UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-8200 CAS (MANx)	Date	July 6, 2010
Title	CALIFORNIA PHARMACISTS ASSOC.; ET AL. v. DAVID MAXWELL-JOLLY		

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:
N/A	N/A

Proceedings: **(In Chambers:) PLAINTIFFS' MOTION FOR REHEARING AND TO ALTER, AMEND, MODIFY, AND RECONSIDER MAY 5, 2010 ORDER RELATING TO THE SEVENTH CLAIM FOR RELIEF** (filed 06/02/10)

The Court finds this motion appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing date of July 12, 2010, is hereby vacated, and the matter is hereby taken under submission.

I. INTRODUCTION & BACKGROUND

The facts and procedural history of this action are known to the parties and summarized in this Court's May 5, 2010 order granting in part and denying in part plaintiffs' motion for preliminary injunction. Specifically, in its May 5, 2010 order, the Court found that plaintiffs demonstrated a likelihood of success on their fourth and eighth claims for relief challenging two Medi-Cal pharmacy provider cuts. Accordingly, the Court ordered respondent Director, his agents, servants, employees, attorneys, and all those working in concert with him to (1) refrain from enforcing the Upper Billing Limit codified at Cal. Welf. & Inst. Code § 14105.455; and (2) to refrain from enforcing that portion of Cal. Welf. & Inst. Code § 14105.45, as amended by AB 5, which provides a new MAIC reimbursement formula. However, as to the third Medi-Cal pharmacy provider cut, the Court concluded that plaintiffs had failed to make a sufficient showing that the state is liable for the alleged 4% reduction in reimbursements tied to "average wholesale price" ("AWP") that resulted from the settlement in New England Carpenters Health Benefits Fund v. First DataBank, Inc., 602 F. Supp. 2d 277 (D. Mass. 2009). Accordingly, the Court denied plaintiffs' fifth, sixth, and seventh claims for relief.

On June 2, 2010, plaintiffs filed the instant motion seeking to alter, amend, modify, and reconsider its May 5, 2010 order relating to plaintiffs' seventh claim for

relief—namely, that the 4% reduction in reimbursements tied to the AWP constitutes a substantive violation of 42 U.S.C. § 1396a(a)(30)(A) ("§ 30(A)" of the Medicaid Act). On June 21, 2010, respondent filed his opposition. Plaintiffs filed their reply on June 28, 2010. After carefully considering the arguments set forth by both parties, the Court finds and concludes as follows.

II. LEGAL STANDARD

Under Rule 60(b), the court may grant reconsideration of a final judgment and any order based on: "(1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) extraordinary circumstances which would justify relief." ACandS, Inc., 5 F.3d at 1263. A motion for reconsideration on any of these grounds must be brought within a reasonable time and no later than one year of entry of judgment or the order being challenged. See Fed. R. Civ. P. 60(c)(1). See also Local Rule 7-18.

III. DISCUSSION

Plaintiffs move the Court, pursuant to Fed. R. Civ. P. 52(b), 59(e), 60(b), and Local Rule 7-18, for a new hearing, and to alter, amend, modify and reconsider that part of the Court's May 5, 2010 order denying plaintiffs' motion for preliminary injunction with respect to plaintiffs' seventh claim for relief. Mot. at 1. According to plaintiffs, such relief is necessary to prevent clear error and manifest injustice to the many Medi-Cal beneficiaries who are patients of plaintiff pharmacies. Id. Plaintiffs contend that the Court failed to consider plaintiffs' uncontradicted evidence, in support of their seventh claim, that the 4% reduction in reimbursement for brand acquisition costs reduced total payment to pharmacies in respect to most brand drugs in the Medi-Cal program to so low a level that most or many pharmacies will cease filling brand prescriptions resulting in millions of recipients being denied access to brand name drugs, in violation of the "quality of care" and "equal access" provisions of § 30(A). Id. at 2. Further, plaintiffs argue that the Court erroneously ruled that the substantive requirements of § 30(A) "are not implicated" in "circumstances such as these where the State has not affirmatively acted to create a new, or modified 'method or procedure' for establishing reimbursement rates to Medi-Cal providers" and erroneous for the Court to rule that the Secretary of the U.S. Department of Health and Human Services (the "Secretary") "is better able to address the potential impact of the markdown of AWP." Id. at 3 (quoting May 5, 2010 order at 11-12). Plaintiffs argue that it was contrary to law and the evidence, and a gross

abuse of discretion, on the part of the Court, for the Court to defer to the Secretary and to accept the findings and conclusions of the United States Department of Justice ("DOJ").[1] Id. at 3-5, 7 (citing Rosado v. Wyman, 397 U.S. 397, 420 (1970)). Plaintiffs emphasize that the DOJ agrees with plaintiffs that when a state's Medicaid provider payment rate has fallen out of compliance with § 30(A), that this is a substantive violation of § 30(A), irrespective of why the payment rate has become non-compliant. Id. at 6. Finally, plaintiffs argue that the Court misstated the facts by finding that the 4% markdown of reimbursement for 18,000 to 20,000 brand drug products was "occasioned by a private settlement" because only 1,400 of these drug products were marked down by First DataBank pursuant to the terms of the settlement. Id. at 8-9.

Respondent contends that plaintiffs' motion is an improper attempt to relitigate the AWP issue that has already been decided by this Court, on at least three occasions, and the Ninth Circuit Court of Appeals in Nat'l Assoc. of Chain Drug Stores, et al. v. Arnold Schwarzenegger, et al. No. 09-7097 CAS (MANx) ("NACDS"), and thus plaintiffs fail to meet their burden for relief under Fed. R. Civ. P. 52(b), 59(e), 60(b), and Local Rule 7-18. Opp'n at 1. Specifically, respondent argues that plaintiffs seek to use Rule 52(b) for the improper purpose of having the Court rehear facts that they have presented to the Court several times, and that, in any event, the Court's determination that the substantive obligations of § 30(A) were not even triggered by the AWP reductions moots each of plaintiffs' requests for amended facts concerning those § 30(A) obligations. Id. at 3-4. As for relief under Rule 59(e), respondent argues that plaintiffs do not allege any newly discovered evidence or change in controlling law, and only allege errors in the Court's consideration of plaintiffs' seventh claim. Id. In this respect, respondent contends that plaintiffs offer no reason for the Court to reconsider or change its conclusion on its ruling that private AWP changes do not trigger the substantive or procedural obligations

[1] On July 1, 2010, plaintiffs filed a request for the Court to take judicial notice of the Statement of Interest filed by the DOJ in the related matter, Nat'l Assoc. of Chain Drug Stores, et al. v. Arnold Schwarzenegger, et al., No. 09-7097 CAS (MANx), which is referred to in the Court's May 5, 2010 order at 12, n.8, in the instant matter. 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). The Court GRANTS plaintiffs' request for judicial notice to the extent that they request that the Court take judicial notice that the document was filed with the Court. However, the Court does not take judicial notice of the truth of the matters asserted therein.

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of section 30(A). Id. at 5-7. Given the rulings in NACDS and the instant case, respondent argues that plaintiffs have not asserted any basis for a Rule 60(b) motion. Id. at 7-8. Finally, respondent argues that Local Rule 7-18 precludes plaintiffs' motion because it states that "[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion" and plaintiffs' entire motion restates evidence and argument that plaintiffs already presented in support of their TRO application and motion for preliminary injunction. Id. at 8.

In their reply, plaintiffs reiterate many of the same arguments raised in their moving papers.

Having reviewed and considered the arguments raised by plaintiff, the Court finds that plaintiffs have not met their burden to demonstrate that the Court should vacate its judgment denying plaintiffs' motion for preliminary injunction in respect to their seventh claim for relief. The Ninth Circuit in NACDS, held that regardless of the plaintiffs' likelihood of success on the merits of their claims challenging the reduction in AWPs, the plaintiffs are not entitled to preliminary injunction because the balance of equities and considerations of public interest weigh in favor of the State. See NACDS, 2010 WL 1506928, *1 (9th Cir. Apr. 15, 2010) ("The injunction that the appellants seek would require California to recalibrate its established reimbursement formula to counteract the effect of the reduction in AWPs. This, in turn, would compel California to bear the administrative burdens associated with amending its state Medicaid plan. See C.F.R. §§ 430.12-20. The state should not be required to take on such burdens before the district court has finally resolved the merits of the appellants' claims."). In the instant case, plaintiffs effectively seek the same relief in their seventh claim.

Accordingly, the Court DENIES plaintiffs' motion to alter, amend, modify, and reconsider its May 5, 2010 order relating to plaintiffs' seventh claim for relief.

IT IS SO ORDERED.

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