

**Appellate Practice Pointer**  
**Foundation Health v. Westside EKG Assocs.**

Under the recently decided Florida Supreme Court case, Foundation Health v. Westside EKG Assocs., No. SCO5-872 (Fla. October 19, 2006), HMOs may be liable to nonparticipating providers (“n.p. providers”) when the HMO fails to comply with the “prompt pay provisions” of the Health Maintenance Organization Act (“HMO Act”).

The Court made three points: (1) a party may bring a common law cause of action against the HMO despite the absence of a private cause of action in the HMO Act; (2) the “prompt pay provisions” (Fla. Stat. § 641.3155) of the HMO Act may be implicitly incorporated into the HMO – insured contract (“HMO contract”); and (3) an n.p. provider may be a third-party beneficiary of the HMO contract for purposes of (a) providing emergency services, because the HMO Act requires payment of such; and (b) providing non-emergency services where the HMO contract grants HMO discretion for payment of such.

While the ramifications of Foundation Health cannot be fully explored in this brief piece, two points are worth noting. First, the use of statutory incorporation should not be assumed to apply just to these “prompt pay provisions,” but may apply to other insurance code provisions. Second, there is some indication that parts of the holding may be avoided by careful contractual drafting. We would be happy to discuss specific recommendations on a case by case basis.

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