UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

Case No.	CV 08-3315 CAS (MANx)	Date	November 2, 2009
Title	INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA ET AL V. SANDRA SHEWRY		

Present: The Honorable	CHRISTINA A. SNYDER	
CATHERINE JEANG	Not Present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(Chambers:) PLAINTIFFS' MOTION TO ENFORCE PRELIMINARY INJUNCTION AND, ALSO, TO STAY AND PRELIMINARILY ENJOIN IMPLEMENTATION OF PAYMENT CUTS FOR LACK OF PUBLIC NOTICE AS REQUIRED BY 42 C.F.R. § 407.205** (filed 10/11/09)

I. INTRODUCTION & BACKGROUND

The facts and procedural history of this action are known to the parties and summarized in the Court's August 18, 2008 order granting in part and denying in part petitioners' motion for preliminary injunction. The August 18, 2008 order preliminarily enjoined the ten percent Medi-Cal reimbursement rate reduction codified in Assembly Bill X3 5, Cal. Welf. & Inst. Code § 14105.19, as to certain fee-for-service providers, including pharmacies. The Ninth Circuit affirmed the Court's August 18, 2009 order. 572 F.3d 644, 663 (9th Cir. 2009) (affirming in part and reversing in part the Court's subsequent order modifying the injunction to apply only prospectively).

On February 27, 2009, the Court in a related action, Managed Pharmacy Care v. David Maxwell Jolly, CV 09-382 CAS (MANx), granted petitioners' motion for preliminary injunction. The February 27, 2009 order preliminarily enjoined the five percent Medi-Cal payment reduction codified in Assembly Bill 1183, modifying Cal. Wel. Inst. Code § 14105.191(b)(3), as to payments to pharmacies for prescription drugs provided under the Medi-Cal fee-for service program. The Court's February 27, 2009 order is currently being appealed to the Ninth Circuit.

Petitioners allege that the Department of Health Care Services ("DHCS") has adopted, in violation of these two preliminary injunctions, three new practices that reduce

payments to pharmacies in the Medi-Cal fee-for-service and managed care programs. Mot. at 7-9. Specifically, on July 28, 2009, the California Legislature enacted Assembly Bill X4 5 ("AB 5"). AB 5 modifies the manner in which the DHCS is to calculate the maximum amount, known as the "maximum allowable ingredient costs" ("MAIC"), it reimburses Medi-Cal pharmacy providers for generically equivalent drugs. See Cal. Welf. & Inst. Code § 14105.45. In addition, AB 5 provides that payment to Medi-Cal pharmacy providers will be the lower of the pharmacy's "usual and customary charge" or the statutory reimbursement rate for legend and non-legend drugs.[1] See Cal. Welf. & Inst. Code § 14105.455 (cross-referencing the rate provided in subdivision (b) of section 14105.45). Finally, petitioners allege that on September 26, 2009, DHCS reduced payments to all Medi-Cal pharmacies by 4% because First Data Bank, Inc. ("First DataBank"), the department's "primary reference source" for pricing the reimbursement rate for brand drug products, changed its standard and formula for arriving at "average wholesale prices" ("AWP"). This change to the published AWP was allegedly a result of a class settlement in a separate lawsuit involving First Data Bank.[2]

On October 11, 2009, petitioners filed the instant motion to enforce the August 18, 2008 and February 27, 2009 injunctions, and to stay and preliminarily enjoin implementation of the three alleged payment cuts.[3] Respondent filed an opposition on

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[1] The "usual and customary charge" means the lower of the following: (1) the lowest price reimbursed to the pharmacy by other third-party payers in California, excluding Medi-Cal managed care plans and Medicare Part D prescription drug plans; or (2) the lowest price routinely offered to any segment of the general public. See Cal. Welf. & Inst. Code § 14105.455(b)(1)-(2).

[2] See New England Carpenters Health Benefits Fund, et al. v. First DataBank, et al., No. 05-11148 PBS (D. Md. Aug. 3, 2009).

[3] Petitioners request that the Court take judicial notice of several filings with the Court. Under Fed. R. Evid. 201, a court may take judicial notice of "matters of public record." Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir.1986). Since the Court the does not rely on the filed documents to rule on the motion, the Court denies petitioners' request as moot.

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October 26, 2009.[4] Petitioners filed a reply on October 29, 2009. On October 30, 2009, the Court vacated the hearing date of November 2, 2009 and took the matter under submission. After carefully considering the arguments set forth by the parties, the Court finds and concludes as follows.

II. DISCUSSION

Petitioners move the Court to enforce the two existing injunctions and to order respondent David Maxwell-Jolly, Director of the DHCS (the "Director"), to refrain from reducing any payments to Medi-Cal pharmacies, as provided by Cal. Welf. & Inst. Code sections 14105.45 and 14105.455, or on account of any reduced AWP published by First DataBank or other publishers affected by the New England Carpenters lawsuit. Mot. at 1. In addition, they request that the Court order respondent to refrain from reducing, "whatsoever or at all," any reimbursement or payments to pharmacies for their costs to acquire brand drug products, in the Medi-Cal fee-for-service or managed care program, during the pendency of this litigation and to refund all the payments DHCS is allegedly withholding under these challenged payment practices.[5] Id. at 1-2.

Petitioners also request that the Court stay and preliminarily enjoin the implementation of these alleged payment cuts for lack of public notice as required by 42 C.F. R. § 407.205.

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[4] Respondent requests that the Court issue sanctions against petitioners for allegedly failing to meet and confer, pursuant to Local Rule 7-3, and for allegedly filing a frivolous pleading, in violation of Fed. R. Civ. P. 11. Opp'n at 17-20. The Court denies respondent's requests.

[5] Petitioners seek for the above described enforcement order to have effect until respondent does the following: (1) applies to and obtains an order from the Court which terminates or amends the existing preliminary injunctions; (2) publishes a public notice, as required by 42 C.F.R. § 447.205, of the three alleged changes in statewide methods and standards for setting and paying Medi-Cal payment rates for services; and (3) the Director, exercising his powers under section 14105, ceases to implement the three challenged practices so that no reimbursement rates are reduced. Mot. 2-5.

A. Application of the August 18, 2008 Order and February 27, 2009 Order to the Alleged Payment Cuts to Medi-Cal Pharmacies

Petitioners contend that these three new alleged payment cuts to Medi-Cal pharmacies are in violation of the August 18, 2008 and February 27, 2009 preliminary injunctions because the orders were "couched in terms of ordering the Director to 'refrain from reducing by [ten and five percent, respectively] payments under the Medi-Cal fee for service program' for prescription drugs." Mot. at 7; Reply at 4-5. In support of their argument, they assert that these three new practices cumulatively result in "at least a 5% cut in overall payments annually to pharmacies in the Medi-Cal program." Mot. at 8; Reply at 5 (citing Declaration of Richard D. Wilson). Petitioners argue that even if respondents believe that the existing injunctions were mooted, as a result of subsequent events or by amendment to existing statutes, that respondents must comply with the existing injunctions until they obtain an order from the court that modifies or terminates the injunctions. Mot. at 10 (citing e.g., U.S. v. Swift, 286 U.S. 106, 119 (1932)).

Respondent contends that this Court's August 18, 2008 order is expressly limited to the ten percent payment reduction mandated by Cal. Welf. & Inst. Code § 14105.19(b)(1), and that the three practices challenged in this motion do not relate to the enjoined statutory provision.[6] Opp'n at 4, 6. Accordingly, he argues that the scope of the prior injunction in this case is limited to the express terms of the injunction, and that the order cannot be the basis for enjoining all future legislative action that might possibly

[6] Respondent further contends that the new statutory provisions, unlike the enjoined statutory provisions, do not mandate payment reduction for any drugs. Opp'n at 3. Specifically, he argues that section 14105.455 "merely codified into statute a longstanding Medi-Cal regulation prohibiting providers from discriminating against the Medi-Cal program by charging it more than the usual and customary charges they charge to members of the general public." Id. at 4. In addition, he argues that it is unclear to what extent section 14105.45 concerning MAICs will impact the reimbursement for multi-source drugs. Id. at 5. Finally, respondent argues that the AWP is established by a third party entity over which he has no authority, and that any impact to a provider's reimbursement for a drug will be based on the existing Medi-Cal reimbursement statute, regulation, or policy. Id.

have any impact on reimbursement to any pharmacy. Id. (citing Firefighters Local Union v. Stotts, 467 U.S. 561, 574 (1984)). Respondent further argues that reimbursements to Medi-Cal pharmacies may be "reduced for a variety of reasons every day, having nothing whatsoever to do with this case," and that the relief petitioners are seeking is to create a system wherein the Court becomes the sole administrator of the Medi-Cal programs. Id. at 7. Such an arrangement, he contends, would clearly violate the separation of powers doctrine and the Medicaid Act. Id.

Furthermore, he argues that Cal. Welf. & Inst. Code sections 14105.45 and 14105.455, and the issue of AWP arising out of the New England Carpenters litigation, have not previously been "briefed, argued or referenced within the scope of this case." Opp'n at 5. Respondent contends that petitioners' new grievances can only be the subject of a separate lawsuit, and that the Court cannot decide issues improperly raised in the instant motion because they are completely outside the relief requested in the petition and proceedings in this action.[7] Id. at 8 (citing Sunlight Carbon Co. v. St Louis & S.F.R. Co., 15 F.2d 802, 804 (1926)). In addition, he argues that Swift, cited by petitioners, is inapplicable because the case involved a consent decree, and moreover, that petitioners in Swift raised their new claims for relief in a new petition for relief. Id. at 9-10 (citing 286 U.S. 106, 120 (1932)).

A district court has continuing jurisdiction to enforce its injunction. Crawford v. Honig, 37 F.3d 485, 488 (9th Cir.1994). Petitioners, in seeking to enforce the injunction, must show that the injunction clearly forbids the challenged conduct, and thus demonstrate that respondent received "explicit notice of precisely what conduct is forbidden." Clark v. Coye, 60 F.3d 600, 604 (9th Cir. 1995) (explaining why Fed. R. Civil P. 65(d) "requires the language of injunctions to be reasonably clear so that ordinary persons will know precisely what action is proscribed," and why "all

[7] Respondent further contends that the proper procedure to add or change one's claims for relief based on new or change facts is a Fed. R. Civ. P. 15(d) motion. Opp'n at 9. He also argues that even if petitioners had sought a joinder of their new claim, pursuant to Fed. R. Civ. P. 20(a), that joinder would be inappropriate because the three grievances petitioners allege are not transactionally related to the payment reduction mandated by Cal. Welf. & Inst. Code § 14105.19. Id. at 10-11.

ambiguities are resolved in favor of the person subject to the injunction") (quoting United States v. Holtzman, 762 F.2d 720, 726 (9th Cir.1985)). However, the Court finds that the August 18, 2009 order, issued in the instant action, expressly states that it is limited to the ten percent rate reduction codified in Cal. Welf. & Inst. Code § 14105.19(b)(1). Likewise, the February 27, 2009 order, issued in the related action Managed Pharmacy Care v. David Maxwell Jolly, CV 09-382 CAS (MANx), expressly states that is limited to the five percent rate reduction codified in Cal. Welf. & Inst. Code § 14105.191(b)(3). Because the Court's orders were expressly limited to these specific statutory provisions, and because they do not at all contemplate the alleged payment cuts challenged in the instant motion, the Court declines to construe the injunctions to apply to Cal. Welf. & Inst. Code sections 14105.45 or 14105.455, or to the alleged payment reduction to pharmacies arising out of the New England Carpenters litigation. The Court finds that petitioners are in fact raising new claims not covered by the current injunctions.

B. Injunction and Stay of Payment Cuts for Failure to Give Public Notice Required by 42 C.F.R. § 447.205

Petitioners contend that respondent should be preliminarily enjoined from implementing these alleged payment cuts until the Director complies with the public notice requirements of 42 C.F.R. § 447.205. Mot. at 13. Section 447.205 requires public notice of significant changes in statewide methods and standards for setting payment rates unless certain enumerated exceptions apply. See 47 C.F.R. § 447.205. Petitioners argue that no public notice has been provided informing the public that First DataBank changed its standard and formula for calculating the AWP, which is the "reference source" used by DHCS to set its pharmacy payment rates, and that this change allegedly resulted in a "4% AWP markdown."[8] Mot. at 14-20. As to the other two alleged

[8] Specifically, petitioners argue that whereas the State Plan filed with the Centers for Medicare and Medicaid Services must, pursuant to 42 U.S.C. § 1396(a)(30)(A), "provide such methods and procedures relating to . . . the payment for, care and services," that the State Plan filed by DHCS only states that the method used to establish the maximum drug product payments is based on the AWP published by an "undisclosed primary reference source." Id. at 15-16. Petitioners assert that the State Plan does not disclose that First DataBank, the primary reference source, uses a "secret proprietary

payment cuts, petitioners argue that although the Director did post a notice of the two statutory changes, codified in AB 5, that he failed to comply with specific notice requirements under section 447.205.[9] Mot. at 21-24.

Respondent contends that petitioners' complaint in this action does not allege a claim based on 42 C.F.R. § 447.205, and that petitioners are improperly attempting to have this Court address an issue not previously or currently before it. Opp'n at 10-14 (citing E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1297 (9th Cir. 1992) (finding that the terms of the injunction must be tailored to eliminate "only the specific harm alleged)). Nevertheless, respondent argues that even if section 447.205 were relevant to the case, he has not violated this statutory public notice requirement. Id. at 14-17.

As previously discussed, the Court finds that petitioners are in fact raising a new claim by challenging these alleged payment cuts, which are not the subject of petitioners' complaint, and by alleging a violation of a new statute. The gravamen of the Court's previous two orders was that petitioners had demonstrated a strong likelihood of success in showing that Cal. Welf. & Inst. Code § 14105.19(b)(1) and § 14105.19(b)(3) were preempted by § 30(A) of the Medicaid Act, 42 U.S.C. § 1396a(30)(A). The Court's analysis of the § 30(A) claims, under a preliminary injunction standard, do not resolve or address the challenge raised by petitioners in this motion.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES petitioners' motion to enforce the preliminary injunction, with leave to amend, and DENIES petitioners' motion to stay and

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formula" to arrive at its published AWP, and that on September 26, 2009, this formula was changed resulting in a one-time 4% price reduction for 18,000 to 20,000 brand drug products. Id.

[9] Specifically, petitioners argue that the public notice posted in the California Regulatory Notice Register fails to explain why DHCS is changing its methods and standards, and to give an estimate of any expected increase or decrease in annual aggregate expenditures due to these two changes. Mot. at 21-24.

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preliminarily enjoin the challenged practices, with leave to amend.

IT IS SO ORDERED.

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