at law because there is no plain, certain, prompt, speedy, sufficient, complete, practical, or efficient way to attain the ends of justice without *immediately* enjoining the enforcement.

Plaintiffs' injuries far exceed any damage injunctive relief may cause the Defendant. As established in the Verified Complaint, Defendant's enforcement of the 2012 PIP Act on

January 1, 2013 will prohibit: [Complaint at ¶64]. Plaintiff Myers from providing any Acupuncture care to any existing or new patients injured during a motor vehicle collision covered by PIP insurance. [*Id.* at ¶10]. Plaintiff Myers is an Acupuncture Physician licensed by the State of Florida who derives a substantial portion of his income from the evaluation and treatment of patients injured as a result of motor vehicle collisions. [*Id.*]. The 2012 PIP Act will severely limit his ability to work or earn a living.

The 2012 PIP Act will prohibit Plaintiff Smith from providing any Massage Therapy for any existing or new patients injured during a motor vehicle collision covered by PIP insurance. [*Id.* at ¶12]. Plaintiff Smith is licensed by the State of Florida as a Licensed Massage Therapist who derives a substantial portion of her income from the evaluation and treatment of patients injured as a result of motor vehicle collisions. [*Id.*]. The 2012 PIP Act will severely limit her ability to work or earn a living.

The 2012 PIP Act will prohibit Plaintiff Damaska from providing any Massage Therapy to any existing or new patient injured during a motor vehicle collision covered by PIP insurance. [*Id.* at ¶13]. Plaintiff Damaska is licensed by the State of Florida as a Licensed Massage Therapist who derives a substantial portion of her income from the evaluation and treatment of patients injured as a result of motor vehicle collisions. [*Id.*]. The 2012 PIP Act will severely limit her ability to work or earn a living.

The 2012 PIP Act will prohibit Plaintiff John Doe Acupuncture Physician from providing any Acupuncture care to any existing or new patients injured during a motor vehicle collision covered by PIP insurance. [*Id.* at ¶14]. Plaintiff John Doe is licensed by the State of Florida to practice as an Acupuncture Physician. Equally, the 2012 Act will prohibit

Plaintiff John Doe Licensed Massage Therapists from providing any Massage Therapy care to any existing or new patients injured in a motor vehicle accident covered by PIP insurance. [*Id.*]. Plaintiff John Doe is licensed by the State of Florida to practice as a Licensed Massage Therapist.

The 2012 PIP Act will also prohibit Plaintiff Jane Doe from receiving any Acupuncture care or any Massage Therapy following a motor vehicle accident. [*Id.* at ¶15]. As established in the Verified Complaint, Defendant's enforcement of the 2012 PIP Act on January 1, 2013 will restrict: [*Id.* at ¶64]. Plaintiff Zwirn to providing only twenty five percent (25%) of the Chiropractic care he currently provides for existing or new patients injured as a result of a motor vehicle collision covered by PIP insurance, unless a medical doctor, osteopathic doctor, dentist, or healthcare extender such as a physician's assistant working under their auspices verifies that an emergency medical condition exists within a limited time after such collision. [*Id.* at ¶11]. Plaintiff Zwirn is licensed by the State of Florida as a Chiropractic Doctor. There is no merit to allege that "there is no case or controversy" currently in play.

X. Alternative Consent to Implement Pullman Abstention and Request for Clarification

In addressing the concepts of *Pullman* Abstention (*Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643,(1941)), this Court was considerate and candid enough to articulate its view of the future of Plaintiffs' federal action if Plaintiffs can't persuade the Court that they have a "fundamental right" in their medical licenses that is violated by the restrictions of the 2012 PIP Act, or can't convince the Court that their "unequal" treatment rises to the denial of their equal protection rights, their federal court experience would be

short lived:

In the event this Court later decides that Plaintiffs' federal claim is not legally cognizable, the Court would have the discretionary option of declining to exercise supplemental jurisdiction over the nine state law claims. See 28 U.S.C. § 1367(c). In making that discretionary determination, the Court would have to consider the principles of economy, convenience, fairness, and comity. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988). As the Court observed in Cohill, "[w]hen the single federal-law claim in the action was eliminated at an early stage of the litigation, the District Court had a powerful reason to choose not to continue to exercise jurisdiction." 484 U.S. at 351, 108 S.Ct. at 619.

If this Court still has doubts about the viability of Plaintiffs' federal claims after digesting the instant Motion, then Plaintiffs respectfully concede that abstention under *Pullman* would be appropriate. As this Court knows, *Pullman* abstention is based, in part, on the following considerations:

... In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. *Glenn v. Field Packing Co.*, 290 U.S. 177; *Lee v. Bickell*, 292 U.S. 415. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

Id., at 500.

Plaintiffs respectfully assert that they have set forth a viable and cognizable federal cause of action, but the state law claims, if resolved in favor of Plaintiffs, would obviate the need for an adjudication of the federal claims, supporting the *Pullman* abstention:

Pullman abstention requires two elements: (1) an unsettled question of state law and (2) that the question be dispositive of the case and would avoid, or substantially modify, the constitutional question. If such an issue is present, it is then incumbent on the court to exercise discretion in deciding whether to abstain. A number of factors should inform that

decision. Factors arguing against abstention include delay, cost, doubt as to the adequacy of state procedures for having the state law question resolved, the existence of factual disputes, and the fact that the case has already been in litigation for a long time. Factors which might favor abstention include the availability of “easy and ample means” for determining the state law question, the existence of a pending state court action that may resolve the issue, or the availability of a certification procedure, whereby the federal court can secure an expeditious answer.

An uncertain question of state law is critical to the decision to abstain. The test of uncertainty is typically said to be that the state law must be fairly subject to an avoiding construction. Most *Pullman*-type cases involve a constitutional challenge to a state statute, as does Duke's claim. Construction of a state statute normally requires reference to the challenged statutory provision, the act of which it is a part, the legislative history of the enactment, and any other reliable, relevant statutory materials.

Duke v. James, 713 F.2d 1506, 1510 - 1511 (11th Cir. 2001) [Footnotes omitted]

While certain of Plaintiffs state law claims, *e.g.*, the violation of the single subject rule, are clearly already decided in Plaintiffs' favor, other claims, *e.g.*, a takings claim under Florida law (Count II) or the access to the courts issue, (Count IV) are fairly subject to an avoiding construction that would comport with the Constitution of the United States. Additionally, and perhaps not entirely coincidental, the Florida Cabinet issued “emergency” amendments to the 2012 PIP Act which do create new issues not addressed anywhere in the Plaintiffs' Complaint, and seem to be largely unprecedented in scope and procedure. A copy of the applicable Agenda is attached hereto and incorporated herein as Exhibit “A,” and the description of the “circumstances” that pose “an immediate danger to the public health safety and welfare...” is attached hereto and incorporated herein as Exhibit “B.” This radical and exaggerated response to the allegations of the complaint manifest in these “emergency”

measures present as yet “unchartered” fodder for disputed state actions related to the 2012 PIP Act.

Accordingly, as an alternative to dismissing this action, which remains a pending matter, Plaintiffs would cautiously consent that this Court abstain pursuant to the *Pullman* doctrine, and close – **but not dismiss** – this case without prejudice, allowing the state law claims to be transferred or refiled, and adjudicated by, the state courts, and preserving the Federal claims for adjudication, if necessary, at a later date.

XI. Conclusion

Plaintiffs did not enter into this action to reinstate Florida No-Fault. Plaintiffs did not enter this action for any improper purpose. Plaintiffs entered into this action because Plaintiffs could imagine no conceivable rational basis for their absolute exclusion, or severe limitation, from the only third party payor for injuries arising out of motor vehicle accidents when they may evaluate and treat the same injuries, provided they do not arise out of a motor vehicle accident. Plaintiffs simply want to enjoy the property rights they have in their medical licenses in an equal fashion with other state licensed medical professionals not harmed by the 2012 PIP Act.

XII. Relief Sought

WHEREFORE, Plaintiffs respectfully request this Court to reconsider the denial of the sought for Preliminary Injunction, or, in the alternative, to invoke the *Pullman* Abstention doctrine and hold this action in abeyance to allow Plaintiffs to resolve any unsettled issues of state law.

Respectfully submitted this 21^s Day of December 2012

/s/ Luke Lirot
Luke Lirot, Esq.
Florida Bar No. 714836
Luke Charles Lirot, P.A.
2240 Belleair Road, Suite 190
Clearwater, Florida 33764
(727) 536 – 2100 [Telephone]
(727) 536 – 2110 [Facsimile]
luke2@lirotlaw.com [Primary Email]
jimmy@lirotlaw.com [Secondary Email]
Co-Counsel for the Plaintiffs

/s/ Adam S. Levine
Adam S. Levine, M.D., J.D.
Florida Bar no. 78288
Florida Legal Advocacy Group of Tampa Bay
1180 Gulf Boulevard, Suite 303
Clearwater, Florida 33767
(727) 512 – 1969 [Telephone]
(866) 242 – 4946 [Facsimile]
aslevine@msn.com [Primary Email]
alevine@law.stetson.edu [Secondary Email]
Co-Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I, Luke Lirot, Esq., hereby certify that on the date listed below, this document and any attached exhibits were filed with the Clerk of Court using the CM/ECF system which sent a notice of electronic filing to all counsel of record who have consented to electronic notification. I further certify that I mailed a copy of the foregoing document to: none.

Respectfully submitted this 21st Day of December 2012

/s/ Luke Lirot
Luke Lirot, Esq.
Florida Bar No. 714836
Luke Charles Lirot, P.A.
2240 Belleair Road, Suite 190
Clearwater, Florida 33764
(727) 536 – 2100 [Telephone]
(727) 536 – 2110 [Facsimile]
luke2@lirotlaw.com [Primary Email]
jimmy@lirotlaw.com [Secondary Email]
Co-Counsel for the Plaintiffs

/s/ Adam S. Levine
Adam S. Levine, M.D., J.D.
Florida Bar no. 78288
Florida Legal Advocacy Group of Tampa Bay
1180 Gulf Boulevard, Suite 303
Clearwater, Florida 33767
(727) 512 – 1969 [Telephone]
(866) 242 – 4946 [Facsimile]
aslevine@msn.com [Primary Email]
alevine@law.stetson.edu [Secondary Email]
Co-Counsel for the Plaintiffs

AGENDA
FINANCIAL SERVICES COMMISSION
Office of Insurance Regulation
Materials Available on the Web at:
<http://www.floir.com/Sections/GovAffairs/FSC.aspx>

December 11, 2012

MEMBERS
Governor Rick Scott
Attorney General Pam Bondi
Chief Financial Officer Jeff Atwater
Commissioner Adam Putnam

Contact: Ashlee Falco
(850-413-5069)

9:00 A.M.
LL-03, The Capitol
Tallahassee, Florida

<u>ITEM</u>	<u>SUBJECT</u>	<u>RECOMMENDATION</u>
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1. Minutes of the Financial Services Commission for June 26, 2012 and August 7, 2012.

(ATTACHMENT 1)

FOR APPROVAL

2. Request for Approval for Repeal of Rule 69O-164.030; Application of Rule 69O-164.020 to Various Product Designs

The Office of Insurance Regulation has recently conducted a comprehensive review of all agency rules to determine whether any of its rules should be modified or eliminated. As a result of this process, it has been determined that Rule 69O-164.030, Florida Administrative Code, is unnecessary and should be repealed. This rule concerns reserving approaches for guarantees established by universal life insurance policies. The repeal of this rule will make the Florida Insurance Code more consistent with the National Association of Insurance Commissioners' model laws and rules.

(ATTACHMENT 2)

APPROVAL FOR FINAL ADOPTION

3. Request for Approval for Adoption of Proposed Amendments to Rule 69O-137.001; Annual and Quarterly Reporting Requirements and Rule 69O-138.001; NAIC Financial Condition Examiners Handbook Adopted

These rules are being amended to adopt the current versions of the National Association of Insurance Commissioners Instructions, manuals and Financial Condition Handbook.

(ATTACHMENT 3)

APPROVAL FOR FINAL ADOPTION

4. Request for Approval for Repeal of Rule 69O-143.045; Definitions

Rule 69O-143.045, Florida Administrative Code, was originally promulgated in the early 1970s. The rule defines a list of insurance terms. Many of the terms defined in the rule are

inconsistent with portions of the Insurance Code. As result of these inconsistencies, this rule should be repealed.

(ATTACHMENT 4)

APPROVAL FOR FINAL ADOPTION

5. Request for Approval for Repeal of Rules 69O-157.018; Right to Return Policy-Free Look, 69O-185.005; Advertisement of Mortgage Insurance, 69O-196.008; Failure to Comply, 69O-157.105; Refund of Premium, Rule 69O-198.003; License Required and 69O-170.012; Sinkhole Insurance.

These rules should be repealed because the laws that they were adopted to implement have been repealed or they substantially restate language contained in the Florida Insurance Code.

(ATTACHMENT 5)

APPROVAL FOR FINAL ADOPTION

6. Request for Approval for Adoption of Proposed Amendments to Rule 69O-149.003; Rate Filing Procedures

Pursuant to Section 627.410(6)(a), Florida Statutes, health insurers seeking to issue or renew health insurance policy forms in the State of Florida must submit documentation (rating manuals, rating schedules, change in rating manual, change in rating schedule, etc) to the Office demonstrating that the proposed policy or policy renewal's premium rates are reasonable in relation to the benefits provided. Rule 69O-149.003, Florida Administrative Code, provides insurers with detailed rate filing procedures.

Rule 69O-149.003(5), Florida Administrative Code, allows insurers without fully credible data to make streamlined rate increase filings with the Office that are simpler in format and content than the full filing format defined in Rule 69O-149.003(2), Florida Administrative Code. Insurers who qualify and elect to file streamlined rate increase filings with the Office are limited to rate increases equal to the maximum annual medical trend for medical expense coverage or the maximum annual medical trend for Medicare Supplement coverage. The current version of Rule 69O-149.003(6), Florida Administrative Code, includes tables which display the applicable maximum annual medical trend. The proposed amendments to Rule 69O-149.003 deletes the aforementioned maximum annual medical trend tables from the text of the rule and provides the URL of the Office's website on which the Office will update the tables as needed.

Rule 69O-149.003(5)(a), Florida Administrative Code, defines the qualifications that insurers must meet to make streamlined rate increase filings. The current version of 69O-149.003(5)(a) allows Medicare Supplement providers with fewer than 1,000 Florida policyholders to make streamlined rate increase filings with the Office. The proposed amendments to 69O-149.003(5)(a) limit the use of streamlined rate increase filings to Medicare Supplement providers with fewer than 1,000 policyholders nationwide rather than to 1,000 policyholders in Florida.

(ATTACHMENT 6)

APPROVAL FOR FINAL ADOPTION

7. Request for Approval for Adoption of Proposed Amendments to Rule 69O-149.022; Forms Adopted

The purpose of this rule is to update and edit the contents of the Universal Standardized Data Letter (UDL) form and instructions used by Life and Health Insurers to make electronic form filings via the Office's I-File system. The proposed revisions simplify the reporting entries to reflect the Office's technology. Most of the proposed changes are already in place and have been filed by Insurers for some time. As a result, the adoption of these changes by rule will not have a significant economic impact on the insurers that are required to file the revised form.

(ATTACHMENT 7)

APPROVAL FOR FINAL ADOPTION

8. Request for Approval for Publication of Proposed Amendments to Rule 69O-170.0155; Forms, 69O-176.013; Notification of Insured's Rights and Standard Disclosure Form; Personal Injury Protection Benefits.

During the last legislative session, the legislature enacted House Bill 119 (Chapter 2012-197, Laws of Florida), which made significant changes to the provision of Personal Injury Protection ("PIP") benefits in Florida. The proposed changes to Rules 69O-170.0155 and 69O-176.013 make PIP forms adopted in these Rules consistent with the changes to PIP benefits that arose out of the passage of HB 119 (Chapter 2012-197, Laws of Florida).

Rule 69O-170.0155 adopts form OIR-B1-1809 "Health Care Provider Certification of Eligibility" which requires healthcare professionals providing PIP benefits to certify that they are an eligible PIP provider by filing a copy of the form with insurers upon making an initial claim for PIP medical benefits. The amendments to this form are technical in nature and are designed to conform the form with the language of the statute.

Rule 69O-176.013 adopts Form OIR-B1-1149 "Notification of Personal Injury Protection Benefits" which is required to be given to PIP claimants upon filing a claim for PIP benefits. This form explains the rights and benefits claimants are entitled to under The Florida Motor Vehicle No-Fault Law. Form OIR-B1-1149 is being revised in accordance with revisions to the PIP law as amended by HB119 (Chapter 2012-197, Laws of Florida). Specifically, the form was revised to reflect that PIP benefits are now allocated for emergency medical treatment and a flat \$5,000 death benefit. The form was also revised to incorporate technical edits regarding fraud reporting and billing disclosures.

(ATTACHMENT 8)

APPROVAL FOR PUBLICATION

9. Request for Approval for Adoption of Emergency Rule 69OER12-01, "Emergency Adoption of Revised Notification of Personal Injury Protection (PIP) Benefits Form".

During the 2012 Legislative Session, the Legislature enacted House Bill 119 (Chapter 2012-197, Laws of Florida), which made significant changes to the provisions of Personal Injury Protection ("PIP") benefits in Florida. The effects of the Emergency Rule will allow the Office to adopt Form OIR-ER1-1149 - "Notification of Personal Injury Protection Benefits" on January 1, 2013. This form is designed to notify claimants about the PIP benefits that they are entitled to under the Florida Motor Vehicle No Fault Law.

The current version of the Notification of Personal Injury Protection Benefits accurately describes PIP benefits under the old law but would be inconsistent with the new law. As an example, the current form states that policyholders who have a claim are entitled to \$10,000 in PIP benefits. The new form explains that the benefits are limited to \$2,500 except under certain circumstances.

The Office believes adopting this form in an emergency rule is the fairest method to protect the public and to assure that insured's are timely notified of their PIP Benefits as required by Florida Law. Furthermore, rulemaking proceedings are being pursued to adopt the Notification of the PIP Rights form on a permanent basis and interested parties will have an opportunity to participate in the standard rulemaking process.

(ATTACHMENT 9)

FOR APPROVAL

EXHIBIT D

NOTICE

FINANCIAL SERVICES COMMISSION

RULE TITLE:

RULE NO.:

Emergency Adoption of Revised Notification of

Personal Injury Protection Benefits Form

69OER12-01

SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC

HEALTH, SAFETY OR WELFARE: The Financial Services Commission and the Office of Insurance Regulation ("Office") hereby state that the following circumstances constitute an immediate danger to the public health, safety, or welfare:

The 2012 Legislature adopted substantial amendments to the Florida No-Fault Law (Sections 627.730 – 627.7405, F.S.), hereinafter referred to as the PIP Law, which modified the personal injury protection benefits available to an insured consumer on or after January 1, 2013. Section 627.7401, F.S. requires the Financial Services Commission to adopt by rule the form that must be provided to consumers when they file a claim. The revised form will allow the timely compliance with Florida law that requires all insurers that write PIP insurance in this state to provide the consumer that has filed a claim on a policy, issued in compliance with the revised law, with proper notification of the benefits available. Requiring the utilization of the new form will prevent consumer confusion as to the new benefits that will be available pursuant to the revised PIP Law.

REASONS FOR CONCLUDING THAT THE PROCEDURE USED IS FAIR UNDER THE

CIRCUMSTANCES: The Financial Services Commission believes that adopting an

emergency rule is the fairest method to protect the public to assure that insureds are timely notified of their PIP Benefits as required by Florida Law. Furthermore rulemaking proceedings are being pursued to adopt the Notification of PIP Rights form on a permanent basis and interested parties will have an opportunity to participate in the standard rulemaking process. An Office bulletin addressed to all regulated persons and insurers would reach them, but would not be legally binding. A permanent rule would not have the flexibility and immediacy to protect the public welfare.

In consideration of the emergency conditions currently existing, and given the Office's responsibility to protect the public interest and implement the Insurance Code, an emergency rule is necessary.

SUMMARY OF THE RULE: Emergency Rule 69OER12-01 requires insurers writing PIP insurance policies issued or renewed on or after January 1, 2013, in accordance with Chapter 2012-197, Laws of Florida, to utilize Form OIR-ER1-1149(New 1-1-2013) "Notification of Personal Injury Protection Benefits".

THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS:

Michelle Brewer, Office of Insurance Regulation, Email Michelle.Brewer@flor.com.

THE FULL TEXT OF THE EMERGENCY RULE IS:

69OER12-01 Emergency Adoption of Revised Notification of Personal Injury
Protection Benefits Form.

(1) Chapter 2012-197, Laws of Florida(House Bill 119) revised the benefits available under the Florida No-Fault Law(Sections 627.730-627-7405 F.S.). Personal Injury Protection (PIP) Benefit policies issued or renewed in this state on or after January 1, 2013 in accordance with the provisions of Chapter 2012-197, Laws of Florida will be required to utilize Form OIR-ER1-1149(New 1-1-2013),"Notification of Personal Injury Protection Benefits" until such time as revisions to Form OIR-B1-1149(Rev. 8/30/06) is adopted by rule. Form OIR-ER1-1149(New 1-1-2013) is adopted and incorporated herein by reference and available at www.flor.com.

(2) Policies that do not provide the new benefits, shall continue to utilize Form OIR-B1-1149(Rev. 8/30/06).

(3).This Emergency Rule shall be effective on January 1, 2013.

Specific Authority: 120.54(4), 624.308, 627.7401 FS. Law Implemented: 626.7401, FS.

History – New _____

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF
STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.



OFFICE OF INSURANCE REGULATION
Property and Casualty Product Review

NOTIFICATION OF PERSONAL INJURY PROTECTION BENEFITS
YOUR PERSONAL INJURY PROTECTION RIGHTS AND BENEFITS UNDER
THE FLORIDA MOTOR VEHICLE NO-FAULT LAW

The Florida Motor Vehicle No-Fault Law does two things:

- (1) It establishes a limited exemption from liability for injuries caused to others in an automobile accident; and
- (2) It establishes personal injury protection (PIP) benefits to pay for certain losses resulting from an accident.

LEGAL RESPONSIBILITIES AND RIGHTS

Who is covered?

- (1) If you are a resident of Florida and own a motor vehicle, you are required to purchase PIP. You are covered by PIP if you are the named insured. You, the insured, are covered by PIP while driving your vehicle or when a passenger in another's vehicle. You are also covered while outside a motor vehicle if struck and injured by a motor vehicle.
- (2) Resident relatives who live with you, the insured, may be covered by your PIP benefits while they are driving your car, as passengers in your or another's car, and while pedestrians if struck and injured by a motor vehicle.
- (3) Others who are injured while driving your insured motor vehicle or who are injured while a passenger in your insured motor vehicle or who are injured as a pedestrian when struck by your insured motor vehicle may be covered by your PIP.
- (4) If you or your insured relatives living with you are injured while outside Florida, and are in your insured motor vehicle, you and your insured relatives are covered under PIP as long as the injury occurs within the United States, its territories or possessions, or in Canada.

FRAUD ADVISORY NOTICE: Solicitation of a person injured in a motor vehicle crash for purposes of filing personal injury protection or tort claims could be a violation of Florida law or the rules regulating The Florida Bar and should be immediately reported to the Division of Insurance Fraud on-line at www.MyFloridaCFO.com/fraud or by calling 1-800-378-0445 from within Florida or 850-413-3261 from outside of Florida.

EXCEPTIONS

If your passengers or relatives living with you have a motor vehicle licensed in Florida or own a motor vehicle required to be licensed in Florida, they are not covered by your PIP coverage. They must purchase PIP for themselves to have coverage.

EXCLUSIONS

An insurer may exclude no-fault benefits:

- (1) For injury sustained by any person operating the insured motor vehicle without your express or implied consent.
- (2) To any injured person, if his/her conduct contributed to the injury under either of the following circumstances:
 - (a) causing injury to himself intentionally; or
 - (b) being injured while committing a felony.
- (3) For injuries sustained by the named insured and relatives residing in the same household while occupying another motor vehicle owned by the named insured and not insured under the policy.

BENEFITS

The minimum limits for no-fault personal injury protection benefits ~~are:~~ is

- \$10,000 per person for loss sustained as a result of bodily injury, sickness, or disease arising out of the ownership, maintenance, or use of a motor vehicle if a physician, dentist, physician assistant, or advanced registered nurse practitioner has determined that the injured person had an emergency medical condition. (\$5,000 death) arising out of the ownership, maintenance, or use of a motor vehicle.
- \$2,500 per person for loss resulting from bodily injury, sickness, or disease arising out of the ownership, maintenance, or use of a motor vehicle if a physician, dentist, physician assistant, or advanced registered nurse practitioner has determined that the injured person did not have an emergency medical condition, and
- \$5,000 per individual for death benefits.

MEDICAL PAYMENTS

PIP medical benefits pays 80 percent of ~~medical benefits~~ for all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, wheelchairs, ~~crutches, slings, neck braces and splints,~~ and medically necessary ambulance, hospital and nursing services are covered, and benefits also are paid for necessary remedial treatment and services recognized and permitted under the laws of the state for an injured person who relies solely upon spiritual means through prayer for healing because of religious beliefs. Medical benefits are only paid if the individual receives initial services and care within 14 days after the motor vehicle accident. Medical benefits do not include massage or acupuncture, regardless of the person, entity, or licensee providing massage or acupuncture and a licensed massage therapist or licensed acupuncturist may not be reimbursed for medical benefits.

Note: If you have medical payments coverage through your auto insurance policy, then the medical payments coverage will be secondary to PIP coverage. The excess medical expenses, the 20 percent not covered by PIP, and the deductible may or may not be covered by the additional medical payments coverage depending on your particular policy.

BILLING REQUIREMENTS

Florida law Statutes provides that with respect to any treatment or services, other than certain hospital and emergency services, the statement of charges furnished to the insurer by the provider may not include, and the insurer and the injured party are not required to pay, charges for treatment or services rendered more than 35 days before the postmark date of the statement, except for past due amounts previously billed on a timely basis, and except that, if the provider submits to the insurer a notice of initiation of treatment within 21 days after its first examination or treatment of the claimant, the statement may include charges for treatment or services rendered up to, but not more than, 75 days before the postmark date of the statement. The insured has a responsibility to furnish the provider with the correct name and address of the personal injury protection insurer. Failure to do so may result in delayed reimbursements to the provider.

At your initial treatment or service provided you will be required to sign a disclosure and acknowledgement form stating that the services were actually rendered, it is your right and duty

to confirm that those services were rendered, you were not solicited to seek services from the provider, the provider explained the services, and if you notify the insurer of a billing error you may be entitled to a share of the insurer's savings.

ADVISORY NOTICE: You may be entitled to a certain percentage of a reduction in the amount paid by the motor vehicle insurer if you notify that insurer of a billing error.

DISABILITY BENEFITS

PIP pays 60 percent of disability benefits for any loss of gross income and loss of earning capacity per individual from inability to work because of an injury sustained in an accident. Disability benefits also cover all expenses reasonably incurred for household services that, if not for injury, the injured person would have performed. Benefits must be paid not less than every two weeks.

DEATH BENEFITS

PIP pays up to \$5,000 ~~of available benefits~~ per individual in death benefits. Death benefits are in addition to the medical and disability benefits provided under the insurance policy. The insurer may pay death such benefits to the executor or administrator of the deceased, to any of the deceased's relatives, including those related by marriage, or to any person appearing to the insurer to be equitably entitled to the payment.

OPTIONAL DEDUCTIBLES AND LIMITATIONS

1. Persons subject to deductibles may be able to recover the amount of the deductible from a tortfeasor otherwise exempt from liability under Section 627.737, F.S.
2. Deductibles must be applied to the entire amount of any expenses and losses described under required personal injury protection benefits. After the deductible is met, each insured is eligible to receive up to \$10,000 in benefits. Thus, for instance, an insured with a \$1,000 deductible would have to incur \$13,500 in medical expenses (assuming no

disability or death benefits) in order to receive the entire \$10,000 in benefits [(\$13,500-\$1,000) x 80%].

3. Deductibles of \$250, \$500 and \$1,000 must be offered but may not be required.
4. You may have elected that the benefits from loss of gross income and loss of earning capacity (disability benefits) be excluded from your PIP benefits.

COORDINATION OF BENEFITS

PIP benefits are primary over other insurance coverage, except that workers' compensation benefits received will be credited against PIP benefits. This means that your PIP insurer is ultimately responsible for payment of your claim. How this works in a specific situation depends upon the contract language in the other insurance policy.

PAYMENT OF BENEFITS

PIP benefits will be payable as loss accrues and reasonable proof of the loss and the expenses are provided. Before PIP benefits are paid, an insurer may require written notice be given as soon as possible after an accident involving a motor vehicle.

PIP benefits are overdue if not paid within 30 days after the insurer is provided written notice of a covered loss and of the total amount of the claim. If a partial claim is made, that partial amount must be paid within 30 days after the insurer receives written notice.

Any part, or all of the remainder, of the claim that is later supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. However, any payment shall not be deemed overdue when the insurer has reasonable proof showing that the insurer is not responsible for the payment even though written notice has been furnished to the insurer.

For the purpose of calculating overdue payments, payment is considered as being made on the date it was postmarked or, if not posted, on the date of delivery. All overdue payments will pay simple interest at the rate established in your policy, or pursuant to s. 55.03, F.S., whichever is greater.

WHAT DO I DO TO RESOLVE DISPUTES REGARDING PIP BENEFITS?

(1) In the event you are having a dispute with the insurer for PIP benefits, you may demand mediation of the claim before resorting to the courts by filing a request with the Department of Financial Services "Department" on Form DFS-H2-510 provided by the Department.

(2) Mediation is an informal process whereby a neutral mediator selected by the Department Office will work together with you and the insurer to resolve the dispute.

You may reach the Department at a local service office or call 1-800-342-2762.

PLEASE NOTE: This description of your rights contains general statements and should not be construed to enhance, alter, or amend your rights under your policy and Florida law.

FRAUD ADVISORY NOTICE: The Department of Financial Services may pay rewards of up to \$25,000 to persons providing information leading to the arrest and conviction of persons committing crimes investigated by the Division of Insurance Fraud arising from violations of certain Florida Statutes. You may report such fraud on-line at www.MyFloridaCFO.com/fraud or by calling 1-800-378-0445 from within Florida or 850-413-3261 from outside of Florida.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

ROBIN A. MYERS, GREGORY
S. ZWIRN, SHERRY L. SMITH,
CARRIE C. DAMASKA, JOHN DOE,
and JANE DOE,

Plaintiffs,

v.

CASE NO: 8:12-cv-2660-T-26TBM

KEVIN N. MCCARTHY,

Defendant.

_____ /

ORDER

Plaintiffs have responded with a passionate motion requesting this Court to reconsider its order rendered December 12, 2012, at docket 19, denying their motion to enjoin preliminarily the implementation and enforcement of various provisions of Chapter 2012-197, Laws of Florida, which substantively amended the statutory text of what is commonly known as the Personal Injury Protection Act (the PIP Act) which is scheduled to take effect on January 1, 2013.¹ However, no matter to what degree this Court may sympathize with Plaintiffs' plight of suffering potential economic loss by virtue of this newly enacted legislation, the Court must be guided by the rule of law which, as will be

¹ Also pending before the Court is Defendant's Motion to Dismiss Plaintiffs' Complaint filed at docket 21 to which Plaintiffs have yet to respond.

explained, dictates that the motion is due to be denied, thus obviating the need for a response from Defendant, their federal claim embodied in count one of their complaint be dismissed with prejudice, and their state law claims alleged in counts two through ten be dismissed without prejudice to being refiled in a Florida state court.

Plaintiffs' primary thrust in arguing this Court committed clear legal error in denying their motion for preliminary injunctive relief, thus resulting in manifest injustice to them, is that they possess a fundamental property right in their professional licenses to practice chiropractic medicine, acupuncture medicine, and massage therapy by virtue of their licensure by the State of Florida to practice those healing arts. They contend, therefore, that the amendments to the PIP Act which constrain, in the case of a chiropractic physician, and eliminate, in the case of an acupuncture physician and a massage therapist, their ability to seek reimbursement for professional services rendered to a person injured in a motor vehicle collision under the personal injury protection provisions of an automobile insurance policy deny them due process of law and the equal protection of the laws under the Fifth and Fourteenth Amendments.²

What Plaintiffs fail to grasp is that although they do have a state-created property interest in their professional licenses, that interest is only subject to *procedural* due process protection and not *substantive* due process protection. See McKinney v. Pate, 20

² Although Plaintiffs have alleged nine violations of the Florida Constitution, the Court's focus in this order will be on their federal claim.

F.3d 1550, 1556 (11th Cir. 1994) (*en banc*) (observing that “areas in which substantive rights are created only by state law (as is the case with tort and employment law) are not subject to substantive due process protection under the Due Process Clause because ‘substantive due process rights are created only by the Constitution.’”) (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985)). “Thus, to the extent that [Plaintiffs] predicate[] [their] substantive due process claim directly on the denial of [their] state-granted and-defined property right in the[ir] [licenses], no substantive due process claim is viable.” Greenbriar Vill., L.L.C., v. Mountain Brook City, 345 F.3d 1258, 1262 (11th Cir. 2003) (citing in part McKinney, 20 F.3d at 1560; see also Morley’s Auto Body, Inc. v. Hunter, 70 F.3d 1209, 1217 n.5 (11th Cir. 1995) (noting that “plaintiffs’ substantive due process claim [was] palpably without merit” because “[a]ny expectations that plaintiffs may have had regarding the rotation list do not approach a right ‘implicit in the concept of ordered liberty’ as required for the triggering of substantive due process protection.”) (citing McKinney, 20 F.3d at 1556).

Furthermore, as in Hunter, the statutory restrictions and eliminations imposed on Plaintiffs by the soon to take effect PIP Act do “not cognizably burden the plaintiffs’ liberty ‘to follow a chosen profession free from unreasonable governmental interference,’ Greene v. McElroy, 360 U.S. 474, 492, 79 S.Ct. 1400, 1411, 3 L.Ed.2d 1377 (1959) or ‘to work for a living in the common occupations of the community,’ Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915).” 70 F.3d at 1217 n.5. Finally, because

the focus of Plaintiffs' complaint as framed relates to governmental action which is legislative in nature, the procedural component of the due process clause is not implicated. See 78 Acres, LLC v. Miami-Dade Cty, Fla., 338 F.3d 1288, 1294 (11th Cir. 2003) (quoting Ronald E. Rotunda & John E. Nowack, *Treatise on Constitutional Law* § 17.8 (3d ed. 1999) for the proposition that "[w]hen the legislature passes a law which affects a general class of persons, those persons have all received procedural due process - the legislative process. The challenge to such laws must be based on their substantive compatibility with constitutional guarantees.").

Measured against these well-settled principles, Plaintiffs' effort, under the auspices of 42 U.S.C. § 1983, to invoke substantive due process protection, as well as to claim a violation of the equal protection of the laws, in an effort to undermine constitutionally the newly added provisions to the PIP Act is doomed to utter failure in light of this Court's legal analysis under the rational basis test utilized in the order denying their motion for preliminary injunctive relief. As the Court observed in that order, based on Plaintiffs' submissions, they utterly failed to "bear the burden of disproving every conceivable basis supporting the challenged amendments to the PIP Act in order to sustain their federal equal protection and due process claims." Plaintiffs' recent submission in the form of their motion for reconsideration fares no better inasmuch as they again fail to demonstrate that they are part of a suspect class or that the challenged provisions of the PIP Act violate a fundamental constitutional right. See Haves v. City of

Miami, 52 F.3d 918, 921 (11th Cir. 1995). Consequently, even though, as noted, Plaintiffs have not had the opportunity to respond to Defendant's pending motion to dismiss,³ the Court concludes that such a response would be an exercise in futility, as would be permitting Plaintiffs to file an amended complaint, so that their federal claim is due to be dismissed with prejudice.⁴

The Court's task now is to determine whether, in the absence of Plaintiffs' federal claim, it should retain supplemental jurisdiction over their state law claims pursuant to 28 U.S.C. § 1367(a) or whether it should decline to exercise jurisdiction over those claims and dismiss them without prejudice to being refiled in a Florida state court in accord with

³ The Court would note, however, that Plaintiffs have asked for alternative relief in the form of having this Court abstain from deciding the federal claim under the doctrine of Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941), closing but not dismissing this case, allowing the state law claims to be adjudicated in a Florida state court, and preserving the federal claim for adjudication, if necessary, at a later date. The Court declines to grant this alternative relief.

⁴ The Court notes that one might reasonably surmise that the Florida legislature's true motivation in enacting the challenged amendments to the PIP Act was not to combat fraud, as was widely and consistently reported, but to curtail the proliferation and continued viability of so-called 1-800 lawyer and medical referral services by restricting their ability to secure personal injury protection benefits for their clients. Even if this were the case, the Court's conclusion to dismiss the federal claim remains unaffected because the Court is absolutely prohibited from inquiring into a legislative body's motivation in enacting legislation. See F.C.C. v. Beach Commcns, Inc., 508 U.S. 307, 315, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211 (1993) (stating within the context of a rational basis analysis of a statute, that "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."); accord Houston v. Williams, 547 F.3d 1357, 1363 (11th Cir. 2008); Panama City Med. Diagnostic, Ltd. v. Williams, 13 F.3d 1541, 1546 (11th Cir. 1994).

the criteria embodied in § 1367(c)(1-4). In making this discretionary determination, the Court must consider the principles of economy, convenience, fairness, and comity. See City of Chicago v. International Coll. of Surgeons, 522 U.S. 156, 173-74, 118 S.Ct. 523, 533, 139 L.Ed.2d 525 (1997) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988)). After doing so, those principles dictate that the Court decline to exercise supplementary jurisdiction over the state law claims.

First, economy and convenience weigh heavily in favor of relinquishing jurisdiction to a Florida state court because this case is in its very early stage with the Defendant having yet to file an answer due to the pendency of his motion to dismiss and the Court having yet to enter a case management and scheduling order. As the Supreme Court instructed in Carnegie-Mellon, “[w]hen the single federal-law claim in the action [is] eliminated, at an early stage of the litigation, the District Court ha[s] a powerful reason to choose not to continue to exercise jurisdiction.” 484 U.S. at 351, 108 S.Ct. at 619.

Second, principles of comity also weigh heavily in favor of allowing a Florida state court to assume jurisdiction over the state law claims because that court is better suited to determine the unique issues of Florida constitutional law raised by Plaintiffs’ complaint. See Lake Cty. v. NRG/Recovery GRP., Inc., 144 F.Supp. 2d 1316, 1321 (M.D. Fla. 2001). Moreover, Plaintiffs initiated their challenge to the constitutionality of the amended provisions of the PIP Act in a Florida state court only to dismiss that case

without prejudice for some reason unexplained in the record.⁵ Finally, the Court can conceive of no reason as to why principles of fairness will be offended if a Florida state court is allowed to hear and resolve Plaintiffs' state law claims, especially in light of the fact that those nine claims predominate over the lone federal claim.

Accordingly, for the reasons expressed, it is ordered and adjudged as follows:

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- 3) Count one of Plaintiffs' complaint is dismissed with prejudice and the Clerk is directed to enter judgment for Defendant on that count.
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- 5) The Clerk is directed to close this case.

DONE AND ORDERED at Tampa, Florida, on December 27, 2012.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

⁵ See dockets 15 and 16.

Tab 6

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBIN A. MYERS, GREGORY
S. ZWIRN, SHERRY L. SMITH,
CARRIE C. DAMASKA, JOHN DOE,
and JANE DOE,

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CASE NO: 8:12-cv-2660-T-26TBM

KEVIN N. MCCARTHY,

Defendant.

ORDER

Plaintiffs have responded with a passionate motion requesting this Court to reconsider its order rendered December 12, 2012, at docket 19, denying their motion to enjoin preliminarily the implementation and enforcement of various provisions of Chapter 2012-197, Laws of Florida, which substantively amended the statutory text of what is commonly known as the Personal Injury Protection Act (the PIP Act) which is scheduled to take effect on January 1, 2013.¹ However, no matter to what degree this Court may sympathize with Plaintiffs' plight of suffering potential economic loss by virtue of this newly enacted legislation, the Court must be guided by the rule of law which, as will be

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- 5) The Clerk is directed to close this case.

DONE AND ORDERED at Tampa, Florida, on December 27, 2012.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

⁵ See dockets 15 and 16.

Tab 7

1 IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
2 IN AND FOR LEON COUNTY, STATE OF FLORIDA
3 CIVIL DIVISION

4 CASE NO. 2013-CA-000073

5 ROBIN A. MYERS, A.P., an individual person
6 And Acupuncture Physician, GREGORY S.
7 ZWIRN, D.C., an individual person and
8 Chiropractic Physician, SHERRY L. SMITH,
9 L.M.T., an individual person and Licensed
10 Massage Therapist, CARRIE C. DAMASKA, L.M.T.,
11 An individual person and Licensed Massage
12 Therapist, "John Doe," on behalf of all
13 Similarly situated health care providers,
14 And "Jane Doe," on behalf of all those
15 Individuals injured by motor vehicle
16 Collisions,

17 Plaintiffs,
18 vs.

19 KEVIN N. McCARTY, in his Official Capacity as
20 Commissioner of the Florida Office of Insurance
21 Regulation,
22 Defendant.

23 PLAINTIFFS' EMERGENCY MOTION TO VACATE DEFENDANT'S
24 NOTICE OF AUTOMATIC STAY

25 DATE: Monday, April 1, 2013
26 TIME: 11:00 a.m. - 12:05 p.m.
27 PLACE: Leon County Courthouse
28 301 South Monroe Street
29 Tallahassee, Florida
30 REPORTED BY: NICOLE MAZZARA
31 Notary Public in and for
32 the state of Florida at
33 Large

1 APPEARANCES:

2 REPRESENTING THE PLAINTIFF:

3 ADAM S. LEVINE, ESQUIRE
4 The Florida Legal Advocacy
5 Group of Tampa Bay, P.A.
6 1180 Gulf Boulevard, Suite 303
7 Clearwater, Florida 33767
8 Phone: 727.512.1969
9 Fax: 866.242.4946
10 Aslevine@msn.com

11
12
13 LUKE CHARLES LIROT, ESQUIRE
14 Luke Charles Lirot, P.A.
15 2240 Belleair Road, Suite 190
16 Clearwater, Florida 33764
17 Phone: 727.536.2100
18 Fax: 727.536.2110
19 Luke2@lirotlaw.com

20 REPRESENTING THE DEFENDANT:

21 BRUCE CULPEPPER, ESQUIRE
22 Assistant General Counsel
23 Office of Insurance Regulation
24 Larson Building, Room 645A-1
25 200 East Gaines Street
Tallahassee, Florida 32399
Phone: 850.413.4139
Fax: 850.922.2543
Bruce.culpepper@floir.com

26
27
28 TIMOTHY GRAY, ESQUIRE
29 Assistant General Counsel
30 Office of Insurance Regulation
31 Larson Building, Room 647-B
32 200 East Gaines Street
33 Tallahassee, Florida 32399
34 Phone: 850.413.2122
35 Fax: 850.922.2543
36 Tim.gray@floir.com

37

38

39

1 ALLEN C. WINSOR, ESQUIRE
Chief Deputy Solicitor General
2 Office of the Attorney General
PL-01, the Capitol
3 Tallahassee, Florida 32399
Phone: 850.414.3681
4 Fax: 850.410.2672
Allen.winsor@myfloridalegal.com

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I N D E X

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EXHIBITS

Exhibit A Explanation of Benefits	21
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1 PROCEEDINGS

2 THE COURT: Well, little close but looks like
3 everybody got a seat anyway. Maybe they didn't,
4 maybe they did. Okay. So let's see. You filed a
5 motion on this side. I saw your motion, I saw the
6 response on the other side. So, anything you want
7 to add?

8 MR. LIROT: Judge, we were just going to hit
9 on the high points of our motion and see if you had
10 any questions and take it from there.

11 THE COURT: All right.

12 MR. LIROT: Very good. If it please the
13 Court.

14 Judge, Luke Lirot, I'm here for the
15 Plaintiffs. I'm here with Adam Levine, my
16 co-counsel. And, Judge, just by way of being clear
17 about the sequence of events here, if you remember
18 we had our oral argument on the motion for a
19 temporary injunction back on February 1st.
20 Sometime around the 10th, you asked for some
21 additional supplemental memoranda. We got those in
22 about Valentine's Day, noting the events here. And
23 then on March 15th, you issued your Order granting,
24 in part, the Motion for Temporary Injunction.
25 Thereafter the Office of Insurance Regulation

1 filed their Notice of Appeal on the 28th, and on
2 the same day we filed our Motion to Lift the Stay.
3 And what I would like to do this morning is just
4 talk to you a little bit about the cases that we
5 cited in our motion. And then I would like to turn
6 the floor over to Mr. Levine, who has some factual
7 presentation to make to support our request.

8 Judge, I think the cases are pretty clear. I
9 have a copy for you, and we put it up there on your
10 desk. The Court certainly does have the right,
11 obviously, the Appellate Rule 9.310(b)(2) allows
12 for the issuance of a stay when it's a governmental
13 entity that's actually filing the Notice of Appeal.
14 But that's not the end of the analysis. The
15 Circuit Court still maintains jurisdiction to
16 lift the stay if we can show that we have
17 compelling circumstances to support that. The
18 cases that I cited and actually, I think one of
19 them was yours, was the Reform Party of Florida v.
20 Black back in 2004. That was the Supreme Court
21 decision.

22 In that instance the Court talks about the
23 entitlement to seek a stay, and then also to try to
24 have that stay lifted. And, the Circuit Court
25 retains jurisdiction to entertain motions to lift

1 the stay, which is what we filed the same day that
2 the Notice of Appeal was filed. That case is at
3 885 So.2d 303, Supreme Court of Florida.

4 The other case is about the same issue as it
5 pertained to a civil forfeiture. And that case is
6 Gervais v. Melbourne, 890 So.2d 412. And that was
7 the -- that case was the Fifth District Court of
8 Appeal case. It again goes through the criteria
9 that the Courts look at when determining whether or
10 not to lift the stay. And I think the last
11 paragraph says that, "We note the Automatic Stay
12 Rule does not permit the Lower Tribunal at the
13 discretion to -- we note that the Automatic Stay
14 Rule does permit the Lower Tribunal the discretion
15 to vacate the stay," and then it cites the other
16 cases that we have.

17 The other one that we cited to support the
18 proposition that you have the authority to vacate
19 that stay is, Saint Lucie County v. North Palm
20 Development Corporation. That's found at 444 So.2d
21 1133, Fourth District Court of Appeals case. It's
22 interesting in that case because what they did is
23 they decided it would be important to stop the --
24 allow the stay to stand so that the developers that
25 were the parties that were benefiting from the

1 injunction wouldn't initiate building a development
2 in the instance if, in fact, the Appellate Court
3 would reverse the decision.

4 The last case that we have, Judge, is the
5 Tampa Sports Authority v. Gordon Johnson case. And
6 this, I think, is probably the most relevant to the
7 point that we hope to raise, because there Mr.
8 Johnson was challenging the policy adopted by the
9 Tampa Sports Authority to frisk all of the
10 attendees at Buccaneer football games, and he got
11 an injunction.

12 And what they looked at was the same criteria.
13 In fact, they articulate those tests saying that,
14 "It's really the same criteria we look to, to
15 determine whether or not we are going to lift the
16 stay, whether or not those establish a compelling
17 circumstance." And in that instance, they looked
18 at the balancing of the interest of the parties who
19 would suffer more. It really just came down to
20 that.

21 And, in our case, Judge, I think if you look
22 at the context of the injunction that you granted,
23 it really is not as expansive as opposing counsel
24 would try to have the Court believe. It really --
25 from our perspective, it eliminates, as you recall,

1 the emergency medical condition as a prerequisite
2 to the full policy limits of the PIP coverage, and
3 it also lifts the prohibition against licensed
4 massage therapists and acupuncturists from being
5 able to provide those services, and chiropractors
6 being able to provide services in excess of the
7 \$2,500 limitation imposed by the act.

8 In your Order, as we articulated in our
9 complaint, the people we represent are out of
10 business. They -- you know, certainly for the
11 licensed massage therapists and the acupuncturists,
12 they cannot do the job that they studied and
13 prepared to do in providing these health care
14 services to people that are injured in automobile
15 accidents. And, candidly, the chiropractors are in
16 the same position.

17 Dr. Frank is here, and I know he's going to
18 give you some testimony as to what the limitations
19 of the \$2,500 limit is on his practice. And quite
20 honestly, Judge, we reviewed all of the pleadings
21 that were filed, the irreparable harm that we
22 alleged that you found, and in the response papers,
23 Judge, the arguments really just come down to pure
24 time and economic damages. Nowhere in any of the
25 response to our emergency motion to lift the stay

1 does the Office of Insurance Regulation say
2 anything about their suffering any kind of
3 irreparable harm.

4 They talked about developing rates and forms,
5 and the number of filings that they had from the
6 different insurance companies, problems that they
7 would have because they've listed and issued a
8 number of new policies that reflect these new
9 limits. And they talk about the PIP Act being
10 halted.

11 Well, that's not what the injunction does.
12 It does not halt the PIP Act, it simply imposes
13 limitations on those specific criteria that you
14 identified in your Order. And again, it's talking
15 about the third-party insurance companies'
16 financial interests, not the interests of the
17 Florida consumer.

18 So, our position is that if you are to weigh
19 these competing interests, they're complaining
20 about disruption, we're complaining about
21 devastation and people that are in health care,
22 providing services that can't earn a living. So, I
23 think based on the balancing of the harm, and I
24 talked with Mr. Levine about this, he urged me to
25 bring this up, we look at this as forms over

1 substance. That the issuance of these different
2 forms and having the insurance companies have to
3 make these minimal changes, really does not
4 outweigh the irreparable harm that this Court found
5 that's occasioned on licensed massage therapists,
6 acupuncturists, and chiropractors desirous of
7 delivering the full extent of their services under
8 PIP coverage as it used to exist. So --

9 THE COURT: Not to mention the injured person.

10 MR. LIROT: Exactly.

11 THE COURT: Who can't get insurance coverage.

12 MR. LIROT: That's correct. And therein lies
13 the reason that we think the citizens of Florida,
14 the consumers, those being the injured persons,
15 they're suffering as well from the imposition of
16 these particular restrictions. So we're not
17 asking, and the Court did not find that the entire
18 PIP Act had to be set aside.

19 I don't know the extent of the effort that
20 would have to be taken by the insurance companies
21 to have to correct this, but having studied how
22 they adopted and implemented the changes that were
23 brought about by the adoption of the challenged
24 legislation, it seems to me relatively easy to send
25 out a memo, an e-mail to the people and say, "Look,

1 here are some very, very minor changes. There is
2 no longer the requirement that people seeking
3 coverage have to establish that emergency medical
4 condition, and there's no longer a prohibition
5 against licensed massage therapists and
6 acupuncturists who provide services that they have
7 historically done prior to the adoption of this
8 challenge legislation."

9 So, based on that, Judge, and the compelling
10 circumstances and the balancing of the harms, I
11 don't think other than disruption, an
12 inconvenience, and what really, if you refine it
13 down to its lowest common denominator, is simply an
14 economic loss to the insurance companies. It
15 seemed a little bit strange to us that the Office
16 of Insurance Regulation would be trying to defend
17 the insurance companies rather than trying to
18 protect the Florida consumer. But be that as it
19 may, nothing in the papers that they filed has
20 alleged any irreparable harm, and we feel that the
21 compelling circumstances that are exhibited by the
22 Plaintiffs in this action outweigh whatever results
23 will occur from the affectation of this injunction
24 against the Office of Insurance Regulation.

25 And with that, Judge, I would like to go ahead

1 and cede the floor to Mr. Levine if I could.

2 THE COURT: All right.

3 MR. LEVINE: Your Honor, thank you. Adam
4 Levine. Again, briefly, Your Honor, I provided you
5 on your desk a copy of all the affidavits that we
6 filed in the black binder. They're alphabetized.
7 I actually color-coded them to make it easy. This
8 morning there were just a couple of high points
9 that I wanted to hit on, and then I thought I would
10 leave them with you for your reading pleasure.

11 In looking at what we've been talking about,
12 the State of -- the Office of Insurance Regulation
13 filed an affidavit that basically said that the
14 auto insurance industry was going to sustain
15 economic losses and time and money to revert back
16 the pre-January 1st, forms and papers that were
17 done, and if any -- the Office of Insurance
18 Regulation had to review approximately 446 forms
19 and filings.

20 What we've provided Your Honor with is a
21 statement from massage therapist Reeve, who is the
22 lavender tab, who said that she was not able to
23 quantify her losses because her referrals stopped.
24 We're not talking about just economic -- mere
25 economic losses and loss of a business that is

1 potentially compensable, we're talking about the
2 fact that her referrals have stopped and the
3 relationship has stopped and that is irreparable
4 harm.

5 Massage therapist Pendum, who is the bright
6 pink tab, says she has lost goodwill. She has lost
7 her ability to have a patient-provider relationship
8 because the patients stopped coming in when the
9 \$2,500 limit is reached. The affidavit of Ms.
10 Lawrence, who I'm not sure if we'll hear from
11 today, says in the last paragraph, "Well, gee, I
12 haven't heard of any insurance companies saying
13 that they can find a doctor to say there's no
14 emergency medical condition."

15 We would say it's quite the opposite, and I'll
16 bring up a witness for three minutes who will
17 explain that that's not the case. In fact, if you
18 look at the affidavits under the dark blue tab, Dr.
19 Fulton, who is a chiropractor, provided you with a
20 copy of an explanation of benefits form where the
21 treatment was allowed for the first visit and then
22 was stopped immediately thereafter when it was
23 reached from one insurance provider. Dr. Fulton
24 said that without the care his patients are not
25 receiving the best care that they can.

1 Dr. Crespo, who is a medical doctor, said that
2 massage is the most beneficial treatment available
3 for people in an auto accident. And he said that
4 the 2012 PIP Act, "Severely limits medically
5 necessary and scientifically proven medical
6 treatment." There are also a number of concerns
7 from many of the massage therapists in the
8 affidavits.

9 That massage therapist Kydar is under the
10 green tab, and massage therapists Hernandez, Bravo
11 and Pardino, who I didn't tab each of them, who
12 also said that they are having a significant issue
13 because of the economic loss from having a decrease
14 in their business, they can't pay either their
15 business loans or their student loans. So they are
16 not able to do business and it's not able to keep
17 them in business.

18 One of the chiropractors, Dr. Hanson, said
19 that he's going to have to go bankrupt. That he's
20 invested his life savings in his practice and
21 because of the denials he's getting after that
22 \$2,500 limit, \$2,500 limit, he is no longer able to
23 do business because he can't continue to employ the
24 massage therapists and the assistants that work
25 with him.

1 address is 4455 North Ninth Avenue, Pensacola, Florida.

2 Q And just very briefly for the Court, what's
3 your background and your experience so that you can
4 testify on behalf of chiropractors, generally?

5 A I was -- graduated in 1988. I'm a
6 chiropractor in Pensacola, Florida specializing in the
7 treatment of musculoskeletal injuries. I have a large
8 facility that employs two physical therapists, three
9 PTAs and a massage therapist.

10 I am a member of Ascension Health Care. I am
11 a Primary Tier I physician with Sacred Heart Health
12 Systems. I was contracted with the hospital, which is a
13 large 600-bed hospital. We also have facilities in
14 Destin and also a new hospital in Port St. Joe.
15 My practice specializes in treatment of patients who
16 have been injured in motor vehicle accidents. Also, I
17 have a fair amount of patients that have major medical
18 problems, that's sports injuries, pediatrics. And I
19 also do a small percentage of independent compulsory
20 medical reviews and peer reviews. And a small portion
21 of that is doing defense work for insurance companies.

22 Q In your experience, are you familiar with the
23 2012 PIP Act?

24 A Yes, I am.

25 Q And how has the 2012 PIP Act affected your

1 practice?

2 A Well, the 2012, has severely restricted and
3 limited my patients to access proper medical care. It's
4 also limited my ability to deliver proper medical care.
5 I have patients that once the \$2,500 amount is reached,
6 patients either drop out of care because they are
7 fearful of incurring bills after the \$2,500.
8 So if I can't bring a patient to maximum medical
9 improvement or to threshold, we can't pursue a claim in
10 court for those patients.

11 Also, it restricts my ability to have patients
12 referred out for advanced diagnostic imaging, such as CT
13 scans, MRIs. The patient gets involved in a motor
14 vehicle accident, Your Honor, they take an \$800
15 ambulance right to the hospital. They're evaluated,
16 they're maybe doing a plain film set of x-rays, lumbar
17 films, possibly a CT scan of the head or neck, they're
18 given three prescriptions and they're released and
19 they're sent out on the street. God forbid that, you
20 know, they still have pain. Generally some of these
21 patients go to sleep, they can't wake up, they can't get
22 out of bed in the morning, and they need to seek further
23 care.

24 I had a little incident where, you know,
25 personally, my mother was involved in a motor vehicle

1 accident 10 months ago, and she was rear ended by an
2 uninsured motorist. She -- two young people, my dad is
3 87, my mom is 85, they live outside of Boca Raton,
4 Florida, and she injured her shoulder, and they both
5 have pacemakers.

6 And so, she went to the hospital and she had
7 to be checked by an electrophysiologist to see that the
8 leads were not taken out of her pacemaker. And she had
9 to have extensive rehabilitation to her left shoulder.
10 So I look at these injured people that after they go to
11 the hospital their \$2,500 is met, that if they get up in
12 the morning, and a mother can't take care of her
13 children, a father can't go to work, provide for his
14 family and a daughter or son can't go to school, those
15 are big issues.

16 So, these patients are relying on pain
17 medication and muscle relaxers to take care of their
18 problems. The -- this PIP law restricts my protocol, my
19 plan.

20 I have a loss of referrals. Sixty percent of
21 my referral business is from doctors. Doctors are
22 calling me all the time asking me about what's the
23 definition of emergency medical condition and I can't
24 give it to them because it's very vague and ambiguous.
25 So it's had a decrease in my practice referrals,

1 patients have dropped out of care.

2 It's also affected my clinical
3 decision-making. You know, some patients when they've
4 been involved in an accident, they -- their adrenaline
5 levels are high, their cortisol levels are high.
6 They go to the hospital, they come home and then all of
7 a sudden, maybe a week, three weeks, four weeks later
8 they bend over to pick up a toothbrush off of the sink
9 and maybe they've had some disruption in a disc, an
10 angular or circumferential tear in a disc and they
11 sneeze and a disc blows and they drop to their feet.
12 And so these people now after having been to a hospital,
13 they're out of luck.

14 They can receive anymore care, and I can't do
15 my job and I can't deliver proper health care to these
16 patients. So, it's about people. And my crux has
17 always been about taking care of people. And my motto
18 has been, if I take care of the people in my practice,
19 my practice has always taken care of me.

20 MR. LEVINE: Your Honor, may I approach?

21 THE COURT: Okay.

22 BY MR. LEVINE:

23 Q Okay. I've showed this to them. Dr. Frank,
24 I'm handing you what I've marked as Exhibit A. Can you
25 identify that?

1 A Yes, it's a --

2 Q Can you describe it?

3 A -- explanation of benefits for one of my
4 patients.

5 (Whereupon, Exhibit A was marked for
6 identification and received in evidence.)

7 BY MR. LEVINE:

8 Q Okay. You provided that form to me?

9 A Yes, I did.

10 Q And the reason I'm handing that to you, Dr.
11 Frank, is to show that emergency -- that patients are
12 not getting provided with the full \$10,000 in coverage.
13 The affidavit that I believe we provided you a copy from
14 Sandra Soren that says in the end that she didn't
15 believe that insurance carriers were denying coverage.

16 Has it been your experience that insurance
17 carriers since January 1st, are denying the \$10,000 in
18 coverage?

19 A They are starting to now because the policies
20 are now becoming renewed. And so, we're starting to see
21 this. I don't think it's hit a head until maybe June,
22 July, August, when all these policies are renewed.

23 Another thing is about massage therapy, it's
24 such an integral part of what I do. It's a very valid
25 science. It's the only way to really deal with

1 myofascial spasms and my physical therapists generally
2 refer to that all the time.

3 Q If you look at that explanation of benefits
4 form that you have, is that essentially the same verse
5 that you provided me with?

6 A Yes, it's exactly the same.

7 Q The only thing that's been redacted is the
8 individual's identity?

9 A That's correct.

10 MR. LEVINE: Your Honor, with any objections I
11 would like to introduce this as Exhibit A.

12 MR. CULPEPPER: I have no objections.

13 THE COURT: All right.

14 MR. LEVINE: I will provide you with a copy of
15 that. And I think with that, Your Honor, we would
16 like to stop at the moment and --

17 THE WITNESS: Can I add one more thing? This
18 issue really shifts the burden of accidents on to
19 the victims, and it limits patient access. And it
20 really restricts the insurance companies from
21 paying legitimate claims.

22 THE COURT: Cross-examine?

23 MR. CULPEPPER: Do you mind if I ask questions
24 from here?

25 THE COURT: That's fine.

1 CROSS EXAMINATION

2 BY MR. CULPEPPER:

3 Q I apologize, tell me your last name.

4 A Frank.

5 Q Frank. Dr. Frank, I'm Bruce Culpepper, I
6 represent the Office of Insurance Regulation. Just a
7 few follow-up questions.

8 In these explanation of benefits, I didn't see
9 the point where they say, "We're going to cap at \$2,500
10 for reimbursement. In order for -- to make any
11 additional reimbursement decisions please provide the
12 determination of patient's emergency medical conditions.
13 So, USAA is telling the patients, "If you have an
14 emergency medical condition we'll pay more."

15 Do you know -- are you aware if any of your
16 patients have gotten a statement from a doctor that they
17 do, in fact, have an emergency medical condition?

18 A Well, first of all, I don't understand
19 emergency medical condition. It's very -- extremely
20 vague and --

21 Q I'm asking about the -- tell me about your
22 patients.

23 A Okay. Could you repeat the question, please?

24 Q Explanation of benefits says, "USAA will pay
25 more if the patient will provide a determination of the

1 patient's emergency medical conditions by a provider
2 authorized."

3 Are you aware of any of your patients that
4 have gone to a doctor and gotten a determination of
5 emergency medical condition?

6 A No, I'm not.

7 Q Okay. Okay. So, you're not aware of any or
8 you're aware that the patients have not been able to do
9 that?

10 A I'm not aware of any.

11 Q Okay. You've talked to doctors. You say 60
12 percent of your referrals are from doctors?

13 A Yes, sir.

14 Q Okay. And these are medical providers that
15 would be articulated in the statute, would they not?

16 A I'm not understanding your question.

17 Q Okay. Medical providers, under the statute,
18 we talked about it, if there's a determination of an
19 emergency medical condition by a medical provider, and
20 you are familiar in this statute there's a list of
21 medical providers that can make that determination?

22 A Dentists and medical doctors, DOs, nurse
23 practitioners, everyone except a chiropractor. But we
24 can declare a non-emergency.

25 Q Okay. But your referrals come from those

1 entities, doctors, medical providers?

2 A Some of them, yes.

3 Q Right. And when -- so, are you saying that in
4 your conversations with these doctors, they're telling
5 you this patient does not have an emergency medical
6 condition, therefore, you are capped at \$2,500?

7 A Nobody has made the determination of an
8 emergency because nobody I believe understands it. I
9 have doctors calling me saying they don't understand it.

10 Q Okay. Now the statute says, "In order to be
11 capped there must be a determination that the person did
12 not an emergency medical condition."

13 So you are not receiving a determination from
14 a doctor that the patient you're treating has an
15 emergency medical condition, is that correct?

16 A I'm not understanding your question. I'm
17 sorry.

18 Q All right. You're talking to doctors, you get
19 referrals from doctors?

20 A I get referrals from patients, I mean, I don't
21 -- okay.

22 Q All right. And you say you also have patients
23 that come from the Emergency Room, right?

24 A I have patients that are referred to me
25 through other patients, I have patients that are medical

1 referrals, I have patients that are referrals from --
2 just from -- I do a TV show in town. I have patients
3 that come in off the street.

4 Q Do you treat other injuries, injuries other
5 than automobile accident injuries?

6 A Absolutely.

7 Q So you have sources of payment other than
8 personal injury protection, right?

9 A Yes, I do.

10 Q Okay. Do you have automobile insurance?

11 A Do I?

12 Q Yeah.

13 A Absolutely. I'm required to have it.

14 Q When was it renewed?

15 A I believe the renewal came around February.

16 Q Okay.

17 (Whereupon an off-the-record discussion was
18 held.)

19 BY MR. CULPEPPER:

20 Q Dr. Frank, are you aware of any of your
21 patients who stopped receiving payments under PIP at
22 2,500 that had been sued for their economic damages for
23 anything filed, claimed by you?

24 A My patients that have been sued?

25 Q Well, the injured party would have sued.

1 A No.

2 Q You're not aware of it?

3 A I'm not aware of it.

4 MR. CULPEPPER: Nothing further.

5 THE COURT: Okay. Any redirect?

6 MR. LEVINE: Your Honor, just one in response
7 to the last question that was asked.

8 REDIRECT EXAMINATION

9 BY MR. LEVINE:

10 Q Dr. Frank, you said earlier in the very
11 beginning, that you can't make the determination of a
12 permanent injury because your patients don't reach
13 maximum medical care?

14 A Because they dropped out of care and I haven't
15 finished my treatment protocol, or the physical
16 therapist hasn't finished.

17 Q Earlier, in the opening statement, the State
18 argued that patients don't have to drop out of care
19 because health insurance should provide a buffer. Has
20 that been your experience?

21 A Well, a lot of times health insurance will not
22 cover it and it's denied that the injuries are caused by
23 motor vehicle accidents. And some insurance policies
24 don't even cover, they lump physical medicine together.
25 And those are very limited, as well. Take Medicare, for

1 example.

2 I mean, they only cover spinal manipulation.
3 They don't cover any of the physiotherapy modalities,
4 such as electrical stimulation, interferential wave
5 current, ultrasound, myo-facial treatments,
6 neuromuscular treatments from a massage therapist. I
7 mean, those are vital portions of my practices to help
8 patients to get as well as I can get them and achieve
9 maximum therapeutic benefit from me.

10 Q Is it fair to say that the patients on the
11 explanation of benefit form that you have or this
12 patient specifically and your patients in general that
13 have been cut off at \$2,500 haven't reached any kind of
14 final visit or final care?

15 A Absolutely.

16 MR. LEVINE: No further questions, Your Honor.

17 The Court: All right. Thank you, sir.

18 Okay.

19 MR. LEVINE: Your Honor, with that I think we
20 should stop and move along on.

21 THE COURT: All right. Let's pick up on this
22 side.

23 MR. CULPEPPER: Your Honor, I would like to
24 call Sandra Starnes.

25 THE COURT: All right.

1 Whereupon,

2 SANDRA STARNES

3 was called as a witness, having been first duly sworn to
4 speak the truth, the whole truth and nothing but the
5 truth, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. CULPEPPER:

8 Q Could you state your name, please?

9 A Sandra Starnes.

10 Q And where do you work?

11 A I work at the Office of Insurance Regulation.

12 Q What are your responsibilities there?

13 A I'm the Director of the Property and Casualty
14 Product Review Unit. My unit -- or I supervise the
15 people that review the rates and forms that insurance
16 companies use for property and casualty products.

17 Q And property and casualty, what's your
18 response -- your involvement with the auto insurance
19 industry?

20 A Well, when I first started at the Office I was
21 reviewing the auto rate guideline. After I was
22 promoted, you know, obviously, I took a strong interest
23 in House Bill 119. I provided several presentations for
24 House Bill 119, and have been kind of the point person
25 when it came to the implementation of House Bill 119.

1 Q So you're familiar with the -- the PIP Act is
2 what we're calling it, the Amendment?

3 A Very familiar.

4 Q Okay. And I'll direct you, because we're
5 focused on impact and the impact of any adjustments to
6 this law or invalidations in terms of it.

7 Can you tell the Court a little bit about
8 what's involved in making a rate filing? When an
9 insurance company has to make a rate filing and makes
10 rates and forms for PIP coverage limits, what's involved
11 in that?

12 A There's a lot of supporting detail that has to
13 go into it. Companies generally take a couple of months
14 at least to develop the rate filing, sometimes longer.
15 In general, if you were to request a PDF filing that the
16 office has reviewed, they can be hundreds, if not
17 thousands, of pages of information that the insurance
18 company submitted to support changes.

19 Q And then they submit those rate filings to
20 you?

21 A To the Office, and for rate filings actuaries
22 review the rate filings to determine whether or not they
23 comply with actual standards of the Florida Statutes.

24 Q How long do you and the Office have to review
25 rate filings?

1 A There are two options of filing under Florida
2 Statutes. There's a filing use in and a use in file
3 provision for auto. The file in use we're given 60 days
4 to review the filing. And if a final determination is
5 not made, then the insurance company can deem the file
6 approved.

7 However, if the Office needs additional time,
8 the company is willing to waive and go past that
9 60 days. On a use in file filing, the company submits
10 it within 30 days of starting to use the filing. So
11 there is no set time period that the Office has to
12 finish review of that filing, that type of file.

13 Q Okay. And just so I can summarize it, the
14 time that goes into calculating a rate filing, a company
15 you take -- you said several months is typical for a
16 company to calculate a rate filing for auto insurance?

17 A Yes.

18 Q Okay. And then the Office has 60 days after
19 that to review and approve the rate filing?

20 A Yes.

21 Q And add extensions if they're needed?

22 A Exactly.

23 Q Let's look at this PIP Act. When did the PIP
24 Act become law, are you aware?

25 A It was signed into law in May of 2012. There

1 A The Office reviewed every single rate filing,
2 and determined whether or not they complied with the
3 requirements of the Florida Statutes and actuarial
4 standards.

5 Q Okay. Law goes into effect January 1, 2013.
6 Does that mean the auto insurance policies with the new
7 PIP limits went into effect on that date?

8 A The statute is actually unclear on that.
9 Because there is a provision in the statute that says
10 that an insurance company can implement the provisions
11 of House Bill 119 without it being specifically included
12 in the policy. So the insurance company didn't
13 necessarily need to issue a policy with the changes in
14 order to actually implement the provisions of the Bill
15 according to Statute.

16 Q Okay. Then let me ask you the practical
17 effect. Here we are on April 1st, January 1, all the
18 PIP coverage went into effect. What's happened with all
19 our insurance policies between January 1, and April 1?

20 A At this point in time, all the insurance
21 companies should be renewing their policies with new
22 policies with a benefit level. There might be some that
23 have held out with denial approval on their forms that
24 should be in the Office. But for the most part, they
25 should be at the new benefit level in their forms, as

1 well as the new rate level.

2 Q And I don't want to lose anybody, but I assume
3 every driver in the state of Florida would be covered by
4 insurance policies under the new PIP coverage limits?

5 A That's correct.

6 Q Okay. Let's talk about impact of the PIP
7 benefits, if -- you're aware that an injunction has been
8 granted to halt certain provisions of the PIP Act. If
9 that junction goes into effect today, and so, I assume
10 the impact would be that PIP coverage rates would be for
11 the old standard?

12 A Uh-huh.

13 Q All right. What is the effect on the auto
14 insurance industry?

15 A Well, there's several different things. First
16 of all, the auto in charge would want to revert back to
17 their old policy forms to get the level of benefits that
18 they're providing actually to meet within the forms of
19 the insurance that the insured has. But also, they
20 would want to revert back to their rate structure that
21 was in place before they accounted for the benefits of
22 the Bill.

23 Many insurers reduced their rates by 10
24 percent in order to meet the requirements of House Bill
25 119. Some didn't, some were able to support that they

1 needed a higher rate than that within the rate change.
2 But you can expect that once -- if this injunction were
3 to go into place, that most insurers would probably file
4 to reverse any decreases of the benefits from House Bill
5 119.

6 But not only that, the insurance company would
7 have to wait until they can implement those changes in
8 their system, which sometimes can take a significant
9 amount of time. And then they would have to set up
10 effective dates in order to implement it.

11 Because for renewal business you have to give
12 at least 45 days renewal notice of the premium before
13 you can actually charge it. So, at a bare minimum,
14 renewal business would be at the old rate structure at
15 least for the next 45 days if it were to go into effect
16 now. And that would be an inadequate rate for that
17 45 days, and the past three months that they've been
18 charging.

19 Q And I'm asking you about the comment that the
20 insurance industry could make the adjustment with just a
21 memo. Is just a memo enough to make these rate changes?

22 A No. There's no way that a memo would be able
23 to do that.

24 Q Okay. You talked about information you
25 received in your position about the impact of PIP

1 coverage benefits, and you made the comment that the
2 practical -- that you had not -- in your position, you
3 had not seen a significant practical impact. Can you
4 describe that for the Court?

5 A We've had several insurance companies call
6 because they have concerns about the emergency medical
7 condition and how they can limit to \$2,500 for the
8 non-emergency medical conditions. And several companies
9 have expressed even now that they found difficulty in
10 finding medical providers that would certify that it is
11 a non-emergency medical condition.

12 In which case the law states that if it's not
13 an emergency medical condition that you have to get a
14 certification in order to limit to \$2,500. So they're
15 kind of in a catch 22 because they have to get
16 certification that it is an emergency medical condition
17 to provide the \$10,000, or it is not a non-emergency
18 medical condition to limit to the \$2,500.

19 There's nothing in there that says, you know,
20 what do you do if you don't -- you're not able to get
21 certification. So I think a lot of companies have erred
22 on the side of caution because they don't want to be
23 charged with that fee if they cannot get a certification
24 for non-emergency medical condition that they pay the
25 \$10,000.

1 Q And one last area, again trying to get the big
2 picture here. We have the PIP Act which is in effect,
3 the PIP limits coverage. We have an injunction that's
4 been granted. If the injunction goes into effect, the
5 changes you have discussed have to be made. We haven't
6 gotten -- we don't have a final determination yet on the
7 case.

8 What happens if the injunction goes into
9 effect, the insurance industry acts and then the
10 Defendants prevail, so the Fifth Amendment stays law,
11 what is that affect on the insurance industry?

12 A Well, it would be a nightmare for both my
13 Office and for the insurance companies having to
14 reverse. We've had nine months to enact House Bill 119
15 so far. And we've taken that nine months, it's been,
16 you know, 450 filings that we've had to review. And
17 it's taken the full time in order to review those
18 filings.

19 In fact, we still have several filings that
20 are outstanding of those 450 filings. So, in order to
21 turn that around and, you know, in a short time period
22 and then have to re-implement it, it would just be a
23 nightmare.

24 MR. CULPEPPER: No further questions.

25 THE COURT: Cross-examine?

1 MR. LEVINE: If I may.

2 CROSS EXAMINATION

3 BY MR. LEVINE:

4 Q Good morning.

5 A Good morning.

6 Q A nightmare equates to a lot of time and
7 effort?

8 A Yes, and expense.

9 Q It can be done?

10 A It can be done.

11 Q So time and money?

12 A Uh-huh.

13 Q And you had mentioned that in the actual Act,
14 itself, that there was a provision that said that there
15 was really no need that the insurance companies change
16 their policies to implement the limitations that are the
17 subject of the injunction, yes?

18 A That's correct. But most companies have.

19 Q Well, they're changed their policies, but the
20 statute, itself, says you can implement these changes
21 without changing any of your paperwork.

22 A Right.

23 Q What's different about the injunction? Why
24 would they have to change their paperwork in order to
25 comply with an injunction?

1 A Well, first of the all, they would have to --
2 in order to charge an actuarial sound rate, they would
3 have to make a rate filing. That's approximately 155
4 filings right there. They wouldn't necessarily have to
5 provide policy form changes if they are going to provide
6 a higher benefit level than what is in their policy.
7 But most companies would just to have it out there so
8 that the insured knew exactly what they were purchasing.

9 Q So, the consumer ends up at the end losing
10 more money?

11 A Potentially, yes. I mean, the consumer will
12 lose out because they are going to lose the benefit of
13 the decreases in premiums that have come about because
14 of House Bill 119.

15 Q And those decreases in premiums are
16 commensurate with decreases in coverage and when you can
17 go to for treatment, yes?

18 A Yes.

19 Q Okay. Now you've talked about these rate
20 filings, and as I understand the PIP Act actually
21 required that by October 1st, that insurance companies
22 identify what kind of savings or decrease of premiums
23 would take effect.

24 A No. The House Bill required that there would
25 be a rate filing as of October 1st, and the insurance

1 company would show you -- it would file a 10 percent
2 decrease or provide a detailed explanation for why they
3 could not obtain that 10 percent.

4 Q How many detailed explanations did you get?

5 A We received about 150 filings, approximately.
6 Only about 35 of those used the minus 10 percent or more
7 of a decrease, so the rest of them would have had
8 detailed explanations.

9 Q Okay. So the goal of trying to reduce
10 premiums really only proved to be the case in what was
11 filed in your office in approximately one-third of the
12 insurance companies?

13 A Well, keep in mind that what the Bill was
14 really doing is it was changing the trajectory of the
15 PIP premiums. If you look at January 1st, 2011, and
16 forward, and you exclude House Bill 119, 85 percent of
17 the filings that the Office approved had increases in
18 PIP. And of those 85, the majority had double-digit
19 increases of PIP.

20 And we even had one insurance company that had
21 to increase their premiums by over a hundred percent in
22 order to maintain an actuarially sound rate.

23 Q Okay. And --

24 A So --

25 Q Finish, forgive me.

1 A So when you look at that trajectory, and you
2 look at over the time having double-digit increases, and
3 then all of a sudden you actually have a vast majority
4 of companies either having filing decreases or filing
5 their change in the premiums, then that's a positive
6 sign.

7 Q But those increases are based on what
8 information?

9 A They were based on an actuarial study that was
10 performed by Pinnacle Actuarial Resources, Inc.

11 Q All right. And is there any oversight or
12 independent research to verify the information that was
13 given to you by Pinnacle?

14 A Well, Pinnacle was the independent research.
15 We were -- we hired out with them, and then, you know,
16 they provided the report that was required by the
17 Legislature. Most companies use that report.

18 Q And where did they get their information?

19 A From a variety of places. They contacted
20 companies to get some information, they looked at
21 historical data, closed-claims studies, things like
22 that.

23 Q But the majority of that information would
24 come from the insurance companies themselves, yes?

25 A Or regulating organizations, yes.

1 Q Okay. That work for the insurance companies?

2 A Yes. I guess.

3 Q So there's never been any independent
4 peer-review research done into any of this information.
5 We've just kind of taken their word that all these
6 increases and problems exist?

7 A I'm not sure that I follow your question. I
8 don't know how you can get independent information
9 without getting information from the insurance company.

10 Q Obviously if you got that information, someone
11 else could review it. They could possibly come to a
12 different conclusion?

13 A You get 10 actuaries in a room, you could get
14 10 different numbers.

15 Q Okay. Now, again I just want to stress, the
16 issues that we're talking about as far as what would
17 have to be done to accommodate a stay being lifted and
18 consumers being allowed to just return to those minimal
19 components of actually not having to prove an emergency
20 medical condition to get their \$10,000 in coverage, and
21 having access to licensed massage therapists and
22 acupuncturists, that trade-off would be a suffering of
23 what? Just time and money on the part of the Office of
24 Insurance Regulation?

25 A Well, on our part it would be time and money

1 of the expense of having to review the filings. On the
2 insurance company's side they would have to have the
3 time and the expense and the hassle of, you know, having
4 to do the filings. Submit them, implement them, get
5 their ID systems up, you know.

6 In addition they would be having to go back
7 and review claims that they have had since January 1, to
8 make sure that it complies with the new law, so to
9 speak. And not only that, there might be some
10 additional bad faith involved. And there could be, you
11 know, additional expenses from that.

12 Q I just want to ask you one last question about
13 the certification of a non-emergency medical condition.

14 A Okay.

15 Q Where does that concept come from?

16 A I'm not sure I follow your question.

17 Q Well, as I understand it, the burden is on the
18 consumer to establish that they have an emergency
19 medical condition in order to enjoy the full \$10,000
20 benefits.

21 A There's a provision in the Bill that says that
22 if you want the \$10,000 in benefits that you have to get
23 certification from a medical provider that it's an
24 emergency medical condition. But there's also a
25 provision in the Bill that says that if it's going to be

1 limited to \$2,500 you have to have a medical provider
2 certify that it is a non-emergency medical condition.

3 Q And nobody will do that?

4 A I don't know that nobody will do that. What
5 I've said is that there have been several carriers that
6 have expressed to me the concerns that they have not
7 been able to find a medical provider, at that point, in
8 order to sign off on that.

9 Q And so those several carriers are
10 automatically allowing \$10,000 in coverage?

11 A There are some that are, yes.

12 Q So this injunction, if the stay is lifted and
13 the injunction is allowed to go into effect, it would
14 have no impact on those insurance companies that as a
15 matter of their own decision allow the full \$10,000 in
16 coverage?

17 A For those companies, correct. Unless they
18 find a way to limit to \$2,500 if they started getting in
19 the certifications.

20 Q All right. Would those companies have asked
21 for the rate reviews and things you are talking about?

22 A All the companies would have submitted the
23 filings. I don't know if the companies that I talked to
24 submitted the minus 10s or if they did the detailed
25 explanation.

1 Q Okay. But in your last example there are
2 companies that submitted for the changes in the forms
3 and all those administrative aspects that you talked
4 about, that are still providing \$10,000 of coverage to
5 their insured?

6 A Well, at this point in time, they're providing
7 the level of coverage that they feel they have to.
8 Until they get a provider that will certify that it's a
9 non-emergency medical condition.

10 Q And that's independent of whatever forms they
11 file allowing them to limit that to \$2,500?

12 A It's not independent of it. The forms say
13 that there has to be a certification that there's a
14 non-emergency medical condition. So they are following
15 the forms, and they are following the law.

16 MR. LEVINE: Okay. I have no further
17 questions. Thank you for your indulgence for just
18 one second. Nothing further.

19 THE COURT: Redirect?

20 MR. CULPEPPER: One question.

21 REDIRECT EXAMINATION

22 BY MR. CULPEPPER:

23 Q We talked about changes to the rate filings
24 and forms would take time and expense on insurance
25 companies. Who ultimately is going to bear the cost of

1 that expense for the insurance company?

2 A The expenses will be passed on in their rates
3 to the policyholder. So ultimately the policyholder
4 will end up paying for not only the expenses of having
5 to change that, but the higher cost if the benefits
6 increase.

7 Q Thank you.

8 MR. CULPEPPER: No further questions.

9 THE COURT: And I'm sorry, Ms. Starnes?

10 THE WITNESS: Starnes.

11 THE COURT: I thought they called you Stoner.
12 So, had there never been a PIP Act in 2000 -- I
13 guess was it passed in 2012? In 2012, when did the
14 insurance companies come to you to get approval of
15 the rate they want to charge?

16 THE WITNESS: The companies come to us
17 whenever they want to make changes in the rates.

18 THE COURT: How often can they come in to you?

19 THE WITNESS: They can come in every day if
20 they wanted to. In general, companies don't do
21 that. Most companies issue six-month policies, so
22 most of the time they will come in every six months
23 in order to adjust the rates.

24 THE COURT: What about in terms of -- the law
25 requires them to do an adjustment, right?

1 THE WITNESS: Uh-huh.

2 THE COURT: So if it had not been for the PIP
3 Act, there would be no different rate filings more
4 than the usual?

5 THE WITNESS: There were more than usual at
6 one point in time. So what I anticipate what will
7 probably happen even if the Bill stays and you
8 consider it to be okay, so for a while companies
9 will still do every six-months. So we'll probably
10 get bunches of filings every six months in
11 intervals. So we'll probably -- we should start
12 seeing an increase in filings right now for that
13 six months.

14 THE COURT: So if just in the usual average
15 workday, you expect every six months when policies
16 come up they may ask for a renewal or a rate
17 change, but they may not.

18 THE WITNESS: Right.

19 THE COURT: Do they -- and they present stuff
20 to justify that to you, don't they?

21 THE WITNESS: Yes, sir.

22 THE COURT: In this most recent thing, did
23 they present to you -- they just say, "Listen,
24 because of the new PIP Act we want to reduce the
25 rate," or they were required to, right?

1 THE WITNESS: Uh-huh.

2 THE COURT: Unless they came up with some
3 reasonable explanation as to why they couldn't do
4 it?

5 THE WITNESS: What we did -- there's no
6 explanation in the Bill about what a detailed
7 explanation was.

8 THE COURT: Right.

9 THE WITNESS: So if a company came in and they
10 were taking a minus 10 or more of a decrease, they
11 didn't have to provide any additional support.
12 They just said, "We're reducing our PIP rates by
13 minus 10 and that's it." What most companies did
14 though, is that they came in and they supplied what
15 we consider a detailed explanation. It complies
16 with all the requirements of Florida Statutes and
17 actuarial standards and principles that we would
18 normally expect in a rate filing. And our --

19 THE COURT: Well -- I'm sorry. Go ahead.

20 THE WITNESS: I was just going to say that our
21 rate filings can get very detailed, very quickly.

22 THE COURT: Aren't they mostly asking for more
23 when they come in to see you?

24 THE WITNESS: Actually, in general, yes. You
25 know, when you start from 2011 forward, PIP was

1 skyrocketing, double-digit rate increases were the
2 norm. If you look at House Bill 119 filings, and
3 just those --

4 THE COURT: Not those -- not the law we're
5 talking about.

6 THE WITNESS: Okay.

7 THE COURT: But just in general when they
8 come, aren't they usually asking, "Can we charge
9 more?" They can't be coming and asking to charge
10 less.

11 THE WITNESS: They do actually, believe it or
12 not. Yeah. Progressive has come in several times.

13 THE COURT: It's a competitive thing.

14 THE WITNESS: And done a lot of decreases.

15 THE COURT: Whatever it is, if they want to
16 raise it, they have to justify it to you, don't
17 they?

18 THE WITNESS: Yes, sir. Raising or lowering
19 they have to justify any changes.

20 THE COURT: Okay. All right. So that would
21 be the same if they want to change it now, won't
22 they?

23 THE WITNESS: Yes.

24 THE COURT: I mean, the law says they are
25 supposed to reduce it by 10.

1 THE WITNESS: Uh-huh.

2 THE COURT: Nothing's changed in that?

3 THE WITNESS: Nothing's changed in that.

4 THE COURT: Okay. Okay. Anything else based
5 on my questions?

6 MR. GRAY: Yeah -- oh. Based on your
7 questions? No, Your Honor.

8 THE COURT: Okay. All right. Thank you.
9 Anything else?

10 MR. GRAY: Yes. Do you mind if I just sit
11 here?

12 THE COURT: No, I don't. But actually it's
13 five of 12:00 and we've gone well over the
14 30 minutes we had. I'm going to pick a Jury this
15 afternoon. I've got a trial tomorrow. I would
16 say, "Let's come back when we can do it," but I
17 don't know when I'm going to have a chance to do
18 it. Is -- and I don't want to cut you off.
19 So I'm not sure what to do in this situation. I
20 guess I can just get with Laura and see. But I
21 don't have anymore time left.

22 MR. LEVINE: For time's sake, we're finished,
23 Judge. I think --

24 THE COURT: Well, I know that you are, but
25 they need to get their chance.

1 MR. LEVINE: I don't want to deprive them of
2 their right.

3 THE COURT: Well, do you have some more
4 evidence?

5 MR. GRAY: No, Your Honor, just arguments.

6 THE COURT: Just arguments?

7 MR. GRAY: Yeah. I'll make it as brief as
8 possible.

9 THE COURT: Okay.

10 MR. GRAY: The landscape is different today.
11 Had we been in here in the fall or the summer of
12 2012, it would be different. At last hearing
13 counsel said they couldn't get a hearing before
14 the date, and this is an exchange of e-mails
15 between Judge Carroll's office and Mr. Lirot that
16 shows at the lower portion of page 1 that they
17 could have gotten a hearing in December. But the
18 landscape changed dramatically.

19 And what Your Honor suggests is just couldn't
20 the rates have stayed in place had there been
21 something before January the 1st, that would be a
22 lot easier than trying to undo everything, redo it,
23 and then possibly redo it again if Your Honor is
24 overturned.

25 So, we think that there is -- that this

1 current status quo should be maintained because of
2 all the complications that has risen instead of
3 getting in here on December the 5th, and having the
4 hearing. All the complications that have been
5 created by waited until February, to get into a
6 court where they knew they had jurisdiction and
7 they knew they had a venue. I don't know why we
8 made the detour through Federal Court in Tampa.

9 Secondly, the affidavits, I don't know really
10 what to say about the affidavits and the testimony,
11 is that it's almost like -- almost like a res
12 loquitor is that there's a cottage industry that
13 has developed around PIP that is the cause for what
14 the Legislature was trying to hold down.

15 I want to emphasize that we're not here
16 opposing the consumer of Florida, we're here
17 supporting a decision made by the Legislature. And
18 that is what we're defending. We're not, as
19 suggested by counsel, we're not here to oppose the
20 consumer of Florida, because the consumer is also
21 being harmed by the fraud that is well documented
22 in the PIP system through higher rates and what
23 Governor Scott has called a hidden PIP tax from
24 that standpoint.

25 We would also like to note that if Your Honor

1 is going to lift the stay and vacate the stay, that
2 there is no bond that was required in Your Honor's
3 injunction ruling. The rule is clear that if you
4 have a -- that if you issue a temporary injunction
5 that you must have a bond. We think the bond
6 should not be a deminimus bond because of the cost
7 to the Office in terms of reviewing what would have
8 to be a whole new batch of filings. As well as --

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

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

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

17 MR. GRAY: And so, now --

18 THE COURT: That's still in effect.

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

20 THE COURT: Why is it all undone?

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

23 THE COURT: Well if I've got to make the
24 decision, you should want to answer my question.
25 Why would that undo it? If the law still requires

1 them to do that, how can they come out and say,
2 "Well, yeah, but this Judge over here ruled these
3 things not affable so we want to change our rate?"
4 I guess they could --

5 MR. GRAY: They could --

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

10 MR. GRAY: Let me answer it this way, is that
11 I got a letter yesterday or over the weekend from
12 my pest control company that said, "You've been at
13 \$70 and we're only going to raise your rate by \$5,
14 but we're going to charge new customers \$90."

15 Well, that's a \$15 savings to me. But what
16 we're talking about is, we're talking about now
17 we're having all new customers come in and being
18 covered by the rate filings that would have to be
19 revised to reflect the increased cost that would
20 have been reflected had they not been mandated to
21 reduce their cost or explain otherwise.

22 The companies are entitled to a rate of return
23 and protection on their capital which is what Ms.
24 Starnes' office goes through. Simply -- we simply
25 contend that the current status quo is what should

1 be maintained, because if we're in an equitable
2 proceeding, which an injunction is, the record
3 clearly shows that this could have been decided
4 before January the 1st, and then wouldn't have
5 nearly the confusion and chaos that we are going to
6 have if the injunction is vacated.

7 One final request, Your Honor, is that if you
8 are going to vacate the injunction we would request
9 that you delay the vacation for 10 days to allow us
10 to file an emergency motion with the DCA to address
11 that ruling.

12 THE COURT: Yeah. I was going to ask you all
13 procedurally, I always thought the DCA could always
14 -- either way, could the DCA -- I know the DCA
15 could issue a stay. Could they vacate a stay?

16 MR. GRAY: They did that in the Pringle case.

17 THE COURT: The Pringle --

18 MR. GRAY: The Pringle case.

19 THE COURT: They vacated a stay?

20 MR. GRAY: Yes, the Judge issued a stay
21 regarding the net banned -- or had vacated the
22 stay, and the First DCA reinstated the stay.

23 THE COURT: Right. Has there been occasion to
24 do the opposite? In other words, if I don't grant
25 the motion, is there any appellate release? And

1 then I think it ought to be stayed while these --

2 MR. GRAY: My opinion is that there is
3 jurisdiction to do that, because it says that
4 whatever the Lower Tribunal does, that the Court
5 can then review that.

6 THE COURT: Do you all agree?

7 MR. LIROT: We agree, Judge. In fact one of
8 the cases actually says that, that it can be the
9 Trial Court or it can be the Court of Appeal.

10 THE COURT: Okay. Well, let me give you an
11 answer as quick as I can then. I've got your
12 filings and your arguments and I'll get you
13 something as soon as I can.

14 MR. LIROT: Thank you very much, Your Honor.

15 THE COURT: All right.

16 (Whereupon, the proceedings were concluded at
17 11:05 p.m.)

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1 CERTIFICATE OF REPORTER

2

3

4

5 I, NICOLE MAZZARA, do hereby certify that I
6 was authorized to and did report the foregoing
7 proceedings, and that the transcript, pages 5
8 through 57, is a true and correct record of my
9 stenographic notes.

10

11 Dated this 8th day of April, 2013 at
12 Tallahassee, Leon County, Florida.

13

14

15

NICOLE MAZZARA

16

Court Reporter

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Tab 8

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, STATE OF FLORIDA
CIVIL DIVISION

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

Plaintiffs,

Case: 2013-CA-000073

v.

KEVIN N. McCARTY, in his Official Capacity as
Commissioner of the Florida Office of Insurance
Regulation,

Defendant.

**PLAINTIFFS' NOTICE OF FILING AFFIDAVIT AND SUPPLEMENTAL
MEMORANDUM OF LAW IN SUPPORT OF VACATING THE NOTICE OF
AUTOMATIC STAY**

Plaintiffs, by and through the undersigned counsel, hereby give Notice of Filing the attached Affidavit of Patrick Joseph Tighe, and herein provide a Supplemental Memorandum of Law in support of vacating the Defendant's Notice of Automatic Stay, and would state as follows:

The Temporary Injunction Ordered By This Court Should Be Enforced Because Defendant's Argument That An Automatic Stay Is Necessary To Prevent Market Wide Disruption Is Not Supported By Evidence Provided by PIP Insurance Carriers

Contrary to assertions made by the OIR, and based upon documents being circulated, it appears that larger PIP insurance carriers are notifying their insureds and healthcare providers that they will be providing ten thousand dollars (\$10,000.00) in Personal Injury Protection (PIP) insurance coverage regardless of whether the undefined "emergency medical condition" has been diagnosed. Affiant Patrick Joseph Tighe (Affiant) was in a motor vehicle accident on January 11,

2013 and, as an attorney, he is familiar with the requirements of the 2012 PIP Act. A copy of the Affidavit of Patrick Joseph Tighe is attached hereto as Exhibit "A."

After seeking appropriate healthcare within the required fourteen (14) days, Affiant submitted a PIP claim with Affiant's PIP insurance carrier, State Farm. Affiant subsequently received notice that Affiant's PIP coverage was constructively limited to two thousand five hundred dollars (\$2,500.00) because the letter states the Affiant was *not* diagnosed with an emergency medical condition. *Id* at Page 2. Before Affiant was forced to protest the reduction in his PIP coverage limits after Affiant consistently paid for ten thousand dollars (\$10,000.00) in coverage, Affiant received written notification, on April 8, 2013, which showed that State Farm had received notice of, and would comport their coverage practices consistent with the terms of this Court's temporary injunction:

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. *Id.* at Page 3.

Thus, despite Defendant's argument that "Voiding...PIP coverage limits...will result in market wide disruption to the automobile industry in Florida," it certainly appears that PIP insurance carriers are able, by simple written correspondence (as suggested by Counsel for the Plaintiffs during the oral argument on the motion on April 1, 2013), to notify their insureds that they will be providing ten thousand dollars (\$10,000) in coverage and will also be covering

massage therapy and acupuncture. See page 4, Defendants Response to Motion to Vacate Stay

See page 4, Defendants Response to Motion to Vacate Stay

Equally, it appears that despite Defendant's testimony, PIP insurers are able to adjust their coverage limits, in this unique set of circumstances, by a simple memo. On April 1, 2013, Defendant queried its own witness, Sandra Starnes, about the insurance industry's ability to adjust rates depending on coverage limits: Hearing Transcript Page 35, Lines 19 – 23 (**emphasis added**). "Q: And I'm asking you about the comment that the insurance industry could make the adjustment with just a memo. Is just a memo enough to make these rate changes? A: No. **There's no way that a memo would be able to do that.**" Although Defendants stated that there is no way to adjust the rates by memorandum, it appears that these letters are in fact adjusting coverage limits as well as extending the scope of coverage to Licensed Massage Therapists and Acupuncturists.

Finally, Plaintiff's prevailed on their Motion for Temporary Injunction because Plaintiffs' were suffering irreparable harm, because a temporary injunction was in the public interest, and because Plaintiffs had established a likelihood of success in the legal arguments asserted. Unlike the irreparable harm suffered by Plaintiffs, who are also suffering significant economic harm, Defendant OIR's witness testified that PIP insurance carriers and that Defendant would suffer *only* economic harm (i.e., inconvenience, time and money) by entry and enforcement of the temporary injunction. Defendants never alleged that they would suffer any irreparable harm. On April 1, 2013, Defendant queried its own witness, Sandra Starnes, about the effect of the Temporary Injunction on the insurance industry; specifically if the temporary injunction is effective and then the Defendants prevail at trial. "A: Well, it would be a nightmare for both my

Office [the Florida Office of Insurance Regulation] and for the insurance companies having to reverse.” Hearing Transcript Page 37, Lines 12 – 14.

On cross examination, Ms. Starnes admitted that the “nightmare” she described really equated to time, effort and expense but that the temporary injunction could be enforced. Hearing Transcript Page 38, Lines 6 – 12. Unlike the Plaintiffs suffering irreparable harm related to the 2012 PIP Act, Ms. Starnes failed to testify that any insurer would actually suffer any irreparable harm and that a temporary injunction would only cost the insurers and the Florida Office of Insurance Regulation time and money.

Plaintiffs file the Affidavit of Patrick Joseph Tighe in support of Plaintiffs’ Motion to Vacate the Defendant’s Notice of Automatic Stay and in support of Plaintiffs’ Motion for Temporary Injunction because the affidavit and attached correspondence indicate that PIP insurance carriers are capable of complying with this Court’s temporary injunction without resulting in “wide spread disruption” to the insurance industry. Because Plaintiffs suffer irreparable harm, because Plaintiffs are likely to prevail, and because the temporary injunction is in the public interest, Plaintiffs’ respectfully request that this Honorable Court vacate the Automatic Stay and enforce the Temporary Injunction Ordered by this Court.

Respectfully submitted this 18th day of April 2013

Luke Charles Lirot, P.A.,
- /s/ Luke Charles Lirot
Luke Charles Lirot, Esq.
Florida Bar No. 714836
2240 Belleair Road, Suite 190
Clearwater, Florida 33764
(727) 536 – 2100 [Telephone]
(727) 536 – 2110 [Facsimile]
luke2@lirotloaw.com [Primary E-mail]
jimmy@lirotlaw.com [Secondary E-mail]
Co-Counsel for the Plaintiffs

Florida Legal Advocacy Group of Tampa Bay, P.A.,
- /s/ Adam Levine
Adam S. Levine, M.D., J.D.
Florida Bar No. 78288
11180 Gulf Boulevard, Suite 303
Clearwater, Florida 33767
(727) 512 – 1969 [Telephone]
(866) 242 – 4946 [Facsimile]
aslevine@msn.com [Primary E-mail]
alevine@law.stetson.edu [Secondary E-mail]
Co-Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished in accordance with Florida Rule of Judicial Administration 2.516 to C. Timothy Gray, Esquire, and J. Bruce Culpepper, Esquire, of the Florida Office of Insurance Regulation at tim.gray@flor.com and bruce.culpepper@flor.com; and to Pamela Bondi, Esquire, Allen Winsor, Esquire, and Rachel Nordby, Esquire, of the Florida Office of the Attorney General at pam.bondi@myfloridalegal.com, allen.winsor@myfloridalegal.com, Rachel.nordby@myfloridalegal.com, allenwinsor@yahoo.com, and Barbara.durham@myfloridalegal.com, this 18th day of April, 2013.

/s/Luke Lirot

Luke Lirot, Esq.
Florida Bar Number 714836

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, STATE OF FLORIDA
CIVIL DIVISION**

ROBIN A. MYERS, A.P., an individual person
and Acupuncture Physician, GREGORY S.
ZWIRN, D.C., an individual person and
Chiropractic Physician, SHERRY L. SMITH, L.M.T.,
an individual person and Licensed Massage Therapist,
CARRIE C. DAMASKA, L.M.T., an individual
person and Licensed Massage Therapist, "John Doe,"
on behalf of all similarly situated health care providers,
and "Jane Doe," on behalf of all those individuals
injured by motor vehicle collisions,

Plaintiffs,

Case: 2013-CA-000073

v.

KEVIN N. McCARTY, in his Official Capacity as
Commissioner of the Florida Office of Insurance
Regulation,

Defendant.

AFFIDAVIT OF: PATRICK JOSEPH TIGHE

STATE OF FLORIDA
COUNTY OF PALM BEACH

Before me, the undersigned authority, appeared PATRICK JOSEPH TIGHE, having been duly identified and who states under oath the following:

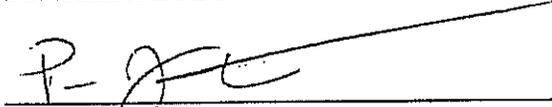
1. I am over the age of 18 years and otherwise competent to make this affidavit;
2. I have personal knowledge of the facts set forth herein;
3. I am a resident of PALM BEACH County;
4. I am an attorney in Palm Beach County, licensed by the Florida Bar, Number 568155.

Affidavit of Patrick Joseph Tighe

Exhibit "A"

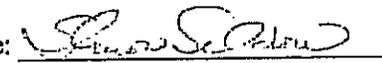
5. I am a motor vehicle owner in Florida and I purchased the required \$10,000 (ten thousand dollars) of personal injury protection (PIP) insurance as well as \$20,000.00 (twenty thousand dollars) medical payment coverage (MPC) from State Farm Insurance Company.
6. I was in a motor vehicle accident in January, 2013;
7. I read the 2012 PIP Act and am familiar with its requirements. Pursuant to those requirements I sought medical care within 14 (fourteen) days;
8. I have an active PIP/MPC claim with State Farm;
9. I received the attached letter from State Farm in the Mail;
10. This letter accurately portrayed my claim number, the date of loss and all of my identification;
11. Interestingly, before receiving the attached letter, I received written notification from State Farm that my PIP coverage was being limited to \$2,500.00 in my medical payments coverage is being limited to \$1250.00 because they did not have a diagnosis of emergency medical condition for me.
12. My orthopedic surgeon on January 21, 2013, gave me a prescription for physical therapy and care of my cervical and lumbar spine as well as my right knee for a possible lateral meniscus tear (See attached prescription).
13. Before I could contest this lack of an emergency medical condition diagnosis, I received the attached letter.

FURTHER AFFLIANT SAYEHT NAUGHT

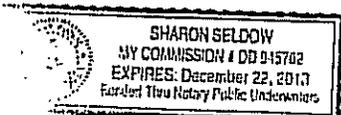

 Name: Patrick Joseph Tighe

NOTARY ACKNOWLEDGMENT

The foregoing Affidavit was sworn and acknowledged before me on this 12 th day of APRIL 2013 by PATRICK J TIGHE who is personally known to me or produced the following identification: _____

Notary Signature: 
 Notary Name: SHARON SELDOW
 Notary Expiration Date: 12-22-13

Seal:



**ORTHOPAEDIC
CARE SPECIALISTS**

7301 U.S. Highway One
North Palm Beach, FL 33408
561-840-1000
Fax 561-840-0701

Richard L. Weiner, M.D. DEA #DW1840114	Thomas F. Saylor, M.D. DEA #087705477
Samuel R. Saelow, D.O. DEA #001000004	Kyle D. Brown, PA-C PA# 01121
Andrew L. Schneider, M.D. DEA #082004143	Ramiro Rodriguez, PA-C PA# 01000
Chetan Arlosooroff, M.D. DEA #040118173	Carla Crawford, PA-C PA# 03700
Alexander R. Leonard, M.D. DEA #RL5703100	Jordan Thomas, PA-C PA# 07007

NAME: Patrick Tighe

ADDRESS: R

DATE: 1/12/12

PT
C-Spine
LS Spine
RH Spine

Control
W/O

D) Control
LS Spine
RH Spine
Control

TO OBTAIN THIS PRESCRIPTION, THE PATIENT MUST WRITE BACK ALL INFORMATION ON THE PRESCRIPTION.

ESP12100021301

February 19, 2013

Patrick J Tighe
324 Datura St Ste 223
West Palm Bch FL 33401-5416

Auto Claims
P.O. Box 106134
Atlanta GA 30348-6134

RE: Claim Number: 59-238G-726
Date of Loss: January 11, 2013
Our Insured: Patrick J Tighe

Dear Patrick J Tighe:

This letter is in follow up to correspondence received from you dated 2/14/13. Please be advised that the submitted Rx for physical therapy is not sufficient in determining if an Emergency Medical Condition (EMC) was declared. Also, please be aware that we have sent letters to your treating physicians advising them that a decision needs to be made on EMC status.

If you have any questions please do not hesitate to contact me.

Sincerely,

Michael Brungardt
Claim Representative
(866) 537-2716 Ext. 9048281620

Fax: (800) 627-4023

State Farm Mutual Automobile Insurance Company

Affidavit of Patrick Joseph Tighe

April 08, 2013

Patrick J Tighe
324 Datura St Ste 223
West Palm Bch FL 33401-5416

Auto Claims
P.O. Box 106134
Atlanta GA 30348-6134

RE: Claim Number: 59-238G-726
Date of Loss: January 11, 2013
Our Insured: Patrick J Tighe
Patient Name: Patrick J Tighe

Dear Patrick J Tighe:

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.

Please contact us if you have any questions about your PIP benefits available to you.

Sincerely,

Michael Brungardt
Claim Representative
(866) 537-2716 Ext. 9048281620

Fax: (800) 627-4023

State Farm Mutual Automobile Insurance Company

Affidavit of Patrick Joseph Tighe