

**IN THE SUPREME COURT OF FLORIDA**

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,  
DIVISION OF PARI-MUTUEL  
WAGERING,

Petitioner,

Case No. 93,952

v.

INVESTMENT CORPORATION OF  
PALM BEACH, et al.,

Respondents.

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On Discretionary Review of a Decision of  
the Third District Court of Appeal Based  
Upon Express and Direct Conflict

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**AMENDED BRIEF OF AMICUS CURIAE PHYCOR, INC.**

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## **PRELIMINARY STATEMENT**

Amicus curiae PhyCor, Inc. (“PhyCor”) is a physician practice management company that manages medical practices in 28 states, including Florida. PhyCor is an amicus curiae in a case currently pending in the First District Court of Appeal, Phymatrix Management Company, Inc. v. Bakarania, Case No. 97-4543, which involves an issue similar to the question raised in this case concerning the proper use of a declaratory statement by a state agency.

PhyCor’s sole purpose in filing this amicus curiae brief is to provide this Court with information concerning the legislative history of the 1996 amendments to the declaratory statement statute, section 120.565, Florida Statutes, which PhyCor believes will assist the Court in its resolution of this case.

## **SUMMARY OF THE ARGUMENT**

The 1996 legislative changes to the declaratory statement statute, section 120.565, Florida Statutes, were not intended to be substantive. The amendments to this section were among those drafted by a group of government and non-government lawyers assembled by the Executive Office of the Governor in 1995 to “simplify” the Administrative Procedure Act. The “simplified draft” produced by these lawyers was intended to rearrange existing language in a more logical fashion, eliminate duplicative provisions, and make the APA easier to read.

This “simplified draft” was reviewed and recommended to the Legislature by the Governor’s Administrative Procedure Act Review Commission “with the express understanding that it makes no substantive changes to the APA.” The Legislature acknowledged the nonsubstantive nature of the “simplified draft” in its Final Staff Analysis of the 1996 APA legislation and used this draft as the base document for its rewrite of chapter 120, Florida Statutes.

Nothing in the Legislature’s 53-page staff analysis of the 1996 APA amendments describes any substantive changes to section 120.565, although the analysis addresses the 1996 legislation section-by-section and identifies numerous substantive changes. Rather, the analysis of section 120.565 states that “[t]he provisions concerning declaratory statements are revised for clarity.” Similarly,

nothing in the Final Report of the Governor's APA Review Commission references any recommended changes to the declaratory statement statute.

The "simplified draft" that was used by the Legislature as a basis for the 1996 amendments illustrates the intent of the drafters to streamline, clarify, and eliminate excess wording in the APA without making substantive changes. The recommended changes to section 120.565 included in the "simplified draft" are consistent with that intent.

Thus, the current version of section 120.565 should not be interpreted differently than prior versions of the statute, and longstanding case law construing section 120.565 remains valid and should not be disturbed.

## ARGUMENT

**THE 1996 AMENDMENTS TO SECTION 120.565 WERE INCLUDED IN A PACKAGE OF REVISIONS THAT WERE INTENDED TO “SIMPLIFY” THE ADMINISTRATIVE PROCEDURE ACT AND SPECIFICALLY WERE NOT INTENDED TO MAKE SUBSTANTIVE CHANGES.**

The Court is presented with the opportunity in this case to interpret the scope of Florida’s declaratory statement statute, section 120.565. Both the lower court opinion under review, Investment Corp. of Palm Beach v. Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation, 714 So. 2d 589 (Fla. 3d DCA 1998), and the conflict opinion, Chiles v. Department of State, 711 So. 2d 151 (Fla. 1st DCA 1998), interpret section 120.565 and reference 1996 amendments to the statute.

Both courts, to differing degrees, credit the 1996 amendments with substantive changes to section 120.565, noting that the substantive changes involve deletion of the word “only.” See Investment Corp. of Palm Beach, 714 So. 2d at 591 n.3; Chiles, 711 So. 2d at 154. The current version of section 120.565 provides in relevant part:

(1) Any substantially affected person may seek a declaratory statement regarding an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances.



(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

Prior to the 1996 amendments, section 120.565 provided in relevant part:

Each agency shall provide by rule the procedure for the filing and prompt disposition of petitions for declaratory statements. A declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his or her particular set of circumstances only.

(Emphasis supplied).

Although the court in Investment Corp. appropriately set aside the declaratory statement issued by the agency because its subject matter was more appropriate for rulemaking proceedings, the majority nonetheless found that “the 1996 deletion of ‘only’ means that the issue raised by a petition for a declaratory statement need not apply solely to the petitioner.” 714 So. 2d at 591 n.3. The court in Chiles placed even more reliance on the 1996 statutory change, stating that deletion of the word “only” makes the declaratory statement statute “less restrictive” than earlier versions of the statute and “signifies that a petition for declaratory statement need not raise an issue that is unique.” 711 So. 2d at 154. The court in Chiles went on to suggest that longstanding case law interpreting section 120.565 is no longer valid as a result of the 1996 amendment. See id.

Both courts ignore the legislative history of the 1996 amendments to the Administrative Procedure Act (“APA”). This history makes clear that the amendments to section 120.565 in 1996, including deletion of the word “only,” were adopted as part of a “simplification” of the APA that was not intended to be substantive. See Fla. H.R. Comm. on Streamlining Govt’l Regs., CS for SB 2290, 2288 (1996) Staff Analysis (June 14, 1996) (on file with comm.) (attached as App. C) [hereinafter Staff Analysis, ‘96 APA Amendments]; Governor’s Administrative Procedure Act Review Comm’n, Final Rep. (Feb. 20, 1996) (attached as App. D) [hereinafter APA Comm’n, Final Rep.]; Affidavit of Executive Director, Governor’s Administrative Procedure Act Comm’n authenticating attached “Simplified Draft” of APA referenced in APA Comm’n, Final Rep. (attached as App. E) [hereinafter Simplified Draft]. This legislative history demonstrates that the word “only” was deleted from section 120.565 not for any substantive purpose, but because drafters of the “simplified” APA believed that the word was superfluous.

Many of the 1996 changes to the APA implement the recommendations of the Governor’s Administrative Procedure Act Review Commission. See Staff Analysis, ‘96 APA Amendments, App. C at 1. The Commission issued its final report on February 20, 1996, and concentrated its efforts in three areas:

simplifying the APA, increasing its flexibility in the application of administrative rules and procedures, and increasing agency accountability to the Legislature and the general public. See Staff Analysis, ‘96 APA Amendments, App. C at 3 (emphasis supplied).

The base document used by the Legislature for its massive rewrite of chapter 120 in 1996 was the so-called “simplified draft” of the APA that was recommended to lawmakers by the Review Commission. See Staff Analysis, ‘96 APA Amendments, App. C at 27. This draft was crafted over the course of many months by a team of government and non-government lawyers assembled by the Executive Office of the Governor. See APA Comm’n, Final Rep., App. D at 6. The goal of these lawyers was to make the APA easier to read and understand. See id. Duplicative provisions were eliminated and paragraphs and subsections were shortened. See id. The draft eliminated “legalese” and “unnecessary wording.” Id. at 7. The simplified draft was not intended to make substantive changes. Indeed, the Commission specifically stated in its final report:

The Commission recommends adoption of the simplified draft with the express understanding that it makes no substantive changes to the APA. The Commission also recommends that the simplified draft serve as the basis for future substantive changes that may be considered by the Legislature, including those identified in this report.

APA Comm'n, Final Rep., App. D at 8. The Legislature specifically recognized the nonsubstantive nature of the simplified draft, noting that it “rearranges the provisions of the chapter for clarity and readability.” Staff Analysis, ‘96 APA Amendments, App. C at 27.

Nothing in the Legislature’s 53-page staff analysis of the 1996 APA amendments describes any substantive changes to section 120.565, the declaratory statement statute, although the analysis addresses the 1996 legislation section-by-section and identifies numerous substantive changes. Indeed, the only references to section 120.565 in the staff analysis are at page 40, where the analysis notes that “[t]he provisions concerning declaratory statements are revised for clarity,” and at page 47, which simply lists the section where the revisions are located. Staff Analysis, ‘96 APA Amendments, App. C at 40, 47 (emphasis supplied). Similarly, nothing in the APA Review Commission’s final report references any recommended changes to the declaratory statement statute. See generally APA Comm’n, Final Rep., App. D.

A copy of the “simplified draft” can be found at Appendix E. This is the 59-page document recommended by the APA Review Commission and used by the Legislature as a basis for the 1996 APA rewrite. None of the changes in this draft were intended either by the Review Commission or by the Legislature to be

substantive, as previously noted. Indeed, a review of the draft illustrates the intent of the drafters: to streamline, clarify, and eliminate excess wording in the APA. The changes to section 120.565 in the “simplified draft” can be found at pages 28-29.

PhyCor respectfully submits that the 1996 amendments to the APA do not substantively change section 120.565 or the validity of longstanding case law interpreting that section. Under the present version of section 120.565, as under earlier versions, a declaratory statement is an appropriate vehicle for articulating an agency interpretation of a statute or rule, as that statute or rule affects a petitioner’s particular set of circumstances. Section 120.565 is not an appropriate vehicle for articulating broad policy statements that affect numerous groups or individuals. Agency statements of general applicability should be adopted as rules. See § 120.54(1), Fla. Stat.; Tampa Elec. Co. v. Florida Dep’t of Community Affairs, 654 So. 2d 998, 999 (Fla. 1st DCA 1995); Regal Kitchens, Inc. v. Florida Dep’t of Revenue, 641 So. 2d 158, 161-62 (Fla. 1st DCA 1994); Florida Optometric Ass’n v. Department of Professional Regulation, Bd. of Opticianry, 567 So. 2d 928, 937 (Fla. 1st DCA 1990).

## CONCLUSION

For the reasons expressed, PhyCor respectfully requests that this Court approve the decision of the Third District Court of Appeal in Investment Corp. of Palm Beach to the extent that it recognizes that declaratory statements are appropriate for dealing with a petitioner's particular factual situation, but are inappropriate when they would result in agency statements of general applicability stating law and policy. As noted previously, the Legislature's staff analysis of section 120.565 states that "[t]he provisions concerning declaratory statements are revised for clarity." PhyCor also respectfully requests that this Court clarify that the 1996 amendments to section 120.565, Florida Statutes, as illustrated by legislative history, were not intended to be substantive.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the Amended Brief of Amicus Curiae PhyCor, Inc. has been furnished by U.S. Mail this \_\_\_\_ day of February, 1999, to the following:

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The amended brief has not been changed in any way except a change in the font from Times Roman 12 point to Times Roman 14 point.

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