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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INITIAL BRIEF OF PETITIONER, HUMANA MEDICAL PLAN, INC.

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PRELIMINARY STATEMENT

This is a Petition for Discretionary Review, pursuant to Rule 9.030(a)(2)(v) of the Florida Rules of Appellate Procedure, based upon the Fourth District Court of Appeals' certification that its decision passes upon a question of great public importance. Petitioner, Humana Medical Plan, Inc., shall be referred to as "Humana." Respondent, Westside EKG Associates, shall be referred to as "Westside."

Reference to the record on appeal shall be by the symbol "(R_-__)" and to our Appendix by the symbol "(A.__)." All emphasis is ours unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On November 4, 2002, Westside, a medical provider of echocardiogram interpretations and related services, filed a three (3) count Amended Complaint against Humana, a Florida health maintenance organization ("HMO"), and a number of other Florida HMOs. (R2-232-243). The Amended Complaint seeks class certification and alleges claims for damages and declaratory relief.

Count I seeks damages for medical services rendered. It alleges that Westside provided emergency and non-emergency services to HMO members,

charged usual and customary rates, and that the Defendants, "failed to pay such outstanding claims within 45 days and/or failed to pay interest owed on such claims, [and] in so doing, violated Florida Statute 627.613 and 641.3155."[1] (R2-236-237). In addition to unspecified principal damages, Westside seeks interest charges under the statutes.[2] Count II alleges a claim for damages for breach of contract. While tacitly admitting that it had no contract with Humana or any of the other HMO Defendants, Westside nevertheless claims to be a third party beneficiary of the HMO contracts between Humana and its subscribers/members. (R2-237-238). It further alleges that those HMO contracts incorporated by operation of law all of the statutory law contained within Chapter 641, Florida Statutes (Florida's HMO Act), including the prompt pay provisions of Section

[1]While too cumbersome to reproduce in its entirety here Section 641.3155, Fla. Stat. (2003), which we shall refer to as the "prompt pay" statute, is a comprehensive regulatory template for how HMOs are to pay, contest and investigate claims, including time frames for the completion of each undertaking. It also provides that interest on unpaid claims shall accrue at 12% per year and that, "[i]nterest on an overdue payment for a claim for an overdue payment begins to accrue when the claim should have been paid, denied, or contested." (A. 12-14).

[2]Although Westside sued under both the Florida HMO Act and the general insurance statute, Chapter 627, the Fourth District decided the case under the HMO Act only. In truth and in fact, Humana Medical Plan, Inc., the only Humana entity

641.3155, Florida Statutes (2003), which it claims were breached/violated.[3] (R2-234, ¶10). We shall refer to Westside's breach of contract theory where 1) it has no contract with Humana and 2) it seeks to latch onto and enforce prompt pay provisions that do not exist in the text of the HMO contracts of which it claims to be a beneficiary, as its "double fiction" theory.

Count III seeks a declaratory judgment that Humana and the other HMOs engaged in a general business practice of failing to pay outstanding provider claims within 45 days and/or failed to pay interest on such claims and in so doing "violated Florida Statute 627.613 and 641.3155." The relief sought includes a claim for an injunction and an order requiring the Defendants to notify the Florida Department of Insurance of such adverse determination. (R2-239-240).

Humana and the other HMOs moved to dismiss the Amended Complaint arguing, *inter alia,* that the HMO Act did not provide a private right of action and that only the Department of Insurance [or now the Office of Insurance Regulation]

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sued in this case, is governed by the HMO Act. Its parent company, Humana, Inc., has other subsidiaries that are governed by Chapter 627.

[3]Humana was sued, however, before Westside's counsel possessed even a single Humana subscriber contract.

had the power to enforce the provisions of the Act. (R2-244-248). The trial court denied that motion. (R3-365-366).

Thereafter, on April 5, 2003, in the immediate wake of this Court's decision in *Villazon v. Prudential Healthcare Plan, Inc.*, 843 So.2d 842, 852 (Fla. 2003), which held that, "the [HMO] Act does not specifically provide a private right of action for damages based upon an alleged violation of its requirements" and that none can be inferred, the Defendant HMOs filed a Joint Motion for Judgment on the Pleadings. (R7-1144-1150). They argued that Counts I (direct claim for violation of HMO Act) and III (declaratory judgment that HMO Act had been violated) failed because there was no private right of action under the HMO Act. They further argued that Count II (third party beneficiary claim) failed on the basis that Westside could not avail itself of the double fiction theory to circumvent the proscription against private enforcement of the provisions of the HMO Act. In essence, Defendants argued that Westside could not do indirectly that which it could not do directly.

The trial court heard argument on the motion on May 21, 2003. (R17- 1-56). On August 21, 2003, following further argument (R17-1-16), the trial court agreed with Humana and the other HMOs and granted the Motion for Judgment on the Pleadings, finding that there was no private right of action under the HMO Act.

(R16-2618-2619). The trial court also ruled that the third party beneficiary contract theory failed and could not be cured through further amendment. (R16-2620).

During argument on the motion, in response to an argument by Westside's counsel that the HMO contracts with subscribers incorporated the prompt pay provisions of Florida Statutes Section 641.3155, the trial judge made the following observation concerning the third party beneficiary contract theory,:

> Westside Counsel: All existing applicable or relevant and valid statutes, ordinances, regulations and settled law of the land at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted therein except where the contract discloses a contrary exception [sic].
>
> The Court: If I did that, why wouldn't the portion of the statute that apparently, according to Villazon says, you don't have a private cause of action, why doesn't that apply.
>
> * * *
>
> The Court: Also part of that statute, the Supreme Court has interpreted that you don't have a cause of action for this. Why isn't that part of this deal?

(R17- May 21, 2003, 22-24).

Westside appealed the Final Judgment on the Pleadings to the Fourth

District Court of Appeals. (R16-2621-2626).

On May 4, 2005, the Fourth District reversed the Final Judgment on the Pleadings, finding that this Court's decision in *Villazon* and two other district court of appeal decisions (including one of its own), which uniformly held that there is no private right of action under the HMO Act, did not apply "to an action founded on a theory of breach of contract." *Westside EKG Associates v. Foundation Health, et. al.,* 30 Fla. L. Weekly D1123 (Fla. 4th DCA May 4, 2005). (A.1-6).

Not only did the Fourth District permit the breach of contract action in Count II to proceed, but it also permitted the direct actions under the statute in Counts I and III, even though they were not "founded on a theory of breach of contract," but were direct statutory claims.

While conceding that, "the Act does not explicitly authorize private enforcement of its provisions," the Fourth District nevertheless concluded that, "[a]pplying *Villazon* to bar breach of contract and declaratory judgment claims would essentially preclude any significant court action against HMOs . . . Application of *Villazon* in this manner would restrict unpaid service providers to relief by administrative proceedings to resolve violations of the Act . . . while leaving HMOs free to sue to determine by litigation if the HMO is liable for payment."

Recognizing the significance of its sharp departure from the consistent trend against finding a private right of action where no expression of legislative intent to create one exists in the HMO Act, and acknowledging the strong impact its decision would have on the provision of health care services, the Fourth District certified the following question as one of great public importance:

> 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 A HMO BY A SERVICE PROVIDER?

A. Attorneys' Fee Portion of Humana's Petition for Review

The Amended Complaint alleged in Count II that Humana's members received medical services pursuant to health insurance contracts with Humana. It further alleged that Westside was a third party beneficiary of those contracts. Finally, it alleged that Humana, by its actions, has "refused to pay and/or improperly denied the properly submitted outstanding claims in whole or in part submitted by the Plaintiff and said refusal is a breach of such contracts." (R2- 237-238).

Westside conceded in paragraph 14 of its proposed Second Amended Complaint (which was rejected as futile) that, "Plaintiff's cause of action herein . . . arises from the health insurance/HMO Contracts which pursuant to long established common law, as well as Florida Statutes §§ 627.418 and/or 641.3105, incorporate such statutory provisions." (R14-2229-2239). The allegation was made in support of its claim for breach of contract, in its capacity as third party beneficiary of Humana's contract with its members.

After the third party beneficiary contract claim was dismissed with prejudice, Humana and the other defendants moved for attorney's fees pursuant to § 641.28, Florida Statutes (2003). (R16-2631). That statute provides for an award of attorney's fees to the prevailing party in a suit to enforce the terms of a health

maintenance organization (HMO) contract.[4] The defendants urged that since Westside, as alleged third party beneficiary, unabashedly sought to enforce what it considered to be the terms of HMO contracts between defendants and their members/subscribers, its failure in that regard triggered their right to fees.

On November 7, 2003, the trial court entered an order denying Humana an award of attorneys fees. (A.7-8). Humana timely appealed the denial of fees. That appeal was consolidated with Westside's main appeal and treated as a cross-appeal. The Fourth District denied Humana's cross-appeal as moot because it reversed the Final Judgment on the Pleadings, thus making Westside the provisional prevailing party.

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[4]Humana had previously perfected its claim for fees in its Answer and Affirmative defenses by demanding, "that Humana be awarded fees and costs of defending this action." (R3-450). *See Caufield v. Cantele,* 837 So. 2d 371 (Fla. 2002)(general demand for attorneys' fees is legally sufficient to notify opposing party and prevent unfair surprise; it is unnecessary to plead specific basis). In addition, the Motion for Judgment on the Pleadings specifically identified the statute pursuant to which fees would be sought. (R7-1144-1150).

SUMMARY OF THE ARGUMENT

The certified question should be answered in the negative and the decision of the Fourth District quashed. There is no private right of action to enforce the requirements of Florida's HMO Act, whether through a direct action alleging a violation of the statute, a declaratory judgment that the statute has been violated, or an indirect action for breach of contract based upon a fiction that those same statutory requirements were, by operation of law, part of all HMO contracts in the State of Florida.

First, all cases which preceded the Fourth District's opinion in this case have held that the HMO Act provides no private right of action to enforce its requirements, under circumstances with far more sympathetic plaintiffs than this case. *Villazon v. Prudential Healthcare Plan, Inc.*, 843 So. 2d 842 (Fla. 2003); *Fla. Physicians Union, Inc. v. United Healthcare of Fla., Inc.*, 837 So. 2d 1133 (Fla. 5th DCA 2003); *Greene v. Well Care HMO, Inc.*, 778 So. 2d 1037 (Fla. 4th DCA 2001). Those cases looked to the lack of textual support in the statute itself as well as the lack of any indication in the legislative history of any intent to create one. In fact, this Court has repeatedly held in recent years that the polestar for determining whether a private right of action was intended is legislative intent, not whether the statute imposed a the duty to benefit a particular class of persons. *Villazon;*

Murthy v. N. Sinha Corp., 644 So. 2d 983 (Fla. 1994).

Although conceding the lack of textual support for the creation of a private right of action to enforce the requirements of the prompt pay statute of Florida's HMO Act, §641.3155, Fla. Stat. (2003) – or any other provision of the Act – the Fourth District nevertheless divined one because it believed that it was the only effective way for providers of medical services, like Westside, to protect themselves from the alleged misconduct by HMOs in the claims payment process. The fatal flaw, among many, in the Fourth District's analysis, is that it focused upon the duty under the statute to benefit Westside and all but ignored what should have been the primary focus of its inquiry, viz: the lack of legislative intent.

In addition to the lack of textual support for a private right of action, a review of the legislative history of the HMO Act affirms the conclusion that no such right was intended. The Act, in general, and the legislative history behind the specific 1998 enactment of the "prompt pay" statute clearly contemplates administrative enforcement as the exclusive remedy. Moreover, no less than five (5) attempts have been undertaken by the Florida Legislature since 1996 to create a private right of action under the HMO Act, the last four (2001, 2002, 2004 and 2005) under the "prompt pay" statute itself. Each effort failed. By its repeated,

but failed efforts to amend the statute, the Legislature has affirmed that the HMO Act, as currently written, affords no private remedies.

The theory, accepted by the Fourth District, that the requirements of the HMO Act became part of the contract between Humana and its members is equally flawed for a number of reasons. We note, too, that Westside has no contract with Humana, but instead seeks to employ a "double fiction" by arguing that it is a third party beneficiary (fiction 1) to a contract that contains no "prompt pay" provision, but which, by operation of law, incorporated the entire HMO Act into its body (fiction 2).

The first problem with that thesis is that Mr. Villazon, Ms. Greene and the physicians represented by Florida Physicians Union, unlike Westside, all had written contracts with HMOs. Thus, if the existence of a contract which, by operation of law, incorporated the entirety of the HMO Act into its body, is the critical distinction for Westside, it is no distinction at all. Under *Westside* then, those other cases were decided incorrectly, a proposition we are confident this Court will reject.

More importantly, if there is no private right of action under the statute directly, Westside may not do an "end run" around that proscription by having its statutory claim masquerade as a breach of contract. A plethora of cases from

around the country have rejected attempts identical to Westside's on the basis that one may not do indirectly that which it cannot do directly. As the Federal 10th Circuit has stated in a similar context:

> We agree with plaintiff's contention that "existing applicable law is a part of every contract." [cite omitted]. We reject, however, its argument that incorporating UCSPA into the insurance contract somehow creates the private right of action that does not exist in the unincorporated statute.

Council Oaks Learning Campus, Inc. v. Farmington Casualty Co., 210 F.3d 389, 2000 WL 376623 *3 (10th Cir. 2000).

Additionally, even assuming that the contracts between Humana and its subscribers incorporated "existing law," prompt pay of a provider is irrelevant to their relationship because, by statute, a provider may not seek payment from an HMO subscriber. §641.3154, Fla. Stat. (2003). Thus, the "prompt pay" statute is as irrelevant to Humana's contracts with its subscribers as are family law and land boundary statutes and cannot be construed to have become a part of them.

Lastly, Humana was and is entitled to attorneys' fees because Westside sued as a third party beneficiary to enforce the alleged terms of Humana's contract with its subscribers. Westside alleges that those contracts included the prompt pay provisions of the HMO Act. If Humana prevails, it will be because it did not

breach any contract of which Westside is third party beneficiary and thus, under Section 641.28, would be the prevailing party in a breach of contract action by Westside.

ARGUMENT

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.

a. A number of courts, including this one and the Fourth District itself, have expressly held that the HMO Act does not create any private right of action under far more compelling circumstances than those presented in this case.

In *Villazon v. Prudential Health Care Plan, Inc.*, 843 So.2d 842, 852 (Fla. 2003), this Court recently concluded that, "[t]he [HMO] Act does not specifically provide a private right of action for damages based upon an alleged violation of its requirements" and that none could be inferred from its text.[5] In reaching that conclusion this Court stated:

There are other regulatory statutes in which the

[5] Florida's HMO Act is found at Section 641.17, et seq., Fla. Stat. (2003).

> legislature has specifically created a private right of action. In the nursing home statute, for example, the legislature created a nursing home resident's 'right to receive adequate and appropriate health care,' [cites omitted] and a concomitant private right of action for deprivation of a resident's statutory rights. [cites omitted]. Absent such expression of intent, a private right of action is not implied.

Id.

Villazon involved a claim by the husband of an HMO subscriber who died as the result of an alleged failure to diagnose her cancer. The HMO was sued on a theory of vicarious liability for the physicians with whom it had contracted to render care to its members, including the plaintiff's wife. Villazon sought, unsuccessfully, to enforce a non-delegable duty of care which he claimed was imposed on the HMO by Florida's HMO Act. This Court found that he could not avail himself of the provisions of the HMO Act to create that duty of care because the legislature did not intend to give him that right. Instead, Mr. Villazon would have to resort to the common law and an interpretation of the contracts between the HMO and the subject physicians to determine whether the HMO exercised such a degree of control over the physicians to vitiate the express language in the contracts that ostensibly made the physicians independent contractors.

Villazon followed and favorably quoted *Greene v. Well Care HMO, Inc.*,

778 So. 2d 1037 (Fla. 4th DCA 2001), where the Fourth District also held that no private right of action exists to enforce the provisions of Florida's HMO Act. *Id*. at 1040-41. Greene sued an HMO, *inter alia,* under the deceptive and unfair acts or practices provisions of the HMO Act (§641.3903, Fla. Stat.) because of its refusal to authorize and pay for her hyperbaric oxygen treatment to remedy serious complications resulting from radiation and chemotherapy. The HMO had two medical opinions on file, including one from a physician to whom it sent Greene for a second opinion, that she, "was at great risk without the hyperbaric oxygen treatment." Notwithstanding the very unfortunate plight of Greene, the Fourth District remained true to this Court's decision in *Murthy v. N. Sinha Corp.*, 644 So.2d 983, 985 (Fla. 1994), discussed below, and concluded that the lack of legislative intent to create a private right of action ruled the day.

Murthy, which was also relied upon by this Court in *Villazon,* answered the more general question of when a private right of action can be inferred from what is obviously a regulatory statute. This Court recognized that, in the past, some courts have looked to whether a statute imposed a duty to benefit a particular class of individuals. "These courts simply concluded that a cause of action arose when a class member was injured by a breach of that duty. [cite omitted]. Today, however, most courts generally look to the legislative intent of a statute to

determine whether a private cause of action should be judicially inferred." *Murthy* at 985. This Court then went on to state that, "legislative intent, rather than a duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one."[6] *Id.* *Murthy* concluded that the plaintiff there had no private right of action under that statute.[7]

The teaching of *Murthy* and *Villazon* is that just because the HMO Act may have been enacted primarily to protect the interests of HMO subscribers is not enough, in itself, to give rise to a private right of action for those subscribers to

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[6]See also *Aramark Unif. and Career Apparel, Inc. v. Easton*, 894 So.2d 20 (Fla. 2005)(legislative intent is the polestar that guides inquiry into whether a private right of action for violation of a statute exists; and courts must determine the legislative intent from the plain meaning of the statute).

[7]*Murthy* involved an effort by a homeowner to hold the president of a construction corporation personally liable for construction defects pursuant to chapter 489, Florida Statutes (1991), which required a corporation seeking to become a contractor to procure an individual licensed contractor as its qualified agent and that the qualified agent is responsible for supervising, directing, managing and controlling both the corporation's contracting and construction activities. This Court concluded that, "the language of chapter 489 indicates that it was created merely to secure the safety and welfare of the public by regulating the construction industry" and not to create a civil liability. 644 So.2d at 986.

enforce a violation of its requirements. Rather, a necessary ingredient to the creation of a private right of action today is a clear indication by the Legislature of its intent to do so. "Absent such expression of intent, a private right of action is not implied."[8] *Villazon* at 852.

No reasonable person could disagree that *Greene* and *Villazon* cry out far more for such a private remedy under the HMO Act than does this case, which is about perhaps a few pennies of interest to a large number of providers, but a lot of dollars for the class action lawyers. That no private right of action was found to exist in those cases dramatically weakens the Fourth District's conclusion that Westside has a private right of action here. If the express intended beneficiaries of the HMO Act – the subscribers who are within the class for whose benefit the statute was principally drafted and who all have written contracts with HMOs – have no private right of action, by what logic does a provider – who, in this case, has not even expended a single drop of contractual ink to attempt to protect its own interests – have a right to sue for alleged violations of the same Act under a strained and parasitic theory of contract?

In *Florida Physicians Union, Inc. v. United Healthcare of Florida, Inc.*, 837 So. 2d 1133 (Fla. 5th DCA 2003), the Fifth District rejected a claim by medical providers, like Westside, who actually thought that they stood in a superior position to the plaintiff in *Greene* (and who would, no doubt, feel the same way about the plaintiff in *Villazon*), in their ability to sue for violations of the requirements of the HMO Act.[9] The Fifth District was decisive in rejecting such an argument:

> Florida Physicians argues that *Greene* is not determinative of this case because the plaintiff in this case is a provider, not an insured or a subscriber. That difference does not help Florida Physicians' position. As noted above, the statute appears primarily designed to protect and safeguard the subscribers or the insureds. Although providers may also need protection in this business context against HMOs, if the subscribers do not have a private cause of action under the statute, then even more clearly providers do not.

Id. at 1136. This case should have short circuited the Fourth District's effort to

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[8]See also *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2763 (U.S. 2004), where the U.S Supreme Court expressed its reluctance to infer intent to provide a private right of action when one has not been expressly supplied by the statute.

[9]The Fifth District noted that all of the physicians and their associations represented by Florida Physicians Union were under contract with United Healthcare.

limit *Villazon* to the non-contractual/personal injury arena because it carried through the proscription against a private right of action with equal force to the provider contracting arena.[10] We urge this Court to maintain consistency and avoid any temptation to elevate the rights of non-contracting businessmen above contracting subscribers and insureds for whose benefit the HMO Act was principally drafted.[11]

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[10]We believe that the Fourth District's opinion in *Westside*, coupled with its certification, is really an oblique challenge to *Villazon*, *Greene and Florida Physicians Union*, because there is really no way to distinguish them on the basis that they did not involve contracts. Villazon, Greene and the physicians represented by Florida Physicians all had written contracts with HMOs that, if *Westside* is correct, incorporated by operation of law the very features of the HMO Act that they sought to enforce. Hence, the effort to distinguish those cases under the guise that *Westside* involved an effort to enforce parasitic contract rights is very flawed.

[11]What is most surprising about the Fourth District's decision in *Westside* is that it came on the heels of its decision, only three months earlier in *Plantation Gen. Hosp. Ltd. P'ship v. Horowitz*, 895 So.2d 484 (Fla. 4th DCA 2005), where it correctly cited to this Court's opinion in *Murthy* and concluded that no private action existed under a regulatory statute. *Plantation General* involved efforts by a judgment creditor to hold a hospital responsible for a medical malpractice judgment against a physician who enjoyed staff privileges at the hospital. The theory of liability was that the hospital failed to properly supervise the physician's compliance with the financial responsibility law regarding medical malpractice judgments. The Fourth District in *Plantation General* concluded, based upon *Murthy*, as follows: "The Legislature has implied no damages remedy of any kind -

b. The language of the HMO Act combined with its legislative history, including at least 5 failed efforts to create a private right of action (4 under the prompt pay statute itself), reinforce the conclusion that no private right of action was provided or intended.

The "prompt pay" statute of the HMO Act was first enacted in 1998. §641.3155, Fla. Stat. (1998). (A.12-14). Its provisions contain no language even hinting that providers may privately enforce its requirements. In fact, other provisions of the HMO Act are explicit in expressing legislative will that no private right of action was intended. For example, Florida Statutes Section 641.185 (2003), (A.9-10), summarizes a panoply of protections for HMO subscribers (and some for providers) that are found elsewhere in the Act, including at Section 641.3155. It provides, in part, as follows:

> (1) With respect to the provisions of this part and part III, the principles expressed in the following statements shall serve as standards to be followed by the commission, the office, the department [Department of Insurance], and the Agency for Health Care Administration in exercising their powers and duties, in exercising administrative discretion, in administrative interpretations of the law, in enforcing the provisions, and in adopting rules:
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under section 458.320, whether it is based on strict liability, negligence, suretyship, contract, contribution, indemnification, criminal punishment, or any other legal theory the creative minds of lawyers can discern."

> (e) A health maintenance organization subscriber should receive timely, concise information regarding the health maintenance organization's reimbursement to the providers and services pursuant to ss. 641.31 and 641.31015 and should receive prompt payment from the organization pursuant to s. 641.3155.

Immediately following is Section 2, which states in no uncertain terms:

> This section shall not be construed as creating a civil cause of action by any subscriber or provider against any health maintenance organization.

Fla.Stat. 641.185

The above expression of legislative intent cannot be clearer. No private right of action exists, and none may be inferred from the text of the Act itself.

In addition, no private right of action may be inferred from the 1998 Staff Analysis to the bill that created Section 641.3155 ("prompt pay" statute). (A.15-19). In speaking about the 10% interest resulting from an HMO's failure to timely pay a claim under the statute (it is now 12%), the analysis indicated that,

> if an HMO violates the provisions of the statute, the department [Department of Insurance] may determine that the HMO is not operating in compliance with part I of chapter 641, F.S., and impose such administrative penalties authorized by ss. 641.23 and 641.25, F.S., which authorizes fines of up to $2,500 for each nonwillful violation and up to $20,000 for each willful violation.

(A. 19). Again, nowhere is there even a hint of an intention to create a private

remedy.

Thus, consistent even with the Fourth District's concession that, "the Act does not explicitly authorize private enforcement of its provisions," Section 641.185 and the Staff Analysis make clear that enforcement of these provisions is remanded exclusively to the domain of regulatory agencies, principally the Department of Insurance or Division of Insurance Regulation and the Agency for Healthcare Administration. *See* §641.27, Fla. Stat. (2003).

Further support for this conclusion is found in five (5) separate and failed attempts, beginning in 1996, to expressly create a private right of action to enforce the requirements of the HMO Act. The first attempt was in 1996, when the Legislature actually passed a bill that would have created a private right of action for subscribers to sue HMOs for violations of the deceptive and unfair trade practice provisions of the Act. It was vetoed by Governor Chiles. *Greene,* 770 So.2d. at 1040.

The next effort was in 2001, when the Legislature considered adding Section 641.275, which would have provided a private right of action for subscribers to enforce in court violations of prompt pay provisions.[12] (A.20-36). That proposal

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died in committee. (A.20).

The next effort was in 2002, when the Legislature considered an amendment that would have expressly created a private right of action to providers under the prompt pay statute itself.[13] (A. 37-54). The proposed language in the bill would have created a subsection "12" to Section 641.3155 which would have read as follows:

> (12)(a) Without regard to any other remedy or relief to which a provider is entitled, any provider aggrieved by a violation of this section [641.3155] by a health maintenance organization may bring an action to enjoin a person who has violated, or is violating, this section. In any such action, the provider who has suffered a loss as a result of the violation may recover any amounts due the provider by the health maintenance organization, including accrued interest, plus attorney's fees and costs. . .

S. 362, 2002 Leg. (Fla. 2002). (A.52-54).

Consideration of that proposal was temporarily postponed on March 22, 2002 and later died on calendar. (A.38).

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[12]S. 984, 2001 Leg. (Fla. 2001).

[13]S. 362, 2002 Leg. (Fla. 2002).

Significantly, another amendment to the "prompt pay" provisions of the Act was proposed and passed that same year in its place.[14] (A.55-68). The provision inserted as subsection "12" (in place of the private right of action proposal) provides for an allowable error ratio of 5% for HMO's in paying claims. (A.66-67). Thus, not only did the Legislature reject the creation of a private right of action to enforce the prompt pay provisions of the HMO Act, but it acknowledged the difficulty and cost in appropriately and timely paying millions, if not billions, of individual claims per year by allowing for a 95% accuracy rate. It balanced the cost of compliance and the practical realities of business life against the rights of providers to be paid timely and accurately by selecting an accuracy rate that would serve the interests of both HMOs and providers. That express legislative policy decision completely undermines the notion that a private right of action exists to enable class action lawyers to collect the other 5%. As a matter of policy, to allow private enforcement of those same provisions of the Act would destroy the delicate balance struck by the Legislature by unreasonably increasing the cost of doing business by requiring 100% compliance, which the Legislature has manifestly rejected as too costly and unfair to the HMO industry.

The next effort was in 2004, where the Legislature tried to add a subsection to the prompt pay statute, §641.3155, Fla. Stat., that would have explicitly created a private right of action to enforce its requirements.[15] (A.69-72). That effort died in committee. (A.69).

Finally, in 2005 the Legislature again tried to pass a similar amendment to the prompt pay statute that would have explicitly provided for a private right of action. (A.73-79). That bill never made it out of House committee.[16] (A.73).

The five (5) failed attempts to create a private right of action under the HMO Act coupled with the plain language of the statute conclusively establishes that such a right does not exist.

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."

The Fourth District's effort to distinguish *Villazon, Greene* and *Florida Physicians Union*, rested on the notion that they were not in the nature of contract actions, whereas Westside's case is. So the argument goes, Westside is not really

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[14]S. 46, 2002 Leg. E (Fla. 2002).

[15]S. 2814, 2004 Leg. (Fla. 2004)

seeking to enforce the requirements of the Act, but is merely seeking to enforce the terms of its contract which, by operation of law, just happen to incorporate all of the provisions of the Act. In addition to the inequity, if not novelty, of allowing a stranger to a contract to enforce terms that do not exist in the language of the contract itself, where the actual party to the contract – the subscriber – has no such similar right, there are glaring problems with the analysis.[17]

First, *Villazon*, *Greene* and *Florida Physicians Union* were as much contract actions – or could have been – as this case. In fact, unlike Westside, Villazon, Greene and the physicians represented by Florida Physicians Union actually had written contracts with their HMOs. Westside is using its double fiction theory to concoct its contract from thin air. It is ironic that it was able to successfully use its fanciful and fully invisible contract to create greater rights for itself than those who actually took the time to put pen to paper. In any case, the

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[16]H.R. 631, 2005 Leg. (Fla. 2005)

[17]In fact, a third party beneficiary (assuming, which we do not, that Westside may claim such status) steps into the shoes of the contracting party and cannot claim greater rights than the party through whom it claims. If the contracting party wears a size 9, the third party can't claim rights that only come with a size 11 shoe. *See The Moorings Dev. Co. v. Porpoise Bay Co., Inc.*, 487 So.2d 60 (Fla. 4th DCA 1986).

effort to distinguish Westside's status from that of Villazon, Greene and Florida Physicians Union fails, since all three of those cases involved business or consumer relationships arising from written contracts. Thus, if Westside is able to sue, those other cases were decided incorrectly, a proposition we expect this Court will wholly reject based upon its prior opinions.[18]

Second, the fact that a contract exists in any of the cases makes no legal difference. We have no quarrel with Westside and the Fourth District's general assertion that contracts are presumed to incorporate existing law. As they correctly point out, many cases, both near and far, so hold. The question that looms, however, is whether Westside may apply that principle to "end run" or circumvent the public policy – embodied in the same statute through the absence of

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[18]The Fourth District in *Westside* claims that the fact that both *Greene* and *Florida Physicians Union* agreed that "civil suits to enforce a contract with an HMO are unaffected by the statute and clearly can be brought in a proper case" validates its decision to allow a contract action to circumvent the proscription against a private right of action. We do not read those cases to support such a conclusion. We believe those courts simply sought to point out that other remedies independent of the HMO Act may exist – such as if Westside actually had a contract whose express terms were breached by Humana – and that those remedies are unaffected by the inability to sue under the HMO Act. Those cases cannot be read – as they have been by the Fourth District – to allow a "back door" action to defeat their very holdings. That is an illogical and strained interpretation of those

an enabling provision – that does not allow for a private right of action under Florida's HMO Act, Chapter 641, Florida Statutes. The well established law is that it may not.

Those courts that have considered similar efforts to enforce statutory claims by casting them as breaches of contract have consistently rejected such efforts, where there was no private right of action under the relevant statute or statutory scheme.

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

"It is a fundamental principle of law that a person will not be permitted to do indirectly what he is not permitted to do directly." *Clermont-Minneola Country Club v. Loblaw*, 143 So. 129, 133 (Fla. 1932); *see also Schetter v. Schetter*, 239 So. 2d 51, 52 (Fla. 4th DCA 1970). As applied here, this principle precludes Westside from attempting to enforce the provisions of Florida's HMO Act through a breach of contract action. To hold otherwise is to sanction an "end-run" around legislative intent that no private right of action exists to enforce the provisions of Chapter 641.

Though we have found no Florida state court authority that addresses this

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opinions, where those cases rejected claims based upon violations of the requirements of the HMO Act.

discrete issue – apart from the above general principle – we did find abundant authority elsewhere to bolster our thesis.

In *Solomon v. U.S.Healthcare Sys. of Penn., Inc.,* 797 A.2d 346 (Pa. App. 2002), a Pennsylvania appellate court held that not only did the Pennsylvania Health Care Act not allow a private right of action for providers to enforce its prompt pay statute, but it further stated 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. It thus rejected the principle that the provider could indirectly use a contract action to circumvent its inability to sue directly under the Pennsylvania prompt pay provisions.[19]

In *Keehn v. Carolina Cas. Ins. Co.,* 758 F.2d 1522 (11th Cir. 1985), the

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[19] *But see Grider v. Keystone Health Plan,* 2003 WL 22182905 (E.D. Pa. 2003), where a federal district judge rejected *Solomon* – even though it was a dispositive state appellate decision on state law – and concluded that a private right of action exists under Pennsylvania's HMO prompt pay statute even though it conceded that it, "agree[s] that there is no indication of legislative intent on the part of the Pennsylvania General Assembly [to create a private remedy]." *Id.* at 29. Like the Fourth District in *Westside,* that district court appeared intent on judicially legislating the result it desired. As we argued above, the *Grider* and *Westside* analyses are flawed because this Court has emphasized over and over in recent years that legislative intent is the polestar that guides the court's inquiry in this regard. *See Aramark Uniform* at 23.

Eleventh Circuit affirmed a decision that Florida's Unfair Insurance Trade Practices Act (UITPA), which provided for no private right of action, could not form the basis for a breach of contract claim. *Id*. at 1523. In rejecting the exact argument made by Westside and accepted by the Fourth District here, the court stated:

> [T]hey argue that theirs is a common law action for breach of the underlying contract of insurance, which contract of insurance included the UITPA since it was in effect at the inception of the contract. Plaintiffs' argument is that the insurance contract, by the legal incorporation of §626.9541(24)(c) prohibited the defendant from cancelling the insurance policy due to the insured's failure to place "collateral business."
>
> Plaintiffs' argument, however, ignores the fact that the *entire* UITPA was incorporated into the insurance contract, including FLA. STAT. § 626.9621 and the other provisions of the statute providing an administrative remedy only for violations thereof.

Id. at 1524.

Significantly, that is precisely the reasoning of the trial judge in our case when he queried Westside's counsel during argument on the motion for judgment on the pleadings:

> The Court: Also part of that statute, the Supreme Court has interpreted that you don't have a cause of action for this. Why isn't that part of this deal [contract]?

(R17- May 21, 2003, 22-24). *See Fla. Physicians Union*, 837 So. 2d at 1135 ("[T]he general scheme of the statute is to empower the Department of Insurance to enforce the statute's requirements and determine whether the provisions are being complied with or violated.").

Another case to have squarely addressed this issue is *Council Oaks Learning Campus, Inc. v. Farmington Cas. Co.*, 210 F.3d 389, 2000 WL 376623 (10th Cir. 2000).[20] There, the plaintiff sued an insurer for, among other things, breach of its insurance contract for its refusal to cover water damage to the interior and contents of a school building. The insurer argued that the policy contained an exclusion for loss from repeated seepage or leakage of fourteen days or more. The plaintiff argued that the insurer was barred from asserting that exclusion due to its failure to comply with the notice provisions of Oklahoma's Unfair Claims Settlement Practices Act (UCSPA). In rejecting plaintiff's argument, the Tenth Circuit stated:

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[20]This decision was reported in a "Table of Decisions Without Reported Opinions." Under Rule 36.3 of that court's local rules, an unpublished decision may be cited if it has persuasive value with respect to a material issue that has not been addressed in a published opinion and it would assist the court. Given the lack of Florida case law addressing this discrete issue, we believe we meet all criteria for use of the opinion. Also in conformity with the Tenth Circuit's local rule, we include a copy of the opinion in our Appendix.

> We agree with plaintiff's contention that "existing applicable law is a part of every contract." [cite omitted]. We reject, however, its argument that incorporating UCSPA into the insurance contract somehow creates the private right of action that does not exist in the unincorporated statute.

Id. at *3.

Similarly, in *Berger v. AXA Network, LLC.* , 30 Employee Benefits Cas. 2688, 2003 WL 21530370 (N.D. Ill. 2003), a court again rejected the precise argument advanced by Westside. The plaintiffs there sued for breach of contract, alleging that compliance with the Federal Insurance Contributions Act (FICA) was an implied term of their contracts and that the defendants' failure to comply with FICA constituted a breach of contract. Like Westside here, the plaintiffs argued that Illinois recognizes that in the absence of language to the contrary, the laws and statutes pertinent to a contract and in force at the time the contract is executed are considered a part of the contract. In rejecting the contract claim the district court held as follows:

> It cannot be the case, however, that every employment contract necessarily includes the tax code as an implied term such that any violation of FICA by the employer would lend itself to a breach of contract claim. This would turn on its head the rule discussed above that there is no private right of action under FICA. [the IRS has administrative jurisdiction to address FICA issues]. . . Allowing private lawsuits of FICA issues based on

> plaintiffs' theory that the tax code is an implied term of employment contracts would interfere with this administrative framework. [cite omitted]. Plaintiffs' breach of contract claim is therefore dismissed.

Id. at 4.

Finally, in *Davis v. United Air Lines, Inc.,* 575 F.Supp. 677 (E.D. N.Y. 1983), the court also rejected the identical "incorporation" argument raised by Westside here in an attempt to circumvent the proscription against a private right of action to directly enforce statutory law. The plaintiff, a former employee of United Airlines who suffered from epilepsy and was terminated, sued United claiming to be a third-party beneficiary of its contract with the United States. Section 503 of the Federal Rehabilitation Act provided that any contract with the government in excess of $2,500 must contain a provision that the contractor will take affirmative steps to employ handicapped individuals. The Second Circuit had previously ruled in the same case that no private right of action existed under that Act. *Id*. at 679 (citing *Davis v. United Air Lines, Inc.*, 662 F.2d 120 (2nd Cir.1981)). Hence the plaintiff, like Westside here, was left scrambling for a way to indirectly enforce its provisions.

In rejecting the effort to sue as third party beneficiary of the contract between United Air Lines and the United States, the Court held that "allowing him

to sue here under the contract would be allowing him to make an 'end-run' around the statute which the Court of Appeals has held did not allow him to sue." *Id*. at 680.[21]

The lesson learned from these cases is simple: one may not do indirectly that which it cannot do directly. Where a statute does not provide for a private right of action or where none can be inferred because of affirmative language vesting enforcement powers solely in an administrative or regulatory agency, a private

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[21] *See also Grochowski v. Phoenix Constr.*, 318 F.3d 80 (2nd Cir. 2003)("At bottom, the plaintiffs' state law claims are indirect attempts at privately enforcing the prevailing wage schedules contained in the DBA [Davis-Bacon Act which provided no private right of action]. To allow a third-party contract action aimed at enforcing those wage schedules would be 'inconsistent with the underlying purpose of the legislative scheme' . . . [and] an impermissible 'end run' around the DBA."); *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979)(even if employee qualified as handicapped individual under federal act, the act did not authorize private right of action on ground that he was third party beneficiary of contract between employer and United States); *Niss v. Nat. Ass'n. of Sec. Dealers, Inc.*, 989 F.Supp. 1302 (S.D. Cal. 1997)("This [third party beneficiary] claim merely restates Plaintiff's first cause of action [direct action under rules] in different terms. It is an attempt to evade the doctrine that no private right of action exists against the NASD for failing to supervise its members adequately."); *Bloch v. Prudential-Bache Sec.*, 707 F.Supp. 189 (W.D. Pa. 1989)("[T]hird party beneficiary liability seems incongruous with the large body of case law holding that no private cause of action exists for violation of the rules of self-regulatory organizations."); *Carson v. Pierce*, 546 F.Supp. 80 (E.D. Mo. 1982)("This Court believes that the conclusion that these tenants are not intended third-party beneficiaries follows from its

party may not circumvent that prohibition by claiming that, under general law, the statute became part of a private agreement.[22] Alternatively, assuming, *arguendo*, that it did, so too did the absence of enabling language that would provide a private enforcement remedy.

d. The Fourth District's reasoning in support of its judicially legislated private right of action cannot survive close scrutiny and analysis.

Although perhaps well intentioned, the Fourth District has deviated from basic interpretative principles to achieve the result it believed was appropriate. Therefore, its "stomach justice" cannot survive a rigorous legal review of both cases and statutes.

First, as argued above, the lack of any legislative intent to create a private right of action either in the language of the HMO Act or its legislative history precludes any effort by the judicial branch to divine one. This Court made clear in

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determination that the non-discriminatory provisions of s1713(b) was not intended to create a statutory right or private cause of action.").

[22]In fact, this Court is committed to the principle that a specific statute trumps a general one on the same subject matter. *See Gretz v. Florida Unemployment Appeals Comm.*, 572 So.2d 1384 (Fla. 1991); *Adams v. Culver*, 111 So.2d 665, 667 (Fla. 1959). By analogy, general common law cannot take priority over a specific statute that affords no private remedies for violations of its requirements.

Villazon and *Murthy* that protection of a class for whose benefit a statute was enacted is no longer the primary focus of analysis. Rather, the principal focus is legislative intent, tending toward express intent, as determined from the language of the statute. *See also Aramark Uniform.*

Second, the Fourth District outlines the general proposition that when contracts are created in a domain subject to statutory regulation, those statutes become part of the contract, unless a contrary intention is disclosed. It made that observation despite the fact that Westside did not contract with anybody for anything. Instead, it was referring to the contracts between Humana and its subscribers. There is, however, a real issue concerning what part of the HMO Act, if any, actually became part of those contracts. Since the HMO Act was designed primarily to protect subscribers, not providers like Westside, it is not proper to presume that the subscriber contracts would incorporate provisions that have no bearing on the rights of subscribers.

For example, Section 641.3154(4) of the Act explicitly prohibits a provider of services to HMO members, whether under contract or not, from seeking to collect any portion of its bill from the HMO members/subscribers directly.[23]

(A.11). Thus, the members have absolutely no legal concern about the payment arrangements between Humana and medical providers like Westside, which are outlined in Section 641.3155. (A.12-14). Should the prompt pay provisions still become part of the subscriber contract, when it is not relevant to their relationship with Humana and when Section 641.185, (A.9-10), expressly states that no private right of action under Section 641.3155 (prompt pay statute) is created? We think not. Westside might have a colorable argument in the proper case if it were seeking to engraft the statutory language of Section 641.3155 onto a provider contract, which would address provider issues like timely payment.[24] Subscribers, however, have no legal concern whether the provider is timely paid anymore that an American Express cardholder has concern whether the merchant he bought goods from with his credit card is timely paid by American Express.

The Fourth District next posits that without judicially creating a private right of action, providers would be deprived of common law rights to civil remedies,

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[23]"A provider . . . regardless of whether the provider is under contract with the health maintenance organization, may not collect or attempt to collect money from . . . a subscriber . . . if the provider in good faith knows or should know that the organization [HMO] is liable." *Fla.Stat.* 641.3154.

[24]Although, even there, the fact that no private right of action exists would render that exercise futile.

including third party claims, which would be to the detriment of subscribers. We could not disagree more. Subscribers are removed from the payment process between HMOs and providers by virtue of that same Section 641.3154(4), discussed immediately above. Providers still have rights to be paid under their contracts with HMOs and under the common (*quantum meruit*, good sold, etc.).[25] They simply may not enhance their common law and contract rights by invoking statutory remedies in reliance on the HMO Act.

The Fourth District also states that unless a private right of action is judicially created, HMOs would be impervious to legal action. If that is so, why are so many law firms deriving a considerable part of their incomes defending

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[25]Westside makes it seem as if its plight is shared by most other providers. It is not. The overwhelming majority of providers – the exception generally being other emergency care providers and related hospital based specialty providers like Westside – actually have written contracts with HMOs. In fact, the very concept of an HMO assumes a closed network where, except in limited circumstances, members only receive services from contracted providers. In this regard, an HMO is defined as an organization which, "provides, either directly or through arrangements with other persons, health care services to persons enrolled with such organization." §641.19(12)(b), Fla. Stat. (2003). Thus, the notion that providers in general are in dire need of the statutory benefits in order to survive is a gross exaggeration and distortion.

HMOs in court? This Court can take judicial notice that there were no shortage of lawsuits against HMOs before the Fourth District's ruling.

The Fourth District next cites several cases to support its conclusion that a private right of action has been or should be recognized under the HMO Act. None are expressly supportive and all are readily distinguishable.

Foundation Health v. Garcia-Riviera, M.D., 814 So. 2d 537 (Fla. 3d.DCA 2002), which affirmed class certification of an action to enforce the very "prompt pay" provision that is at issue here, conflicts with *Greene* and *Florida Physicians Union* and was implicitly overruled by *Villazon.*[26] Perhaps most importantly, there is no indication from that scant opinion whether the private right of action issue was ever raised. It would seem not. That case solely addressed class certification.

So too, the issue here was not raised in *Colonial Penn Ins. Co. v. Magnetic Imaging Sys., Ltd.,* 694 So. 2d 852 (Fla. 3rd DCA 1997)(approved a class under PIP "prompt pay" statute), which only addressed class certification.

The Fourth District relied upon this Court's decision in *All State Ins. Co. v.*

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[26] Though *Villazon* does not directly overrule *Foundation Health*, it did so in substance by holding that there is no private right of action under the HMO statute. Accordingly, any prior decision like *Foundation Health* which tends to indicate,

Kaklamanos , 843 So.2d 885 (Fla. 2003), involving Florida's PIP statute, to support its judicial divination of a private right of action under the HMO Act. While it recognized that this Court did not address the private right of action question, and while it cited that case primarily for the proposition that a provider is a third party beneficiary of an HMO subscriber contract, the Fourth District proceeded to compare the PIP statute and the HMO Act's "prompt pay" provisions. It concluded that the similarities it found supported finding a private right of action under the prompt pay provisions at issue here.

Although there are undeniable similarities between the statutes, there are several critical distinctions that support finding legislative intent to create a private right of action under the PIP statute, but not the prompt pay provision of the HMO Act.

For example, the PIP statute explicitly assumes a right to sue in two separate places. The first is in the "Benefits when due" section, which outlines an insurer's responsibilities when paying or not paying particular claims, including time frames for payment. Within the text of that section itself, where it recites what type of notice is required by an insurer to an insured when it denies or reduced benefits,

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directly or inferentially, that a private right of action may exist is no longer good law.

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the statute reads, "provided that this [what is contained in the notice] shall not limit the introduction of evidence at trial;" 627.736(4)(b)[27]. We read that provision to mean that an insurer's defenses will not be limited at a trial on a claim for PIP benefits to the reasons outlined in the initial denial or reduction of benefits letter. Thus, that statute contemplates that its requirements may be judicially enforced. There is no similar language in the HMO prompt pay statute.

Even more dispositive of the Legislature's intent that there be a private right of action to enforce the PIP statute is the language in Section 627.736(11) titled "Demand letter." It states, "As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation." In contrast to this clear acknowledgment of the existence of a private right of action, there is no similar language anywhere in the HMO prompt pay statute because no private right of action was intended.

The Fourth District also suggests that Section 641.28, Fla. Stat. (2003), which is a prevailing party attorneys' fee provision in actions to enforce an HMO contract, "implicitly recognizes that civil actions are available to enforce the terms

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[27]The Fourth District referred explicitly to section 4 of the PIP statute as similar to Section 641.3155.

and conditions of a health maintenance organization contract." We agree. No one has argued that such contracts may not be enforced in court. This dispute is over what silent terms are included in such contracts, if any, by operation of law. That section of the statute does not bolster the Fourth District's conclusion at all.

Lastly, we fully understand – even though we thoroughly disagree with – the holding by the Fourth District that the prompt pay statute may be indirectly enforced through a contract action. We fail to see, however, how that deduction enables Westside to bring a direct action for violation of the statute under Count I or a declaratory judgment action under Count III of its Amended Complaint.[28]

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[28]If this Court concludes, as we advocate, that there is no private right of action under the HMO Act, either directly or by contract, then it follows that no declaratory judgment action will lie either. The reason is simple. Courts are not in the business of issuing advisory opinions. Without any private remedy available, any declaration that Westside could secure would be strictly to satisfy its idle curiosity. As Justice Terrell said long ago:

> Viewed in its proper perspective, the Declaratory Judgments Act is nothing more than a legislative attempt to extend procedural remedies to comprehend relief in cases where technical or social advances have tended to obscure or place in doubt one's rights, immunities, status or privileges. It should be construed with this objective in view, but it should not be permitted to foster frivolous or useless litigation to answer abstract questions, to satisfy idle curiosity, go on a fishing expedition or to give judgments that serve no useful purpose.

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.

Although this issue was not certified by the Fourth District, "once this Court has accepted jurisdiction in order to resolve conflict [or in this case to answer a certified question], [this Court] may consider other issues decided by the court below which are properly raised and argued before this Court." *Caufield v. Cantele*, 837 So.2d at 377, n.5; see also *Savoie v. State*, 422 So.2d 308 (Fla. 1982). "Therefore, [this court has] jurisdiction to review the remaining issue which was not certified." 837 So.2d at 377.

Since Humana has moved for appellate attorney's fees in this Court by separate motion, pursuant to Section 641.28, Florida Statutes (2003), and since this issue is identical to the one raised in that motion for fees, there should be no reason not to consider the error in denying Humana fees in the trial court and the Fourth

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Ready v. Safeway Rock Co., 24 So. 2d 808, 809 (Fla. 1946). Moreover, the allegations in Count III, referencing as they do, "general business practices," are a transparent effort to sue for violation of Section 641.3903, which even the Fourth District holds gives rise to no private right of action. *Greene*, 778 So.2d. 1037.

District as well.

Section 641.28 provides in pertinent part that the prevailing party is, "entitled to" recover reasonable attorney's fees and court costs "[i]n any civil action brought to enforce the terms and conditions of a health maintenance organization contract."

In Count II of its Amended Complaint, Westside sued Humana for breach of contract. It claimed status as a third party beneficiary of the contracts between Humana and its members, thereby manifestly seeking to enforce the terms and condition of HMO contracts. If this Courts quashes the decision under review, Westside would have lost its claim to enforce the provisions of Humana's HMO contracts with its members. It accordingly should be assessed fees if this Court affirms the dismissal of its claim.

The only argument that Westside raised below in opposition to the motion for fees is that the lower tribunal never reached the merits because it granted the motion for judgment on the pleadings on the basis of lack of standing. So its argument goes, no breach of contract issue was litigated that would trigger Humana's right to fees under Section 641.28. Respectfully, that statute only requires a final adjudication in favor of a party in an action to enforce the provisions of an HMO contract.

Florida courts have specifically held that "[i]f a motion for final decree on the pleadings is granted, the decree entered pursuant thereto is a final adjudication on the merits of the cause." *Davis v. Davis*, 123 So. 2d 377, 380 (Fla. 1st DCA 1960); *see also City of Miami v. Miami Transit Co.*, 96 So. 2d 799 (Fla. 3rd DCA 1957)(holding that an involuntary dismissal with prejudice was an adjudication on the merits). In determining who is the prevailing party, a court looks at "whether the party 'succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Smith v. Adler*, 596 So. 2d 696, 697 (Fla. 4th DCA 1992)(quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). There, the court held that it is the results, not the procedure, that governs the determination of the "prevailing party". *Id*. Here, Humana will have succeeded in its argument that Westside had no private right of action under the Florida HMO Act, the significant issue in this litigation.

"A determination on the merits is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the prevailing party." *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990).

The bottom line is that if it prevails, Humana was compelled to defend against a claim that was found to have no merit because the very contractual provision that Westside sought to enforce against it – a provision in Florida's

HMO Act – was determined not to be enforceable by Westside against Humana. The fact that the substance of the claim might not have been reached does not diminish the efforts and cost that went into defending the suit.

Alternatively, the substance of the claim was in fact reached, namely, Humana did not breach any contracts because no contractual provisions were violated, as the provisions that Westside alleged were violated were not part of the contract as a matter of law.

Regardless of how this Court chooses to characterize the issue, Humana is entitled to attorney's fees because a victory is a victory is a victory. *See generally Olson v. Potter*, 650 So. 2d 635 (Fla. 2nd DCA 1995)(defendant was entitled to fees after prevailing on the affirmative defense of res judicata without determining the merits of the claim).

CONCLUSION

For the foregoing reasons, the certified opinion 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.

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 June 2005 to: See attached Service List

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