UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBIN A. MYERS, A.P., GREGORY S. ZWIRN, D.C., SHERRY L. SMITH, L.M.T., CARRIE C. DAMASKA, L.M.T., JOHN DOE, and JANE DOE,

Plaintiffs,

v. CASE NO: 8:12-cv-2660-T-26TBM

KEVIN N. McCARTY, in his Official Capacity as Commissioner of the Florida Office of Insurance Regulation,

Defendant.
_____/

O R D E R

Pending before the Court for resolution is Plaintiffs' Motion for Preliminary Injunction to which Defendant has filed a Response. Although the Court has scheduled the motion for a hearing on Thursday, December 13, 2012, at 1:30 p.m., after careful consideration of the parties' submissions, the Court now concludes that the motion is due to be denied without the necessity of a hearing because Plaintiffs have utterly failed to demonstrate that there is a substantial likelihood they will eventually prevail on the merits.

The named Plaintiffs are licensed health care providers in the State of Florida providing chiropractic, massage therapy, and acupuncture services. The John Doe Plaintiff purports to represent similarly situated licensed health care providers in the State

of Florida. The Jane Doe Plaintiff purports to represent citizens of the State of Florida injured in motor vehicle collisions. They have sued the Defendant in his official capacity as the Commissioner of the Florida Office of Insurance Regulation seeking declaratory and injunctive relief with regard to the implementation and enforcement of certain provisions of Chapter 2012-197, Laws of Florida, which materially amended the text of what is commonly known as the Personal Injury Protection Act (the PIP Act) and which is due to take effect on January 1, 2013.[1]

The original PIP Act was enacted by the Florida legislature in 1971 with an effective date of January 1, 1972. The purpose of the Act was to provide benefits to a person injured in an automobile accident in an expeditious manner without regard to who was at fault in the accident. These newly enacted amendments severely restrict a chiropractic physician's ability to obtain personal injury protection benefits under an automobile insurance policy insuring a person whom the chiropractic physician has treated for injuries suffered in a motor vehicle collision. They also eliminate a massage therapist's and acupuncture physician's treatment services as services that are compensable as personal injury protection benefits under an automobile insurance policy of a person injured in a motor vehicle collision. Finally, they impose a fourteen-day

[1] Plaintiffs' counsel filed a substantially similar case in the Circuit Court of Leon County, Florida, styled Mooneyham v. McCarty, case number 2012-CA-3060 on September 12, 2012. Plaintiffs' counsel later voluntarily dismissed that action without prejudice on November 20, 2012, and filed this federal case on November 23, 2012. See dockets 15 and 16.

deadline in which a person injured in a motor vehicle collision must seek treatment after a motor vehicle collision to be able to seek personal injury protection benefits under that person's automobile insurance policy and, although requiring an individual to carry $10,000.00 in total personal injury protection benefits coverage, limit the amount of personal injury insurance benefits to $2,500.00 unless the person is diagnosed with an "emergency medical condition."

Plaintiffs claim in count one of their complaint, which is based on 42 U.S.C. § 1983, that the revisions to the PIP Act outlined above violate their rights to due process of the law and the equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution. Invoking this Court's supplemental jurisdiction under 28 U.S.C. § 1367, Plaintiffs have also alleged a host of violations of the Florida Constitution by virtue of these amendments to the PIP Act in counts two through ten as follows: count two alleges an unlawful abridgement and restraint of the Plaintiffs' rights to enjoy the fruits of engaging in a lawful occupation in violation of Article I, Sections 2 and 9 of the Florida Constitution; count three alleges a violation of the "single subject rule" in contravention of Article III, Section 6 of the Florida Constitution; count four alleges a denial of access to the courts in violation of Article I, Section 21 of the Florida Constitution; count five alleges a denial of equal protection in violation of Article I, Sections 2 and 9 of the Florida Constitution; count six alleges an unlawful exercise of the state's police power in violation of an unspecified provision of the Florida Constitution; counts seven and eight allege violations of due process of law in

contravention of Article I, Sections 2 and 9 of the Florida Constitution; count nine appears to allege another equal protection claim coupled with an impairment of contracts claim in violation of Article I, Sections 2 and 9, and Article III, Section 6 of the Florida Constitution; and, finally, count ten alleges a violation of the separation of powers doctrine in contravention of Article III, Section 11 of the Florida Constitution. As noted above, Plaintiffs seek preliminary injunctive relief against Defendant's implementation and enforcement of the challenged provisions.

In order to establish the right to a preliminary injunction, a party must establish four separate factors: (1) a substantial likelihood of success on the merits; (2) irreparable injury will be suffered if injunctive relief is not granted; (3) the threatened injury outweighs the harm the injunctive relief would inflict on the non-movant; and (4) entry of injunctive relief would serve the public interest. See, e.g., Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1225-26 (11th Cir. 2005) (citations omitted). Furthermore, "[c]ontrolling precedent is clear that injunctive relief may not be granted unless the plaintiff establishes the substantial likelihood of success criterion." Id. at 1226 (citations omitted).

In this case, Defendant, through his response, has identified a number of arguably meritorious factual and legal issues which may inure to his benefit, thus requiring further briefing, thought, reflection, and analysis before resolving those issues. As framed by Defendant, those issues consist of whether Plaintiffs have standing to bring this action under Article III of the United States Constitution, whether Plaintiffs have properly laid

venue in this district as opposed to the Northern District of Florida , whether Plaintiffs have even suffered a constitutional deprivation by the challenged amendments to the PIP Act inasmuch as they "have no legally vested right in any particular iteration of a statutorily created right" based on the Florida legislature's right "to amend a statutorily created scheme," and whether this Court should abstain from hearing the alleged controversy based on the Pullman abstention doctrine because of "difficult and unsettled" questions of Florida state law that must be resolved before the Court can decide any federal constitutional questions. See Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

Of equal significance is the fact that, even accepting the allegations of Plaintiffs' complaint as true and construing them in the light most favorable to Plaintiffs, which this Court is constrained to do at this early juncture of the proceedings,[2] Plaintiffs may not have stated a claim for relief under their federal claim embodied in count one under existing United States Supreme Court and Eleventh Circuit precedent. Although not argued by Defendant,[3] the case of Panama City Medical Diagnostic Ltd. v. Williams, 13

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[2] See, e.g., World Holdings, LLC v. Federal Republic of Germany, ___ F.3d ___, 2012 WL 5512377, at *5 (11th Cir. Nov. 15, 2012).

[3] As noted in his response, because Plaintiffs' based their constitutional arguments on Florida case law, Defendant's counsel did likewise. However, counsels' sole reliance on Florida law with regard to constitutional issues did not constrain this Court from *sua sponte* relying on federal cases in its analysis of Plaintiffs' federal claim based on the Court's inherent power to manage its docket so as to achieve the orderly and expeditious disposition of cases. See Equity Lifestyles Prop., Inc. v. Florida Mowing and Landscape Serv., Inc. 556 F.3d 1232, 1240 (11th Cir. 2009) (citing and quoting Chambers

F.3d 1541 (11th Cir. 1994) is instructive. In that case, a district court entered a preliminary injunction enjoining the State of Florida from enforcing a statute which imposed fee caps on providers of diagnostic imaging services with an exemption for hospitals and group practices based on a violation of the Equal Protection Clause of the United States Constitution. In reversing, the Eleventh Circuit determined that because the case did not involve a suspect class nor dealt with a fundamental right, Florida only had to demonstrate a rational basis under the Equal Protection Clause in order to insulate the statute from a constitutional infirmity. The Court commented that "[t]he proper inquiry is concerned with the *existence* of a conceivable rational basis, not whether that basis was actually considered by the legislative body." Id. at 1547 (emphasis in original). Drawing on Supreme Court precedent, the Court also added that a state is not obligated to produce evidence to sustain the rationality of a statutory classification; instead, the burden falls to the challenger of the statute to disprove every conceivable basis which might support the classification whether or not that basis has a foundation in the record. Id. (citing and quoting Heller v. Doe by Doe, 509 U.S. 320-21, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993)). Finding several arguable rationales to support the classification exemption embodied in the legislation, the Court held it did not violate the Equal Protection Clause "even if these rationales are based on faulty premises[.]" Williams, 13 F.3d at 1547.

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v. Nasco, Inc., 501 U.S. 32, 43, 111 S.Ct. 2123, 2312, 115 L.Ed.2d 27 (1991)); cf. Magluta v. Samples, 256 F.3d 1281, 1284 n.3 (11th Cir. 2001) (noting that district courts confronted by shotgun complaints have the inherent authority to demand repleader *sua sponte*).

Also instructive is the Eleventh Circuit's opinion in Leib v. Hillsborough County Public Transportation Commission, 558 F.3d 1301 (11th Cir. 2009). In that case, the Eleventh Circuit upheld the dismissal of plaintiff's civil rights complaint founded on § 1983 in which he alleged in part that the Commission violated his rights to due process and equal protection by denying him a permit to operate a particular vehicle as a limousine because that vehicle did not qualify as a "luxury" vehicle and thus did not fall within the definition of a "limousine" under the Commission's rules. Because plaintiff did not allege that he belonged to a suspect class or that the Commission's rules denied him a fundamental right, the Court assessed his equal protection claim under the rational basis test. Again drawing on Supreme Court precedent in the form of the Heller decision, the Court agreed with the district court's finding that there were a multitude of rational bases to support the "luxury" vehicle requirement, thus rejecting his equal protection claim. Id. at 1306. The Court also rejected plaintiff's due process claim on the basis that because the criteria for evaluating a substantive due process challenge to social and economic legislation is virtually identical to the rational relationship test for evaluating an equal protection claim, and because the Court had determined that the Commission's rules had survived plaintiff's equal protection claim, it followed "*a fortiori*" that the rules survived rational basis review in the face of plaintiff's due process claim. Id. at. 1308 (citing and quoting In re Wood, 866 F.2d 1367, 1371 (11th Cir. 1989)).[4]

[4] The Court notes that one of Plaintiffs' counsel in this case represented the plaintiff in the Leib case. The Court, therefore, reasonably assumes that he was familiar

In this case, Plaintiffs make no claim that they are part of a suspect class or that the challenged provisions of the PIP Act violate a fundamental right.[5] Consequently, measured against Supreme Court and Eleventh Circuit precedent just discussed and analyzed, they bear the burden of disproving every conceivable basis supporting the challenged amendments to the PIP Act in order to sustain their federal equal protection and due process claims. At this stage of the proceedings, the Plaintiffs have utterly failed to sustain this burden based on their submissions. It follows, therefore, that Plaintiffs have also not met their burden of establishing the essential element necessary for the issuance of a preliminary injunction - a substantial likelihood they will prevail on the merits.[6]

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with the principles that guided the Court in deciding Leib when he participated in the drafting and filing of Plaintiffs' complaint and their motion for preliminary injunction.

[5] To the extent that Plaintiffs claim the challenged provisions constitutionally impair their right to earn a living or practice their profession or infringe on their ability to enjoy full automobile coverage, such rights are clearly state-created rights and not fundamental rights created by the United States Constitution and thus do not enjoy substantive due process protection. See McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994) (*en banc*); accord Leib v. Hillsborough Cty. Pub. Trans. Comm'n, 558 F.3d 1301, 1306 n.4 (11th Cir. 2009) (citing McKinney).

[6] In the event this Court later decides that Plaintiffs' federal claim is not legally cognizable, the Court would have the discretionary option of declining to exercise supplemental jurisdiction over the nine state law claims. See 28 U.S.C. § 1367(c). In making that discretionary determination, the Court would have to consider the principles of economy, convenience, fairness, and comity. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988). As the Court observed in Cohill, "[w]hen the single federal-law claim in the action was eliminated at an early stage of the litigation, the District Court had a powerful reason to choose not to continue to exercise jurisdiction." 484 U.S. at 351, 108 S.Ct. at 619.

ACCORDINGLY, for the reasons expressed, it is **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Preliminary Injunction (Dkt. 7) is **denied**. The hearing scheduled for Thursday, December 13, at 1:30 p.m., is **cancelled**. Defendant shall file his response to Plaintiffs' complaint within twenty-one (21) days of service of the complaint.

DONE AND ORDERED at Tampa, Florida, on December 12, 2012.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record