

II. Present Situation:

Part I of ch. 636, F.S., regulates the operation and administration of prepaid limited health service organizations² (PLHSOs) and discount medical plan organizations in the state of Florida. PLHSOs solely providing services to Medicaid recipients under a contract with Medicaid are exempt from several provisions of ch. 636, F.S., including those related to rates and charges;³ changes in rates and benefits, material modifications, and the addition of limited health services;⁴ restrictions upon expulsion or refusal to issue or renew a contract;⁵ notice of cancellation of contract;⁶ and extension of benefits.⁷

Since 1994, Florida law has imposed a tax on the insurance premiums, contributions, and assessments received by a PLHSO.⁸ The premium tax is to be paid annually and is calculated at a rate of 1.75 percent of the gross amount of premiums, contributions, and assessments collected on health insurance policies issued by PLHSOs, and subject to various credits available against the tax.⁹

There are currently four PLHSOs which provide mental health services to Medicaid recipients through a contract with the Agency for Health Care Administration (AHCA) that are subject to this tax.¹⁰ One organization, Lakeview Center, Inc. (Lakeview), filed a legal challenge in 2007 to the imposition of the tax by the Department of Revenue (DOR).¹¹ According to the court's order, Lakeview had been paying the premium tax under s. 624.509, F.S., since 2003. Lakeview subsequently came to believe that the tax was paid in error and sought a refund from the DOR. The request for refund was denied and Lakeview timely filed a Complaint with the Circuit Court for the Second Circuit in Tallahassee.

The court found that Lakeview contracted with AHCA to provide mental health and other services to Medicaid recipients. Lakeview was paid a fixed sum by AHCA to provide the stated services. Lakeview argued that the fixed sum paid by AHCA under the contract did not constitute a "premium" to trigger the imposition of the premium tax under s. 624.509, F.S. The court disagreed, finding that a rule established by the Office of Insurance Regulation (OIR),

² Section 636.003(7), F.S., defines a "prepaid limited health service organization" as "any person, corporation, partnership, or any other entity which, in return for a prepayment, undertakes to provide or arrange for, or provide access to, the provision of a limited health service to enrollees through an exclusive panel of providers, and s. 636.003(5), F.S., defines a "limited health service" as ambulance services, dental care services, vision care services, mental health services, substance abuse services, chiropractic services, podiatric care services, and pharmaceutical services.

³ Section 636.017, F.S.

⁴ Section 636.018, F.S.

⁵ Section 636.022, F.S.

⁶ Section 636.028, F.S.

⁷ Section 636.034, F.S.

⁸ Section 636.066(1), F.S.

⁹ Section 624.509(1)(a), F.S.

¹⁰ Email from the Agency for Health Care Administration to the Senate Committee on Health Regulation, Feb. 11, 2011, 4:40 p.m., on file with the Committee. The four PLHSOs are: Lakeview Center, Inc. (d/b/a Access Behavioral Health), Magellan Behavioral Health of Florida, Inc., North Florida Behavioral Health Partners, Inc., and Florida Health Partners, Inc.

¹¹ See *Lakeview Center, Inc. v. State of Florida*, Dept. of Revenue, No. 2007-CA-1255 (Fla. 2nd Cir. Co. Jan 23, 2008).

which regulated Lakeview as an insurer in the state of Florida, defined “premium”¹² and concluded that the fixed rate paid to Lakeview by AHCA met the definition and was taxable. Lakeview appealed the circuit court ruling to Florida’s First District Court of Appeal, but the lower court’s ruling was per curiam affirmed by the appellate court.^{13,14}

Currently, one or more PLHSOs have been paying the premium tax and others have not. Additional information regarding the identity of those PLHSOs, the amount of taxes that have been paid, and the amount of taxes still owed is not available from the DOR due to state confidentiality provisions.¹⁵ However, according to AHCA, the state has paid over \$844 million to PLHSOs for the provision of Medicaid behavioral health services over a 13-year period beginning in state fiscal year 1997-98 through state fiscal year 2009-10. The application of a 1.75 percent premium tax on capitations paid to such PLHSOs in state fiscal year 2009-10 would amount to \$3.2 million.

PLHSO Capitation Rates

The PLHSOs under contract with AHCA solely for the provision of Medicaid behavioral health services are managed care plans known as “prepaid mental health plans” or PMHPs. AHCA contracts with PMHPs by competitive procurement under s. 409.912(4)(b), F.S., and pays them a fixed, lump-sum payment per beneficiary on a monthly basis, typically at the beginning of the month. These prepayments are designed to cover services needed in the aggregate for any given month in a 12-month period. Such a fixed, prepayment is known as a “capitation.”¹⁶

Managed care plans that provide for services on a prepaid, capitated basis agree to accept the capitation payment and assume financial risk for delivering the covered services, regardless of whether the capitation fully covers the cost for all services that need to be provided. Capitated entities sometimes assume full risk, i.e. the coverage is comprehensive with no mitigation factors for the risk assumed, and others assume partial risk, i.e. the coverage is limited as opposed to comprehensive and/or the risk may be mitigated by loss prevention or shared-savings arrangements. PMHPs assume partial risk since they cover only behavioral health services. Payment systems based on capitation are designed to provide the state with less risk and more predictability for Medicaid spending and to incent the capitated entities to manage the provision of services in a cost-effective manner.¹⁷

¹² Rule 69O-203.013(6), F.A.C. (2007), defined “premium” as “[t]he contracted sum paid by or on behalf of a subscriber or group of subscribers on a prepaid per capita or a prepaid aggregate basis for limited health services rendered by or through the PLHSO.”

¹³ Lakeview Center, Inc. v. State of Florida, Dept. of Revenue, 8 So.3d 1136 (Fla. 1st DCA 2009)(unpublished disposition).

¹⁴ “Per curiam affirmed,” or PCA, refers to a decision of a court, without identifying any judges by name, finding that the decision of a lower court was correct. Such a decision is often made without rendering an opinion and the lack of record for its basis can preclude further review.

¹⁵ Section 213.053(2)(a), F.S.

¹⁶ Senate Committee on Health Regulation, *Issue Brief 2011-221: Overview of the Medicaid Managed Care Programs in Florida*, November 2010, available at <http://flsenate.gov/Committees/InterimReports/2011/2011-221hr.pdf>, (Last visited on April 9, 2011).

¹⁷ *Id.*

Actuarial Soundness

Florida law and federal regulations require that capitation rates for Medicaid managed care plans must be actuarially sound. The federal Centers for Medicare and Medicaid Services (CMS) requires Medicaid capitation rates developed at the state level to be actuarially certified prior to CMS approval. The AHCA has contracted with Milliman, Inc., for actuarial services related to capitation rates for PMHPs, both to develop the rates and to certify them as actuarially sound.¹⁸

Following the First District Court of Appeal's 2009 per curiam affirmation of the Second Circuit Court's ruling against Lakeview, AHCA instructed Milliman that because PMHPs that are PLHSOs¹⁹ would presumably be required to pay the 1.75 percent premium tax under s. 624.509(1)(a), F.S., Milliman should take the tax under consideration when calculating and certifying the 2010-11 capitation rates for PMHPs, in the interest of maintaining actuarial soundness.

The following passage is from Milliman's actuarial certification of the 2010-11 PMHP rates:²⁰

PMHP Administrative Costs and Premium Taxes:

We added a 14.75% allowance (as a percentage of the capitation rate) for PMHP administrative services and state premium taxes. The encounter data rate must include an allowance for administrative service because it is based on the actual utilization of services by PMHP enrollees. We selected a 13% administration load based on typical administrative costs of behavioral health organizations across the country, a 2% of revenue margin allowance, and our judgment. The state premium tax allowance is 1.75% of revenue.

In this way, capitation rates for PMHPs that are PLHSOs were increased by 1.75 percent for the current contract year in order to offset an expected tax payout by the PMHPs to the DOR reflecting the same percent of revenue paid by AHCA to the PMHPs. AHCA has indicated that the 1.75 percent offset (i.e. increased payments by AHCA to the PMHPs) is to be maintained in perpetuity for PMHPs subject to the 1.75 percent premium tax.

The effect of this offset is that capitation rates for PLHSOs have been increased with Medicaid dollars so that the PLHSOs can pay the premium taxes to the DOR, without harming the actuarial soundness of the capitation rates.

III. Effect of Proposed Changes:

Section 1 amends s. 636.0145, F.S., to exempt any entity providing services solely to Medicaid recipients through a contract with Medicaid from payment of the premium tax required by s. 624.509, F.S.

¹⁸ Senate Committee on Health Regulation, *Issue Brief 2011-226: Medicaid Managed Care Rate-setting*, November 2010, available at <http://flsenate.gov/Committees/InterimReports/2011/2011-226hr.pdf>, (Last visited on April 9, 2011).

¹⁹ One PMHP currently under AHCA contract is not a PLHSO and is therefore not subject to the premium tax.

²⁰ Milliman, Inc., *State of Florida Agency for Health Care Administration, September 1, 2010 – August 31, 2011 Prepaid Mental Health Plan Capitation Rate Development*, August 19, 2010, p. 7. On file with staff of the Senate Committee on Health Regulation.

Section 2 creates a non-statutory provision of law for retroactive application of the exemption to December 31, 1998. The bill provides that the retroactive application is remedial in nature and does not create the right to a refund of any tax, penalty, or interest to any company that has paid the tax, penalty, or interest prior to July 1, 2011.

Section 3 provides an effective date for the bill of July 1, 2011.

Other Potential Implications:

Exempting PLHSOs from the tax on premiums, contributions, and assessments would impact the way in which AHCA's actuarial contractor currently calculates capitation rates for those organizations. The 1.75 percent increase in the capitation rates for 2010-11 to offset the tax would be eliminated prospectively since it would no longer be necessary.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The bill would exempt the specified PLHSOs from taxes on premiums, contributions, and assessments that are currently in place under s. 624.509, F.S. As amended, the bill applies prospectively and the prospective operation does not provide a basis for an assessment of taxes not paid nor a basis for determining any right to a refund of taxes paid, prior to the bill's effective date. The Revenue Estimating Conference has determined that the bill, as amended, reduces General Revenue on a cash and recurring basis by \$1.6 million.

B. Private Sector Impact:

Prospectively, the bill should have a neutral effect on private-sector PLHSOs currently subject to the tax because the amount of the bill's tax relief should be offset by an equivalent reduction in their capitation rates.

C. Government Sector Impact:

According to AHCA, the capitation rates for prepaid mental health plans for September 1, 2010 to August 31, 2011 were increased by 1.75 percent to account for the premium tax. Therefore, the present rates paid by Medicaid since September 2010 already reflect the capitation rates paid to the plans that were based on encounter data and the 1.75% statutory premium tax rate. If the tax is no longer levied against the prepaid mental health plan contract vendors, AHCA would adjust the rates according to its capitation rate setting methodology effective September 1, 2011. As a minor component in the rate methodology, removal of the tax would result in a reduction to the rates paid to the plans by Medicaid. The reduction to the rates would only be the portion attributable to the actuarial adjustment and would not impact the service expenditure portion of the rates; therefore, the rates would remain actuarially sound. The plans would no longer be required to pay the tax; therefore, the tax would not be built into the rates. The current adjustment acts as a pass-through of expenditures within the capitated rates. Because the tax just became part of the rates in September 2010, sufficient expenditure data available after that date is not yet available to estimate savings to ACHA. However, there would be no additional costs to AHCA above current payments with or without the tax.

In its analysis of the bill, the Revenue Estimating Conference found the effective premium tax rate for the affected entities to be 0.75 percent, instead of the statutory 1.75 percent. (The availability of credits against the premium tax can cause the statutory and effective rates to diverge.) The combined impacts of the reduced capitation rate and lower premium tax revenue are likely to offset each other, negating the bill's impact on the state budget.

VI. Technical Deficiencies:

None.

VII. Related Issues:*Penalties, Interest, and the Rate of Taxation*

In its presentation to the Conference on February 25, 2011, the DOR indicated that interest pertaining to any unpaid taxes would likely be applied but penalties would likely be waived. Further, due to certain tax credits that would apply to PLHSOs in these cases,²¹ the net tax rate actually paid by the PLHSOs would be less than 1.75 percent. Because of those tax credits, the Conference assumed a net tax rate of 0.75 percent instead of 1.75 percent when determining the fiscal impact described above.²²

Tax Payments for 2011

It is unclear what would happen under the bill to dollars currently being used to boost capitation rates for PLHSOs in the 2010-11 contract year (for the purpose of offsetting the tax) if the PLHSOs are no longer required to pay the tax for the 2011 calendar year. It is also unclear how

²¹ Section 624.509(5), F.S.

²² *Supra* note 21.

the difference between the assumed tax rate of 1.75 percent, which was used to boost the current capitation rates,²³ and the estimated net tax rate of 0.75 percent would be resolved.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

Barcode 386990 by Health Regulation on April 12, 2011:

The amendment removes the tax exemption's retroactivity. The amendment provides that the bill applies prospectively and that the prospective operation does not provide a basis for an assessment of taxes not paid nor a basis for determining any right to a refund of taxes paid, prior to the bill's effective date. (WITH TITLE AMENDMENT)

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²³ *Supra* note 20.