



**RE:            Mounting a Successful Challenge to an  
Emergency License Suspension Order**

**DATE:         September 2, 2011**

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Before an Emergency Suspension Order can be issued to suspend a medical license, the Department of Health must provide specific facts and reasons to support a finding of immediate danger to the public health, safety and welfare. The First District Court of Appeal recently released an opinion in which the Department failed this minimum requirement. In a unanimous decision, the court struck down an emergency order suspending the medical license of Alan Mendelsohn, a prominent ophthalmologist in Broward County.

The applicable standard of review for any Emergency Suspension Order (which allows suspension of a license without a prior hearing on the merits) is whether, “on its face, the order sufficiently states particularized facts showing an immediate danger to the public welfare.” Robin Hood Group, Inc. v. Florida Office of Insurance Regulation, 885 So. 2d 393, 396 (Fla. 4th DCA 2004). See also, Broyles v. Department of Health, 776 So. 2d 340 (Fla. 1st DCA 2001).

Instead of citing any facts which warranted the emergency license suspension, the Department of Health relied solely on a state statute and prior court opinion that permitted such emergency suspension orders where the licensee has committed a misdemeanor or felony under one of several federal statutes relating to Medicaid fraud. Previously, Dr. Mendelsohn, who was also a registered lobbyist, had entered a plea of *nolo contendere* in federal court to a charge of conspiracy to commit fraud upon the United States in violation of 18 U.S.C. § 371 for allegedly using campaign funds for private use.

The statute relied upon by the Department -- § 456.074(1), Florida Statutes -- specifically lists certain federal violations, including 18 U.S.C. § 371, ending with the modifying term “relating to the Medicaid program.” Dr. Mendelsohn argued that the statute requires all of the listed violations be related to the Medicaid program in order for the Department to be excused from stating specific facts showing harm to the public. The Department argued that the modifier applied only to the offenses immediately preceding the modifier. The First DCA disagreed and, citing basic rules of grammatical construction and indicators of legislative intent, ruled the modifier applied to all of the listed violations. Since no facts were provided on the face of the emergency order to support a finding of immediate danger to public health, the order was stricken.

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Historically, Florida courts have kept agencies from abusing the imposition of emergency moratoriums where immediacy of public harm is lacking or where the moratorium is not “narrowly tailored” to address the threat of harm. See e.g., St. Michael’s Academy, Inc. v. Department of Children and Families, 965 So. 2d 169 (Fla. 3rd DCA 2007) (allegations of isolated incidences were insufficient for emergency order suspending license because danger was not immediate and future harm was speculative); Henson v. Department of Health, 922 So. 2d 376 (Fla. 1st DCA 2006) (department’s emergency order suspending doctor’s license to practice osteopathic medicine because of narcotics violations quashed as broader than necessary to protect the public); Cunningham v. AHCA, 677 So. 2d 61 (Fla. 1st DCA 1996) (emergency suspension of psychiatrist’s license for over-prescribing narcotics to three patients was overly broad); Duabe v. Department of Health, 897 So. 2d 493, 495 (Fla. 1st DCA 2005) (emergency order to suspend petitioner’s license before administrative complaint was issued was unnecessary where petitioner stopped using an unapproved product on patients and destroyed his remaining supply before the emergency order was issued). Moreover, a demonstration of immediate serious harm to the public, and the consequent necessity for the emergency order, must be more than a general, conclusory prediction of harm. Bio-Med Plus, Inc. v. Department of Health, 915 So.2d 669 (Fla. 1st DCA 2005).

In Dr. Mendelsohn’s case, the Department currently has an administrative complaint pending with the Florida Board of Medicine to suspend or revoke Dr. Mendelsohn’s license. Unlike the Emergency Suspension Order, this course of action provides for a hearing on the merits *before* the license can be suspended. Even if an appellate court upholds an emergency suspension order, the licensee is entitled to an administrative hearing on the merits.

If you have any questions about Department of Health Emergency Suspension Orders and your rights to contest them, please feel free to speak with an attorney at Smith & Associates.

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