No. 124661

IN THE
SUPREME COURT OF ILLINOIS

IN RE: ELENA HERNANDEZ,	)	
	)	
	)	Certified Question
Debtor-Appellant.	)	
	)	From the U.S. Court of Appeal
	)	for the Seventh Circuit
	)	
	)	No. 18-1789

APPELLEES' BRIEF

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E-FILED
10/8/2019 2:17 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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NATURE OF THE CASE

Since the Illinois Workers' Compensation Act (the "Act") was amended in 2005, this Court has not issued any opinion construing the Legislature's modifications to the Act. The Appellate Courts have issued relatively few, and most of those opinions were issued within the past two (2) years. The instant case arises out of litigation over the Appellant's assertion of a state-law exemption in her Chapter 7 Bankruptcy petition, raised questions regarding the effect of the 2005 amendments on an earlier provision of the Act, Section 21. Appellees here (providers of medical services to the Debtor associated with a work-related injury) objected t to the claimed exemption.

After rulings by the Bankruptcy Court and the District Court in favor of the Appellees, the Seventh Circuit Court of Appeals certified the case to this Court because the Seventh Circuit found itself "genuinely uncertain about a question of state law that is key to a correct disposition of the case" and, indeed, had "serious doubt[s] about how [the] state's highest court would resolve" this question of statutory interpretation." *In re Hernandez*, 918 F.3d 563, 570 (7th Cir. 2019). Moreover, the Seventh Circuit found that the case was a "matter of vital public concern" which "implicates the state's

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ability to administer a fair and efficient workers' compensation regime." *Id*. at 571.

Fundamentally, the Appellees ask this Court to construe the 2005 Amendments and certain subsequent, related amendments in a manner which affords them direct redress to collect for services which they have rendered to injured workers without being beholden to parties with interests which plainly conflict with the their own interests. To date, the construction of the Act urged by the Appellant here (and reflected in certain recent decisions of the First District Appellate Court of Illinois) has wholly frustrated the express statutory dictates and the public policies upon which the Workers' Compensation Act is founded.

Here, the injured worker (Appellant Elena Hernandez, the Debtor in bankruptcy) received hundreds of thousands of dollars of medical treatments from the Appellees. Under the plain language of the 2005 amendments to the Act, the medical providers were to be paid directly by the injured worker's employer (and/or its insurer) within 30 days of the time the services were billed (*i.e.,* in 2008 through 2010.) The amended statutory scheme further provided that if the bills were not paid promptly by the employer and/or its insurer directly to the medical providers, the Appellees' claims were to be adjudicated in Ms. Hernandez' claim before the Illinois

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Workers' Compensation Commission ("IWCC") and interest on unpaid bills was to accrue at the rate of 1% per month until paid.

To date, the bills have not been paid, because Ms. Hernandez declined to prosecute the propriety of those bills or the medical services provided. Rather, she agreed to compromise all aspects of her IWCC claim – including the medical providers' bills – for what she believed was the value of the disability aspects of her claim without regard to the treatment she received. Before the IWCC settlement was effectuated, she filed a bankruptcy petition and asserted that all aspects of her IWCC claim were exempt from her creditors, including the Appellees/medical providers here, pursuant to Section 21 of the Act.

On March 25, 2019, this Court issued and Order indicating that, pursuant to Supreme Court Rule 20, the Court would answer the question of law certified to this Court by the United States Court of Appeals for the Seventh Circuit in *In re: Elena Hernandez*, No. 18-1789.

QUESTION PRESENTED

The Seventh Circuit's opinion invited this Court to expand its inquiry beyond the certified question: "Nothing in this certification should be read to limit the scope of the Illinois Supreme Court's inquiry, and the justices are invited to reformulate the certified question." *In re Hernandez*, 918 F.3d

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563, 571 (7th Cir. 2019). The case is a "matter of vital public concern" and "implicates the state's ability to administer a fair and efficient workers' compensation regime." *Id*.

In 2005, the Legislature amended the Illinois Workers Compensation Act to add new payment obligations from employers and their insurers to providers of medical services to injured employees. For the first time, the Act established direct payment rights to medical providers against employers and their insurers (and also provided for payment of interest on late-paid bills), not just against injured employees. These newly-conferred payment rights for medical providers was the legislative trade-off for another amendatory provision that instituted caps on the fees payable to those same providers.

The certified question references providers' payment rights conferred by the 2005 amendments only against the injured employee (and whether Section 21 of the Workers Compensation Act limits that right):

> After the 2005 amendments to 820 ILCS 305/8 and the enactment of 305/8.2, does section 21 of the Illinois Workers' Compensation Act exempt the proceeds of a workers' compensation settlement from the claims of medical-care providers who treated the illness or injury associated with that settlement?

At the invitation of the Seventh Circuit, however, this Court's answer should be one that guides the enforcement of provider payment rights

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conferred by the 2005 amendments against employers and insurers as well, no less than against employees. Therefore, Appellees respectfully present the question so as to make clear that the Court's answer is intended to guide all payment rights conferred on medical providers under the 2005 amendments, be they against employees or against employers and the employers' insurers:

> *In light of the 2005 amendments to the Illinois Workers Compensation Act, which established statutory payment rights for medical providers, whether the provisions of the Act (including without limitation Section 21) should be interpreted to enable those rights to be effectively enforced by providers against those otherwise obligated under the Act to make or cover such payments.*

In answering that question, Appellees respectfully urge this Court to interpret the Act to fulfill its letter and purpose, so that medical providers get the benefit of all the payment rights conferred by the 2005 amendment — rights to which medical providers have been systematically deprived in the absence of the statutory interpretation we request from this Court.

STATEMENT OF JURISDICTION

Appellees accept the Appellant's statement of jurisdiction and provide the following supplemental information in support of this Court's jurisdiction:

On March 25, 2019, this Court issued and Order indicating that, pursuant to Supreme Court Rule 20, the Court would answer the question of

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law certified to this Court by the United States Court of Appeals for the Seventh Circuit in *In re: Elena Hernandez*, No. 18-1789.

STATUTES INVOLVED

The Court's complete consideration of the question presented requires review of several Sections of the Act, *i.e.,* Section 4, Section 8, Section 8.2 and Section 21. Section 8 was amended in 2005. Section 8.2 has been amended in 2005, 2011, 2018 and 2019. Appellant's Appendix reproduced many of these sections; the relevant provisions of the amendments to the statutes which were omitted by the Appellant are reproduced, in relevant part, below.

STANDARD OF REVIEW

Appellees agree that the questions of statutory interpretation required here are matters of *de novo* review in this Court. *E.g., Cassidy v. China Vitamins, LLC*, 2018 IL 122873, ¶ 15 ("Because this dispute requires us to construe the language of a statute, it presents a question of law, and our standard of review is *de novo*.") The *de novo* review required here is doubly *de novo* since this Court has never considered the questions of statutory construction presented here.

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STATEMENT OF FACTS

Appellant's statement of facts is incomplete, and Appellees provide the following supplemental information which bear heavily upon this Court's consideration of the issues before it.

A. The 2018 Amendment to Section 8.2(d).

Section 8.2(d) was again amended, effective November 27, 2018 by Public Act 100-1117. That amendment has expressly authorized direct suits in the circuit courts by medical providers to collect from employers and/or their insurers the statutory interest with Section 8.2(d) mandates must be paid on late-paid bills. Section 8.2(d)(4) was added, providing:

> (4) If the employer or its insurer fails to pay interest required pursuant to this subsection (d), the provider may bring an action in circuit court to enforce the provisions of this subsection (d) against the employer or its insurer responsible for insuring the employer's liability pursuant to item (3) of subsection (a) of Section 4. Interest under this subsection (d) is only payable to the provider. An employee is not responsible for the payment of interest under this Section. The right to interest under this subsection (d) shall not delay, diminish, restrict, or alter in any way the benefits to which the employee or his or her dependents are entitled under this Act.

The amendment further provides:

> The changes made to this subsection (d) by this amendatory Act of the 100th General Assembly apply to procedures, treatments, and services rendered on and after the effective date of this amendatory Act of the 100th General Assembly.

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(Accordingly, the rights and remedies at issue in this case are not directly affected by the 2018 Amendment. However, as argued, *infra*, the Legislature's attempt to clarify, in part, admittedly an ambiguous statute has a significant bearing on the questions at issue in the instant case.)

B. Facts Presented to the Bankruptcy Court.

Appellant Elena Hernandez ("Hernandez") was injured at work and was treated by Appellees Marque Medicos Fullerton, LLC, Medicos Pain and Surgical Specialists, S.C. and Ambulatory Surgical Care Facility, LLC (hereafter "the Medical Providers") between 2009 and 2011. (Bankruptcy Court Docket No. 1, Schedule E/F paragraphs 4.1[1], 4.7[2] & 4.8[3].)

On December 1, 2016, Hernandez filed her Petition pursuant to Chapter 7 of the Bankruptcy Act, acknowledging that she owed the Appellees more than $138,000 (*Id*.) but claiming no assets with which to pay for her treatment. Bankruptcy Docket No. 1. The petition acknowledged that Hernandez had no debt or creditors other than medical providers

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[1] Acknowledging 2011 debt owed to Ambulatory Surgical Care Facility, LLC in the amount of $28,709.

[2] Acknowledging 2009 debt owed to Marque Medicos Fullerton, LLC in the amount of $58,901.20.

[3] Acknowledging 2009 debt owed to Medicos Pain & Surgical SC in the amount of 50,161.26

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(Chapter 7 Petition, DKT # 1, Schedule E/F paragraphs 4.1 through 4.10) and scheduled her pending claim before the IWCC, the procedure through which she could adjudicate her disability benefits and the payment of her outstanding medical bills. (Docket No. 1, Schedule A/B, paragraph 33). The petition claimed that the entirety of her claims pending before the IWCC – both for disability benefits and the payment for her medical treatment – should be deemed an exempt asset pursuant to Section 21 of the Act, 805 ILCS 305/21 (Docket No. 1, Schedule C, p.2).

After Hernandez filed her petition, she purported to settle her case for a lump sum settlement of $30,566.33 on December 3, 2016, without notice to the Trustee or the Objecting Creditors and without having obtained the Bankruptcy Court's permission (Docket Nos. 11, 24, 28.) The settlement agreement provided, in relevant part (emphasis added):[4]

> *Issues exist between the parties as to whether petitioner has incurred injuries to the degree alleged and whether or not such injuries are compensable*, and this settlement is made to amicably settle all issues. The settlement includes liability for TTD, TPD, and *all medical, surgical and hospital expenses, past or future, for all of which petitioner expressly assumes responsibility*. All rights under §§ 8(a) and 19(h) of the Act are expressly waived

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[4] The Settlement Agreement was included in the Appendix filed by Amici LAF and NACBA. Appellees have no objection to this Court taking judicial notice of same. LAF/NACB brief, p. 15, n.5 citing *People v. Linda B (In re Linda B.),* 2017 IL 119392, ¶31, n.7.

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> by the parties. *** The parties agree that other claims under the Acts may exist, and that petitioner fully releases respondent from any and all such claims… *** This settlement is made to end all litigation between the parties for claims under the Act through the date of Illinois Industrial Commission approval of the contract without exception. *** Without limiting the generality of the foregoing release, the settlement represents (on an industrial basis): 7.6% loss of use of person as a whole and 30% loss of use of the right leg (102 weeks @ $299.57) to resolve any and all outstanding issues.

The Medical Providers filed a timely objection to Hernandez' exemption claim since it would, in effect, permit Hernandez to retain the entire IWCC settlement (including those aspects of the claim relating to unpaid medical bills) and obtain a discharge of all of her debts, leaving the Medical Providers with no ability to collect anything for their services. (Docket No. 11.)

The Bankruptcy Court sustained the Medical Providers' objection and "denied her claimed exemption of the proceeds associated with her workers' compensation claim." (April 12, 2017 Order, Docket No. 27.). The District Court affirmed, holding that, although Section 21 of the Act should be construed to protect an injured worker's disability benefits from her general creditors, it did not apply to medical providers who provided services for her work-related injuries. *In re Hernandez*, 2018 WL 1469000, at *3 (N.D.Ill., 2018).

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The District Court's opinion described the substantial changes to the overall statutory scheme of the Act resulting from the 2005 amendments/enactments to the Act (emphasis added):

- The 2005 amendments significantly altered the WCA by establishing a fee schedule limiting what medical providers can collect for certain procedures, 820 ILCS 305/8.2(a), and adding several provisions governing how medical providers bill and receive payment.

- Medical providers, upon becoming aware an injury is work-related, are required to bill employers directly, instead of employees. 820 ILCS 305/8.2(d). During the pendency of any dispute between the employee and employer over whether the injury is compensable under the WCA, medical providers are to "cease any and all efforts to collect payment" from the employee, 820 ILCS 305/8.2(e-5), (e-10), but any statute of limitations or statute of repose applicable to the provider's collection efforts is tolled.

- Although collections must cease while the dispute is pending, "[u]pon a final award or judgment by an Arbitrator or the [Illinois Workers' Compensation] Commission, or a settlement agreed to by the employer and the employee, a provider may resume any and all efforts to collect payment from the employee for the services rendered to the employee and the employee shall be responsible for payment of any outstanding bills for a procedure, treatment, or service rendered by a provider." 820 ILCS 305/8.2(e-20).

Id. The decision was issued a year before the 2018 Amendment to Section 8.2(d) described *supra*.

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C. Additional Relevant Facts About Which This Court May Take Judicial Notice: The scope and magnitude of the medical providers' services and difficulties in obtaining statutorily mandated payments.

This Court may take judicial notice of public documents, such as those included in the records of other courts and administrative tribunals (*In re Linda B.*, 2017 IL 119392 (2017) as well as reports of the Illinois Department of Insurance and other governmental agencies. *Felt v. Board of Trustees of Judges Retirement System*, 107 Ill.2d 158, 165 (1985).

Reports published by the Illinois Workers' Compensation Commission demonstrate that Illinois has more than 330 workers' compensation insurers, the largest number in any state.[5] Collectively, they insure 300,000 Illinois employers who paid $2.83 billion in premiums in 2016.[6] Annually, Illinois workers' compensation insurers pay about $1.5 billion in workers' compensation claims[7] in about 200,000 work-related

[5] 2016 Illinois Workers' Compensation Insurance Oversight Report, https://insurance.illinois.gov/wcfu/2016WorkCompReportFinal.pdf.

[6] *Id*.

[7] Illinois Department of Insurance Market Share Report 2015, pp. 133-148. http://insurance.illinois.gov/Reports/Market_Share/2015/2015PCIllinoisCompaniesAlpha.pdf).

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injuries. Medical expenses comprise about 45% of those claims[8], which calculates to approximately $720 million in services rendered by Illinois medical providers to those injured employees per year.

Moreover, both the Illinois Director of Insurance and the First District have observed that workers' compensation insurance companies have not routinely observed the directives in Section 8.2(d) to pay medical providers directly and promptly. For example, in *Marque Medicos Archer, LLC v. Liberty Mutual Insurance Company*, 2018 IL App (1st) 163350, ¶ 28 ("Archer"), the First District noted that it could not "condone Liberty [Mutual]'s conduct in failing to pay outstanding medical bills and interest as it is obligated to do under both the Act and its insurance policy."

Similarly, in *Marque Medicos Farnsworth, LLC v. Liberty Mutual Insurance Company*, 2018 IL App (1st) 163351, ¶ 27 ("*Farnsworth*"), the First District took judicial notice that (as alleged in *Archer*) the Director of Insurance conducted a market conduct examination which criticized Liberty Mutual's practices concerning the payment of interest on medical bills paid after the 30-day grace period and that, as a result, Liberty entered into a

[8] Illinois Workers Compensation Commission 2016 Annual Report, p. 10 http://www.iwcc.illinois.gov/2016AnnualReport.pdf

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stipulation and consent order whereby Liberty committed to institute and maintain procedures for the payment of interest.

Furthermore, as noted in *Beatty v. Accident Fund General Insurance Company*, 2018 WL 3219936, at *5 (S.D.Ill., 2018), in December, 2012, the Illinois Department of Insurance issued a Bulletin reminding all insurance companies and self-insured entities providing workers' compensation coverage in Illinois "of their duty to comply" with the statutory interest provisions of Section 8.2(d).

ARGUMENT

A. PRINCIPLES OF STATUTORY CONSTRUCTION.

1. This Court's Construction of the Act, as Amended, Shall Be Engrafted into the Act Until and Unless the Legislature Expressly Contradicts Such Construction.

The cardinal rule this Court applies to questions of statutory construction is to ascertain and give effect to the true intent of the legislature. *Illinois State Treasurer v. Illinois Workers' Compensation Com'n*, 2015 IL 117418, ¶ 20. In light of the substantial uncertainty concerning the reach of the 2005 (and related Amendments), the significance of the instant appeal is obvious: When this Court construes a statute, that construction is considered a part of the statute itself unless and until the Legislature amends it contrary to this Court's interpretation. *Porter v. Decatur Memorial Hosp.*, 227 Ill.2d 343, 355 (2008).

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2. <u>Universally Applied Principles of Statutory Construction.</u>

In *Sylvester v. Industrial Com'n*, 197 Ill.2d 225, 232 (2001), this Court articulated the universally applied rules of statutory construction in the context of a Workers' Compensation Act case (emphasis added):

> We must construe the statute so that each word, clause, and sentence, if possible, is given a reasonable meaning and not rendered superfluous, [] *avoiding an interpretation which would render any portion of the statute meaningless or void*. [] We also presume that the General Assembly did not intend absurdity, inconvenience, or injustice.

Moreover, the principles of statutory construction applicable to a statutory amendment are also well-developed.

> [W]here the passage of a series of legislative acts results in confusion and consequences which the legislature may not have contemplated, *courts must construe the acts in such a way as to reflect the obvious intent of the legislature and to permit practical application of the statutes*.

People ex rel. Community High School District No. 231 v. Hupe, 2 Ill.2d 434, 448 (1954)(emphasis added). Furthermore, each word, clause, and sentence of a statute must be given a reasonable construction, if possible, and should not be rendered superfluous. *Prazen v. Shoop*, 2013 IL 115035, ¶ 21.

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3. Principles of Statutory Construction Applied to an Obviously Ambiguous Statute.

Two federal courts have recently found that the Act, as amended in 2005 was legally ambiguous, *i.e.,* "capable of being understood by reasonably well-informed persons in two or more different senses." *Solon v. Midwest Medical Records Ass'n*, 236 Ill. 2d 433, 440 (2010). The Seventh Circuit was "genuinely uncertain" about how to interpret the 2005 Amendments and had "serious doubts" as to how this Court would resolve the issues relevant to the case. *Hernandez*, 918 F.3d at 570. Furthermore, the District Court in *Beatty v. Accident Fund General Insurance Company*, 2018 WL 3219936, at *4 (S.D.Ill., 2018) held that the Act unduly ambiguous and construed the Act as amended in a manner favorable to medical providers.

Accordingly, where, as here, the Act as amended cannot be properly construed solely through resort to the plain language of the statute, this Court considers the purpose behind the law and the evils the law was designed to remedy as well as the consequences that would result from construing the statute to prevent an absurd, inconvenient, or unjust consequences. *In re Marriage of Goesel*, 2017 IL 122046, ¶ 13.

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B. MEDICAL PROVIDERS PLAY A VITAL AND NECESSARY ROLE IN FULFILLING THE PURPOSE AND PUBLIC POLICY OF THE WORKERS' COMPENSATION SYSTEM.

This Court observed the overarching public policies which are the foundation of the Workers' Compensation system in, *e.g., Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 180–81 (1978)(internal citations omitted).

> The Workmen's Compensation Act substitutes an entirely new system of rights, remedies, and procedure for all previously existing common law rights and liabilities between employers and employees subject to the Act for accidental injuries or death of employees arising out of and in the course of the employment. *** This trade-off between employer and employee promoted the fundamental purpose of the Act, which was to afford protection to employees by providing them with prompt and equitable compensation for their injuries. *** The Workmen's Compensation Act, in light of its beneficent purpose, is a humane law of a remedial nature. *It provides for efficient remedies for and protection of employees and, as such, promotes the general welfare of this State.*

Several years later, and seven years before the 2005 Amendments to the Act, this Court expressly held that the compensation to which an employee was entitled included the employee's medical expenses and the employer/insurer's duty to pay medical providers was of equal importance to the administration of the Workers' Compensation system as payments for lost time and disability. *McMahan v. Industrial Com'n*, 183 Ill.2d 499, 513 (1998). That holding was recently reaffirmed in *Bayer v. Panduit Corp.*,

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2016 IL 119553, ¶ 30 ("the law is settled that *both* payments for medical services *and* payments for lost wages constitute compensation benefits an employee is entitled to receive under the Workers' Compensation Act"). Indeed, in *McMahan*, this Court emphasized that the fundamental purposes of the Act could not be fulfilled unless medical providers were assured of payment for treating injured workers:

> *The refusal of an employer to pay for an injured employee's medical expenses is as contrary to the purposes of the Workers' Compensation Act as an employer's refusal to compensate the employee for lost earnings.* For the employee, the consequences can be every bit as devastating. *Indeed, to the extent that nonpayment of medical expenses may imperil the employee's ability to obtain future treatment, the consequences of the employer's actions may actually be far worse.*

McMahan, 183 Ill.2d at 514 (emphasis added).

In sum, medical providers are a key component to an effective Workers' Compensation system, and prompt payment for their services is essential to ensure that injured workers receive the medical treatment they require. As the First District observed in *Marque Medicos Fullerton, LLC v. Zurich American Insurance Company*, 2017 IL App (1st) 160756, *petition for leave to appeal denied*, 93 N.E.3d 1043 (Nov. 22, 2017)(the holding of which the Appellees ask this Court to overrule in its argument *infra)*,

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> *[A] ll of the provisions [of the 2005 Amendments] regarding the payment of medical care for injured employees* [] — from the requirement that providers bill employers directly and employers pay providers directly, to the imposition of a medical fee schedule limiting the amount providers can charge for covered services, to the provisions seeking to ensure timely payment — *are designed to ensure prompt and equitable payment of an injured employee's medical bills….*

Zurich, 2017 IL App (1st) 160756, ¶ 5 (emphasis added). This Court denied the medical provider's Petition for Leave to Appeal that case, but that discretionary decision declining review has been superseded by the Seventh Circuit's certification of questions relating to the statutory interpretation of the 2005 Amendments.

C. THE 2005 (AND RELATED) AMENDMENTS GRANTED MEDICAL PROVIDERS AN EXPRESS RIGHT TO PROMPT AND DIRECT PAYMENT.

As the District Court ably summarized, the 2005 Amendments imposed substantial changes upon the Workers' Compensation system: the amounts which providers could charge were limited and regulated by administrative review. But in exchange for limiting the provider's charges for services, the Legislature took the sting out of price-regulation by requiring employers and insurers to make prompt, direct payment to the providers or pay the providers (again, directly) interest at the rate of 1% per month. In 2011, the Act was again amended to further limit the medical

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providers' charges, but again, in exchange for the price-regulation, Section 8.2(d) was further amended to shorten the "prompt pay" period from 60 to 30 days.

The new statutory scheme created direct billing and payment relationships between the provider and the employer/insurer, and providers filed several cases in the Circuit Court seeking to enforce their statutory right to direct payments, either through an implied private right of action under Section 8.2(d) or as intended beneficiaries of the Workers' Compensation policies written in Illinois.

However, prior to the 2018 Amendment, the medical providers were completely stymied in their ability to protect their own economic interests. As a result of the First District's (we submit erroneous) decision in *Zurich, supra*, medical providers were denied the private right of action to collect their unpaid bills which had been recognized by several Circuit Courts. As the First District later observed a year later in *Farnsworth*, the *Zurich* decision left the medical providers completely beholden to the injured worker and his/her attorney to prosecute the medical providers right to the direct payments which the 2005 Amendment specifically authorized. *Farnsworth,* 2018 IL App (1st) 163351 at ¶ 32 (all efforts to collect on unpaid medical bills and interest "*must be undertaken by the*

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employee")(emphasis added). That somber observation led to an exhortation which is particularly relevant to this case (emphasis added):

> Attorneys handling workers' compensation cases on behalf of claimants ***must be cognizant of their clients' potential post-award exposure to claims by medical providers for unpaid bills***. As noted, if, as happened here (and apparently in a number of other cases involving Liberty), the employer does not fulfill its undertaking to pay outstanding medical bills, ***providers are permitted to pursue payment from the injured employee***. With that in mind, *competent counsel should insist that any settlement agreement contain a sum certain that* ***the employer has agreed to pay for outstanding medical bill****s and also contain a representation that the* **employer** *has consulted with its insurance carrier and secured the carrier's commitment to pay that amount upon execution of the settlement.*

Id. at ¶32.

In sum, although the 2005 Amendments created express statutory rights to direct payment and interest on late-paid bills, the medical providers have had no ability to enforce such rights as a result of appellate court decisions which this Court must revisit to fulfill the statutory mandates and public policies of the State.

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D. THE 2005 (AND RELATED AMENDMENTS) PROVIDED MEDICAL PROVIDERS WITH SOME, ALBEIT LIMITED AND DELAYED, DIRECT RELIEF WHICH SUPERSEDE PRIOR AND INAPPOSITE JUDICIAL DECISIONS CONCERNING SECTION 21.

Pursuant to Section 8.2(e-5) of the 2005 Amendment, medical providers were expressly prohibited from billing or pursing injured workers in their care who filed a claim in the IWCC:

> Once an employee informs the provider that there is an application filed with the Commission to resolve a dispute over payment of such charges, the provider shall cease any and all efforts to collect payment for the services that are the subject of the dispute.

However, a further subsection, Section 8.2(e-20) specifically authorized medical providers to sue their patients for amounts which remain unpaid *after an IWCC award or settlement* if such bills had not been addressed or adjudicated in the IWCC proceeding/settlement. The relevant portions of Section 8.2(e-20) provide (emphasis added):

> Upon a ***final award or judgment*** by an Arbitrator or the Commission, or a ***settlement agreed to by the employer and the employee,*** a provider may resume any and all efforts to collect payment from the employee for the services rendered to the employee and *the employee shall be responsible for payment of any outstanding bills for a procedure, treatment, or service rendered by a provider as well as the interest awarded under subsection (d) of this Section.* ***In the case of a procedure, treatment, or service deemed [in the IWCC arbitration] compensable***, the provider shall not require a payment rate, excluding the interest provisions under subsection (d), greater than

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> the lesser of the actual charge or the payment level set by the Commission in the fee schedule established in this Section. ***Payment for services deemed not covered or not compensable under this Act is the responsibility of the employee*** unless a provider and employee have agreed otherwise in writing.

Thus the 2005 Amendment specifically envisioned the circumstances presented here – that an injured worker would settle his/her case and, to the extent that the employer/insurer had not already paid for medical services (as required by Sections 8(a) and 8.2(d)), *the injured worker would remain fully responsible for the medical treatment that he/she received*. [9]

The 2005 Amendment imposed incentives for the injured worker and his attorney to fully adjudicate medical bills as party of the IWCC proceedings and any settlement thereof. But, as noted by the *Farnsworth*, *supra*, injured workers, their attorneys and workers' compensation insurers were not adequately incentivized to fully address medical bills, and medical providers were not appropriately protected by the incomplete incentives provided in the 2005 Amendment. As these issues are now presented to this Court, medical providers sole hope for payment for services they have rendered is the thin reed that "competent counsel" would indeed follow the

[9] This is also the circumstance which concerned the *Farnsworth* court, leading to the exhortation which has clearly been ignored here.

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procedures outlined in *Farnsworth* prior to 2018. But absent further clarification from this Court, medical providers currently have no effective recourse to collect for unpaid services nor any effective recourse to collect for the statutory interest due on unpaid bills for services rendered prior to 2019. Appellees here provided services in 2008 for which, 11 years later, they remain unpaid.

Indeed, the instant dispute arises out of a relatively obvious loophole in the 2005 Amendment (absent the provision to the medical providers of a private right of action argued *infra*). Section 8.2(e-20) permits the medical providers to pursue Ms. Hernandez and other patients who settle and leave a large medical bill. But the interpretation offered by the Appellants and their *Amici* concerning the interplay between Section 8.2(e-20) and Section 21 renders any rights the medical providers have to payment feckless.

E. SECTION 21 WAS ENACTED AT THE BEGINNING OF THE 20TH CENTURY, AND THE 21ST CENTURY CHANGES TO THE WORKERS' COMPENSATION SYSTEM REQUIRE THAT THE REACH AND SCOPE OF SECTION 21 BE HARMONIZED WITH MODERN REALITIES AND THE 2005 AMENDMENTS.

Section 21 was originally enacted 100 years before the 2005 Amendments to the Act, at a time when medical providers had no statutory entitlement to payment whatsoever. As demonstrated in the Appellant's discussion of judicial decisions construing Section 21 in 1918, 1921, 1965,

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1991 and 1992[10], the language of Section 21 has remained the same for 100 years or more. Section 21 states, in relevant part (emphasis supplied):

> *No payment, claim, award or decision* under this Act shall be assignable *or subject to any lien, attachment or garnishment, or be held liable in any way for any lien, debt, penalty or damages*. [] The *compensation* allowed by *any award or decision of the Commission* shall be entitled to *a preference over the unsecured debts of the* ***employer***, wages excepted, contracted after the date of the injury to an employee. A decision or award of the Commission against an employer for compensation under this Act, or a written agreement by an employer to pay such compensation shall, upon the filing of a certified copy of the decision or said agreement, as the case may be, with the recorder of the county, *constitute a lien upon all property of the employer* within the county, paramount to all other claims or liens, except mortgages, trust deeds, or for wages or taxes. Such liens may be enforced in the manner provided for the foreclosure of mortgages under the laws of this State.

By its plain language, an injured worker's general creditors have no right to place or enforce a lien of any kind against "payments, claims, awards or decisions." Furthermore, the injured worker is provided with a lien *against his employer*, and takes a superior position to the unsecured creditors of the *employer*."

Appellees do not seek to undermine the protections afforded by Section 21 to the injured workers' disability benefits. The public policy

[10] Notably, none of these cases have any relevance to the questions presented here.

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supporting such protection was sound 100 years ago and appears sound now so long as it is limited to the injured workers' disability benefits and does not affect the medical providers' right to payment.

Indeed, as a result of the 2005 (and related) Amendments, the injured worker's claim for disability benefits and the medical providers' right to payments have been conceptually separated by the direct-payment provisions of the 2005 Amendments. Accordingly, any payments due medical providers (directly from the employer/insurer) which remain unpaid at the end of the IWCC arbitration process should not be considered an exclusive asset of the debtor/injured worker. Rather, the direct payment relationship between the medical providers and the employer/insurer mandate that the claim for payment of medical bills be deemed outside the scope of the injured worker's general assets (let alone protected assets) under Section 21 and/or the Bankruptcy Code but rather treated as the proceeds of a constructive or resulting trust for the benefit of the medical providers.

Section 21 does not expressly or implicitly suggest that monies due to parties other than the injured worker may be collected by the injured worker and claimed as exempt property as if such funds were identical to payments for temporary or total disability, and should not be interpreted to provide a general exemption for all matters justiciable before the IWCC. Such an

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interpretation would effectively eliminate the direct payment requirements of Section 8.2(d) and open an avenue of untold expanse for injured workers and insurers to delay medical payments and inappropriately (and perhaps fraudulently) convey the medical provider's assets (right to direct payment) from the providers into an injured worker's bankruptcy estate.

In essence, the Debtor and the *Amici* propose a statutory interpretation which produces results that are repugnant to one of the fundamental purposes of the Act – to ensure a vibrant market of medical providers treating injured workers. *McMahan*, 183 Ill.2d at 514. In contrast, no public policies are violated or abrogated by the Appellees' suggested interpretation of Section 21 which protects both the rights of the injured worker and the medical providers.

Indeed, at bottom, the interpretation of the Debtor and the *Amici* suggests some necessary trade off between the rights of injured workers and the rights of medical providers which would create incentives for injured workers to file bankruptcy for the sole purpose of avoiding any obligations to pay for medical treatment – a result which the Legislature found

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antithetical in 2005 and provided an open avenue for the providers to protect their interests if the injured worker and his/her employer either ignored or leapfrogged the direct payment requirements of Section 8.2(d).

Taken to its logical conclusion, the Debtor's proposed interpretation of Section 21 provides the injured worker *and* the employer/insurer with strong incentives to reach collusive settlements on the eve of a bankruptcy filing. Absent the private right of action urged by the Appellees here, the release provided in the injured worker's IWCC settlement agreement, taken together with a bankruptcy discharge of the injured worker's pre-petition debts, wholly obliterate the claims of medical providers for services rendered for the benefit of the injured worker and the employer/insurer. Plainly, nothing in the record here – and nothing in the market conduct study and other insurance practices discussed in *Farnsworth* – suggest that the $30,000 settlement of Ms. Hernandez' claim for disability benefits *and* nearly $140,000 in medical bills was an arm's-length transaction, and the employer/insurer surely gained the benefit of avoiding the IWCC's scrutiny of its failure to pay substantial medical bills.

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F. THIS COURT SHOULD EXPRESSLY FIND THAT THE MEDICAL PROVIDERS HAVE A PRIVATE RIGHT OF ACTION TO PURSUE CLAIMS FOR DIRECT PAYMENTS FOR THEIR SERVICES IF NECESSARY.

SUCH A DECLARATION WOULD FURTHER THE LETTER AND PURPOSE OF THE WORKERS' COMPENSATION ACT AND SUBSTANTIALLY REDUCE LITIGATION REGARDING BANKRUPTCY EXEMPTIONS LIKE THAT AT ISSUE HERE.

The Appellees have, since at least 2014, sought to enforce their rights provided by Section 8.2(d) in accordance with its plain language. The Legislature's 2018 "clarification" has now expressly provided the medical providers the private right of action to pursue claims for statutory interest that they were seeking in, *inter alia*, *Zurich, Farnsworth and Archer*.[11]

[11] The medical providers were stymied, in large part, by the First District's erroneous view that a private right of action could only be recognized in favor of one, purportedly "primary" intended beneficiary of a statute. *See, e.g., Zurich* at ¶¶ 60-61 (providers cannot claim an implied right of action because they are not the primary beneficiary of the over-arching Workers Compensation Act). The First District's belief that a private right of action could be afforded *only* to one class of intended beneficiaries of a statute conflicts with, *inter alia, D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 39 (court implied a right of action under the Illinois Condominium Property Act for one class of statutory beneficiaries -- resale purchasers of condominium units -- even though the Act conferred an express right of action on a different class of beneficiaries, i.e., initial purchasers) and *King v. Senior Services Assocs., Inc.*, 341 Ill. App. 3d 264, 270 (2d Dist. 2003) (implying private right of action for service providers to enforce retaliatory discharge provision of a statute whose

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(Admittedly, the "clarification" provides only a private right of action against employers and insurers to collect interest on late-paid bills and has left open the question concerning the medical providers could assert private right of action against employers and insurers to collect on the underlying, unpaid bills.) Those three claims have been adjudicated in a manner inconsistent with the Legislatures' intention and, Appellees submit, should be expressly overruled by this Court now in the service of an over-arching construction of the medical providers' rights under the Workers' Compensation system for claims not raised or adjudicated in *Zurich*, *Farnsworth* or *Archer*. Indeed, such a declaration would substantially reduce litigation in bankruptcy court concerning the scope and reach of Section 21 and exemptions in general, because the medical providers would be expressly afforded a remedy which will undoubtedly be more effective than their collection efforts in Chapter 7 proceedings.

It is well established that decisions of this Court should normally apply retroactively to claims and causes which are ripe but yet to be filed or are pending in the trial courts as of the time this Court announces its definitive interpretation of the effect of the 2005 (and related) Amendments

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purpose is to provide services for abused elderly persons (Illinois Elder Abuse and Neglect Act)).

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to the Act. *Heastie v. Roberts*, 226 Ill.2d 515, 535–37 (2007).

Here, in light of, *inter alia*:

a) the nearly 15-year long statutory mandate to pay medical providers directly and timely;
b) the 2012 Bulletin issued by the Illinois Department of Insurance emphasizing the employer/insurers obligation to pay medical bills and interest on late-paid bills directly;
c) The Illinois Department of Insurance's market conduct studies; and
d) the 2018 "clarification" of the Legislature,

Appellees respectfully urge this Court to expressly declare that its interpretation of the 2005 (and related) Amendments to the Act is entitled to the presumption that this Court's definitive interpretation of a statute shall be applied to claims which have not been previously dismissed with prejudice as a result of the First District's decisions in *Zurich*, *Farnsworth* and *Archer*.

CONCLUSION

For the forgoing reasons, Appellees respectfully urge this Court to expand the scope of the certified question to address both the reach of Section 21 (*i.e.*, limiting the terms of that subsection to the injured worker's disability benefits) and the erroneous holdings of *Zurich, Archer* and *Farnsworth*, to construe the 2005 (and related) Amendments to the Workers' Compensation Act to provide medical providers with a private right of

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action to pursue claims for unpaid medical bills and interest on late paid bills in the Circuit Courts consistent with the 2018 clarification, and for such further and other declaratory relief regarding the construction of the Workers' Compensation Act as this Court deems appropriate.

Respectfully submitted,

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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

Pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I hereby certify that Appellees' brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 32 pages.

/s/ Alan J. Mandel

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CERTIFICATE OF SERVICE

Alan J. Mandel, an attorney, certifies pursuant to Section 1-109 of the Illinois Code of Civil Procedure that on October 8, 2019, that he e-filed with the Supreme Court Clerk's office through the greenfiling.com portal and served a copy of Appellees' Brief by emailing a copy to the attorneys identified below at the email addresses supplied by in their respective briefs. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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I further certify that, on October 8, 2019, I mailed a copy of the foregoing to

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No. 124661

IN THE
SUPREME COURT OF ILLINOIS

IN RE: ELENA HERNANDEZ,	)	
	)	
	)	Certified Question
Debtor-Appellant.	)	
	)	From the United States Court of Appeal
	)	for the Seventh Circuit
	)	
	)	No. 18-1789
	)	

NOTICE OF FILING

To: See Certificate of Service

PLEASE TAKE NOTICE THAT ON October 8, 2019, Appellees Marque Medicos Fullerton, LLC, Medicos Pain and Surgical Specialists, S.C. and Ambulatory Surgical Care Facility, LLC ("Appellees"), by their undersigned attorney, electronically filed with the Supreme Court Clerk's Office through the greenfiling.com portal APPELLEES' BRIEF.

Appellees Marque Medicos Fullerton, LLC, Medicos Pain and Surgical Specialists, S.C. and Ambulatory Surgical Care Facility, LLC

By: /s/ Alan J. Mandel
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