IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-870

FOUNDATION HEALTH, A FLORIDA HEALTH PLAN, INC.; HEALTH OPTIONS, INC.; VISTA HEALTH PLAN f/k/a HIP HEALTH PLAN OF FLORIDA, INC.; HUMANA MEDICAL PLAN, INC. f/k/a PCA FAMILY HEALTH PLAN, INC; HUMANA MEDICAL PLAN, INC. f/k/a PCA HEALTH PLANS OF FLORIDA, INC.; and, HEALTH OPTIONS CONNECT, INC. f/k/a PRINCIPAL HEALTH CARE OF FLORIDA, INC.,

***Petitioners*,**

vs.

WESTSIDE EKG ASSOCIATES,

Respondent.

On Discretionary Review Of A Decision Of the Fourth District Court of Appeal

---

BRIEF OF AMICI CURIAE

FLORIDA HOSPITAL ASSOCIATION,

FLORIDA COLLEGE OF EMERGENCY PHYSICIANS,

the FLORIDA MEDICAL ASSOCIATION, and the

AMERICAN MEDICAL ASSOCIATION

Edward J. Pozzuoli
Stephanie Alexander
Tripp Scott, P.A.
110 S.E. 6th Street,
15th Floor
Fort Lauderdale, FL 33302
Tel.: (954) 525-7500
Fax: (954)761-8475

Counsel for Florida Hospital Association,
the Florida College of Emergency Physicians,
the Florida Medical Association,
and the American Medical Association

TABLE OF CONTENTS

TABLE OF CONTENTS .... **i**

TABLE OF AUTHORITIES .... **ii**

STATEMENT OF IDENTITY AND INTEREST OF *AMICI* **1**

SUMMARY OF ARGUMENT **3**

ARGUMENT **5**

I. MEDICAL PROVIDERS CLEARLY HAVE THE RIGHT ENFORCE THE PROMPT PAYMENT STATUTE 5

A. The Statutory Scheme 7

B. The Statutory Interpretation Urged By The HMOs Is Wrong 9

C. The Legislative History Does Not Contain Any Prohibition Against Provider Enforcement Of The Prompt Payment Statute 12

D. The Department of Insurance Does Not Have The Authority To Force the Payment of Overdue Claims Or Interest Due. 13

E. The Dispute Resolution Scheme Set Forth In F.S. § 408.7057 Does Not Apply To Prompt Pay Claims. 16

II. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT PROVIDERS CAN SUE HMOS AS THIRD PARTIES. 17

III. THE ANTI-ASSIGNMENT ISSUE IS A RED-HERRING 19

CONCLUSION **20**

CERTIFICATE OF SERVICE **21**

CERTIFICATE OF COMPLIANCE **21**

SERVICE LIST .... **a**

TABLE OF AUTHORITIES

Cases

Girard Trust Co. v. Tampashores Development Co.
117 So. 786 (Fla. 1928) 10

Gisela Inv. N.V. v. Liberty Mut. Ins. Co.,
452 So. 2d 1056 (Fla. 3d DCA 1984) 19

In Re the Matter of: Southwest Florida Physician Organization, Inc.
Case No. 43261-01-IN (Denial of Petition for Declaratory Statement)
28 Fla. Admin. Weekly No. 1, pp. 33-34 (01/04/02) 15

Lefler v. United Healthcare of Utah, Inc.
72 Fed.Appx. 818 (10th Cir. 2003) 8

Medical Society of New Jersey v. Amerihealth HMO, Inc.
868 A.2d 1162 (N.J. App. 2005) 12

Moyant v. Beattie
561 So. 2d 1319 (Fla. 4th DCA 1990) 10

Orion Insurance Company v. Magnetic Imaging Systems I
696 So. 2d 475 (Fla. 3d DCA 1997) 18

Pasteur Health Plan, Inc. v. Salazar
658 So. 2d 543 (Fla. 3d DCA 1995) 18

Professional Consulting Services, Inc. v. Hartford Life and Accident Ins. Co.
849 So. 2d 446 (Fla. 2d DCA 2003) 19

Smith v. Piezo Technology and Professional Adm'rs
427 So. 2d 182 (Fla. 1983) 9

Vencor Hospitals South, Inc. v. Blue Cross and Blue Shield of Rhode Island
169 F.3d 677 (11th Cir. 1999) 18

Westside EKG Associates v. Foundation Health
--- So. 2d ----, 2005 WL 1026183 (Fla. 4th DCA 2005) 17-18

Statutes

Fla. Stat. § 408.7056 16
Fla. Stat. § 408.7057 .... 4, 16
Fla. Stat. § 624.27 13
Fla. Stat. § 624.281 13
Fla. Stat. § 624.310 13
Fla. Stat. § 624.3161 13
Fla. Stat. Chap. 626, Part IX 13
Fla. Stat. § 627.613 9
Fla. Stat. § 627.6131 9
Fla. Stat. § 641.19(12) 18
Fla. Stat. § 641.31(1) 18
Fla. Stat. § 641.3154 .... 10, 19
Fla. Stat. § 641.3154(1) 8, 10
Fla. Stat. § 641.3154(2) 10
Fla. Stat. § 641.3154(4) 7
Fla. Stat. § 641.3155, "Prompt Payment Statute" ... 3, 4, 9, 10, 11, 12, 13, 14, 19, 20
Fla. Stat. § 641.3155(1) 8
Fla. Stat. § 641.3155(3)(b) 5
Fla. Stat. § 641.3155(3)(e) 6, 8, 10
Fla. Stat. § 641.3155(4)(b) 5
Fla. Stat. § 641.3155(4)(e) 6, 10
Fla. Stat. § 641.3155(6) 6, 10
Fla. Stat. § 641.3155(9) 6, 9
Fla. Stat. § 641.3155(12) 6, 15
Fla. Stat. § 641.3903 15
Fla. Stat. § 641.513 9

Regulations

Fla. Admin. Code 69O-191.300 15

Rules

Fla. R. App. P. 9.210(a)(2) 21

Other Authorities

3 Couch on Insurance § 35:7 19

31A Fla. Jur. 2d, Insurance § 3176 (2005) 19

49 Fla. Jur. 2d, Statutes § 223 (1984) 10

Agency for Health Care Administration, 2004 Annual Report on the Statewide Provider and Health Plan Dispute Resolution Program, http://www.fdhc.state.fl.us/MCHQ/Managed_Health_Care/SPHPClaimDRP/Annual_Report_2004.pdf 16

Florida Department of Insurance
Target Market Conduct Report on Health Options, Inc. (Dec. 1, 1999), http://www.fldfs.com/companies/mc/exams/health_opt_%20inc_99_rpt.doc 14

Florida Department of Insurance
Target Market Conduct Report on Health Options Connect, Inc. (Dec. 1, 1999), http://www.fldfs.com/companies/mc/exams/hlth_%20opt_%20connect_%20inc_99_rpt.doc 14

Florida Department of Insurance
Target Market Conduct Report on Foundation Health (Dec. 7, 1999), http://www.fldfs.com/companies/mc/exams/found_hlth_fl_hlth_99_rpt.htm 15

Florida Senate Committee on Banking and Insurance
CS for SBs 706 & 2234 (2000) Staff Analysis (April 4, 2000), http://www.flsenate.gov/data/session/2000/Senate/bills/analysis/pdf/SB0706.bi.pdf 6, 10, 16

Florida Senate Committee on Fiscal Policy
CS for SBs 1508, 706 & 2234 (2000) Staff Analysis (April 26, 2000), http://www.flsenate.gov/data/session/2000/Senate/bills/analysis/pdf/SB1508.fp.pdf 3

Florida Senate Committee on Health Care
CS for SB 46-E (2002) Staff Analysis (April 30, 2002), http://www.flsenate.gov/data/session/2002E/Senate/bills/analysis/pdf/2002s0046E.hc.pdf........ 14

STATEMENT OF IDENTITY AND INTEREST OF *AMICI*

The Florida Hospital Association (the "FHA") is a not-for-profit association representing all types of hospitals throughout the state. Through advocacy, education, research, representation, and service, the FHA carries out its mission "to promote the ability of member hospitals and healthcare systems to effectively and efficiently serve the healthcare needs of their communities." Currently, FHA's membership includes over 200 hospitals, 20 professional membership groups and councils, and over 1,800 professional members.

The Florida College of Emergency Physicians ("FCEP") is a state chapter of the American College of Emergency Physicians ("ACEP") and represents more than 1,100 emergency physicians in the State of Florida. FCEP member physicians represent the health care safety net of Florida's residents and visitors. More than seven million patients seek care annually in Florida emergency departments. FCEP was founded on October 15, 1971, and is headquartered in Orlando.

The Florida Medical Association (the "FMA") is a not-for-profit corporation which is organized and maintained for the benefit of the approximately 16,000 licensed Florida physicians who comprise its membership. The FMA was created and exists for the purpose of securing and maintaining the highest standards of practice in medicine and to further the interests of its members. One of the primary

purposes of the FMA is to act on behalf of its members by representing their common interests before the courts of the State of Florida. Members of the FMA are substantially affected by state or national statutes, rules, regulations, and policies applicable to health care claims.

The American Medical Association ("AMA"), an Illinois non-profit corporation, is an association of approximately 250,000 physicians, residents, and medical students. Its members practice in every state, including Florida. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. Its members practice in all fields of medical specialization, and it is the largest medical society in the United States.[1]

The primary legal issue raised in this case (namely the enforceability of Florida's Prompt Payment Statute by healthcare providers) is of significant importance to the instant *amici* and their members since the Prompt Payment Statute is the primary means by which the Florida Legislature sought to guarantee that health care providers were compensated promptly and fully for their services.

---

[1] The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts.

The FHA and the FMA played an instrumental role in the original passage of the Prompt Payment Statute in 1998 and in its legislative revisions in 1999 through 2002. Indeed, the Florida legislature specifically used FHA surveys to support the 2000 amendments to the Prompt Payment Statute.[2] In addition, the hospitals represented by the FHA and the physicians represented by the FCEP, the FMA, and the AMA are required, by law, to provide emergency care to HMO subscribers and to submit those claims to HMOs for reimbursement. Hence, the instant *amici* and their members have an important stake in the outcome of this case and also have significant expertise and knowledge on the issues raised by this appeal.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal should be affirmed. The Florida legislature clearly intended that providers be able to enforce the Prompt Payment Statute (the "Statute"). The clearest proof is the very text of § 641.3155 itself. Under the explicit text of the Statute, claims that remain unpaid after 120 days become "uncontestable obligations" of HMOs that accrue hefty interest charges. Although Florida's Department of Insurance has the power and authority to levy fines and penalties for the habitual late payment of claims, it has no authority to collect specific unpaid claims or interest for aggrieved providers. In

[2] See Fla. S. Comm. On Fiscal Policy, CS for SBs 1508, 706 & 2234 (2000) Staff Analysis at p. 5 (April 26, 2000), http://www.flsenate.gov/data/

2002, Florida strengthened the Prompt Payment Statute by adding a subsection that precluded its provisions from being waived or otherwise nullified in any way (through contract or otherwise). This amendment confirms that providers must have a private right of action that, in fact, could otherwise be waived if it were not for the 2002 additions to the law. Moreover, contrary to the suggestions of the HMOs, the statutory mediation program set forth in Florida Statute § 408.7057 is not an alternative to civil suits by providers since that program does not cover prompt payment or interest claims and the procedure is a strictly voluntary mechanism, rarely used.

In sum, it is clear that the Florida legislature intended that the Prompt Payment Statute be enforced by providers (either by incorporation through subscriber contracts or by providers directly) to collect what the very provisions of that Statute guarantee. To preclude providers from enforcing the Prompt Payment Statute would not only be contrary to the text of the statute and the legislative intent behind it, but would completely eviscerate it. Without a private right of action under the Prompt Payment Statute, the following absurdities would result: 1) § 641.3155 would declare untimely claims to be "uncontestable obligations," but would not empower providers to collect those overdue payments from HMOs; 2) the same statute would require that overdue claims bear 12 percent interest, but

---

session/2000/Senate/bills/analysis/pdf/SB1508.fp.pdf.

would not allow providers to collect the interest due; and, 3) although the statute would declare that its statutory protections could not be waived, providers would not be able to invoke its protections. The Florida legislature did not intend the Prompt Payment Statute to be either a nullity or an absurdity.

ARGUMENT

I. Medical Providers Clearly Have the Right Enforce The Prompt Payment Statute.

The question certified to this Court by the Fourth District Court of Appeal is:

> ARE THE PROMPT PAY PROVISIONS OF THE HEALTH MAINTENANCE ORGANIZATION ACT ENFORCEABLE BY COURTS IN AN ACTION FOUNDED ON PRINCIPLES OF BREACH OF CONTRACT BROUGHT AGAINST AN HMO BY A SERVICE PROVIDER?

The answer to this question can only be "yes." The answer to this question, moreover, is the same whether enforcement of the Prompt Payment Statute is sought by providers through contract, implied contract, declaratory judgment, or by incorporation through the HMOs' subscriber agreements. By their express terms, the prompt pay provisions of the HMO Act require that HMOs pay or deny "clean claims" within 20 days. F.S. § 641.3155(3)(b).[3] "Failure to pay or deny a claim within 120 days after receipt of the claim creates an uncontestable obligation to

[3] Health insurers are required to pay electronically submitted claims within 20 days, but have 40 days to pay claims submitted in hard copy (F.S. §

pay the claim." F.S. § 641.31553)(e).[4] Moreover, the failure of an HMO to pay a claim in a timely manner constitutes a waiver of any discount previously agreed to by the provider and renders the provider's full, billed charges due and payable.[5] An overdue payment under the statute bears simple interest of 12 percent per year. F.S. § 641.3155(6). The statute specifically provides that its provisions may not be waived, voided, or nullified by contract. F.S. § 641.3155(9). The Statute applies to all providers (regardless of whether a provider has its own contract with the HMO). The Florida Department of Insurance (the "DOI") has authority to assess fines and penalties for violations of the Prompt Payment Statute, but absolutely no authority to collect provider claim or interest payments guaranteed therein. The imposition of penalties and fines payable to the government does not provide a monetary remedy to individual providers injured by violations of the Prompt Payment Statute. In addition, the provision in the Prompt Pay Statute precluding its protections from being waived, nullified, or modified by contract (§ 641.3155(12)) would be meaningless if no private right of action exists because providers cannot

---

641.3155(4)(b)). The vast majority of healthcare claims are submitted by providers electronically.

[4] Non-electronic claims not paid or denied within 140 days become uncontestable obligations of the insurer. F.S. § 641.3155(4)(e).

[5] Fla. S. Comm on Banking and Insurance, CS for SBs 706 & 2234 (2000) Staff Analysis at pp. 2 & 12 (April 4, 2000), http://www.flsenate.gov/data/session/2000/Senate/bills/analysis/pdf/SB0706.bi.pdf.

waive the DOI's right to enforce the Statute. Rather, providers could only, before the amendment, have waived their own private right of action.

A. The Statutory Scheme

The issue of whether medical providers can sue HMOs for failing to fully and timely pay claims for medical care rendered to their members is answered clearly and unequivocally in the statutory scheme. After years of fighting between providers and HMOs, Florida implemented a statutory scheme that was intended to ensure the prompt payment of claims by HMOs and to protect patients from getting caught between the providers who rendered services (and sought payment) and the HMOs who had a vested and obvious interest in denying claims or paying them as slowly as possible. In sum, health care providers needed to be paid for their services and their patients needed affordable medical services.

The statutory framework adopted by the Florida legislature beginning in 1998 strikes a balance. It: 1) obligates an HMO to pay the medical provider (whether the provider has its own contract with the HMO or not) where the provider has timely billed for its services in accordance with applicable law, and 2) with respect to claims that are the obligations of the HMO, it prohibits the provider from collecting from HMO patients directly. The statutory framework is critical to this Court's understanding of the issues raised in this appeal.

When a doctor or hospital provides services to an HMO member, the law generally prohibits the medical provider from collecting payment for those services from the insured subscriber. F.S. § 641.3154(4). The HMO, in exchange, is obligated to pay the provider's claim. See F.S. §§ 641.3154(1); 641.3155(3)(e). The term "claim" is defined as a HCFA-1500 or UB-92 data set. F.S. § 641.3155(1). Thus, when a provider provides medical services to an HMO member, the provider submits a claim for services using one of these two forms. These claim forms state what the provider charges for a particular service and, under Medicare law, the provider has to charge the same rate for the same service to all insurers, patients, or government programs, regardless of who will ultimately pay the bill. Hence, the uniformity of a provider's charges is actually mandated by federal law. See Lefler v. United Healthcare of Utah, Inc., 72 Fed.Appx. 818, 821 (10th Cir. 2003). The HMO, thereafter, is obligated to pay the claim for medical services rendered. In the absence of a negotiated contractual discount between the provider and the HMO, the HMO must pay the provider's billed charges. Because there was a concern that HMOs were slow in paying claims and inappropriately denying more claims than they should have, the Florida legislature passed the "Prompt Payment" Statute set forth at § 641.3155.[6]

[6] The very same prompt payment provisions are now required to be in every commercial health insurance contract pursuant to Florida Statutes §§ 627.613 and

B. The Statutory Interpretation Urged By The HMOs Is Wrong.

Multiple provisions of the Prompt Payment Statute demonstrate that the Florida legislature intended to create a private right of action therein. The prompt pay provisions of the HMO Act[7] make unpaid claims "uncontestable obligations" of the HMOs and add interest to those overdue payments. Moreover, the protections set out in § 641.3155 cannot be waived, voided, or otherwise nullified by contract. As this Court has noted, "[i]t must be assumed that a provision enacted by the legislature is intended to have some useful purpose." Smith v. Piezo Technology and Professional Adm'rs, 427 So.2d 182, 184 (Fla. 1983). This means that

> [w]here a statute requires an act to be done for the benefit of another or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is that the party injured should have an action; for where a statute gives a right, there, although in express terms it has not given a remedy, the remedy by law which is properly applicable to that right follows as an incident.

627.6131. This means that all health insurers in Florida, not just HMOs, have a legal obligation to pay medical claims timely and fully.

[7] The HMOs suggest that the issue raised by this appeal is whether there is a private right of action to enforce the entire HMO Act in general. This is not the issue. Instead, the Fourth District Court of Appeal correctly certified the narrower question of whether the prompt pay provisions of the HMO Act were enforceable by providers. Hence, the instant *amici*, in this brief, have focused on the issue actually certified. In addition to there being a private right of action under § 641.3155, providers also have a private right of action under Florida Statute § 641.513 and other provisions of the HMO Act. However only the enforceability of § 641.3155 is at issue in this case.

Girard Trust Co. v. Tampashores Development Co., 117 So. 786, 788 (1928). See also Moyant v. Beattie, 561 So.2d 1319 (Fla. 4th DCA 1990)(quoting 49 Fla. Jur.2d, Statutes § 223 (1984)("If a statute grants a right or imposes a duty, it may be construed as conferring by implication the power necessary for the exercise of the right or the performance of the duty.").

Section 641.3154 provides, in pertinent part, that "regardless of whether a contract exists between the organization and the provider, the [HMO] is liable for the payment of fees to the provider" and that "[an HMO] is liable for services rendered to an eligible subscriber by a provider." F.S. §§ 641.3154(1) & (2). In addition, the Prompt Payment Statute expressly provides that "[f]ailure to pay or deny a claim within 120 days after receipt of the claim creates an uncontestable obligation to pay the claim." F.S. § 641.3155(3)(e).[8] Moreover, the failure of an HMO to pay a claim in a timely manner constitutes a waiver of any discount previously agreed to by the provider and renders the providers' full, billed charges due and payable.[9] An overdue payment under the statute bears simple interest of 12 percent per year. F.S. § 641.3155(6). Hence, §§ 641.3154 and 641.3155 expressly

---

[8] Non-electronic claims not paid or denied within 140 days become uncontestable obligations of the insurer. F.S. § 641.3155(4)(e).

[9] Fla. S. Comm on Banking and Insurance, CS for SBs 706 & 2234 (2000) Staff Analysis at pp. 2 & 12 (April 4, 2000), http://www.flsenate.gov/data/session/2000/Senate/bills/analysis/pdf/SB0706.bi.pdf.

impose a duty on HMOs to promptly and fully pay health care providers for medical services rendered to their subscribers and to pay interest on any late-paid amounts, and providers can sue in contract or implied contract to collect any monies due.

The relevant provisions of the HMO Act dictate that unpaid claims become "uncontestable obligations" or overdue ***principal*** upon which ***interest*** is due. The Prompt Payment Statute provides not one, but two monetary remedies to providers. Providers are authorized to collect both principal and interest thereunder. Providers must have the right to sue to collect those amounts via a contractual or statutory claim. Otherwise, there would be no point in the Statute ***obligating*** the payment of each separate item (both principal and interest). This is significant. The New Jersey appellate court recently agreed with this analysis, holding that the New Jersey prompt payment statute:

> may provide a private cause of action for doctors who file lawsuits to collect overdue payments from insurers, and who in that context seek to collect the statutory ten percent interest penalty mandated by the [prompt payment] Act. Allowing the [prompt payment] Act to be privately enforced by doctors suing for overdue payments would appear to further the purpose of the Act by permitting the doctors, for whose benefit the statute was enacted, to recover the interest on those payments. We need not decide that issue here, however, because the doctors, who would have standing to raise the issue, are not before us.

.

Medical Society of New Jersey v. Amerihealth HMO, Inc., 868 A.2d 1162, 1168 (N.J. App. 2005). In this case, however, the providers have already brought suit and are properly before this Court, and the issue should be decided in their favor.

C. The Legislative History Does Not Contain Any Prohibition Against Provider Enforcement Of The Prompt Payment Statute

Despite the HMOs' arguments to the contrary, nothing in the legislative history of § 641.3155 indicates that providers cannot assert a claim against HMOs for blatant violations of the Statute. The legislative history from Governor Chiles' era cited by the HMOs proves nothing more than that the legislature has not permitted ***HMO subscribers*** to bring private claims under the HMO ***Act for tort damages***. Governor Chiles' veto of House Bill 1853 objects to expanding "the rights of ***HMO subscribers*** to sue their HMO in cases where the HMO denies a medical treatment or service to the subscriber." In addition, the intent of the April 12, 2000 Commission Substitution Bill 1900 was to create statutory causes of action for ***HMO subscribers*** against health maintenance organizations for violating "any of 20 specified subscriber rights." Accordingly, the failed and/or vetoed legislation establishes nothing more than the fact that ***HMO subscribers*** cannot maintain claims under the HMO Act ***for tort or extra-statutory damages***. As discussed above, the only express remedy providers have for violations of § 641.3155 is to bring claims against HMOs to recover the proper amount for

services provided, plus interest. Providers cannot generally seek such payments from HMO subscribers. Their sole remedy really is to obtain relief from the HMOs (as the Statute expressly provides), and nothing in the legislative history precludes this.

D. The Department of Insurance Does Not Have The Authority To Force the Payment of Overdue Claims Or Interest Due.

The HMOs' argument that there are administrative remedies available to providers cannot be sustained. There is nothing in the Statute that makes the DOI's authority exclusive and the DOI does not have the authority to pursue civil claims against HMOs requiring HMOs to reimburse specific claims to providers when the HMOs fail to make timely or proper payments under § 641.3155 anyway. Indeed, the April 30, 2002 Senate Staff Analysis for SB 46-E (relating to the most recent legislative amendments to the Prompt Payment Statute) confirms unequivocally that, with respect to prompt payment issues, the

> Department of Insurance has jurisdiction to examine the affairs, transactions, accounts, and business records of both insurers[10], and HMOs[11], to investigate such entities and assess fines[12], seek injunctive relief[13], and sanction them for unfair or deceptive trade practices.[14]

---

[10] F.S. §624.3161.
[11] F.S. §624.27.
[12] F.S. §624.310.
[13] F.S. §624.281.
[14] F.S. §641.3903 for HMOs and Part IX of Ch. 626 for insurers.

Florida Senate Committee on Health Care, CS for S.B. 46-E (2002), Staff Analysis at p. 6 (April 30, 2002), http://www.flsenate.gov/data/session/2002E/Senate/bills/analysis/pdf/2002s0046E.hc.pdf.

Therefore, contrary to the arguments made by the HMOs, it is clear that the DOI does not have the authority to collect overdue claims or order the payment of specific interest claims. It can only seek injunctions for violations of the Prompt Payment Statute or assess fines for those violations. It cannot collect "uncontestable obligations" owed to healthcare providers.

This is also confirmed by the DOI's own Market Conduct Examinations of several of the Petitioners in this case. In late 1999, for example, Health Options, Inc., Health Options Connect, Inc. and Foundation Health, Inc. all entered into consent orders with the DOI for numerous violations of the Prompt Payment Statute. All of these HMOs are parties to this appeal. All had to pay fines and/or take various corrective actions. None was apparently forced by the DOI to pay specific claims or interest thereon. See Florida DOI's Target Market Conduct Report on Health Options, Inc. (December 1, 1999)[15]; Florida DOI's Target Market Conduct Report on Health Options Connect, Inc. (December 1, 1999)[16]; Florida

[15] http://www.fldfs.com/companies/mc/exams/health_opt_%20inc_99_rpt.doc.
[16] http://www.fldfs.com/companies/mc/exams/hlth_%20opt_%20connect_%20inc_99_rpt.doc

DOI's Target Market Conduct Report on Foundation Health, A Florida Health Plan, Inc. (Dec. 7, 1999).[17]

The fact that the DOI does not have the authority to collect claims on behalf of providers is further confirmed by the relevant provision of Florida's Administrative Code. See F.A.C. 69O-191.300 (setting out HMO penalty categories). Although, the DOI does have the authority to issue injunctions and assess fines, it does not have any authority to collect specific claims. Subsection (12) of the Prompt Payment Statutes only refers to the DOI assessing ***fines*** for the late payment of claims. F.S. § 641.3155(12). The DOI is granted ***no authority to order payment*** to medical providers on specific claims. This does not mean, however, that the "uncontestable obligations" of HMOs are not collectible. Rather, it means only that the DOI is not charged with collecting them. That is the responsibility of providers themselves. See also In Re the Matter of: Southwest Florida Physician Organization, Inc., Case No. 43261-01-IN, ¶ 8 (Denial of Petition for Declaratory Statement)(28 Fla. Admin. Weekly No. 1, pp. 33-34, 01/04/02)(DOI opinion noting that the enforceability or provider rights is a matter for the courts).

---

[17] http://www.fldfs.com/companies/mc/exams/found_hlth_fl_hlth_99_rpt.htm

E. The Dispute Resolution Scheme Set Forth In F.S. § 408.7057 Does Not Apply To Prompt Pay Claims.

The HMOs claim that the dispute resolution procedure set out in Florida Statute § 408.7057 provides an effective dispute resolution alternative to private enforcement of the Prompt Payment Statute. However, it is clear from the text of Florida Statute § 408.7057 (and the administrative authority interpreting that statute) that it is completely inapplicable to prompt pay claims.[18]

The Florida Agency For Health Care Administration ("AHCA"), the agency charged with creating and overseeing this statutory dispute resolution program, has made this fact clear. According to the most recent interpretive authority from AHCA, the dispute resolution procedure set out in Florida Statute § 408.7057 does not apply to "late payment disputes" or "interest payment disputes. See AHCA's 2004 Annual Report on the Statewide Provider And Health Plan Dispute Resolution Program, p. 2.[19] That is, according to AHCA, the voluntary dispute resolution program set out therein does not have jurisdiction over prompt payment

[18] The dispute resolution program set out in Florida Statute § 408.7056 does not cover prompt pay claims either. According to the legislative history, the Statewide Provider and Subscriber Assistance Program set out in that statute "does not provide assistance for a grievance for 'unpaid balances.' Therefore, the program does not typically provide assistance for grievances related to provider disputes for late payments or underpayments." Florida Senate Committee on Banking and Insurance CS for SBs 706 & 2234 (2000) Staff Analysis, p. 3 (April 4, 2000), http://www.flsenate.gov/data/session/2000/Senate/bills/analysis/pdf/SB0706.bi.pdf

disputes. AHCA's 2004 Annual Report also confirms that this procedure is almost never used to resolve claim disputes and has, to date, been used only in a very small number of cases. Thus, from a practical standpoint, this alternative dispute resolution procedure is not actually a viable option (even if it actually covered prompt pay disputes).

II. The District Court Was Correct In Holding That Providers Can Sue HMOs As Third Parties.

In this case, the Fourth District Court of Appeal concluded that medical "service providers, claiming as third party beneficiaries under a subscriber's contract, may bring an action founded on the HMOs' prompt pay provisions of the Act." 2005 WL 1026183, *5 (Fla. 4th DCA 2005). The HMOs suggest that, in this case, providers are seeking to enforce ***all*** of the provisions of the HMO act through a private cause of action. This is an overbroad contention. Rather, this case, as certified, is about only the enforceability of the prompt payments provisions of the HMO Act. Although the express terms of the Prompt Payment Statute clearly mandate that providers can enforce its provisions directly via breach of contract or implied contract actions, it was also legally sound for the Fourth District Court of Appeal to conclude that the Prompt Payment Statute could be enforced by providers as third party beneficiaries to the HMOs' subscriber contracts as well.

---

[19]http://www.fdhc.state.fl.us/MCHQ/Managed_Health_Care/SPHPClaimDRP/Ann

It is well accepted that health care providers are third party beneficiaries of insurance contracts providing coverage for health care. Vencor Hospitals South, Inc. v. Blue Cross and Blue Shield of Rhode Island, 169 F.3d 677, 680 (11th Cir. 1999); Orion Insurance Company v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1997); Pasteur Health Plan, Inc. v. Salazar, 658 So. 2d 543 (Fla. 3d DCA 1995). Indeed, the HMOs would be the last to argue that their contracts were not enforceable against medical providers if this case dealt with the enforceability of a coverage exclusion contained in HMO subscriber contracts.

Perhaps the best way to analyze the third party issue presented in this case is to look at the very heart and structure of HMOs themselves. HMOs agree to provide medical services to their subscribers for a fixed, monthly premium. Thus, HMOs owe a contractual duty to provide medical services. F.S. §§ 641.19(12) & 641.31(1). HMOs can provide those medical services themselves or, as they more usually do, they can delegate that duty to health care providers (through their own contracts with those providers or via statutory obligation) for another fee. The provision of medical services by providers, then, actually discharges part of the HMOs' legal duty to provide medical services to its subscribers. Therefore, providers, who discharge the HMOs' legal duties when they render medical services to their subscribers, must be third-party beneficiaries of those subscriber

---

ual_Report_2004.pdf

agreements. It would be patently unfair to allow HMOs to essentially delegate their contractual duties to provide medical services under their subscriber agreements to providers but not allow those same providers the right to collect prompt and full payment under those very agreements. Both §§ 641.3154 and 641.3155 mandate that payment is owed directly to providers. The Fourth District Court of Appeal's conclusion was, therefore, correct as a matter of law, and should be affirmed.

III. The Anti-Assignment Issue Is A Red-Herring

In its *amicus* brief, the FAHP claims that the anti-assignment provision in many ERISA plans precludes a third-party claim by providers under their subscriber benefit contracts. First, this is not an ERISA case and no ERISA claims have been raised by Respondent. Regardless, Florida law is completely contrary to the FAHP's assertion. More specifically, Florida law is clear that

> [a]n insured may assign insurance proceeds to a third party after loss, even without the consent of the insurer. Accordingly, a provision in a policy of insurance which prohibits assignment thereof except with the consent of the insurer does not apply to prevent the assignment of the claim or interest in the insurance money due after loss.

31A Fla. Jur. 2d Insurance § 3176

See also Professional Consulting Services, Inc. v. Hartford Life and Accident Ins. Co., 849 So.2d 446, 447 (Fla. 2d DCA 2003); citing to Gisela Inv. N.V. v. Liberty Mut. Ins. Co., 452 So.2d 1056, 1057 (Fla. 3d DCA 1984); 3 Couch on Ins. § 35:7 (affirming that policy provisions requiring consent prior to

assignment do not apply after loss). This is not an assignment case, but, if it were, Florida HMO subscribers are free to assign their benefits despite any anti-assignment provisions in their HMO contracts.

CONCLUSION

WHEREFORE, for all the foregoing reasons, *amici curiae*, the Florida Hospital Association, the Florida College Of Emergency Physicians, the Florida Medical Association and the American Medical Association, respectfully request that this Court affirm the decision of the Fourth District Court of Appeal. Without a private right of action under the Prompt Payment Statute: 1) § 641.3155 would declare untimely claims to be "uncontestable obligations," but would leave providers without the ability to collect those overdue payments from HMOs; 2) the same statute would require that overdue claims bear 12 percent interest, but would leave providers without the ability to collect the interest due; and, 3) although the statute would declare that its statutory protections could not be waived, providers would be unable to invoke its protections. This makes no sense. If providers cannot enforce the very statute that the Florida legislature passed (and repeatedly tightened via amendment) to ensure the prompt payment of provider claims, they are left, as Voltaire said, like the proverbial blind men in a dark room looking for a black cat that isn't there. The Florida legislature clearly intended that the promises of the prompt pay provisions of the HMO Act be real, and not illusory.

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was furnished via U.S. Mail to the persons on the attached service list, this 20th day of August, 2005.

CERTIFICATE OF COMPLIANCE

We hereby certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

TRIPP SCOTT, P.A.
Attorneys for Amici Curiae
the FHA, FCEP, FMA, and the AMA
110 S.E. 6th Street, 15th Floor
Fort Lauderdale, FL 33301
Telephone: (954) 525-7500
Facsimile: (954) 761-8475

By:________________________________
EDWARD J. POZZUOLI
Florida Bar Number: 717363
STEPHANIE ALEXANDER
Florida. Bar Number: 0081078

SERVICE LIST

Bradley Winston, Esq.
8211 West Broward Blvd.
Plantation, FL 33324
Counsel for AARP

Andrew S. Berman, Esq.
Young, Berman, Karpf & Gonzalez, P.A.
17071 West Dixie Highway
North Miami Beach, FL 33160
Counsel for Humana

Brian Boyle, Esq.
Brian Brooks, Esq.
O'Melveny & Myers, L.L.P.
1625 Eye Street
Washington, DC 20006
Counsel for Humana

Gerald M. Cohen, Esq.
Vista Health Plan, Inc.
300 South Park Road
Hollywood, FL 33021
Counsel for Vista

Heidi E. Garwood, Esq.
Humana, Inc.
500 West Main Street, 27th Floor
Louisville, KY 40201
Counsel for Humana

Craig J. Trigoboff, Esq.
Waldman, Feluren & Trigoboff, P.A.
2200 North Commerce Pkwy., Ste. 202
Weston, FL 33326
Counsel for Foundation and Vista

Nancy W. Gregoire, Esq.
Bunnell, Woulfe, Kirschbaum,
Keller, McIntyre & Gregoire, P.A.
One Financial Plaza, 9th Floor
100 S.E. Third Avenue
Ft. Lauderdale, FL 33394
Counsel for Petitioners,
Health Options, Inc.
and Health Options Connect, Inc. f/k/a
Principal Health Care of Florida, Inc.

Philip M. Burlington, Esq.
Philip M. Burlington, P.A.
2001 Palm Beach Lakes Blvd., Ste. 205
West Palm Beach, FL 33409
Appellate Counsel for Westside

Richard Barnett, Esq.
P. O. Box 223248
Hollywood, FL 33022-3248
Counsel for Westside

Louis M. Silber, Esq.
Silber & Valente
1800 Old Okeechobee Rd., Ste. 200
West Palm Beach, FL 33409
Counsel for Westside

Jene P. Williams, Esq.
Jeffrey M. Liggio, Esq.
Liggio, Benrubi & Williams, P.A.
1615 Forum Place, Suite 3-B
West Palm Beach, FL 33401
Counsel for Westside

George N. Meros, Jr., Esq.
Gray Robinson, P.A.
P. O. Box 11189
Tallahassee, FL 32302-3189
Counsel for Fla. Assn. of Health Plans

Edward H. Zebersky, Esq.
Zebersky & Payne, L.L.P.
4000 Hollywood Blvd., 400-N
Hollywood, FL 33021
Counsel for Westside

Rochelle Bobroff, Esq.
AARP Foundation Litigation
601 East Street, N.W.
Washington, DC 20049
Appellate Counsel for AARP