IN THE SUPREME COURT OF FLORIDA

Case No: SC05-872

HUMANA MEDICAL PLAN, INC.,

Petitioner,

v.

WESTSIDE EKG ASSOCIATES,

Respondent

_____/

On Discretionary Review From The Fourth District Court Of Appeals, Upon Its Certification Of A Question Of Great Public Importance

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REPLY BRIEF OF PETITIONER, HUMANA MEDICAL PLAN, INC.

ANDREW S. BERMAN, ESQ.
Fla. Bar No. 370932
Young, Berman, Karpf & Gonzalez, P.A.
17071 West Dixie Highway
North Miami Beach, Florida 33160
Telephone: (305) 945-1851
Facsimile: (305) 940-4616
E-mail: aberman@ybkglaw.com

Counsel for Petitioner, Humana

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REPLY ARGUMENT

To streamline consideration of this Petition for Discretionary Review – which is identical to two (2) other Petitions presently before the Court arising from the same District Court opinion – and rather than parrot what has already been written, we adopt and rely upon the Reply Brief filed by Health Options, Inc. and Health Options Connect, Inc. in Case Number SC05-871.[1] A true copy of the Health Options brief is included in our Supplemental Appendix. We utilize our brief instead to supplement Health Options' position by addressing some points that either we conclude need a little further development or which Health Options did not address (because they involved issues raised only by Humana, principally the attorneys' fee award).

I. THE HMO ACT DOES NOT PROVIDE A PRIVATE RIGHT OF ACTION FOR DAMAGES BASED UPON AN ALLEGED VIOLATION OF ITS REQUIREMENTS, REGARDLESS OF WHETHER THE ACTION IS DIRECT OR MASQUERADES AS A BREACH OF CONTRACT CLAIM.

In this section, we first reply to the *Amicus Curiae* argument, and in particular the brief filed by the Florida Hospital Association, et. al., which claims that without private enforcement, the prompt pay statute would be completely eviscerated. We

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[1] Westside has filed a single Answer Brief intended to respond to both Health Options and Humana. In the third companion appeal, Case No. SC05-870, Foundation Health has simply adopted all of Health Options' briefs.

could not disagree more. The HMO Act currently provides for a clear system of accountability by health maintenance organizations. If an HMO violates the provisions of the Act, including the prompt pay provisions, it can be fined, sanctioned or have its certificate of authority suspended or revoked. *See eg. §§* 641.3155(12), 641.3909 and 641.3913, Fla. Stat. (2003). The risk of suspension or revocation of an HMO certificate is certainly a greater motivator to adhere to the prompt pay provisions of the HMO Act than is an interest penalty on a particular claim[2]. They are economic death sentences! The notion, therefore, that private enforcement is somehow an essential ingredient in the enforcement process is seriously flawed.

Westside and its allies may not like the framework chosen by the Legislature – and they may have even spearheaded the many chronicled and failed efforts over the years to change it by expressly adding a private right of action – but until the Legislature decides to change the landscape, a court is powerless to legislate in its stead and divine private rights that the Legislature has deliberately withheld.

In that vein, we remind that the statutory scheme currently in place contains a "substantial performance" provision in that an HMO is deemed to be in compliance

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[2] We also do not doubt that the governmental agencies charged with enforcement have the coercive power to compel the payment of penalty interest in particular cases to avoid a harsher sanction.

with the prompt pay statute if it pays 95% of its claims timely and correctly. §641.3155(12), Fla. Stat. (2003).[3] Private enforcement would elevate substantial compliance to total compliance, in derogation of specific legislative intent and at great cost to the industry and ultimately the HMO subscribers. Self anointed private attorneys' general, like Westside and its counsel, cannot be allowed to collect the remaining up to 5% of principal, plus penalty interest, on behalf of all providers in the State of Florida, under circumstances where the government itself cannot.[4] If allowed, this action would be one of the greatest coups ever in legaldom: a party would be permitted to enforce a non-existent provision in its non-existent contract to a greater extent than could governmental agencies who were given direct, express power by the Legislature over the same subject matter.[5]

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[3] This section states in pertinent part that, "If the error ratio of a particular insurer does not exceed the permissible error ratio of 5% for an audit period, no fine shall be assessed for the noted claims violations for the audit period."

[4] Of course, nothing stops any individual provider from suing at common law for breach of contract (if, unlike Westside, the provider actually has a contract with the HMO) or *quantum meruit*, and then collecting prejudgment interest from the date any amount due is liquidated. They just would not be able to collect the penalty interest written into the statute, nor would the matter be susceptible to class treatment.

[5] And, also, to a greater extent than the plaintiffs in *Greene, Villazon* and *Florida Physicians Union*, each of whom, unlike Westside, actually had written contracts with HMOs.

We next observe that Westside and the *amicus curiae* refuse to acknowledge the significant difference between using a violation of a statute defensively and offensively. A statute or regulation, whether or not it provides for a private right of action, may be used defensively to argue against enforcement of a particular contract or against a particular claim that violates public policy. *See eg. Harris v. Gonzalez,* 789 So.2d 405 (Fla. 4th DCA 2001)(contract which violates a provision of the constitution or a statute is void and illegal); *see also Chandris v. Yanakakis,* 668 So.2d 180 (Fla. 1995)(contingency fee contract that does not comply with Bar regulations is void against public policy).

On the other hand, a party may not use the violation of a statute offensively as the predicate for a civil claim for affirmative relief unless the Legislature so intended. For example, the Third District held in *Bass v. Morgan, Lewis & Bockius,* 516 So.2d 1011 (Fla. 3d DCA 1988), that a violation of the criminal extortion statute does not give rise to a civil cause of action for damages. However, today one may sue for damages for violation of that same statute under Section 772.104, Florida Statutes (2005)(Civil Remedies for Criminal Practices), because the Legislature, through Section 772.102(26), Florida Statutes (2005), expressly incorporated the extortion statute (§836.05, Fla. Stat. (2005)) into the list of predicate acts giving rise to civil liability. As we argued in our Initial Brief, it all comes down to an expression of

legislative intent to allow a statute to form the basis for a private affirmative claim for damages or other relief. *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994).

Many provisions of the HMO Act may form the basis for affirmative defenses against an HMO. We need look no further than a case cited by Westside in its Answer Brief, *Humana Medical Plan, Inc. v. CAC-Ramsay Health Plans, Inc.,* 714 So.2d 1025(Fla. 3d DCA 1997), where CAC- Ramsay was held to be responsible for pre-existing conditions of a subscriber because its HMO agreement did not contain the explicit disclaimer language required by Section 641.31(16), Florida Statutes (1989). The HMO tried to hide behind its contract, but the court found implicitly that without the disclaimer language required by the HMO Act, its attempt to disclaim such coverage violated public policy. There is, however, a decided difference between setting the Act up as a defense and using it offensively. Westside is trying to do the latter, which need express legislative approval that simply does not exist.[6]

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[6] The Fourth District correctly did not rely upon that case to support its decision here, because it doesn't.

c. Westside's clever attempt to use contract theory to undermine the proscription against bringing a direct private action to enforce the requirements of the HMO Act is an impermissible "end run."

i. Westside may not do indirectly that which it cannot do directly.

Westside tries mightily to persuade that this appeal does not turn on whether a private right of action exists under the HMO Act. Respectfully, it is wrong. Even those who have come to its aid concede in their *amicus curiae* brief that the primary question is whether, at the least, the prompt pay provisions of the Act may be privately enforced. *See* Brief of Florida Hosp. Assoc., et. al.[7] It is truly beyond dispute that this Court must first conclude that a private right of action under the HMO Act exists before even addressing the ability of Westside to maintain an action to enforce its double fiction contract against the HMOs.

The ultimate question here is thus whether the general principle of incorporation of statutes into contracts trumps the proscription against private enforcement of the provisions of a specific statute. As Humana argued in its Initial Brief, cases near and far and in virtually identical contexts uniformly hold that a party

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[7] Westside, too, spends much time trying to analogize the HMO Act to the PIP statute in order persuade that, like the PIP statute, the HMO Act affords a private right of action. Its effort in that regard thus speak s much louder than its words suggesting that whether the Act affords a private right of action or not is inconsequential.

may not use contract theory to secure for itself greater private rights than it has under a particular regulatory statute.

Westside tries to distinguish Humana's cases by arguing that none of them involved a statutory scheme designed to regulate contracts. It is incorrect. In fact, Westside does not even mention *Solomon v. U.S. Healthcare Sys. of Penn., Inc.*, 797 A.2d 346 (Pa. App. 2002), which held both that no private right of action exists under Pennsylvania's prompt pay HMO statute (very similar to Florida's) and that a provider may not use contract theory to circumvent that proscription. *Solomon* stated specifically that, "we find no merit to the contention that the Health Care Act can be interpreted to rewrite the parties' written agreement." *Id. at* 351. That case is "on all fours" with this one since it involved Pennsylvania's version of the HMO Act and thus involved, in Westside's words, "a statutory scheme designed to regulate contracts."

Humana also disagrees with Westside's effort to distinguish on that basis the many other cases we cited. They all involved statutes which contained strong public policy statements to benefit a particular class of persons, yet all uniformly and broadly held that without an expression of legislative intent to create a private right of action, a contract action may not be employed to circumvent the inability to sue directly under the statute. In our estimation the issue turns on whether a private right exists to enforce the terms of the statute, not the nature of the statutory provisions

themselves. In other words, whether the statute is in the nature of a deceptive and unfair trade practices regulation;[8] protects providers from systematic down coding of claims;[9] or, as here, regulates how and when claims should be paid with consequences for failures to comply, the principle is the same. Namely, without an expression of legislative intent to enable private parties to enforce the statutory provisions, no contract action may lie.[10]

Westside next tries to downplay our argument that the subscriber contract – to which Westside claims third party beneficiary status – did not incorporate the prompt pay provisions of the Act because the subscriber has no interest in that issue since the provider may not collect from a subscriber for a covered claim. *See* §641.2154(4), Fla. Stat. (2003)("A provider . . . regardless of whether the provider is under contract with the health maintenance organization, may not collect or attempt to collect money

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8 *Keehn v. Carolina Cas. Ins. Co.*, 758 F.2d 1522 (11th Cir. 1985); *Greene v. Well Care HMO, Inc.*, 778 So.2d 1037 (Fla. 4th DCA 2001).

9 *Florida Phys. Union, Inc. v. United Healthcare of Fla., Inc.*, 837 So.2d 1133 (Fla. 5th DCA 2003).

10 For some reason Westside states on page 14 of its brief that, "Defendants concede that the HMO Act authorizes breach of contract actions." We did nothing of the sort. We didn't have to. Contract actions were here long before the HMO Act. No party needs legislative approval to sue for common law breach of contract. We argue, however, that they do need legislative approval to sue for violations of the HMO Act, either directly or indirectly through a contract action.

from . . . a subscriber . . . if the provider in good faith knows or should know that the organization [HMO] is liable.").[11] Westside counters that the subscriber has an interest if the claim is denied by the HMO, thereby leaving the subscriber on the hook. That response is faulty, however, because the entire premise for Westside's lawsuit is that its claims are for covered services. If there is a question here of interest on a claim paid late or of an underpaid claim, that is strictly between the HMO and the provider. It is only for a non-covered claim – not the situation here – that the subscriber may be legitimately billed by the provider. No provider is permitted under the HMO Act to seek alleged unpaid interest from a subscriber for the covered claims which are the subject of this lawsuit.

Lastly, Westside tries to downplay the significance of this case by arguing that this Court has recently held that the PIP statute (which it claims is similar to the HMO Act) allows a private right of action to enforce its prompt pay provisions. However, it is able to muster only a feeble challenge to our argument that the PIP statute, unlike the HMO Act, contains language that at least implicitly acknowledge the right to bring a private suit to enforce its provisions. We fully explored that issue in our Initial Brief at pages 36 to 38. *See* also §§627.736(4)(b) and 627.736(11), Fla. Stat. (2003).

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[11] The Florida Hospital Assoc., et. al., in its brief, agrees that this statute, "generally prohibits the medical provider from collecting payment for those services from the insured subscriber." See Brief at page 7.

The best argument that Westside can assemble is to strain to show that several provisions of the HMO Act which 1) regulate HMO contracts and 2) acknowledge the existence of contract actions that are unrelated to enforcement of provisions of the Act itself, supply the same kind of textual support for private rights as exist in the PIP statute. They do not. The direct response to these points have been made by Health Options in its Reply Brief.[12]

We add that we have never denied that the HMO Act contains provisions that regulate HMO contracts. That does not, however, translate into a private right of action, although it may be fodder for defensive use. *See eg. Humana Med. Plan. Inc. v. CAC-Ramsay Health Plans, Inc.* Moreover, those statutory provisions which simply recognize the existence of common law contract actions (such as the prevailing party attorneys' fee statute, §641.28, Fla. Stat.) do not help Westside's cause because, in contrast to the PIP sections we cited, they do not contain language that acknowledges the right to enforce specific provisions of the HMO Act.

In fact, the only language in the HMO Act that even speaks to civil actions for violations of the Act – including the prompt pay provisions – states just the opposite,

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[12] Westside cites to Section 641.28, which is the provision under which Humana claims fees against it, as but one example. That statute simply provides for a prevailing party fee in common law actions to enforce the terms and conditions of an HMO contract. It does not even remotely suggest that those contractual terms and conditions include the provisions of the Act itself.

that, "[t]his section shall not be construed as creating a civil cause of action by an subscriber or provider against any health maintenance organization." §641.185(2), Fla. Stat. (2003); *see also* Humana's Initial Br. at 19-21. Even the Fourth District – with knowledge of how the PIP statute has been interpreted – conceded the importance of this case and implicitly expressed doubt about the soundness of its own conclusion by certifying the question and by thereafter granting the stay of its mandate on motion by the HMOs. It is essential for this Court to hear this case on the merits because this is a case of great public importance and the Fourth District, in our view, got it wrong.

II. HUMANA WAS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER SECTION 641.28, FLORIDA STATUTES, BOTH IN THE TRIAL COURT AND THE FOURTH DISTRICT, BECAUSE HUMANA WAS THE PREVAILING PARTY IN AN ACTION TO ENFORCE AN HMO CONTRACT.

Westside's argument in opposition to Humana's entitlement to attorneys' fees is flawed. Yes, Humana did argue against Westside's contract claim. It did so on the basis that the provisions of the HMO Act did not become a part of Westside's non-existent contract. However, whether Humana believed that Westside could not state a cause of action for breach of contract is a wholly separate issue from whether Westside tried to do so. It is Westside's effort to sue Humana for breach of contract that gives rise to the prevailing party right to attorneys' fees under Section 641.28. It

tried to concoct a contract action and failed. Humana was required to retain counsel to defend its contract claim.

Under Westside's theory, if a party tries to sue for breach of contract but fails because the conduct alleged did not amount to a breach, fees may not be assessed against it. That is not and has never been the law.

Plain and simple, Westside sued for breach of contract. If this Court reverses the Fourth District on that point by concluding that it has no contract claim, Westside will have lost its breach of contact claim, thus giving rise to Humana's entitlement to statutory attorneys' fees. Humana has not taken inconsistent positions at all.

CONCLUSION

For the foregoing reasons, the certified question should be answered in the negative and the opinion of the Fourth District should be quashed with instructions to affirm the Final Judgment on the Pleadings. In addition, Humana should be awarded reasonable attorneys' fees pursuant to Florida Statutes Section 641.28 in the trial court, the Fourth District and this Court.

Respectfully submitted,
YOUNG, BERMAN, KARPF & GONZALEZ, P.A.
Counsel for Petitioner/Humana
17071 West Dixie Highway
North Miami Beach, Florida 33160
Telephone: (305) 945-1851
Facsimile: (305) 940-4616
E-Mail: aberman@ybkglaw.com

By:_____
ANDREW S. BERMAN
Fla. Bar No. 370932

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on this ___ day of September 2005 to: See attached Service List

YOUNG, BERMAN, KARPF & GONZALEZ, P.A.
Counsel for Petitioner/Humana
17071 West Dixie Highway
North Miami Beach, Florida 33160
Telephone: (305) 945-1851
Facsimile: (305) 940-4616
E-Mail: aberman@ybkglaw.com

By:_____
ANDREW S. BERMAN
Fla. Bar No. 370932

SERVICE LIST

Edward H. Zebwesky, Esq.
Zebersky, Payne & Kushner, P.A.
President Circle, Suite 400 N
4000 Hollywood Boulevard
Hollywood, Florida 33021-6700

Philip Burlington, Esq.
Philip Burlington, P.A.
2001 Palm Beach Lakes Blvd.
Suite 205
West Palm Beach, Florida 33409

Nancy Gregoire, Esq.
Bunnell, Woulfe, et al.
100 S.E. Third Ave., Ste. 900
Fort Lauderdale, Florida 33394

Paul Griffin, Esq.
Brian D. Boyle, Esq.
O'Melveny & Meyers, LLP
1625 Eye Street
Washington, DC 20006

Gerald Cohen, Esq.
Vista Health Plan, Inc.
300 South Park Rd.
Hollywood, Florida 33021

Craig Trigoboff, Esq.
Glenn Waldman, Esq.
Waldman Feluren & Trigoboff, P.A.
2200 N. Commerce Parkway, Ste. 202
Weston, Florida 33266

Jeffery Liggio, Esq.
Jene Williams, Esq,
LIGGIO, BENBUBI, et al.
1615 Forum Place, Suite 3B
West Palm Beach, Florida 33401

Rochelle Bobroff, Esq.
Michael Schuster, Esq.
AARP Foundation Litigation
601 East Street, NW
Washington, DC 20049

Bradley Winston, Esq.
8211 W. Broward Blvd.
Plantation, FL 33324

George N. Meros, Jr., Esq.
Gary Robinson, P.A.
Post Office Box 11189
Tallahassee, FL 32302-3189

Steven M. Ziegler, Esq.
Dorothy F. Easley, Esq.
Offices of Steven M. Ziegler, P.A.
4000 Hollywood Blvd, Ste. 375
Hollywood, FL 33021-6754

Edward J. Pozzuoli, Esq.
Stephanie Alexander, Esq.
Office of Tripp Scott, P.A.
110 S.E. 6th Street, 15th Floor
Fort Lauderdale, FL 33302