



APPEAL NO. 1D13-1355

**FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA**

KEVIN M. McCARTY, in his Official Capacity,

Appellant,

vs.

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

Appellees.

**APPEAL FROM THE SECOND JUDICIAL CIRCUIT
LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION**

**AMICUS BRIEF
OF THE FLORIDA ACUPUNCTURE ASSOCIATION AND
THE FLORIDA STATE ORIENTAL MEDICAL ASSOCIATION**

**THEODORE "TED" E. KARATINOS
HOLLIDAY, BOMHOFF & KARATINOS, P.L.
18920 North Dale Mabry Highway, Suite 101
Lutz, Florida 33548
(813) 868-1887 (Voice)
(813) 909-8535 (Telefax)
Designated Email: tedkaratinos@hbklawfirm.com
Florida Bar No. 0983209
Counsel for Amici, FAA and FSOMA**

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS..... ii

IDENTITIES OF AMICI AND STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 1

THE ARGUMENT2 through 11

I. INTRODUCTION.

II. THE PIP LAW DENIES ACCESS TO THE COURTS FOR ACUPUNCTURISTS AND THEIR PATIENTS:

 A. WITHOUT PROVIDING ANY ALTERNATIVE; AND

 B. CONTRARY TO PUBLIC NECESSITY.

III. THE PIP LAW DENIES DUE PROCESS TO ACUPUNCTURISTS AND THEIR PATIENTS:

 A. WITH NO LEGITIMATE LEGISLATIVE PURPOSE;

 B. THROUGH DISCRIMINATION;

 C. THROUGH ARBITRARY DECISIONMAKING; AND

 D. THROUGH OPPRESSION.

IV. CONCLUSION.

APPENDIX A (STATISTICAL CHART)

APPENDIX B (BOOKS AND ARTICLES ON ACUPUNCTURE)

TABLE OF CITATIONS

<u>FLORIDA CASES</u>	<u>PAGE NUMBER</u>
<u>Chapman v. Dillon</u> , 415 So. 2d 12 (Fla. 1982).....	9, 10
<u>Ivey v. Allstate Insurance Co.</u> , 774 So. 2d 679 (Fla. 2000).....	6
<u>Kluger v. White</u> , 281 So. 2d 1 (Fla. 1973).....	2, 3
<u>Lasky v. State Farm Insurance Co.</u> , 296 So. 2d 9 (Fla. 1974).....	3
<u>Nationwide Mutual Fire Insurance Co. v. Pinnacle Medical, Inc.</u> , 753 So. 2d 55 (Fla. 2000).....	5, 6, 8
<u>Pasteur Health Plan, Inc. v. Salazar</u> , 658 So. 2d 543 (Fla. 3d DCA 1995), rev. denied, 666 So. 2d 901 (1996).....	8
 <u>OTHER AUTHORITIES</u>	
Appendix A (Statistical Chart)	
Appendix B (Books and Journal Articles on Acupuncture)	
Art. I, § 9, Fla. Const.....	2
Art. I, § 21, Fla. Const.	2
L. Chen, et al., “A Survey of Selected Physician Views on Acupuncture in Pain Management,” 11 Pain Medicine No. 4 at 530-34 (2010).....	9
§ 457.102, Fla. Stat. (2012).....	7
§ 627.736, Fla. Stat. (2012).....	<u>passim</u>

IDENTITIES OF AMICI AND STATEMENT OF INTEREST

Both the Florida Acupuncture Association, and the Florida State Oriental Medical Association consist of licensed acupuncture physicians and their patients who enjoy the health benefits of acupuncture. They express interest in this appeal, because the state usurped their right to receive compensation under the PIP scheme without a rational basis.

SUMMARY OF THE ARGUMENT

In amending Florida Statute Section 627.736(1)(a)(5) to remove acupuncture from reimbursable care, the legislature violated the constitutional rights of licensed acupuncture physicians and their patients both to access the courts, and to receive the due process of law. The legislature shifted the cost of auto-related acupuncture treatment to the patients and, where available, to their health plans. In failing to consider the medical ethics and the medical economics of patient care and delivery, the legislature arbitrarily oppressed both acupuncture physicians, and their patients. Personal injury protection benefits now neither protect, nor benefit auto accident victims who choose acupuncture. Therefore, the Florida Acupuncture Association and the Florida State Oriental Medical Association ask that the temporary injunction be affirmed.

THE ARGUMENT

I. INTRODUCTION.

Florida's acupuncture associations ask the Court to affirm the temporary injunction based on two constitutional arguments. First, the PIP law abolishes access to the courts for acupuncturists and their patients. Art. I, § 21, Fla. Const. Second, the PIP law violates their due process rights. Art. I, § 9, Fla. Const. Specifically, Amici challenge the constitutionality of the following PIP statute:

Medical benefits do not include . . . acupuncture as defined in s. 457.102, regardless of the person, entity, or licensee providing . . . acupuncture, and a . . . licensed acupuncturist may not be reimbursed for medical benefits under this section.

§ 627.736(1)(a)(5), Fla. Stat. (2012). Considering this section's grievous effect on acupuncture physicians and their patients, the two constitutional challenges have a substantial likelihood of success on the merits. The temporary injunction should be affirmed.

II. THE PIP LAW DENIES ACCESS TO THE COURTS FOR ACUPUNCTURISTS AND THEIR PATIENTS.

Section 627.736(1)(a)(5) denies access to the courts for acupuncturists and their patients. The legislature may only abolish the right to access the courts by providing a reasonable alternative, unless it shows "an overpowering public necessity for the abolishment of such right, and no alternative method of meeting

such public necessity can be shown.” Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973). Section 627.736(1)(a)(5) collapses under the Kluger test.

A. WITHOUT PROVIDING ANY ALTERNATIVE.

Abolishing the right to make PIP claims for acupuncture, the legislature provided no alternative. Rather, most auto accident victims must now pay cash for acupuncture. Forcing the victims to pay for treatment defeats the purpose of auto insurance by shifting the risk of casualty from the insurer to the insured. If a patient receives only acupuncture after suffering injuries in an auto accident, then he receives no benefit from the PIP insurance which the state required him to buy. Ironically, the law burdens the acupuncture-only patient by requiring him to prove a permanent injury without receiving any PIP benefits. § 627.737(2), Fla. Stat. (2012). The acupuncture-only patient cannot opt out of the state’s requirement. The acupuncture-only patient loses the benefit of the state’s bargain, *i.e.* no insurance benefits in exchange for the yolk of proving permanency. Lasky v. State Farm Insurance Co., 296 So. 2d 9, 15 (Fla. 1974) (“In exchange for the loss of a former right to recover - upon proving the other party to be at fault - for pain and suffering, etc., in cases where the thresholds of the statute are not met, the injured party is assured a speedy payment of his medical bills[.]”). Many patients will choose not to see acupuncturists for their auto-related traumas because of the PIP

law's economic deterrence. Having been cut out of the PIP law, many auto patients must now pay cash for acupuncture, because the state did not provide a reasonable alternative.

While some health plans may pay for acupuncture, that alternative was not provided by the legislature. The legislature did not study how the cost of acupuncture may shift from auto insurance to health plans before passing Section 627.736(1)(a)(5). From the standpoint of insurance ethics, the risk of auto-related losses should be shouldered by auto insurers; not by health plans. Shifting the cost of acupuncture from an auto insurer to a health plan does not benefit either the consumer, or the physician. Health plans may have high co-pays and deductibles which will discourage consumers from choosing acupuncture to treat their auto-related traumas. The **non-legislative** alternative payment of auto-related acupuncture by health plans fails to satisfy the Kluger test.

B. CONTRARY TO PUBLIC NECESSITY.

Abolishing PIP insurance for acupuncture runs contrary to public necessity. In amending the PIP law, the legislature saw no evidence that acupuncture had compromised the PIP scheme. The Florida Senate relied heavily on a report from the Florida Office of Insurance Regulation which never mentioned acupuncture as a source of increased claims. See "Report on Review of the 2011 Personal Injury

Protection Data Call,” Fla. Office of Ins. Regulation on April 11, 2011.¹ Using the data of Mitchell International from that report and the data of the Florida Office of the Insurance Consumer Advocate, the FSOMA shows that acupuncture accounted for only 0.0008% of PIP claims in 2010. See Statistical Chart at Appendix “A”. Acupuncture accounted for such a small number of PIP claims that removing it from the PIP scheme does not translate into a measurable reduction of insurance premiums. Moreover, the report did not show any statistical correlation between fraud and acupuncture. With no proven connection to fraud, the tiny amount of acupuncture claims did not present an “overpowering” public need to close the courthouse doors to those who provide and receive acupuncture.

III. THE PIP LAW DENIES DUE PROCESS TO ACUPUNCTURISTS AND THEIR PATIENTS.

The PIP law denies due process to acupuncturists and their patients. The law does not bear “a reasonable relationship to a legitimate legislative objective” and is “discriminatory, arbitrary, or oppressive.” Nationwide Mutual Fire Insurance Co. v. Pinnacle Medical, Inc., 753 So. 2d 55, 59 (Fla. 2000). Florida Statute Section 736(1)(a)(5) collapses under the Pinnacle test.

¹ Lorilee Medders, Ph.D. found numerous flaws in this report. The Court may review Dr. Medders’ analysis at www.facan.org.

A. WITH NO LEGITIMATE LEGISLATIVE PURPOSE.

As discussed in Section II.B. above, the legislature failed to materially decrease claims by removing acupuncture from the PIP scheme. The legislature relied on a report that glossed over acupuncture. While discussing an increase in PIP claims by other medical providers, the report did not attribute the increase to acupuncture. To the contrary, the PIP claims for acupuncture were few.

If the “objective of Florida’s No-Fault law was to provide persons injured in an accident prompt payment of benefits,” then the legislature thwarted that purpose by removing acupuncture. Pinnacle Medical, Inc., 753 So. 2d at 59. “Without a doubt, the purpose of the no-fault statutory scheme is to provide swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption.” Ivey v. Allstate Insurance Co., 774 So. 2d 679, 683-84 (Fla. 2000). As to acupuncture, no payment cannot equal prompt payment. The legislature cannot tout the goal of reducing insurance premiums through an amendment, where health premiums may rise because of that amendment. Further, the legislature did not study whether health plans will offer prompt payment for auto-related acupuncture. The legislature failed to consider the far-reaching consequences of its hasty decision to amend 627.736(1)(a)(5). Its decision not to pay for acupuncture served no legitimate purpose.

B. THROUGH DISCRIMINATION.

By removing acupuncture from billable care under the PIP scheme, the legislature discriminated against acupuncturists and their patients. The state recognizes that an acupuncturist is a “primary health care provider.” § 457.102(2), Fla. Stat. (2012). Primary health care providers act as conduits to specialized care. Historically, patients chose to see an acupuncture physician shortly after suffering injuries in an auto accident. Like other primary health care providers, acupuncture physicians make initial diagnoses, provide therapy, order diagnostic tests, and refer patients for specialized consults. The legislature discriminated against acupuncture physicians by favoring other primary health care providers who perform similar functions in a PIP setting.

The discriminatory impact of the new PIP scheme on those who favor acupuncture over other care is clear. For example, Asian Americans and tourists may choose acupuncture over other treatments for cultural reasons. The state should not economically pressure those patients to seek other care. Violating medical ethics, the state interferes with

- the patient’s economical access to acupuncture;
- the patient’s economic freedom to choose acupuncture; and
- the referring medical provider’s recommendation of acupuncture.

Instead of interfering, the state should protect these freedoms. Choosing to reimburse a patient for acupuncture makes more sense than reimbursing him for addictive pain pills. The state should not discriminate against those who choose acupuncture.

C. THROUGH ARBITRARY DECISIONMAKING.

Section 627.736(1)(a)(5) is arbitrary, because the state destroyed the contractual right of acupuncturists to receive an assignment of PIP benefits. In receiving an assignment of PIP benefits, the medical provider steps into the insured's shoes for reimbursement. By removing acupuncture from compensable care, the state destroyed the acupuncturists' right to receive an assignment of PIP benefits at common law. Pinnacle Medical, Inc., 753 So. 2d at 57 ("The right of an assignee to sue for breach of contract to enforce assigned rights predates the Florida Constitution."). Following Pinnacle, Section 627.736(1)(a)(5) reflects the state's arbitrary decision.

Serving its role to protect insurance consumers, the state should also have weighed the fact that an auto insurance policy is a contract of adhesion. Pasteur Health Plan, Inc. v. Salazar, 658 So. 2d 543, 544 (Fla. 3d DCA 1995), rev. denied, 666 So. 2d 901 (1996). An auto insurer stands on its own contractual field of play with a "home field advantage" against any assignee who disputes the

reasonableness of a PIP medical bill. Rather than let acupuncturists at least step onto that uneven playing field with a dispute, the legislature arbitrarily destroyed their right to enforce contractual PIP assignments in court. The state's decision hurts insurance consumers who choose acupuncture.

Adding to the arbitrariness, the legislature ignored peer-reviewed research showing that acupuncture helps patients with headaches and musculoskeletal pain. Section 627.736(1)(a)(5) implies that acupuncture cannot constitute a reasonable and necessary treatment for auto-related spinal trauma. The peer-reviewed research belies this legislative implication. See Medical Research at Appendix B. In fact, the Harvard Medical School recently surveyed 1083 physicians who overwhelmingly supported using acupuncture for pain management. See L. Chen, et al., "A Survey of Selected Physician Views on Acupuncture in Pain Management," 11 Pain Medicine No. 4 at 530-34 (2010). The surveyed physicians decried the lack of insurance coverage as a significant barrier to referring a patient for acupuncture. Id. Based on the peer-reviewed medical research, the legislative bias against acupuncture is arbitrary.

D. THROUGH OPPRESSION.

The new PIP law oppresses acupuncturists, their patients, and the providers who refer to them. In reviewing the 1979 PIP amendments, Justice Overton

commented that those prior amendments had reached the “absolute outer limits of constitutional parameters.” Chapman v. Dillon, 415 So. 2d 12, 19 (Fla. 1982) (Justice Overton’s concurrence). Since 1979, the legislature has passed numerous amendments to the PIP law. Each amendment more narrowly restricted the rights of patients and providers. If Justice Overton was correct in 1982, then the current amendments shoved the PIP scheme into an unconstitutional abyss. Eliminating an entire category of state-licensed health care from the PIP scheme is both medically oppressive, and economically oppressive.

Looking at medical ethics, the oppression is clear. The state should not statutorily discourage patients and other medical providers from choosing acupuncture to treat auto-related trauma. If a medical provider orders acupuncture to treat a patient, then the patient should not be compelled to ignore the doctor’s order, because the auto insurer will not pay. Personal injury protection benefits should indemnify an accident victim for all, not some, of the medical expenses which are reasonable, necessary, and related to the accident. By removing acupuncture from the realm of compensable PIP benefits, the state sent a message that acupuncture constitutes an unreasonable and unnecessary medical treatment for auto-related trauma. The legislative message in the PIP law oppresses both the acupuncture physicians, and their patients.

The economic oppression is also clear, because the legislature failed to research the economics of acupuncture before removing that care from the PIP scheme. The legislature failed to cite a single medical journal in its economic justification for passing the PIP amendments. In truth, the research suggests that acupuncture may be a wiser economic choice than other care for those who suffer spinal traumas. See Medical Research at Appendix B. At the behest of auto insurance lobbyists, the legislature statutorily drowned the proponents of acupuncture through the fisheye lens of insurance data without considering the economic effects on patient care and delivery.

IV. CONCLUSION.

In amending Florida Statute Section 627.736(1)(a)(5) to remove acupuncture from reimbursable care, the legislature violated the constitutional rights of licensed acupuncture physicians and their patients both to access the courts, and to receive the due process of law. Plaintiffs/Appellees will likely succeed on the merits due to the unconstitutional changes to the PIP scheme. Therefore, the temporary injunction should be affirmed.

CERTIFICATE OF COMPLIANCE

Printed in Times New Roman 14-point font, this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Ted E. Karatinos
THEODORE "TED" E. KARATINOS
HOLLIDAY, BOMHOFF & KARATINOS, P.L.
18920 North Dale Mabry Highway, Suite 101
Lutz, Florida 33548
(813) 868-1887 (Voice)
(813) 909-8535 (Telefax)
Florida Bar No. 0983209
Designated Email: tedkaratinos@hbklawfirm.com
Counsel for Amici, FAA and FSOMA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been served electronically on June 10, 2013 to the following:

Mary E. Abate, Esq. at mabate@cftlaw.com
Marcy Aldrich, Esq. at marcy.aldrich@akerman.com
Debra Atkinson, Esq. at debra.atkinson@akerman.com
Pamela Jo Bondi, Esq. at pam.bondi@myfloridalegal.com
J. Bruce Culpepper, Esq. at bruce.culpepper@floi.com
Katherine E. Giddings, Esq. at Katherine.giddings@appellate-firm.com
Bryan S. Gowdy, Esq. at bgowdy@appellate-firm.com
C. Timothy Gray, Esq. at tim.gray@floi.com
Jessie L. Harrell, Esq. at jharrell@appellate-firm.com
Adam S. Levine, Esq. at aslevine@msn.com
Luke C. Lirot, Esq. at luke2@lirotlaw.com
Rachel E. Nordby, Esq. at rachel.nordby@myfloridalegal.com
Timothy Osterhaus, Esq. at timothy.osterhaus@myfloridalegal.com
Martha Parramore, Esq. at martha.parramore@akerman.com
Matthew Scarfone, Esq. at mscarfone@cftlaw.com
Nancy M. Wallace, Esq. at nancy.wallace@akerman.com
Allen C. Winsor, Esq. at allen.winson@myfloridalegal.com

/s/ Ted E. Karatinos
THEODORE "TED" E. KARATINOS