IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

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

vs.

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,
Appellees.
_____/

Case No. 1D13-1355

L.T. No. 2013-CA-0073

APPELLEES' ANSWER BRIEF

On Appeal from a Non-Final Order of the
Second Judicial Circuit in Leon County, Florida

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PRELIMINARY STATEMENT

"Appellant" refers to Kevin M. McCarty acting in his official capacity as the Commissioner of the Florida Office of Insurance Regulation, a political subdivision of the State of Florida responsible for regulating Personal Injury Protection (PIP) insurance carriers. "Appellees" refers to Robin A. Myers, A.P., Gregory S. Zwirn, D.C., Sherry L. Smith, L.M.T., Carrie C. Damaska, L.M.T., John Doe on behalf of all similarly situated acupuncturists, chiropractors, and licensed massage therapists, and Jane Doe on behalf of all those individuals injured as a result of a motor vehicle collision. References to the Record are cited as "(letter code).#.#" where the letter code refers to the source of the record followed by the Tab Number for that record and then the pinpoint page number for that record. The letter codes are listed below. For example, A.2.15 refers to Appellant's Record, Tab 2, Page 15 and B.3 refers to Appellees' Record, Tab 3.

Letter Code	Record
A	Appellant's
B	Appellee

STATEMENT OF THE CASE AND THE FACTS

Personal Injury Protection (PIP) insurance represents one facet of the Florida No-Fault Law and was designed to provide: 1) rapid, efficient, unfettered access to medical benefits for injured victims of motor vehicle accidents; 2) limited compensation for lost work; and 3) a death benefit. See §627.730 Fla. Stat. (2012), §627.736(1) Fla. Stat. (2012), *Lasky* v. *State Farm Insurance Co.,* 296 So. 2d 9 (Fla. 1974), and *Allstate Ins. Co.* v. *Holy Cross Hosp., Inc.*, 961 So. 2d 328 (Fla. 2007).

In 2012, after PIP insurance carriers sought double digit rate increases from the Defendant[1], ostensibly to protect insurance carrier profitability, these same PIP insurance carriers provided the Legislature with "statistics[2]" equating these increased rates with fraud and abuse "among those seeking PIP benefits." See Appellant's Response to Order to Show Cause page 2. Without the benefit of critically evaluating or independently verifying these industry statistics, the Legislature revised PIP in the 2012 PIP Act. Appellant's counsel referred to these revisiosn as a, "paradigm shift in PIP." A.7.37.

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[1] Appellant's witness, Sandra Starnes testified during the hearing to Vacate the Notice of Automatic Stay, "You know, when you start from 2011 forward, PIP was skyrocketing, double-digit rate increases were the norm." B.2.48-49.

[2] See Appellant's witness Sandra Starnes testimony related to these statistics where Actuarial results vary greatly depending on the same underlying data (10 Actuarys may give 10 different results) and that the Actuary providing the data was employed by the insurance industry itself. B.2.41-42.

Appellant's counsel explained

> …[T]he legislature went from a very open-ended $10,000 dollars that was available for any time for five years – which would be the statute of limitations on the written contract of insurance for PIP – from an unlimited situation to receive $10,000 dollars worth of treatment, to a limited situation of where PIP is only going to treat those persons that have an emergency medical condition which is defined by the Act; and that the emergency medical condition[s] [must] manifest within 14 days [for any coverage to be provided at all]. There's no denying that there is a paradigm shift in the way PIP is going to operate. A.7.37-38.

However, despite this paradigm shift, the Legislature failed to restore injured victims access to the courts because injured victims generally require some type of "permanent dysfunction," before accessing the court and acquiring the right to sue under existing Florida Statutes[3]. *Id.* at 40. This "paradigm shift" absolutely prohibited all massage therapy and acupuncture therapy, essentially putting both of these disciplines "out of business," and severely limited chiropractic therapy without providing any medical justification(s) for either this prohibition or limitation. A.7.13-15.

On behalf of Plaintiffs/Appellees in each discipline, a designated Acupuncture Physician (Myers), a Chiropractor (Zwirn), two Licensed Massage Therapists (Damaska and Smith), John Doe (representing all similarly situated affected Acupuncture Physicians, Chiropractors, and Licensed Massage

[3] The right to access the courts was limited when PIP was first introduced and has not been restored during any subsequent revisions to PIP coverage.

Therapists), and Jane Doe (representing all motor vehicle accident victims, Appellees filed suit against the 2012 PIP Act[4] revisions because these revisions: 1) violated the Appellees' procedural and substantive due process rights by taking away their ability to contract and to earn a living through their chosen profession; 2) violated the Appellees' substantive due process because the 2012 PIP Act is not rationally related to a legitimate public policy or objective; 3) violated the single subject rule and the separation of powers required by the Constitution of the State of Florida; and because the revisions 4) violated the right of people to access the courts to seek redress. A.1.2.

This appeal arose from a non-final order granting a temporary injunction after a trial court, "considered the evidence, the written and oral arguments of counsel and the authorities cited," and held, "that the motion [for temporary injunction] should be granted in part because the…[2012 revisions to Florida No-Fault] violate Article I, Section 21 of the Florida Constitution (Access to Courts)." A.1.1. Pursuant to Rule 9.030(b)(1)(B) and Rule 9.130(a)(3)(B), Fla. R. App. P., this Court has jurisdiction.

SUMMARY OF THE ARGUMENT

This Court should allow the Temporary Injunction to remain intact and in force until this case may be heard on its merits. In this latest revision to Florida

[4] The 2012 PIP Act refers to House Bill 119: Motor Vehicle Personal Injury Protection Insurance (2012), Chapter 2012-197 of the Florida Statutes.

No-Fault, the Legislature severely restricted all consumer/beneficiaries' rapid, efficient, unfettered access to healthcare without restoring those same consumer/beneficiaries' rights to access the courts. These severe restrictions were purportedly enacted to reduce fraud and lower insurance premiums. But the alleged evidence of fraud relied solely upon evidence provided by the for-profit private industry regulated by the Appellant. And, although Appellant sought to benefit Florida's consumers with lower insurance premium payments, the actual evidence provided to the Appellant by this for-profit private industry demonstrates that the legislatively required reduction in premiums never actually occurred[5]. This legislation was enacted in the complete absence of any evidence that either massage therapy or acupuncture were ineffectual, that all its practitioners were engaged in fraudulent billing, or even that these restrictions would actually reduce fraud. A.2.5.

Removing the insurance industry rhetoric from the conversation, it is abundantly clear that the challenged 2012 restrictions are so severe that they violate the Constitution of the State of Florida because they no longer constitute the "reasonable alternative" to accessing the courts contemplated under *Lasky.* See 296 So. 2d 9. In a partially concurring and partially dissenting in *Chapman,* Justice

[5] Appellant's employee Sandra Starnes testified that only 35 of 150 PIP insurance carriers actually reduced their premiums by the October 1, 2012 deadline, a deadline before the 2012 PIP Act limitations on care were supposed to become effective. B.2.40.

Sundberg stated that earlier statutory limitations to PIP reducing medical expense benefits and lost earnings benefits in the absence of a restoration of a right of access to the courts came, "perilously close to the outer limits of constitutional tolerance." *Chapman* v. *Dillon,* 415 So. 2d 12, 19 (Fla. 1982). The 2012 PIP Act, violates article I, section 21 of our constitution by absolutely denying access to the courts to vindicate a prior existing common law right to recover intangible damages for nonpermanent injuries…without supplying any viable alternative because the 2012 revisions eviscerate the viable alternative that PIP once was.

By eliminating honest health care providers whose disciplines provide a major benefit to those injured in automobile accidents and reducing the $10,000 coverage relied on by all Florida driving consumers (which includes all named and representative Appellees) by 75%, absent overcoming the obstacles and expense of showing the undefined "emergency medical condition," the previous "reasonable alternative" has become a one-sided, unreasonable framework, benefitting the special interests of a for-profit insurance industry at the grave expense of the Appellees and everyone similarly situated.

This Court should affirm the circuit court's temporary injunction.

STANDARD OF REVIEW

The proper standard of review for appeals involving a temporary injunction when the trial court had the opportunity to weigh the evidence is an abuse of

discretion. See *Sancho* v. *Smith,* So. 2d 856 (Fla. 1d DCA 2002). Appellants incorrectly suggest that the trial court only ruled on a strict issue of law and, as a result, this Court should apply a *de novo* standard of review under *Sancho. Id.* at 861. In *Sancho,* this Court applied a *de novo* standard of review because, "The parties did not present evidence on any material point, and the trial court did not have discretion to determine whether the proposed amendment should remain on the ballot." *Id.*

Unlike *Sancho,* in this case, the trial court considered the evidence presented, "I have considered the evidence, the written and oral arguments of counsel and the authorities cited." A.4.1. The trial court then acted within its discretion and granted the Plaintiffs/Appellees' motion for temporary injunction, after considering that evidence. *Id.* at 7. Thus, because the trial court weighed the evidence presented, this Court should review the trial court's Order for Temporary Injunction based upon the time tested "abuse of discretion" standard.

ARGUMENT

In 2012 Legislature dramatically revised PIP by: 1) requiring that persons injured in a motor vehicle accident seek healthcare within 14 days or receive no benefit coverage; 2) requiring that persons injured in a motor vehicle accident be diagnosed with an emergency medical condition to qualify for the full $10,000.00 in benefit coverage; 3) requiring that persons injured in a motor vehicle accident

not diagnosed[6] with an emergency medical condition only be provided with $2,500.00 in benefit coverage; 4) prohibiting all Massage Therapy; 5) prohibiting all Acupuncture evaluation and treatment; and 6) severely limiting the type and format of Chiropractic therapy. See Chapter 2012-197.

"From a policy perspective, the [Florida] no-fault plan was offered as a viable replacement for the tort reparations system as a means to quickly and efficiently compensate injured parties in auto accidents regardless of fault. The principle underlying no-fault…is a trade off…by assuring payment of medical, disability (wage loss) and death benefits…in return for a limitation on the right to sue for non-economic damages." Florida's Motor Vehicle No-Fault Law Report 2006-102 last accessed June 3, 2013 http://archive.flsenate.gov/data/publications/ /2006/senate/reports/interim_reports/pf/2006-102bilong.pdf.

Since enacted, the Legislature modified and restricted PIP insurance benefit coverage while allowing the statutory provisions limiting access to the courts to remain unchanged. See *Lasky, Kluger, Chapman.* The 2012 PIP Act represented, in the Appellant's words, "A paradigm shift…away from an open-ended $10,000 dollars…to a limited situation of where PIP is only going to treat those persons that have an emergency medical condition." A.7.37-38. Plaintiffs/Appellees filed suit precisely because the PIP insurance benefit limitations criticized in the *Chapman*

[6] See argument below. The 2012 PIP Act provides no default condition and an emergency medical condition must be diagnosed, or not.

came, which were, "Perilously close to the 'outer limits of constitutional tolerance," had come to life. The line has now been crossed and the challenged 2012 PIP insurance benefit limitations far exceed even those in *Chapman,* fully supporting the injunctive relief ordered by the trial court in this cause. See *Chapman* at 19.

Despite severely limiting the enjoyment of these insurance benefits, the Florida Statutes continue to require that all individuals owning or operating a motor vehicle in Florida purchase a minimum of $10,000.00 in PIP insurance. Fla. Stat. §627.733 (2012). The Florida Statutes also require that all motor vehicle insurance carriers provide a minimum of $10,000.00 in medical, disability, and death benefits as PIP for the named insured, relatives residing in the same household, persons operating the motor vehicle, passengers in the motor vehicle, and other persons suffering a bodily injury while not an occupant of the motor vehicle. See Fla. Stat. §627.736 (2012). Thus, although the requirements for possessing and purchasing sufficient PIP coverage remain the same, the benefits provided by purchasing such coverage have been dramatically reduced; benefiting only those for-profit organizations offering this insurance coverage.

Appellant possesses, "primary responsibility for [the] regulation, compliance, and enforcement of statutes related to the business of insurance and the monitoring of industry markets." See Florida Office of Insurance Regulation

website, last accessed May 27, 2013 at http://www.myflorida.com/agency/40. Appellees filed this action alleging that the 2012 PIP Act was invalid because: it violated the single subject rule; it contained a variety of restrictions and limitations violating separation of powers; without a rational basis it violated due process of law; it constituted an improper taking of a property right inherent in a healthcare license already issued by the State; in the absence of any rational basis it violated equal protection; it was based on unsupported, unpublished statistical assumptions that were not the product of a proper research methodology; it unduly limited the rights of both healthcare providers and consumers; and it voided the sufficient alternative relied upon by the courts that permitted Florida No-Fault to limit Floridian's access to the courts. See A.2.3-4.

After considering the evidence and counsels' argument, the trial court ordered a limited Temporary Injunction specifically barring the use of an emergency medical condition to limit PIP benefits and also requiring that PIP insurance carriers continue to reimburse Licensed Massage Therapists and Acupuncture Physicians. See A.1. While Appellees agree with Appellant that PIP was created by statute, Appellees contest those revisions excluding them from providing services when PIP is merely another "third party healthcare payor," especially when this exclusion was predicated on a complete absence of any peer-reviewed medical literature contesting the validity and benefit of massage,

acupuncture, and chiropractic therapies as effective treatment modalities. Because the purchase of PIP coverage is required by statute, because PIP is the primary third party payor for injuries arising from motor vehicle accidents, and because few, if any, health care insurers pay for injuries that are covered by PIP insurance benefits, Appellees' unilateral exclusion from being able to provide the medical evaluations and treatments that they were accredited and licensed to provide by the Florida Department of Health was unreasonable, unjust, and, and not rationally related to any governmental interest. The trial court's order should be affirmed.

I. The Temporary Injunction Was Properly Granted

Pursuant to §26.012(3) Fla. Stat. (2012), and Rule 1.610, Fla. R. Civ. Pro., (2012), the trial court possessed the authority to enter a temporary injunction. Temporary injunctions require that a trial court, "determine that the petition or pleadings demonstrate a *prima facie*, clear legal right to the relief requested. *SunTrust Banks, Inc.,* v. *Cauthon & McGuigan, PLC.*, 78 so. 3d 907, 711 (Fla. 1st DCA 2012) quoting *St. Johns Inv. Mgmt. Co.* v. *Albaneze*, 22 So. 3d 728, 731 (Fla. 1st DCA 2009). Demonstration of a *prima facie* case requires that a petitioner establish: 1) the likelihood of irreparable harm; 2) the lack of an adequate remedy at law; 3) a substantial likelihood of success on the merits; and 4) that the temporary injunction serve the public interest. *Id.* According to its Order, the trial court held that Appellees demonstrated a *prima facie*, clear legal right to relief

based upon the severe restrictions now required for PIP coverage without any improved access to the courts. See A.1.

Originally, Florida No-Fault was created to reduce the volume of court cases, to address the volume of uninsured drivers, and, importantly, to provide for rapid, efficient, unfettered access to payment for healthcare for those injured as a result of a motor vehicle accidents. See §627.730 Fla. Stat. (2012) and *Lasky*. When it was first created, PIP was held to be a legislative enactment serving as a sufficient "reasonable alternatives" to constitutionally protected access to the courts. *Id.* *Lasky,* and its progeny (including *Chapman and Kluger),* clearly demonstrate that a reasonable alternative must be provided when a constitutional right is limited or abrogated in some fashion.

After carefully evaluating the 2012 PIP Act, the trial court scrutinized this trade (PIP as a reasonable alternative to access to the courts), finding that the original Florida No-Fault "…legislation took away or severely limited the right of a person injured in a motor vehicle accident to seek redress in court for injuries wrongfully caused by another, relieving the wrongdoer of responsibility for his conduct, and granting him immunity from civil liability." See A.1.4, referencing *Lasky.*

Further, "[t]his clear impingement upon the rights set forth in Article I, Section 21…[of the Florida Constitution] was rationalized by asserting that

the…[no-fault] legislation was providing a 'reasonable alternative' to the common law tort recovery system." *Id.* And, after reviewing legislative changes to Florida No-Fault over the past almost forty years, the trial court agreed with a "concurring and dissenting" opinion in *Chapman,* where the legislative changes were found to be "perilously close to the 'outer limits of constitutional tolerance.'" A.1.5-6, *Chapman* at 18. Because the trial court found the 2012 PIP Act revisions outside those outer limits of constitutional tolerance, the trial court Ordered the Temporary Injunction and ultimately also entered an Order, affirmed by this Court, Vacating the Notice of Automatic Stay.

The trial court held that the current revisions to Florida No-Fault related to: the 14 day time limit within which one must obtain evaluation or possess no coverage; a limit of $2,500.00 in benefits depending on the existence of an emergency medical condition when individuals must still purchase $10,000.00 in coverage; and the exclusion of all benefits for Massage Therapy and Acupuncture, pass beyond the "outer limits of constitutional tolerance," and were no longer a "reasonable alternative" to access to the courts. A.1.6-7.

As a result of the trial court's weighing of the evidence, the trial court held that, with regard to Appellees' arguments related to access to the courts, Appellees would likely succeed on the merits, possessed no adequate remedy at law, were indeed suffering irreparable harm as a result of the challenged legislation, found

that the balance of equities favored the Appellees, and also found that a temporary injunction would benefit the public interest. See A.1. As demonstrated below, the trial court properly evaluated the evidence and articulated a well reasoned and valid exercise of the trial court's power to issue injunctive relief.

a. Appellees Will Likely Succeed On The Merits Because The 2012 PIP Act Violates The Florida Constitution By Impermissibly Limiting Floridians' Access To The Courts

The 2012 PIP Act voids its use as a "reasonable alternative" to access to the courts because the legislative paradigm shift (described at A.4.41) enacted draconian changes to PIP, dramatically limiting coverage and preventing the rapid, efficient and unfettered access to healthcare contemplated by the Florida Supreme Court in *Lasky* and its progeny. See *Lasky.* Florida No-Fault requires that an individual injured as a result of a motor vehicle accident sustain a permanent physical injury as a condition precedent to accessing the court and filing suit. The necessity of a full and fair remedy, that was manifest in the PIP regulations prior to the adoption of the 2012 PIP Act, is clear. The instant challenged legislation creates a vacuum that does violence to the rights of the healthcare providers and the consumers that it adversely affects, and the trial court properly recognized these facts.

In *Lasky,* the Florida Supreme Court held that with regard to Florida No-Fault and PIP, the Legislature may restrict citizens' access to the courts when

citizens are provided with a reasonable alternative to such restriction. After *Lasky,* the Legislature further revised PIP, and was challenged in *Chapman*, so that payment for medical care was reduced from one hundred percent (100%) of reasonable and customary to eighty percent (80%) of reasonable and customary along with a required twenty percent (20%) deductible. See *Chapman*. The Court held that these revisions continued to constitute a "reasonable alternative" to accessing the courts. *Id.*

Unlike the changes challenged in *Chapman*, the 2012 PIP Act completely prohibits any coverage benefits if care is sought after fourteen (14) days; completely prohibits coverage for all massage and all acupuncture care; severely limits chiropractic care; and limits benefits to two thousand five hundred dollars ($2,500.00), despite still requiring that ten thousand dollars ($10,000.00) in coverage be purchased. A.6.3. These changes constitute a dramatic departure from the No-Fault program initially established, destroying what was previously a "reasonable alternative" to the rights exchanged for swift and effective opportunity to heal from injuries, especially those injuries that might be chronic and agonizing, yet still (presumably) not comprising the undefined "emergency medical condition."

Appellant argued that the 2012 PIP Act represented "A paradigm shift in PIP," where instead of receiving the full ten thousand dollars ($10,000.00) in PIP

coverage, "PIP [was] only going to treat those persons that have an emergency medical condition." A.4.41-42. The trial court inquired: "So from now on, if I have an injury in an automobile accident, if it's not an emergency medical condition, I can't get any money at all"? *Id.* at 42. And the Appellant responded, "That's correct." *Id.*

Appellant thus argues that PIP, as a "reasonable alternative," is not available to all those injured by motor vehicle accidents because the 2012 No-Fault revisions limit PIP only to those diagnosed with emergency medical conditions. Unlike *Chapman* (415 So. 2d 12), where the restrictions were economic and applicable to everyone, the new resultant "alternative" is only available to ***some***, while ***all others*** are prohibited from accessing the courts and being deprived of needed benefits that would be exhausted quickly, leaving the injured without the nebulous "emergency medical condition" to languish in agony, while their PIP insurance companies still enjoy the premiums paid by these same consumers to receive $10,000 in benefits.

After confirming that the 2012 PIP Act limited access to healthcare following a motor vehicle accident without restoring access to the courts, the trial court inquired, "How do you address the access to the court issue? In other words, not only can I not…[receive the $10,000.00 in PIP benefits that I already paid for if I do not seek care within 14 days], but I can't sue anybody either"? *Id.* After an extended discussion, Appellant stated, "Well, you have – you still have the same

right to go into court if there are certain conditions met…I believe permanent dysfunction—it's in the –currently in the statute." *Id* at 44. The "gap" in the so-called "reasonable alternative" was becoming crystal clear to the trial court.

Appellant fails to grasp that one cannot be diagnosed with a permanent dysfunction in the absence of appropriate and reasonable medical care. As Eric Frank, D.C., testified, "A lot of times health insurance will not cover [injuries related to motor vehicle accidents]." B.2.27. Dr Frank also testified that patients injured as a result of motor vehicle accidents dropped out of care before completing treatment because his patients did not possess the financial resources to pay for their care, his patient's health insurance did not cover their care, and because PIP insurers denied necessary and appropriate coverage beyond $2,500.00. B.2.27-28. So, even in the absence of an emergency medical condition determination, without completing their evaluation or treatment, these patients can ***never*** be diagnosed with a permanent injury and would thus be forever barred from having access to the courts. *Id*.

During the temporary injunction hearing, the trial court continued to discuss limitations of access to the courts with the Appellant and, after discussing PIP as constituting a reasonable alternative to accessing the courts, further inquired of the Appellant, "How do you address that in your argument that this is not a reasonable alternative? It was perhaps before, but now you have no access to any remedy at

all, if you were injured in an automobile accident, and it's not an emergency medical condition." A.4.44-46. Appellant responded, "That's a question to be decided in the future…and that it could be up to…[the insured's medical insurance carrier]." A.4.47.

The trial court inquired as to whether the legislative intent was to cost-shift PIP to regular health insurance and whether this met the rational basis test. *Id* at 46-49. In response to whether Appellee Myers could be paid by health insurance after his exclusion from PIP, Appellee Myers testified that in nine (9) years, "I've never heard of a general insurance company paying for injures that were related to an auto accident." A.4.68. and §627.736 Fla. Stat. (2012).

Although Appellant appears to want to cost-shift the first $10,000.00 of injuries related to motor vehicle accidents from motor vehicle insurance carriers to health insurance carriers, Appellant absolutely fails to provide any information related to forms, rates or coverage for health insurance carriers. Clearly, prior to the adoption of the 2012 PIP Act, health insurance carriers have accepted and even come to expect that the first $10,000.00 spent for injuries arising from motor vehicle accidents would be covered by an injured party's PIP coverage, not health insurance. Given the current sea change evident in health insurance coverage related to the Patient Protection and Affordable Care Act (Public Law 111-148 (2010)), health insurance rates are already likely to rise without the added burden

of having to provide $10,000.00 in injury protection coverage for an indeterminate number of Floridians injured in motor vehicle accidents outside of PIP coverage. The bottom line is that PIP coverage is designed for a specific purpose, as is general health insurance, but it is unfair for insurance companies to take advantage of consumers paying for $10,000 in PIP, but if they can only receive 25% of that, consumers would suffer the additional burden of paying independently for general health insurance to make up that shortfall for those subjectively not deemed to be suffering from an "emergency medical condition."

Despite the legislative intent behind the 2012 PIP Act to purportedly limit fraud, the trial court inquired of the Appellant, "What's the rational basis to say that, unless you have an emergency medical condition, you cannot get insurance coverage for it under PIP; and not only that, but you can't sue anybody for it either? What's the rational basis that connects that to fraud"? *Id.* at 50. Appellant responded, "Well, I'm not sure that it has to be – that it necessarily has to be connected to fraud." *Id.*

So, even though the Legislature enacted the 2012 PIP Act to combat fraud and abuse reported by PIP insurance carriers, here Appellant claims that the 2012 Revisions require no rational basis connecting them to combating fraud. The "fraud" label was both speculative and unsupported, and, most importantly, any

actual fraud would be subject to prosecution under the panoply of criminal statutes applicable to such unlawful conduct.

In their argument, Appellants also confound a ruling in Federal Court with the ruling in the trial court. See A.4.39-40. The Judge in Federal Court held that the Appellees were not likely to succeed based on their challenge related to due process and equal protection related to Federal theories and the Constitution of the United States. This same Judge recommended taking Appellees' challenges back to State Court. The trial court previously heard that Appellees could not initially obtain hearing time in State Court before proceeding to Federal Court and that it was only after returning to State Court that hearing time was ultimately granted. See A.4., B.2.

Thus, after considering Appellees' challenge to the 2012 PIP Act based upon the 2012 PIP Acts violation of the Appellees' procedural and substantive due process rights by removing their ability to contract and to earn a living in their chosen profession; violation of the Appellees' substantive due process rights because it was not rationally related to a legitimate public policy or objective; violation of the single subject rule and the separation of powers; the Trial court held that the Appellees met the requirements for entry of a temporary injunction because the 2012 PIP Act, "violates the right of people to have access to the courts to seek redress for their injuries." A.1.2.

b. Appellees Possess No Adequate Remedy And Will Suffer Irreparable Harm Without A Temporary Injunction

The trial court held that the Appellees met their burden of establishing irreparable harm and that the Appellees demonstrated that they possessed an inadequate legal remedy. A.1.2. It is important to note that in addition to being medical providers, Appellees are also motor vehicle owners and operators that are subject to the same coverage limitations as Appellee John Doe and the loss of any constitutional right or freedom, in and of itself, constitutes irreparable harm. *Tampa Sports Authority* v. *Johnston*, 914 So. 2d 1076 (Fla. 2nd DCA 2005). In addition to pure economic losses in the form of lost business, Appellees suffer the loss of customers, the loss of business good will, and the loss of their ability to practice the profession that they were trained for. A.3.7.

Appellee Myers testified that even with nine (9) years experience treating patients injured by motor vehicle accidents as a Florida Licensed Acupuncture Physician, neither he, nor any practitioner Dr. Myers knew, would be able to diagnose an emergency medical condition as defined by the 2012 PIP Act. A.4.57-59. Further Appellee Myers testified that some injuries resulting from motor vehicle accidents only appear after fourteen (14) days. *Id.* at 60-61. Finally, Appellee Myers testified that despite never having been accused of fraud, in addition to pure economic losses, he was suffering lost referrals as a result of the 2012 PIP Act. *Id.* at 62-64.

Thus, according to Dr. Myers' testimony, a cardinal requirement of the 2012 PIP Act was impossible becuase the diagnosis of an emergency medical condition, was too poorly defined by statute and not supported by currently available medical practice. Further, although the 2012 PIP Act required evaluation within a strict 14 day time period or no benefits would be provided, Dr. Myers testified that some injuries occur after the 14 day period – so those insureds that paid for coverage would be left without coverage. Finally, Dr. Myers testified about the irreparable harm he was suffering.

During the hearing on Appellees' Motion to Vacate the Appellant's Notice of Automatic Stay, the Trial court reviewed a number of John Doe affidavits filed on behalf of many similarly situated healthcare providers. See B.3. Specifically, in addition to documenting these Affiant's economic losses, these affidavits clearly documented the Affiant's irreparable harm including lost referrals, lost goodwill, and lost their patient-provider relationship. See B.3. Notably, many of the Affiants documented such severe economic and non-economic losses that they were not able to repay either their student loans or their business loans. B.2.15.

Also during the hearing on Appellees' Motion to Vacate the Appellant's Notice of Automatic Stay, Erik Frank, D.C., testified that, "The 2012 [PIP Act]…severely restricted…my patients' access to proper medical care…[and] also limited my ability to deliver proper medical care…[Because patients drop out of

care as a result of the limitation to $2,500.00]…I can't bring a patient to maximum medical improvement…[and without this they cannot pursue a claim in court]. B.2.18. This funding limitation also prevents appropriate evaluation and treatment such as with diagnostic imaging. *Id.*

During this hearing, Appellant's withess, Ms. Sandra Starnes testified that she was, "The director of the Property and Casualty Product Review Unit [for the Appellant Office of Insurance Regulation]," specifically in charge of PIP insurance carrier rate filings. B.2.29. Ms. Starnes testified that enforcement of the Temporary Injunction would cause a "nightmare" for the Appellant and for the PIP insurance carriers. B.2.37. This "nightmare" was later clearly defined as only "time and money," economic expenses, but not irreparable harm. B.2.38. After weighing the economic losses between Appellant and Appellees and considering the irreparable harm suffered by the Appellees, the trial court determined that the Appellees possessed no adequate remedy at law and suffered sufficiently great irreparable harm to justify ordering a Temporary Injunction. A.1.

c. The Balance Of Equities Favors the Appellees Because Appellees' Injuries Outweigh Appellant's Injuries

Florida's obligation to preserve and protect the public health relies upon its inherent police power. See Fla. Jur. 2d, Health and Sanitation §1. In furtherance of this obligation, Florida regulates the licensure of its healthcare practitioners and the practice of healthcare by statute. *Fischwenger* v. *York*, 18 So. 2d 8 (Fla. 1944).

The right of a properly qualified and licensed healthcare provider to practice the healing arts is a valuable property right for which the healthcare provider is entitled to be secure and protected. *State ex. Re. Estep* v. *Richardson*, 3 So. 2d 512 (Fla. 1941). Injunctive remedies may prevent infringement upon property rights. *Louisville & N.R. Co.* v. *Railroad Com'rs.*, 58 So. 543 (Fla. 1912). Further, injunctive remedies may also remedy infringement upon the right to earn a living and continue practicing one's employment. *Watson* v. *Centro Espanol De Tampa,* 30 So. 2d 288 (Fla. 1947).

It is the legislature's intent that no profession be regulated by the state in a manner that unnecessarily affects the availability of those professional services to the public. Fla. Jur. 2d., Business and Occupations §1. Unfortunately, in the absence of any evidence, Appellant argued that the 2012 PIP Act was necessary because, "The legislature could have believed that the healing arts of acupuncture and massage therapy would not be effective treatments for people that have emergency medical conditions." A.4.49. To the contrary, John Doe Affiant Crespo, "Is a medical doctor, [that] said that massage is the most beneficial treatment available for people in an auto accident." B.2.15, and B.3.A. Further, Affiant Crespo stated that the 2012 PIP Act, "Severely limits medically necessary and scientifically proven medical treatment." *Id.*

Both the trial court and this Court balanced the equities and harm applicable to both Appellant and Appellees while considering the Appellant's Notice of Automatic Stay and related filings. After extensive briefing, this Court affirmed the trial court's vacation of the Automatic Stay. A.6., and Order Affirming Trial Court's Vacation of Automatic Stay. Circuit Courts possess discretionary authority to vacate automatic stays "under compelling circumstances." *Gervais* v. *Melbourne,* 890 So. 2d 412, 414 (5d DCA 2004) referencing *State of Fla., Dept. of Envtl. Prot.* v. *Pringle*, 707 So. 2d 387 (Fla. 1d DCA 1998); *St. Lucie County* v. *North Palm Dev. Corp.,* 444 So. 2d 1133, 1135 (Fla. 4d DCA 1984) rev denied. 453 So. 2d 45 (Fla. 1984). The application of the points and authorities relevant to this concept unequivocally support the Appellees in continuing the ability to both give and receive critical healthcare, and preventing the unparalleled harm caused by any "stay" of the temporary injunction.

A determination of compelling circumstances essentially requires a balancing of harms. *Tampa Sports Authority* at 1082. Quoting the Fourth District Court of Appeals in *St. Lucie County*, the First District "explain[ed] that [an] automatic stay is based upon a policy rationale and…that planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference." *State Department of Environmental Protection* at 390.

When the harms balance, there exist no compelling circumstances and a stay should not be vacated. See *St. Lucie County*. However, in the absence of evenly balanced harms, the party suffering greater harms is entitled to protection. In *Tampa Sports Authority*, the Second District agreed with *St. Lucie County* that a Stay should not be vacated when the harms balanced, but it also concluded that an Automatic Stay should be vacated, and a temporary injunction allowed to remain in place, when the harms leading to the need for injunctive relief were, "overwhelmingly tilted against maintaining the stay," despite any, "judicial deference to planning-level governmental decisions." *Id.* at 1083. Because unbalanced harms should be resolved in favor of the party subject to the greater harm, the trial court appropriately held that the Appellees' harm outweighed any harm to the Appellant and that the Automatic Stay should be Vacated. A.6. These actions even more clearly show that the trial court did not "abuse its discretion" in granting the temporary injunction. Here, the trial court considered and weighed the evidence for the Temporary Injunction twice, including two hearings and two competing sets of motions. Each time, after deliberately and carefully weighing the evidence, the trial court essentially held that the Temporary Injunction was nececessary.

Automatic stays ought to act as a shield to protect one party when the harms to either party are balanced and the court's injunctive remedy causes an imbalance

resulting in harm to the non-moving party. However, as the Second District held in *Tampa Sports Authority* and the Fourth District held in *St. Lucie County*, when the harms to one party significantly outweigh the harms to the other – even after the injunctive relief, the party bearing the grater harm should be entitled to protection. Logically, compelling circumstances and a determination of harm must be similar to those same allegations, proofs, and circumstances necessary to fulfill the requisite elements of a temporary injunction - circumstances such as irreparable harms, the absence of an adequate remedy, the substantial likelihood of the petitioner's success, and that the temporary injunction or vacation of an automatic stay not disserve the public interest.

Appellees filed a Declaratory Action seeking temporary injunctive relief to protect themselves from Appellant's actions. Actions that the trial court itself also determined to be violative of the explicit provisions of Article I, Section 21 of the Florida Constitution. The trial court made the following findings of fact: "[Appellees] have alleged and proven irreparable harm and inadequate legal remedy"; "There appears to be no adverse consequence to the public interest in maintaining the status quo"; "I find that the [Appellees] have met their burden…[in proving that the 2012 PIP] Act violates the right of people to have access to the courts to seek redress for their injuries." A.1.

Appellant actually argued that the Legislature enacted the 2012 PIP Act to protect Appellees by reducing the cost of PIP insurance. Aside from the fact that PIP insurance rates actually ***increased*** since enactment, Appellant failed to consider the harm created by requiring that Floridians purchase commercial insurance product worth $10,000.00 on paper but only requiring that it actually provide $2,500.00, absent unique and subjective circumstances.

When considered in conjunction with the fact that an injunction would not disserve the public interest, that the Plaintiffs are likely to prevail, that the Appellees' irreparable harm and absence of an adequate legal remedy significantly outweigh any potential harm to the Appellant (especially when Appellant is only due some "planning-level deference"), and that the Appellant never complained of any irreparable harm, the trial court appropriately Ordered a Temporary Injunction and ultimately Vacated the Automatic Stay. And, appropriately, this Court affirmed the trial court's Order Vacating the Automatic Stay. Based on the totality of the record and circumstances, no reasonable person could argue that the trial court "abused its discretion" in Ordering a Temporary Injunction in this case.

d. The Temporary Injunction Benefits the Public Interest and Maintains the Status Quo

The trial court held that, "there appears to be no adverse consequence to the public interest in maintaining the status quo if the injunction is issued. A.1.2. The public interest is best served by protecting the rights and privileges afforded by the

Florida Constitution and equally by protecting the health, safety, and wellbeing of Florida's citizens. In addition to the testimony provided by Appellee Myers about his inability to determine precisely what an emergency medical condition was (A.4.59-62), Dr. Erik Frank, D.C., also testified that, "I don't understand emergency medical condition. It's very –extremely vague." B.2.23.

Unfortunately, the 2012 PIP Act contains no default provision and requires either that an emergency medical condition is diagnosed or not: 627.736(1)(a)

> 3. Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. up to $10,000 if a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, a physician assistant licensed under chapter 458 or chapter 459, or an advanced registered nurse practitioner licensed under chapter 464 has determined that the injured person had an emergency medical condition.
>
> 4. Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. is limited to $2,500 if any provider listed in subparagraph 1. or subparagraph 2. determines that the injured person did not have an emergency medical condition. See A.5.

These two sections create far more uncertainty than the Temporary Injunction that serves to restore Florida No-Fault to its well established provisions, supported by a large, established, and well documented judicial history. This revision constitutes a critical problem that is effectively corrected by the Temporary Injunction because the diagnosis of an emergency medical condition is a key element of the 2012 PIP Act and because the diagnosis of an emergency medical condition is a novel concept previously unrelated to motor vehicle

accident victims. As noted above, neither Dr. Frank nor Dr. Myers could determine what actually constituted an emergency medical condition according to the statute. Without the injunction, and despite Affiant Starne's testimony to the contrary, PIP insurers too were not able to determine what an emergency medical condition was and as a result what, if any benefit coverage, was available – these insurance carriers denied coverage as a result. B.2.21-22. This represents a critical problem because the entire basis for PIP insurance was its utilization as a "reasonable alternative" to accessing the courts by providing rapid, efficient, unfettered access to compensation for the evaluation and treatment of healthcare related to injuries resulting from motor vehicle accidents. See *Lasky*.

Finally, one benefit to the 2012 PIP Act was supposed to be a ten percent (10%) decrease in PIP insurance premiums by October 1, 2012. B.2.39-40. Ms. Starnes testified that one hundred and fifty (150) rate filings were received but only thirty five (35) contained at least a ten percent (10%) rate decrease while the remaining one hundred and fifteen (115) provided an "explanation" for the absence of the required rate decrease. B.2.40. It appears then that only a dismal minority of PIP insurance carriers actually reduced their rates. And, as noted above, and contrary to the "nightmare" results argued by the Appellant, State Farm, the largest PIP insurance carrier in Florida, ***is*** complying with the Temporary Injunction even while it raised its rates in response to the 2012 PIP Act. B.4.7. Obviously, as

discussed below, the terms of the temporary injunction were clear and could be complied with by the mere issuance of a simple memorandum.

Accordingly, maintenance of the *status quo* is necessary in order to minimize the public harm arising from flawed legislation that continues to limit access to the courts while still preventing rapid, efficient, unfettered access to compensation for injuries arising from motor vehicle accidents. And, maintenance of the *status quo* is necessary because the beneficiaries of the 2012 PIP Act failed to comply with their requirement to reduce insurance premiums.

II. The Temporary Injunction Is Not Defective

Appellant incorrectly argues that the Temporary Injunction Order, "disregards several indispensible requirements [of Rule 1.610 Fla. R. Civ. P. because]: It does not specify the acts restrained, it does not articulate any factual findings supporting it, and it does not require a bond." See Initial Brief at 10. However, despite Appellant's claim to the contrary, the largest PIP insurance carrier in Florida is complying with the Temporary Injunction. B.1.3. These arguments are specious and unsupported.

a. The Temporary Injunction Is Valid and Provides Specific Direction

The trial court entered a temporary injunction related 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." A.1.7. Before the Temporary Injunction was granted, an injured person represented in this cause as Jane Doe, "Received written notification from State Farm that my PIP coverage was being limited to $2,500.00 in my medical payments being limited to $1,250.00 because…[State Farm] did not have a diagnosis of emergency medical condition for me." See Affidavit of Patrick Joseph Tighe B.1.2.

After the Temporary Injunction was entered, and during the period that the Appellant requested an automatic stay, Affiant Tighe received written notification from State Farm indicating compliance with the 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. See Affidavit of Patrick Joseph Tighe B.1.3.

Notably, according to Appellant's own data, State Farm possesses the largest market share of any PIP insurance carrier in Florida. B.4.7. Pursuant to Ms. Starnes' own presentation to the Florida Senate Banking and Insurance Committee on April 9, 2013 the top five (5) personal auto insurer filings include: (B.4.7.)

Company Name	Market Share	% PIP Premium Change After 2012 PIP Act
State Farm	**17.5%**	**7.9% increase**
Geico General	10.3%	10% decrease
Progressive American	6.3%	10% decrease
Progressive Select	5.3%	10% decrease
Geico Indemnity	4.8%	10% decrease

Since Ms. Starnes testified that the Appellant received one hundred and fifty (150) filings, it appears from her own data that State Farm's market share far exceeds that of any other company. Incidentally, it is equally apparent that State Farm was not one of the thirty five (35) insurers that reduced their PIP rates in response to the 2012 PIP Act. As a matter for the trial court however, it does appear that some of the data presented to the Banking and Insurance Committee of the Florida Senate may conflict with some of the testimony that Ms. Starnes earlier provided to the trial court.

Valid injunctions require identification of enjoined acts with reasonable definiteness and certainty such that those enjoined know what they must refrain from doing without speculation and conjecture. *F.V. Inves., N.V.* v. *Sicma Corp.,* 415 So. 2d 755 (Fla. 3d DCA 1982). Appellant specifically inquired about the effect of the Temporary Injunction of its own witness, Ms. Sandra Starnes, who testified that the impact of the PIP coverage rates would be for the old standard and that PIP insurance carriers would revert back the forms and rates in effect before January 1, 2013 when the 2012 PIP Act took effect. B.2.34.

Although Appellant's witness, Ms. Sandra Starnes, stated that there was no way that the insurance industry could revert back to the pre-2012 PIP Act by memo (B.2. 35.), at least one PIP insurance carrier is abiding by the terms of the Temporary Injunction. Despite this testimony, the Temporary Injunction Order was certainly clear enough and reasonably definite enough that at least one large PIP insurer, State Farm, was able to comply as noted above.

The Order Granting Temporary Injunction does not refer to any pleading, it referred specifically to the Statute that it declared, in part, invalid. Specifically, the Order enjoined, "those sections of the law which require a finding of emergency medical condition as a prerequisite for payment of PIP benefits or that prohibit payment of benefits for services provided by acupuncturists, chiropractors and massage therapists." Although Appellants argue otherwise, enjoining the sections of the law noted above merely restored the status quo prior to January 1, 2013 in Florida – something every automobile insurer was familiar with and something that at least one large insurer is complying with. B.1. Any argument that the scope if the injunction is unclear is completely disingenuous.

b. The Temporary Injunction is Valid and Includes Specific Findings of Fact

The Trial court considered, "the evidence, the written and oral arguments of counsel, and the authorities cited." See Order Granting Temporary Injunction. The Trial court addressed standing and held that Appellees possessed sufficient

standing. The Trial court held that the Appellees "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 of the injunction is issued. The real question is whether the…[Appellees] have shown a substantial likelihood of success on the merits…I find that the…[Appellees] have met their burden only [related to the access to the courts claim]." *Id.*

The specific findings of fact that the trial court appropriately made referenced the record. The trial court found: 1) "[Appellees] are chiropractic physicians, massage therapists, and acupuncturists," A.4.1.; 2) Appellees challenged Chapter 2012-197 requesting declaratory relief, *Id.;* 3) Appellees seek to enforce a right vested in the public at large and as such have established that they suffered a specific injury, *Id*., 4) Appellees provide healthcare to those covered by PIP insurance benefits and Appellees possess a "sufficient interest in the outcome of the case," *Id.* at 2.; 5) Appellees "have alleged and proven irreparable harm and inadequate legal remedy," *Id.,* 6) Appelles have demonstrated a substantial likelihood of success on the merits, *Id.*

Because the trial court made these specific findings of fact and because the trial court evaluated the evidence over the course of two competing sets of written motions, and during two evidentiary hearings, the trial court's Order for

Temporary Injunction should be affirmed and this cause allowed to proceed on its merits.

c. The Temporary Injunction is Valid and the Issue of a Bond Remains Pending in the Trial court

The Temporary Injunction is not invalidated due to lack of a bond because the trial court reserved ruling on the amount of bond that should be required of the Appellees. A.6.2. In this case, a hearing is needed to take testimony and evaluate the need for and the amount of a bond. In *Vargas,* the Third District upheld a Temporary Injunction because, "the trial court made clear, definite, and unequivocal factual findings sufficient to support each of the elements necessary to justify the entry of the temporary injunction." *Vargas* v. *Vargas*, 771 So. 2d 594, 596 (Fla. 3d DCA 2000). However, after holding that, "the trial court did not abuse its discretion in granting the temporary injunction," the Third District remanded the case back to the trial court to hold a hearing on the sufficiency of the bond amount. *Id.*

In this case, determining any bond amount will require another hearing that was delayed, first by the Automatic Stay and now by this interlocutory appeal. Obviously, since State Farm found that the injunction could be complied with by the issuance of a simple memorandum, balanced against the abundantly clear irreparable harm befalling the Appellees as a result of the application of the challenged provisions of the 2012 PIP Act, any bond would appropriately have to

be minimal, and asserting this factor as a criticism is truly an example of "form over substance," and an artifice designed to prevent the achievement and preservation of manifest justice as embodied by the Temporary Injunction. Thus, the trial court's reservation of ruling on the amount of a bond, should not invalidate the Temporary Injunction.

d. The Trial Court Did Not Misconstrue Appellees Standing to Maintain This Action

The trial court did not misconstrue Appellees standing to maintain this action. The trial court specifically found that because the Appellees demonstrated that they possessed, "a sufficient interest in the outcome of this case, as well as an injury that is distinct from the public at large." A.4.2. And, the trial court held that, "[Appellees] have standing." *Id.* "The trial court appropriately held that Appellees sufficiently demonstrated special injuries, separate and apart from the general injuries suffered by the public-at-large, as related to the 2012 PIP Act. A.1.1-2. Specifically, the Trial court held that Appellees, "derive a substantial percentage of their income through PIP insurance payments," and because the 2012 PIP Act revisions prohibit or severely limit future payments, that Appellees suffer special damages apart from those suffered by the public-at-large. A.1.2.

Despite Appellant's argument that the Appellees cannot demonstrate actual harm, Appellees' Complaint, A.2., alleges harm as does Appellee Myer's testimony A.4.62-69. To proceed with injunctive relief, a party should clearly

demonstrate a *bona fide*, actual, present, practical need for relief, and that all necessary parties are before the court. *State* v. *Florida Consumer Action Network,* 830 So. 2d 148 (Fla. 1st DCA 2002) rev. denied, 852, So. 2d 861 (Fla. 2003). In the instant action, actual harm was clearly demonstrated, and it included significantly more than mere "money damages."

Appellant appears to misconstrue the trial court's findings by referring to "Jane Doe" and "John Doe" as hypothetical claimants, when the trial court already recognized both Jane Doe and John Doe as claimants. In addition to the named plaintiffs also being consumers and Jane Does, John Doe also testified in the form of several affidavits as well as Dr. Frank in person. The trial court specifically recognized Jane Doe explaining, "The reason for issuing the injunction was to protect [the constitutional right of citizens to seek redress in the courts if they are wrongfully injured] and prevent the potential harm to citizens injured in automobile accidents, who, under the present PIP statute, may not receive necessary medical care. A.6.

After evaluating the evidence and considering the testimony, the trial court did in fact determine on two separate occasions that Appellees possessed sufficient standing – both at the hearing for Temporary Injunction and then again during the hearing to Vacate the Automatic Stay.

III. This Court Should Not Reverse the Temporary Injunction and Should Allow This Cause To Proceed on Its Merits Without Imposing the Irreparable Harm that would Inescapably Destroy Appellees Rights if Injunctive Relief is Not Maintained

Similar to this Court's affirmation of the trial court's Vacation of the Automatic Stay, this Court should affirm the trial court's Temporary Injunction and allow this case to be heard on its merits. One critical purpose of temporary injunctions is to prevent injury in advance so that a party will not be forced to seek damages after they occurred. *Bailey* v. *Christo,* 453 So. 2d 1134 (Fla. 1st DCA 1984) see also *Lewis* v. *Peters*, 66 So. 2d 489 (Fla. 1953) and *Bowling* v. *National Convoy & Trucking Co.*, 135 So. 541 (Fla. 1931)("The status quo preserved by a temporary injunction is the last peaceable non-contested condition that preceded the controversy."). Despite this, Appellant argues that the temporary injunction was improperly granted because Appellee Jane Doe had not yet sustained and injury and must wait until one accrues. Unfortunately by the time this happens, Jane Doe is already damaged beyond repair or recompense. The majority of persons injured during motor vehicle accidents utilize PIP insurance and few health insurance carriers pay for these injuries. See Affidavits of Melba Reyes and Miriam Velez A.6.

Although Appellant attempts to conveniently shift the responsibility for payment from PIP insurers to other health insurance providers, Appellant fails to address how the injured person will pay what is likely to be a much greater

premium and/or deductible. See Affidavit of Miriam Velez A.6. This increase occurs because, under PIP, the beneficiary must pay twenty percent (20%) or a maximum of two thousand dollars while health insurance deductibles are generally much greater, with some approaching five thousand dollars ($5,000.00). *Id.*

Appellees agree with Appellant that, "The trial court's clear intent…was to effect immediate injunctive relief." See Appellant's Response to Order to Show Cause page 6. Appellees however, disagree with Appellant's contention that, "The Temporary Injunction provided no specificity as to what the…[Appellant] must do (or not do) to obey the order." See Appellant's Response to Order to Show Cause page 7. In fact, Appellant regulates PIP insurers and, as noted below, the largest PIP insurance carrier, State Farm, has already complied with the Temporary Injunction. See. B.1. Because the largest PIP insurance carrier already demonstrated that it can and will comply with the trial court's Order for Temporary Injunction, because of all the arguments already made here and in the competing Responses to the Orders to Show Cause, and because the trial court already weighed the evidence over the course of two hearings, this Court should affirm the Temporary Injunction and allow this cause to be heard on its merits.

a. The Trial court Appropriately Considered the Presumption of Constitutionality Afforded Legislative Enactments

The trial court appropriately considered the presumption of constitutionality provided legislative enactments, twice, and on both occasions held that a

temporary injunction was necessary. An injunctive remedy is appropriate to restrain enforcement of an invalid law. *Board of Com'rs of State Institutions* v. *Tallahassee Bank & Trust Co.*, 100 So. 2d 67 (Fla. 1st DCA 1958); *Daniel* v. *Williams*, 189 So. 2d 640 (Fla. 2nd DCA 1966). The 2012 PIP Act is invalid because it impermissibly abrogates Appellees' rights to treat only those injured as a result of motor vehicle accidents and limits Appellees' rights to access the courts without a reasonable alternative to such access.

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

Appellant relies upon *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session,* 263, So. 2d 797 (Fla. 1972). This decision related to apportionment of legislative districts at a time of racial unrest and provided the legislature with virtually limitless power unchecked by judicial review. However,

that same decision explains how trial courts have the ability to invalidate state statutes when they are clear violations of protected rights. "It is well settled that the state Constitution is not a grant of power but a limitation upon power. Unless legislation duly passed be clearly contrary to some express or implied prohibition contained in the Constitution, the courts have no authority to pronounce it invalid. *Id.* at 805 citing *Harry E. Prettyman, Inc.,* v. *Florida Real Estate Commission,* 92 Fla. 515 (1926) and *State ex rel. Jones* v. *Wiseheart*, 245 So. 2d 849 (Fla. 1971). The plain language of the trial court's order debunks Appellants' argument, where the trial court opined:

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

Because the trial court found that the challenged provisions of the 2012 PIP Act so severely restricted the previously defensible "intent" of no-fault insurance,

it ceased to be that "reasonable alternative," and because the trial court found that the Appellants failed to restore citizens' access to the courts under Article I, Section 21 of the Florida Constitution, the trial court reasonably and correctly held that those relevant portions of the 2012 PIP act were not constitutional and were invalid.

Finally, Appellants argument fails because, after the Trial court entered the Temporary Injunction, Appellants filed a Notice of Automatic Stay, an automatic stay they were procedurally entitled to because of their capacity as a governmental entity. However, after considering the presumption of constitutionality argument, both the Trial court and this Court determined that vacation of the automatic stay was reasonable and permissible.

b. This Court Has Already Agreed That The Trial Court Appropriately Vacated the Automatic Stay Effected by the Appellants' Filing of the Instant Appeal

After considering the evidence, the filings and the arguments of counsel, the Trial court vacated the Appellant's Notice of Automatic Stay. A.6. The court indicated that the focus of the injunction was, "the constitutional right of citizens to seek redress in the courts if they are wrongfully injured." A.6.1. After consideration of the Parties' Motions, this Court affirmed the Trial court's Order Vacating the Appellant's Notice of Automatic Stay. See Order Denying Appellant's Motion dated May 10, 2013.

Under the applicable rigorous standard, any party seeking to vacate the automatic stay must demonstrate an evidentiary basis supporting such compelling circumstances. *Dep't of Envtl. Protection v. Pringle*, 707 So. 2d 387, 390 (Fla. 1st DCA 1998), *underlying injunction subsequently quashed*, 743 So. 2d 1189 (Fla. 1st DCA 1999); *see also St. Lucie Cnty.*, 444 So. 2d at 1135. Amazingly, the same authority asserted by the Appellees to urge the trial court to lift the stay is now being urged as being in favor of reinstating the stay. Correct, the two principal considerations that govern whether to vacate an automatic stay are: (1) the government's likelihood of success on appeal, and (2) the likelihood of irreparable harm. *Tampa Bay Sports Auth. v. Johnston*, 914 So. 2d 1076, 1079 (Fla. 2d DCA 2005) (citing *Mitchell v. State*, 911 So. 2d 1211, 1219 (Fla. 2005)). Comparing the salient provisions of these cases, this Court found that they supported an affirmance of the trial court on the decision to lift the stay, and the same relevant considerations should support an affirmance of the temporary injunction order.

CONCLUSION

Appellees met every element necessary to justify the trial court's issuance of a temporary injunction. In stark contrast to the irreparable harm that would befall the Appellees if the temporary injunction is not validated, the Appellants argue only what boils down to a mere administrative burden, a burden not inconsistent with their day to day responsibilities to regulate and administer insurance

companies writing policies in the State of Florida. The bottom line is that the Appellants' feigned "confusion" or failure to understand the scope of the temporary injunction has already been belied by the largest PIP carrier in the State. Therefore, for the foregoing reasons and points and authorities respectfully asserted herein, Appellees respectfully request that this Honorable Court affirm the trial court's entry of an Order for Temporary Injunction in this cause.

Respectfully Submitted, June 6, 2012

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by electronic mail on the individuals listed below on this 6th day of March 2013.

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I hereby certify that this brief contains 10,440 words, is printed in Times New Roman 14-point font on opaque white, non-glossy paper measuring 8.5 inches by 11 inches with minimum 1 inch borders, and satisfies the font requirements of Rules 9.100(1) and Rule 9.210(a)(2), Fla. R. App. P.

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