SUPREME COURT OF FLORIDA

AGENCY FOR HEALTH CARE ADMINISTRATION, ET AL.,	)	
Appellants, Cross Appellees,	)	
vs.	)	CASE NO. 86,213
ASSOCIATED INDUSTRIES OF FLORIDA, INC., ET AL.,	)	
Appellees, Cross-Appellants.	)	

AMICUS CURIAE BRIEF OF DADE COUNTY PUBLIC HEALTH TRUST, AN AGENCY AND INSTRUMENTALITY OF DADE COUNTY, FLORIDA

ROBERT A. GINSBURG
DADE COUNTY ATTORNEY

Sara A. Price
Assistant County Attorney
Dade County Public Health Trust
1611 N.W. 12 Avenue, West Wing 109
Miami, Florida 33136
(305) 585-1313

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STATEMENT OF THE CASE AND OF THE FACTS

Dade County Public Health Trust, an Agency and Instrumentality of Dade County, Florida (hereinafter "Dade County Public Health Trust"), adopts and incorporates by reference the Statement of the Case and Statement of the Facts set forth in the initial brief of Appellant/Cross Appellee, the Agency for Health Care Administration (hereinafter "the Agency").

SUMMARY OF ARGUMENT

The problems associated with health care costs, access, and quality are well documented. A series of health care task forces were created in 1989 to make recommendations about ways to address these problems. These task forces all concluded that the problems could be better addressed if a single state agency were formed to address all of the state's health care needs. To that end, in 1992, the Legislature created the Agency for Health Care Administration.

It is clear from the history of the law creating the Agency that the Legislature intended the Agency to function as an independent department within the executive branch of government. Although the original legislation would have created a Department of Health, at the eleventh hour the Legislature changed the name of the organization to the Agency for Health Care Administration to avoid violating the Florida Constitution's limitation on the number of departments.

In spite of its change in name, the Agency's mission has remained constant: To ensure more efficient and coordinated health care regulation and policy. In its brief three years of existence, the Agency already has furthered these goals, initiating a number of programs to improve access, reduce costs, and ensure Floridians receive high-quality health care. Programs such as Community Health Purchasing Alliances, Medicaid managed care, certificate of need, state health purchasing, health quality assurance, and medical quality assurance are evidence that the 1992 Legislature's objective was not in vain.

The Agency's success thus far reinforces its continued existence in the future. Before the Agency's existence, the responsibilities for health care regulation, data collection, financing, and policy development lacked coordination and were fragmented. If the Agency were eliminated those problems would only recur. With the unprecedented changes that are occurring in the health care delivery system, Florida now and in the future will need the coordinated, innovative, efficient administration of the health care delivery system that the Agency brings to state government.

ARGUMENT

This brief will be limited to discussing the court's ruling that the Agency for Health Care Administration is unconstitutional. In particular, this brief will focus on the goal of the Florida Legislature in creating the Agency, the ways in which the Agency has furthered that goal, and how those goals may be frustrated if the Agency is declared unconstitutional.

I. THE FLORIDA LEGISLATURE CREATED THE AGENCY TO INTEGRATE HEALTH CARE POLICY, REFORM AND REGULATION AND, THEREBY, TO PROVIDE MORE ACCESSIBLE AND AFFORDABLE HEALTH CARE TO FLORIDA RESIDENTS.

A. Legislative History

In 1992, the State Comprehensive Plan set a goal that "the public shall have access to affordable health care." In spite of that goal, in 1992 Florida still had as many as 2.5 million residents with no access to health insurance coverage. Section 408.002, Florida Statutes. The problems of Florida's uninsured were not isolated, but rather had implications for health care's overall affordability. Increasingly providers who were required to treat the uninsured were forced to shift their costs to the insured. Insurance companies in turn passed their higher costs on to consumers in the form of higher premiums, creating even more uninsured.

To address the problems of health care accessibility and affordability, the Legislature created two task forces in 1989, one to review government-financed health care and the other to review private sector responsibility. The Florida Task Force on Government Financed Health Care and the Florida Task Force on Private Sector Health

Care Responsibility provided the Legislature with a series of recommendations. Included in these recommendations was the idea that a single state agency be responsible for reforming the health care system. Florida Task Force on Government Financed Health Care, *Final Report* 7-8 (March, 1991); Florida Task Force on Private Sector Health Care Responsibility, *Final Report to the Governor and Legislature* 8 (February, 1991) (App. A and B).

Following these recommendations, the Legislature created a Governor-appointed health care work group in 1991 to address the health care accessibility, affordability and quality of care issues facing Florida and to provide recommendations for systemic health care reform. In December 1991, the Florida Health Care Work Group issued its recommendations, in which it stated that

> The governance structure for the state of Florida for health care is fragmented and needs to be better coordinated. A single authority or department of state government should be responsible for health policy development and the current functions of the Certificate-of-Need, the Health Care Cost Containment Board, and professional and facility regulation in coordination with the Department of Insurance, which should certify and regulate plans offering health care coverage in Florida.

The Florida Health Care Work Group, *Addressing Florida's Health Care Concerns: Recommendations to The Governor and the Legislature 15-16* (December 1991) (App. C).

Attempting to carry out the Health Care Work Group's recommendations, in the 1992 legislative session, Representative C. Fred Jones and other representatives proposed House Bill 1477, which aimed to put into law a number of the work group's

recommendations. Most important was the creation of a new Department of Health. As established in House Bill 1477, the new Department of Health was to oversee for health-related professional boards, facility licensure and inspection, the certificate-of-need program, health policy and planning, activities of the Health Care Cost Containment Board, and state health purchasing.

By bringing the disparate aspects of health care regulation and policy into a single state agency the Legislature sought to "improve the state's ability to implement health care reforms that are effective, better coordinated, logical and use the fewest resources." House of Representatives, Committee on Appropriations, Bill Analysis and Economic Impact Statement for CS/HB 1477 (March 6, 1992), (App. D).

In February and early March, HB 1477 made its way through the Legislature with the Department of Health language intact. Committee Substitute ("CS") for HB 1477 passed the House Health Care Committee on February 11, 1992, and the House Committee on Appropriations on March 6, 1992. CS/HB 1477 was significantly revised on March 10, 1992, however, when an amendment appeared on the House floor that struck everything after the enacting clause of CS/HB 1477 and created completely new language. The new language created the Agency for Health Care Administration within the Department of Administration and, with the addition of some later amendments which were passed on the Senate Floor, created the existing Section 20.42, Florida Statutes.[1]

[1] The Senate later incorporated CS/HB 1477 into Committee Substitute for Senate Bill 2390. CS/SB 2390 passed the Legislature on May 14, 1992, and included among its many provisions a newly created Agency for Health Care Administration located for administrative purposes only in the Department of Professional Regulation.

The sudden, eleventh hour change from a Department of Health to an Agency for Health Care Administration is readily explained in the law's legislative history:

> Because of the constitutional limitation placed on the number of state agencies that can exist (Article IV, section 6), the new Department of Health was converted to the Agency for Health Care Administration which is located for administrative purposes only within the Department of Professional Regulation.

Florida House of Representatives, Committee on Insurance and Health Care, Final Bill Analysis and Economic Impact Statement for CS/SB 2390, page 66 (May 14, 1992), (App. E). Thus, the Legislature undoubtedly intended to create, through the Agency for Health Care Administration, a "principal administrative unit within the executive branch of government" to regulate, set policy, and otherwise direct the administration of health care in the state. See Section 20.03(2), Florida Statutes.

B. The Agency's Mission

The Florida Legislature's goals in creating the Agency for Health Care Administration are plainly stated in statute. In Section 408.002, Florida Statutes, the Legislature recognized that the "distribution of health care responsibilities among multiple state agencies has added excessive costs to the health care delivery system." Accordingly, the Legislature created the Agency "in order to reduce administrative costs and to improve the state's efficiency in addressing the health care crisis." Fla. Stat. § 408.002 (1992). Moreover, the Legislature expressly intended to create the Agency to

"consolidate health care financing, data collection, and regulatory functions into a single state agency." Id.

Since its creation, the Agency has strived to coordinate Florida's health care reform efforts. In doing so it has focused on three primary issues: (1) ensuring access to health care, (2) containing cost increases, and (3) ensuring high-quality care. The Agency has consistently sought to make these themes the guiding principles for each component of health care regulation and policy. In this way it has adhered to the Legislature's original goals of establishing a single state agency responsible for making effective, coordinated health care reforms.

II. THROUGH THE AGENCY'S EFFORTS FLORIDA HAS BECOME A RECOGNIZED LEADER IN HEALTH CARE REFORM.

Since its establishment in July, 1992, the Agency has made substantial progress toward fulfilling its mission. Following its original mandates, the Agency has implemented a number of programs designed to improve access to care, reduce the cost of care, and ensure that Floridians receive high-quality care.

A mere five months after the Agency came into existence it convened Florida's first ever Health Care Summit, which brought together Florida's major health care players including providers, insurers, consumers, employers, and policy makers. The purpose of the summit was to forge consensus on Florida's health care problems and to generate ideas for solving them cooperatively. (See App. F).

The Agency used the information collected at the Summit to develop The Interim Florida Health Plan, which the Legislature mandated in the 1992 session. Fla. Stat. § 408.006 (1993). The 1992 Interim Florida Health Plan set forth the principles of health care reform that the Agency would later use to guide its policies.

A. The Agency Has Increased Access to Health Care Through Managed Competition.

Recognizing that Floridians prefer private sector solutions over government-run programs, the Agency developed a managed competition model to promote cost conscious consumer choice. The Legislature subsequently enacted the Health Care and Insurance Reform Act of 1993, which created 11 Community Health Purchasing Alliances ("CHPAs"). 1993 Fla. Laws 129; Fla. Stat. § 408.70-408.706 (1994 Supp.). Through the CHPAs, small businesses may purchase affordable health insurance for their employees and their dependents. Organizations called Accountable Health Partnerships (AHPs) compete for CHPA business on the basis of price and quality. Because of this competition, CHPA premiums are substantially lower than those of other available insurance products. As a result, more than 54,000 Floridians have been able to purchase affordable health insurance through the CHPAs. (App. G). To the extent that many of these Floridians were formerly uninsured, the CHPA program will reduce the cost-shifting that occurs when providers are forced to inflate the bills of insured patients to cover the cost of providing care to the uninsured.

B. The Agency Has Dramatically Reduced Health Care Costs Through Medicaid Managed Care, Renegotiation of the State Employees' Health Insurance Contract, and the Certificate of Need Program.

The Agency's cost containment programs balance the market by helping the state's consumers and purchasers make smarter health care purchasing and utilization decisions.

1. Medicaid Managed Care

Throughout the late 1980's and into the early 1990's the rate of increase in the Medicaid program exceeded 20 percent per year. (App. H). To address this problem, the Agency aggressively pursued managed care in the Medicaid program. Managed care may take the form of enrollment in prepaid health plans or health maintenance organizations ("HMOs") or the MediPass program, which is the state's primary care case management program.

Under the capitated system, providers are reimbursed five percent less than they would have been under the traditional fee-for-service program. Fee-for-service reimbursement creates incentives for providers to render more care than may be medically necessary because their reimbursement depends on the number of services they provide. Recognizing this, the Medicaid program has been and continues to move towards a capitated system, that is, managed care, in which providers receive a set payment for all of the services a Medicaid patient will need. Managed care carries with it a strong incentive for providers to control. Under the MediPass program, primary care

providers receive an extra monthly sum to serve as gatekeepers for Medicaid recipients' access to more specialized services.

Currently almost 440,000 Medicaid recipients are enrolled in prepaid health plans or HMOs and more than 220,000 are enrolled in the MediPass program. Due in part to the Agency's managed care initiative, the rate of increase in the Medicaid program slowed from more than 20 percent annually to less than 10 percent by 1994.

2. State Health Purchasing

In chapter 92-33, Laws of Florida, the Legislature made the Agency responsible for purchasing health care coverage for the state employee health insurance program on July 1, 1993. In chapter 93-129, Laws of Florida, the Agency's responsibilities were clarified. The Legislature stated its intent that the agency be responsible for all aspects of the purchase of health care for state employees under the state self-insured program and in the purchase of health care services through contracts HMOs. Its responsibilities include procuring the administrator of the state employee health insurance plan, developing the plan's benefit design, establishing the plan's cost sharing and cost containment requirements, creating and maintaining administrative cost controls, collecting and analyzing data; and monitoring and evaluating the administrator and provider network performance.

Since assuming these responsibilities, the Agency has developed master policies for the state's self-insured plan and for HMOs that serve state employees. The policy specifies the benefits offered by the state along with concise information on eligibility,

termination, effective dates of coverage, rights to extension and conversion, appeals, deductibles, coinsurance, copayments, benefit maximums, pre-authorization, limitations, and exclusions. The master policies provide information to state employees and plan administrators that has not been available before.

The Agency has negotiated contracts with HMOs serving state employees for the years 1994, 1995, and 1996. As a result of these negotiations, the state saved approximated $6.8 million in 1994 and $23 million in 1995. In 1995, the Agency prohibited HMOs from offering premiums that exceed the statewide average per-employee rate for individual and family coverage under the self-insured plan, and further negotiated $4 million worth of savings from premium quotes that came in under the statewide average per-employee rate.

3. Certificate of Need Program

A strong Certificate of Need (CON) program is another part of the Agency's cost containment strategy. The CON program seeks to mold the health care delivery network so that it meets the needs of the community. CONs are required for tertiary care and other high cost services where the market forces of supply and demand do not operate. CON ensures that the number of providers who perform such high-cost, tertiary services matches the state's need for those services. By eliminating duplication of certain services, CON enables hospitals to spread the fixed costs required to furnish such high-cost services over more patients, thereby making those services more affordable.

CON also bridges the gap between cost and quality of care concerns. By allowing only a few high-quality providers to offer specialized care, CON ensures that specialized procedures such as bone marrow and kidney transplants are performed only by the most well trained and experienced physicians.

C. The Agency Has Improved Quality of Health Care Through A Variety of Programs.

1. Coordinating Health Facility and Health Professional Regulation

Bringing the divisions of Health Quality Assurance (HQA) and Medical Quality Assurance (MQA) together in a single state agency already has yielded results. In the past, the Agency, which was responsible for investigating complaints against health facilities, and the Department of Business and Professional Regulation (DBPR), which investigated health professional complaints, would conduct separate investigations. Because the teams that investigate facility complaints and complaints against health professionals are now in the same agency, they conduct joint investigations, making the investigatory process more efficient and reducing the likelihood that providers rendering poor-quality care will fall through the cracks. In addition, the Agency has reduced the investigatory process from about two weeks to one week because a single team now investigates complaints.

Reducing duplicative efforts, streamlining regulations, and eliminating contradictory requirements between health facility and health professional regulations are other benefits of a single agency. For example, preliminary analyses of HQA and MQA

statutes and rules have identified some contradictions. The Agency is in the process of matching the statutory and regulatory requirements for health facilities and health professionals and devising strategies — such as administrative changes or statutory amendments — that will make the requirements complementary rather than contradictory.

2. Practice Guidelines

In Chapter 92-33, Laws of Florida, the Legislature directed the newly created Agency to begin working on practice guidelines to contain costs and improve health care quality. Practice guidelines have been defined by the Institute of Medicine as "systematically developed statements to assist practitioner and patient decisions about appropriate health care for specific clinical circumstances." Agency for Health Care Administration, Office of Health Policy, State Center for Health Statistics, *Practice Guidelines* 1 (July, 1995), (App. I). Adopting scientifically sound practice guidelines has been accepted as a method of ensuring appropriate service utilization and minimizing variations in health care delivery among providers in different regions.

By December, 1993, the Agency had endorsed, in consultation with industry work groups, 183 practice guidelines for anesthesia and diagnostic imaging, which far exceeded its self-imposed goal of 50 guidelines. During 1994, the Agency worked with a number of advisory groups to evaluate existing guidelines and to establish priorities for developing guidelines to endorse in the future. Agency for Health Care Administration, Office of Health Policy, State Center for Health Statistics, *Practice Guidelines* 1 (July,

1995), (App. I). The Agency is continually evaluating and endorsing guidelines, which provide yet another way to curb health care costs and assure quality.

3. Consumer Education

Consumers' education and satisfaction with their health care is another important aspect of quality. The Agency is currently conducting patient surveys of CHPA and Medicaid enrollees that will compare patients' satisfaction in managed care and fee for service arrangements. The Agency is also working with many of the state's academic and professional experts in health care to develop performance report cards which indicate utilization and quality in Florida's acute-care hospitals. Versions of the reports will be issued for two different audiences. One is intended mainly for health care providers, purchasers, and researchers. Also, it will be a resource for hospitals to use in their internal quality improvement programs. The other, aimed at the health care consumer, will enable the public to make informed comparisons of hospitals and make vital health care decisions.

4. Medicaid Managed Care Survey

In encouraging more Medicaid recipients to enroll in managed care, the Agency had an even greater responsibility to ensure that Medicaid prepaid health plans ("PHPs") and HMOs provided high-quality care. In 1995, the Agency undertook a comprehensive review of the state's 29 Medicaid managed care plans. In January and February, 1995, survey teams reviewed over a three-day period every part of the Medicaid managed care

plans. The contract compliance survey ultimately resulted in a number of Medicaid managed care plans being fined or sanctioned. In addition, the Agency substantially revised the Medicaid prepaid health plan contract for 1995-1996 to ensure future quality of care for Medicaid managed care recipients.

The Agency also consolidated the Medicaid managed care unit with the commercial HMO licensing unit in the Division of Health Quality Assurance to further improve quality oversight. In doing so, it sought to begin uniform quality assurance monitoring of all managed care plans, both public and private, and to streamline quality assurance operations.

III. FLORIDA'S HEALTH CARE REFORM PROGRESS WILL BE SEVERELY JEOPARDIZED IF THE AGENCY IS DECLARED UNCONSTITUTIONAL.

Should the Court determine the Agency to be unconstitutional, it is likely that many of the functions it now performs would continue in other state agencies. Nevertheless, the efficiency, innovation, and progress the Agency has made in the key areas of health care access, cost and quality would be lost.

To understand the problems that would result from eliminating the Agency, one need only look to Florida's recent past. Before the Agency's creation, groups as disparate as the Florida Task Force on Private Sector Health Care Responsibility, the Florida Health Care Work Group, and the Florida Task Force on Government Financed Health Care agreed that the responsibilities for health care regulation, data collection, financing, and policy development were fragmented and lacked coordination. (See App. A, B , and C). These functions were spread across several state agencies — each with its own

independent management team and method of operation — resulting in competitive rather than cooperative approaches to solving problems. Moreover, access, cost, and quality in health care suffered because these disparate entities had no incentive to use each other's resources and expertise, to communicate problems which would their regulatory responsibilities, or to reduce duplicative efforts. Finally, the lack of a single health care organization resulted in the state's inability to set priorities and provide a focus and framework for critical health care issues.

There are many examples of how the state's previous organization of health care regulation contributed to problems rather than solving them. For instance, when responsibilities for regulating health facilities and health professionals were divided between two state agencies Floridians paid for two investigations each time a complaint was received. Two investigations could lead to separate, and possibly contradictory, findings which could jeopardize patient care. As mentioned earlier, the Agency has eliminated these duplications by forming joint teams to perform a single, integrated investigation. Also, improved communication between the divisions of HQA and MQA facilitates information sharing.

The lack of a single agency with overall health care responsibilities means that no one entity, or individual, is accountable to the public. When multiple agencies are responsible for different pieces of the health care system, frequently the result is a great deal of blame-shifting without anyone accepting responsibility or devising solutions to the problems. Another outcome of this fragmentation is an operation which focuses only on maintaining the status quo and avoiding crises rather than developing innovative,

long-range responses to Florida's health care needs. This type of innovative planning led in part to the creation of the CHPAs, to which more than 54,000 Floridians owe their insurance coverage.

Now, more than ever, health care is undergoing unprecedented changes in service delivery and financing. These changes will dramatically affect how and from whom Floridians receive health care. Indeed, they will so alter the health care environment that one cannot yet predict what the health care delivery system will look like in the future. In the midst of these changes, it is imperative that there be a single state agency with the resources and knowledge to ensure that Floridians continue to receive high-quality, affordable health care. The Legislature already recognized this need when it created the Agency for Health Care Administration. To eliminate it now would not only jeopardize its achievements, but may also put at risk the future of Florida's health care.

CONCLUSION

For all of the foregoing reasons, the Dade County Public Health Trust and Orlando Regional Medical Center, respectfully request the Court find the Agency for Health Care Administration to be constitutionally formed.

Respectfully submitted,

ROBERT A. GINSBURG
Dade County Attorney

Sara A. Price
Asst. County Attorney
Fla. Bar #831425
Dade Co. Public Health Trust
1611 N.W. 12 Avenue, West Wing #109
Miami, FL 33136
(305) 585-1313

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Arthur J. ENgland, Jr., Esq. & Harry Richard, Esq., Greenberg, Traurig, Hoffman, Lipoff, Rose & Quentel, P.A., 101 East college Avenue, Tallahassee, Fla. 32302; Alan C. Sundberg, Esq., Carlton, Fields Ward, Emanuel, Smith, & Cutler, P.A. P. O. Drawer 190, Tallahassee, FL. 32302; Dexter Douglas, General Counsel, Executive Office of Governor, tThe Capitol, St. 209, Tallahassee, FL 32309; Luis F. Fhubener, Esq., Charles McCoy, Esq. James A. Petes, Esq., Asst. Attys. General Office of Attorney General, Hauser Hall 420, 1575 Mass Avenue, Cambridge, MASS 02138; Jonathan Massey, Special Counsel, 3920 Northampton Street, Washignton, D.C. 20015; Brian Koukouthos, Esq., Sepcial Counsel, 9 Avaon Road, Bedford, MASS 01730 and Wayne Hogan, Esq., 804 Balcstone Bldg., 233 East Bay Street, Jacksonville, FL 32202, this 6th day of September, 1995.

Sara A. Price