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/Defendant,

vs.

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

Case No. 1D13-1355

L.T. No. 2013-CA-0073

MOTION FOR REHEARING AND MOTION FOR REHEARING *EN BANC*

ON APPEAL FROM THE CIRCUIT COURT IN AND FOR LEON COUNTY, FLORIDA

LUKE CHARLES LIROT, Esq., Florida Bar No. 714836 Luke Charles Lirot, P.A. 2240 Belleair Road, Suite 190 Clearwater, Florida 33764 (727) 536 – 2100 [Telephone] (727) 536 – 2110 [Facsimile] luke2@lirotlaw.com [Primary E-mail] **Co-Counsel for the Appellees**	ADAM S. LEVINE, M.D., J.D. Florida Bar No. 78288 Fl. Legal Adv. Group of Tampa Bay 1180 Gulf Boulevard, Suite 303 Clearwater, Florida 33767 (727) 512 – 1969 [Telephone] (866) 242 – 4946 [Facsimile] aslevine@msn.com [Primary E-mail] **Co-Counsel for the Appellees**

MOTION FOR REHEARING AND MOTION FOR REHEARING EN BANC

The Appellees, captioned above, respectfully move this Honorable Court for a rehearing pursuant to Fla.R.App.P. 9.330, and for rehearing *en banc* pursuant to Fla.R.App.P. 9.331, and would show the Court as follows:

I. MOTION FOR REHEARING

A. INTRODUCTION

On October 23, 2013, this Court reversed the trial court's entry of a temporary injunction preventing the unfair and unconstitutional impact of the relevant provisions of the 2012 PIP Act. This action was filed by the Appellees, healthcare professionals asserting a variety of claims based on the destruction of their practices brought about through the implementation of certain portions of Chapter 2012- 197, Laws of Florida (the "2012 PIP Act"). The operative complaint alleged violations of the "single subject" rule; due process violations; violation of the separation of powers doctrine; violations of the Appellees' "equal protection" rights to be able to provide, and be compensated for, medical treatment provided to auto injury victims; challenges based on "the right to work," and, focusing on the history of how the entire PIP framework came into existence, a challenge was based on the assertion that the delicate balance between the loss of "the right of

access to courts" in exchange for the legislative "trade-off" of providing swift access to benefits for healthcare and other much needed remedies for those inured in auto crashes was completely thrown "out of balance," and thus unconstitutional.

The primary purpose in filing the action was to prevent affected healthcare professionals from being irreparably harmed through either the complete exclusion from providing PIP medical treatment, in the context of acupuncture physicians and licensed massage therapists, or, in the context of chiropractic physicians, limiting their ability to provide treatment by 75%, absent the determination of the subjective and undefined "emergency medical condition."

These causes of action challenging the constitutionality of the 2012 PIP Act were asserted by the Appellees in their own right, as well as in the context of representative plaintiffs, "John Doe" and "Jane Doe." The trial court found that there was sufficient standing established by the Appellees, and determined that the dramatic reduction in benefits that supported the "balancing" rendered the new framework inconsistent with the constitutional right of access to courts as set forth in Art. I, § 21, Fla. Const.

The Panel correctly noted that the Appellees, plaintiffs below, included Robin A. Myers, A.P. (an acupuncture physician), Gregory S. Zwirn, D.C. (a chiropractic physician), and Sherry L. Smith, L.M.T., and Carrie C. Damaska, L.M.T. (licensed massage therapists). The Panel took issue with the inclusion of

"John Doe" as a "plaintiff," who was a representative party, who, ***in addition to the named Plaintiffs***, was named to pursue a facial constitutional challenge on behalf of "all similarly situated citizens of Florida that are actively licensed healthcare providers licensed by Florida pursuant to the Florida Statutes, and/or own businesses providing healthcare services in Florida, and/or provide healthcare services to patients injured as a result of motor vehicle collisions in Florida." This description of characteristics designed to describe "John Doe," was also an accurate description of the named individual Appellees.

The Panel was also critical of the inclusion of "Jane Doe," a representative party, who, ***in addition to the named Plaintiffs***, was named to pursue a facial constitutional challenge on behalf of "all those citizens of Florida that are, were, or will be injured as a result of a motor vehicle collision that were also required to purchase $10,000 . . . of PIP insurance coverage but may actually only receive no or $2,500 . . . in benefits."

Undeniably, the named Appellees were also shown to be citizens of Florida that, as a result of the threatened imposition of the challenged provisions of the 2012 PIP Act, would not only suffer irreparable harm from the loss or limitations of their healthcare practices, but were also were placed in the position where they, like "Jane Doe," would be forced to pay for $10,000 of "no-fault" insurance, but be limited to only $2,500 in coverage, absent the necessity of showing the undefined

"emergency medical condition." These facial challenges, while being extended to "John Doe" and "Jane Doe," were also asserted on behalf of the ***individual*** named Appellees. Notwithstanding that no one had been injured (or could have been when the suit was originally filed), the challenges were based on the clear ***facial*** deprivations imposed by the code on both those giving and receiving medical care under PIP.

Personal Injury Protection (PIP) insurance represents one facet of the Florida No-Fault Law and was designed to: 1) provide efficient, rapid, unfettered access to medical benefits for injured victims of a motor vehicle accidents; 2) provide limited compensation for lost work; and 3) provide 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).

The Panel identified the gist of those portions of the 2012 PIP Act that were asserted as the most egregious:

> "To be eligible for PIP medical benefits under the new law, persons injured in a motor vehicle accident must seek initial services and care from specified providers within fourteen days after the motor vehicle accident. § 627.736(1)(a), Fla. Stat. (2013). Medical benefits up to $10,000 are available for 'emergency medical conditions' diagnosed by specified providers, and up to $2,500 for non-emergency medical conditions. § 627.736(1)(a)3.-4., Fla. Stat. (2013). In addition, the law specifically excludes licensed massage therapists and licensed acupuncturists from being reimbursed for medical

> benefits. § 627.736(1)(a)5., Fla. Stat. (2013). Although chiropractors are authorized to provide treatment to PIP insureds, they cannot make the determination that a patient has suffered an emergency medical condition. § 627.736(1)(a)1.-3., Fla. Stat. (2013). Plaintiffs alleged that the new law significantly limits the type and format of chiropractic treatment of persons covered by PIP insurance." (Decision at p. 4).

The Panel properly identified that the trial court granted the motion for temporary injunction based only on the access-to-courts claim, observing, "The judge determined that the Appellees are entitled to injunctive relief '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.'

The Panel also observed:

> "The judge characterized these plaintiffs as 'seeking to enforce a right vested in members of the public at large,' such that they 'must allege and establish some special injury different in kind from the injury suffered by members of the public.' The court found that the Provider Plaintiffs, 'as health care providers for automobile accident victims, derive a substantial percentage of their income through PIP insurance payments,' which the 2012 PIP Act prohibits or severely limits, giving them "a sufficient interest in the outcome of the case, as well as an injury that is distinct from the public at large." (Decision at p. 6).

The critical issue in this Motion for Rehearing is a reconsideration of those legal theories that the Panel overlooked or misapprehended when determining that Appellees lacked standing to support the trial court's benevolent ruling, and the Motion for Rehearing *En Banc* will point out those prior decisions that the Panel

decision departed form in its reversal and the Panel's conclusion that "Appellees lacked standing to bring this 'access-to-courts' challenge," and reversed the order on appeal.

I. IT IS RESPECTFULLY ASSERTED THAT THE PANEL OVERLOOKED OR MISAPPREHENDED THE CONCEPT OF STANDING TO BRING A CONSTITUTIONAL CHALLENGE TO AN ACT THAT INFLICTED INJURY UPON APPELLEES IMMEDIATELY UPON ITS ADOPTION

Opining that, "Standing presents 'a threshold inquiry' that must be made at the commencement of the case (citing *Olen Props. Corp. v. Moss,* 981 So. 2d 515, 517 (Fla. 4th DCA 2008))..." and stating that, "We have de novo review of the issue of whether Appellees have standing, which is a pure question of law. *Baptist Hosp., Inc. v. Baker,* 84 So. 3d 1200, 1204 (Fla. 1st DCA 2012)," the Panel went through an analysis of various "standing" cases, and concluded, that Appellees' lacked standing to defend an injunction granted on an isolated constitutional issue that affected every driver in the State of Florida. As will be shown below, it is respectfully asserted that the Panel's overly limited view of standing, in the context of the facial constitutional challenges raised below, justifies a rehearing and the withdrawal of the decision reversing the trial court's order granting the temporary injunction.

It is respectfully asserted that the Panel overlooked or misapprehended the well-established rule, cited in the Panel's own decision, "that a party seeking adjudication of the courts on the constitutionality of statutes is required to show

that *his* constitutional rights have been ***abrogated or threatened*** by the provisions of the challenged act." *Hillsborough Inv. Co, v. Wilcox*, 13 So. 2d 448, 453 (Fla. 1943) (emphasis added). ***Every*** Plaintiff had their "constitutional rights... ***abrogated or threatened***" by the fact that the existence of the provisions of PIP itself was based on the "trade-off" giving up "access to the courts" in exchange for the unfettered $10,000 in remedies provided ***before*** the adoption of the 2012 PIP Act.

The requirement that ***all*** Florida drivers would have to pay for coverage, 1) that no longer included ***any*** access to massage therapy and acupuncture, and 2) required the showing of an undefined "emergency medical condition" simply to get what had theretofore been "the benefit of the bargain" was ***itself*** the manifest injury providing standing. The legislative deprivation of this pre-existing, delicately balanced "trade-off" was itself the injury that gave Appellees standing, and, regardless of the criticism for any "representative plaintiff," *a la* "John Doe" or "Jane Doe," the named individual Appellees themselves had "the adverse interest necessary for standing on the sole claim presented in this appeal." The "Provider Plaintiffs" did assert a violation of *their* constitutional right of access to courts sufficient to satisfy standing under any of the applicable considerations, thus meeting the requirement of the Panel's reliance on *Alachua County v. Scharps,* 855

So. 2d 195, 200 (Fla. 1st DCA 2003). Contrary to the position taken by the Panel, the burden ***was*** met here, because the composition of the operative complaint did claim, as to all named and representative Appellees, in "general allegations, that the 2012 PIP Act, "[It] totally voids the sufficient alternative relied upon by the courts to allow the original no-fault PIP insurance scheme to limit Floridian's access to the courts..." (See Complaint, p. 4, pargrapgh 13(h)). This language is the epitome of a "facial challenge." The operative count stated the following:

"Count VI: Violation of Article I §21 of the Florida Constitution

"85. Plaintiffs reincorporate and reallege paragraphs 1 through 51 above and further state:

"86. Article I §21 of the Florida Constitution requires that the courts be available to any citizen. The original no-fault scheme underlying the genesis of PIP insurance determined that efficient and unfettered access to healthcare constituted a sufficient alternative to access to the courts – and PIP insurance was upheld. Now, however, the legislature is effectively undoing this sufficient alternative by decreasing and limiting Floridians efficient and unfettered access to healthcare.

"87. Accordingly in addition to voiding the 2012 PIP Act, in the alternative that the 2012 PIP Act is upheld, the entire PIP Act should be held unconstitutional because of its limiting of Floridian's access to the courts in the absence of a sufficient alternative." (See Complaint, pp. 29-30, paragraphs 85-87).

As such, the trial court did not erroneously confer standing on the "Provider Plaintiffs," since the complaint about "their purported loss of PIP-claim revenue as a result of the 2012 PIP Act" dealt with ***other*** counts of the complaint, but did not

limit the complaint regarding "access to the courts," which was raised on behalf of ***all*** named and representative Appellees.

This fact makes the "equal protection" claims related to elections in *Sancho v. Smith,* 830 So. 2d 856, 863-64 (Fla. 1st DCA 2002), and a hospital's lack of standing to bring an "equal protection" challenge against a law making men, but not women, liable for their spouses' medical bills, as discussed in *Shands Teaching Hosp. & Clinics, Inc. v. Smith,* 497 So. 2d 644, 646 & n.1 (Fla. 1986), completely irrelevant. The alleged economic harm suffered by the "Provider Plaintiffs" neither relates to nor limits ***their*** ability to pursue their own "access-to-courts" claims, which is simply a way of phrasing the fact that the "trade-off" supporting PIP in and of itself was lost when the 2012 PIP At was enacted.

The problem with the Panel decision is that they transformed what was a "facial challenge" into a situation where they demanded, "a showing of an actual denial of access to courts in a specific factual context," without which, "the Provider Plaintiffs lack standing to assert this claim." To demand "injured motorists whose ability to sue tortfeasors has been impermissibly limited" would be to eviscerate the basic concept of seeking injunctive relief for a facially unconstitutional piece of legislation. There was nothing "hypothetical" about Appellees' claim, it was simply clear to the Appellees that the changes brought

about by the challenged provisions of the 2012 PIP Act rendered the legislation facially unconstitutional. Even the trial court recognized that you don't need an injured motorist to determine that, in the unique area of PIP, the 2012 PIP Act was a manifest constitutional violation, citing *Lasky* v. *State Farm Insurance, Co.,* 296 So. 2d 9 (Fla. 1974), and *Chapman* v. *Dillon,* 415 So. 2d 12, 19 (Fla. 1982), and finding 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 revisions eviscerate the viable alternative that PIP once was. *Id.*

Even more critical is the fact that the Appellees pursued a declaratory judgment, which included all the necessary allegations establishing jurisdiction under this statutory remedy. Sec. 86.021, Florida Statutes, provides standing to any person whose rights, status, or other legal or equitable or legal relations are affected by a statute to obtain a declaration of their rights thereunder. Florida does not adhere to the "rigid" doctrine of standing used in the federal system. See *Department of Revenue v. Kuhnlein*, 646 So.2d 717, 720 (Fla.1994). Rather, the general requirement for standing in Florida posits that "every case must involve a real controversy as to the issue or issues presented," so that "the parties must not

be requesting an advisory opinion." *Id.* at 720-21. In a seminal 1952 decision, the Supreme Court set out the Florida rule:

> "Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answers propounded from curiosity. These elements are necessary as being judicial in nature and therefore within the constitutional powers of the courts." *May v. Holley,* 59 So.2d 636, 639 (Fla.1952); *Martinez v. Scanlan,* 582 So.2d 1167 (Fla.1991).
>
> "The Declaratory Judgments Act is 'substantive and remedial,' with a purpose 'to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations,' and the Act is 'to be liberally administered and construed.' § 86.101, Fla. Stat. (1997). Individuals can challenge the validity of a statute in a declaratory action. § 86.021, Fla. Stat. (1997)." *Reinish v. Clark*, 765 So.2d 197, 202-203(1st DCA, 2000).

Additionally, the Panel decision can not be reconciled with the time tested theories on standing articulated in *State ex rel. Clarkson v. Phillip*, 70 Fla. 340, 70 So. 367, 369 (1915), which, as shown in the instant action, beyond any doubt, the 2012 PIP Act clearly is "of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties." The Appellees satisfy standing on all these bases:

> "One cannot raise an objection to the constitutionality of a part of a statute, unless his rights are in some way injuriously affected thereby, or unless the unconstitutional feature renders the entire act void or renders the portion complained of inoperative.... The constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties." *Id.*

The "injury" caused by the manifest loss of the common law right described by the trial court does not require the wreckage of any automobiles, and it involves the rights of Appellees' sufficiently to invoke the Declaratory Judgments Act, and undeniable renders invalid those aspects of the PIP Act that affect the Appellees' rights or duties.

II. MOTION FOR REHEARING *EN BANC*

In support of this Motion for Rehearing *En Banc*, Appellees would respectfully submit that this is a case of "exceptional importance," and it is also equally important that the entire Court review the serious problems created by reversing a temporary injunction which would otherwise be reversible only as "an abuse of discretion," particularly when the polar view of standing articulated by the Panel will do nothing but lead to the opening of the floodgates of litigation now invited by the enforcement of the facially unconstitutional aspects of the 2012 PIP Act.

Critically, with the decision affirming the trial court, "well established principles of law" have been overlooked. The most important of these is that the Panel's affirmance is clearly in conflict with well settled First District Court of Appeal law, primarily, the application of the Declaratory Judgments Act set forth in voluminous First District Court of Appeal cases, a good example being: *Bloomfield v. Mayo*, 119 So.2d 417 (Fla. 1st DCA, 1960)(dealing with injunctive relief); and all First District Court f Appeal decisions set forth above.

These oversights create an intra-district conflict, itself justifying rehearing and rehearing *en banc*. For these important reasons, Appellees respectfully submit that this matter should be considered by this Honorable Court *en banc*, and the issues overlooked and misapprehended by the Panel be corrected.

Respectfully Submitted,

/s/ Luke C. Lirot LUKE CHARLES LIROT, Esq., Florida Bar No. 714836 Luke Charles Lirot, P.A. 2240 Belleair Road, Suite 190 Clearwater, Florida 33764 (727) 536 – 2100 [Telephone] (727) 536 – 2110 [Facsimile] luke2@lirotlaw.com [Primary E-mail] jimmy@lirotlaw.com [Sec. E-mail] **Co-Counsel for the Appellees**	/s/ Adam S. Levine ADAM S. LEVINE, M.D., J.D. Florida Bar No. 78288 Fl. Legal Adv. Group of Tampa Bay 1180 Gulf Boulevard, Suite 303 Clearwater, Florida 33767 (727) 512 – 1969 [Telephone] (866) 242 – 4946 [Facsimile] aslevine@msn.com [Primary E-mail] **Co-Counsel for the Appellees**

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision involves an issue of exceptional importance and that a consideration by the full Court is necessary to maintain uniformity of the decisions of this Court, as set forth herein.

/s/Luke Lirot
LUKE CHARLES LIROT, P.A.
Luke Charles Lirot, Esquire
Florida Bar No. 714836

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 7th day of November 2013.

Counsel for the Appellants:

C. Timothy Gray	tim.gray@floir.com
J. Bruce Culpepper	bruce.culpepper@floir.com
Pamela Jo Bondi	pam.bondi@myfloridalegal.com
Allen Winsor	allen.winsor@myfloridalegal.com
Rachel Nordby	rachel.nordby@myfloridalegal.com
Timothy Osterhaus	timothy.osterhaus@myfloridalegal.com

Amici:

Theodore E. Karatinos	tedkaratinos@hbklawfirm.com
Katherine E. Giddings	katherine.giddings@akerman.com
Nancy M. Wallace	nancy.wallace@akerman.com
Marcy L. Aldrich	marcy.aldrich@akerman.com
Martha Parramore	martha.parramore@akerman.com
Debra Atkinson	debra.atkinson@akerman.com
Matthew C. Scarfone	mscarfone@cftlaw.com
Maria Elena Abate	mabate@cftlaw.com
Jessie L. Harrell	jharrell@appellate-firm.com,

filings@appellate-firm.com
Bryan S. Gowdy bgowdy@appellate-firm.com

/s/ Luke C. Lirot LUKE CHARLES LIROT, Esq., Florida Bar No. 714836 Luke Charles Lirot, P.A. 2240 Belleair Road, Suite 190 Clearwater, Florida 33764 (727) 536 – 2100 [Telephone] (727) 536 – 2110 [Facsimile] luke2@lirotlaw.com [Primary E-mail] jimmy@lirotlaw.com [Sec. E-mail] **Co-Counsel for the Appellees**	/s/ Adam S. Levine ADAM S. LEVINE, M.D., J.D. Florida Bar No. 78288 Fl. Legal Adv. Group of Tampa Bay 1180 Gulf Boulevard, Suite 303 Clearwater, Florida 33767 (727) 512 – 1969 [Telephone] (866) 242 – 4946 [Facsimile] aslevine@msn.com [Primary E-mail] **Co-Counsel for the Appellees**

CERTIFICATE OF COMPLAINCE

I hereby certify that this brief meets the page limitations of Rule 9.330, 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 Fla. R. App. P. 9.210(a)(2).

/s/Luke Lirot
LUKE CHARLES LIROT, P.A.
Luke Charles Lirot, Esquire
Florida Bar No. 714836