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

ROBIN A. MYERS, D.C., ET AL.,

Plaintiffs,

v.

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

Case No. 2013-CA-0073

Defendant.
_____/

**DEFENDANT'S NOTICE OF APPEAL OF NON-FINAL ORDER AND
NOTICE OF AUTOMATIC STAY**

NOTICE IS GIVEN that Defendant/Appellant, KEVIN M. McCARTY, in His Official Capacity as the Commissioner of THE OFFICE OF INSURANCE REGULATION (hereinafter "the Office"), pursuant to Rule 9.130(3)(B), Florida Rules of Appellate Procedure, appeals to the State of Florida, Court of Appeal, First District the Order of this court rendered March 18, 2013. The nature of the Order is a non-final order granting in part Plaintiffs' motion for temporary injunction, enjoining specific provisions of Chapter 2012-197, Laws of Florida. A conformed copy of the Order being appealed is attached hereto.

FURTHER, NOTICE IS GIVEN that the filing of this notice of appeal constitutes an automatic stay of the circuit court's order pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant's Notice of Appeal of Non-Final Order and Notice of Automatic Stay has been served by E-Mail upon Luke

Lirot, Attorney, at Luke2@lirotlaw.com; jimmy@lirotlaw.com, and Adam S. Levine, Attorney, at aslevine@msn.com and alevine@law.stetson.edu on March 21, 2013.

/s/ C. Timothy Gray
C. TIMOTHY GRAY (FBN 0602345)
J. BRUCE CULPEPPER (FBN 0898252),
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ATTORNEYS FOR DEFENDANT,
Kevin M. McCarty, in His Official Capacity as the Commissioner of the Florida Office of Insurance Regulation.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
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ROBIN A. MYERS, D.C., et al,

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

Defendant.
_____/

CASE NO: 2013 CA 73

ORDER GRANTING IN PART MOTION FOR TEMPORARY INJUNCTION

THIS CASE is before me on the Plaintiffs' Motion for Temporary Injunction. The Plaintiffs are chiropractic physicians, massage therapists and acupuncturists who have filed a complaint for declaratory and injunctive relief, challenging the constitutionality of Chapter 2012-197, Laws of Florida (2012 PIP Act or "the Act.") A hearing was held on the Plaintiffs' motion for temporary injunction on February 1, 2013. I have considered the evidence, the written and oral arguments of counsel and the authorities cited. For the reasons set forth below, I find that the motion should be granted in part because the Act violates Article I, Section 21 of the Florida Constitution (Access to Courts).

I first address the standing issue raised by the Defendant. Because the Plaintiffs are seeking to enforce a right vested in members of the public at large, they must allege and establish some special injury different in kind from the injury suffered by members of the public. The complaint alleges, and the evidence showed, that the Plaintiffs, as health care providers for

automobile accident victims, derive a substantial percentage of their income through PIP insurance payments. Because the Act, as revised, prohibits or severally limits future payments from PIP insurance for such treatment, they have a sufficient interest in the outcome of the case, as well as an injury that is distinct from that of the public at large. I thus find that Plaintiffs have standing and will address the merits of their motion for temporary injunction.

In order to obtain a temporary injunction, the Plaintiffs have the burden of establishing that they will suffer irreparable harm if the injunction is not entered, that they have no adequate legal remedy available, that there is a substantial likelihood that they will succeed on the merits and that the injunction is in the public interest. It seems clear to me that the Plaintiffs have alleged and proven irreparable harm and inadequate legal remedy. Moreover, there appears to be no adverse consequence to the public interest in maintaining the status quo if the injunction is issued. The real question is whether the Plaintiffs have shown a substantial likelihood of success on the merits.

In that regard, the Plaintiffs have challenged the Act on several grounds which I summarize as follows: (1) the Act violates their procedural and substantive due process rights by taking away their ability to contract and to earn a living through their chosen profession; (2) the Act violates substantive due process because it is not rationally related to a legitimate public policy or objective; (3) The Act violates the single subject rule and the separation of powers; and (4) the Act violates the right of people to have access to the courts to seek redress for their injuries. I find that the Plaintiffs have met their burden only as to this latter theory.

The common law, on which our legal system is founded, is based upon the interdependent concepts of individual liberty and personal responsibility. While each person is free to chose

what course of action is best for him, he is expected to conduct himself in such a manner so as not to cause injury to the person or property of another. And if he does cause such injury, the law holds him responsible to the injured party for the resulting loss, injury or damage. The fundamental right to seek redress for injuries received at the hands of another is a cornerstone of our legal system. This principle is embedded in our state constitution in Article I, Section 21, which provides in part:

> "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

These libertarian principles are also the underpinnings of our historic, free market economic system with its reverence for individual property rights. After all, the right to bring a claim against another can be a valuable property right. And, in such a system, one is free to take steps to protect oneself against the financial calamities which may be caused by the actions of another, by an unavoidable accident, or by an act of God. Hence the business of insurance.

Over the years, for various reasons or purposes, our representatives in state and federal government have tinkered with these fundamental principles and overridden or altered the common law which embodies them. They have, in some areas, replaced a pure free market approach with a government controlled system in order to address a perceived problem. The "No-Fault law" passed by the Florida Legislature in 1971, and as subsequently revised, is just one example of this experiment with socialism[1] and the trend away from those libertarian principles of individual liberty and personal responsibility.

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1 I use the popular, if somewhat inaccurate meaning -- any law that intrudes significantly into the free market arena with government mandates, e.g., socialized medicine.

The 1971 legislation took away or severely limited the right of a person injured in a Motor vehicle accident to seek redress in court for injuries wrongfully caused by another, relieving the wrongdoer of responsibility for his conduct, and granting him immunity from civil liability. In place of this valuable right, the Legislature instituted a "no-fault" system in which everyone who owned or operated a motor vehicle was required to purchase insurance to cover medical and other expenses.

This clear impingement upon the rights set forth in Article I, Section 21, quoted above, was rationalized by asserting that the legislation was providing a "reasonable alternative" to the common law tort recovery system. Proponents argued that the tradeoff was a "good deal" because it would provide speedy payment of medical costs, lost wages, etc. of any accident victim, regardless of fault, and would avoid the alleged uncertainties and inequalities of the tort system. In theory, this would in turn lessen court congestion and delays, reduce automobile insurance premiums, and reduce the possibility that economic calamity might overwhelm accident victims and force them to accept unduly small settlements of their claims.

When the new legislation was challenged in court, the Florida Supreme Court accepted this argument, holding in Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974), that the new legislation offered a "reasonable alternative" to the right to sue. The Court noted:

> "Protections are afforded the accident victim by this Act in the speedy payment by his own insurer of medical costs, lost wages, etc., while foregoing the right to recover in tort for these same benefits and (in a limited category of cases) the right to recover for intangible damages to the extent covered by the required insurance...; furthermore, the accident victim is assured of some recovery even where he Himself is at fault. In exchange for his former right to damages for pain and suffering in the limited category of cases where such items are preempted by the act, he receives not only a prompt recovery of his major, salient out-of-pocket losses -- even where he is at fault -- but also an immunity for being held liable for the pain and suffering of the other parties to the accident if they should fall within this limited class where such items are not

recoverable."

296 So.2d @ 14.

The Court contrasted this trade-off with the provision that denied the right of recovery for property loss under $550.00 which the court disapproved in the case of Kluger v. White, 281 So.2d 1 (Fla. 1973). The court held in Kluger that there was no reasonable alternative provided to the traditional tort action. The injured party simply was denied any right of recovery or access to the courts. But as for PIP, the court in Lasky held that while injured persons couldn't go into court for a redress of their injuries, the legislation was really a better deal for them, so it was a "reasonable alternative." The court accordingly upheld the legislation as constitutionally valid.

In the forty-odd years since its passage, the Legislature has periodically revised the no-fault law. Some revisions have fostered other constitutional challenges, including hte case of Chapman v. Dillion, 415 So.2d 12 (Fla. 1982). Along the way, that case was reviewed by the Fifth District Court of Appeal, which held the revised law to be unconstitutional. The DCA opined that changes made to the law since the Lasky decision had altered the no-fault law such that it was no longer a reasonable alternative to the right to redress injury in court. Specifically, the court noted that the restrictions on recovery of pain and suffering still remained but that the new legislation lowered the PIP benefits and raised the permissible deductible.2 The Supreme Court disagreed with the District Court of Appeal and concluded that the no-fault law was still a reasonable alternative. The Court reasoned that in spite of the change in coverage and deductible,

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2When Lasky was decided, PIP coverage was 100% of medical expenses and 80% of loss income. This had since been reduced to 80% of medical expenses and 60% of loss income. The maximum deductible when Lasky was decided was $1,000 but had been subsequently changed to allow up to an $8,000.00 deductible.

many motorists would have other insurance to pick up the slack, so that the major and salient economic losses were still covered. The Court also noted that the policy limits had been increased from $5,000 to $10,000.

The Court gave no bright line test or guidelines to indicate what changes in the law might prompt them to find that it was no longer a reasonable alternative to the right guaranteed in Article I, Section 21 of the State Constitution, but I note that Justice Sunberg in his concurring and dissenting opinion felt that the legislation as then enacted was "perilously close to the 'outer limits of constitutional tolerance'". 415 So.2d @ 18.

The question raised in this case by the Plaintiffs' complaint is whether the revised no-fault law passes beyond these "outer limits of constitutional tolerance." I conclude that it does. The law still has the limitations or restrictions for recovery for pain and suffering lamented in Chapman by the District Court of Appeal but rationalized away by the Supreme Court. The percentage of recovery of medical expenses is still 80% and 60% for lost income. The policy limits are still $10,000. The legislation, however, now additionally severely limits what can be recovered under that policy, i.e., what is specifically excluded. Under the new law, an injured party who does not receive initial services or care within 14 days of an accident, is not covered. If you do seek medical care within that time frame, but it is determined that you did not have "an emergency medical condition", your recovery under the policy is limited to $2,500. And, regardless of whether such services are deemed reasonable and necessary for care and treatment, and regardless of who may have referred an injured person, he cannot be covered under PIP for medical benefits provided by a licensed massage therapist or licensed acupuncturist.

Is the no-fault law still a good deal? Is it still a reasonable alternative to the rights

guaranteed to citizens under Article I, Section 21 of the Florida State Constitution? The answer to those questions is probably, like beauty, in the eye of the beholder, and reasonable people may disagree. From my perspective, however, the revisions to the law make it no longer the "reasonable alternative" that the Supreme Court found it to be in Lasky and Chapman.

Accordingly, it is ORDERED AND ADJUDGED as follows:

The Plaintiffs' motion is granted as to those sections of the law which require a finding of emergency medical condition as a prerequisite for payment of PIP benefits or that prohibit payment of benefits for services provided by acupuncturists, chiropractors and massage therapists. In all other respects, the motion is denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 15th day of March, 2013.

TERRY P. LEWIS, Circuit Judge

Copies to:

C. Timothy Gray, Esquire
Luke Lirot, Esquire