

[News Article]

Pharmacy groups sue Delaware over Medicaid drug reimbursement rate cuts

By Sheri Qualters

July 13, 2009

National Law Journal

With several state governments strapped for cash, some have sought to save money by reducing Medicaid drug reimbursement rates. But a lawyer representing pharmacy groups suing Delaware for cutting these rates believes a recent U.S. Court of Appeals for the 9th Circuit ruling stopping California from trimming state Medicaid payments to medical providers strengthens the groups' position in the Delaware case.

That case, filed in Delaware federal court, echoes claims in a recently resolved Washington state federal case that state reimbursement cuts violate the Social Security Act (or Medicaid Act)'s "quality of care" and "access" requirements for Medicaid beneficiaries. It also claims that the cuts, or proposed cuts, violate state and federal laws because Delaware failed to seek approval from federal Medicaid officials. A preliminary injunction hearing in the case, *National Association of Chain Drug Stores v. Markell*, is slated for next month.

The Washington case, *Washington State Pharmacy Association v. Gregoire*, filed in the Western District of Washington, was ultimately dismissed after state officials rescinded the cuts.

The 9th Circuit ruling, issued on July 9, upheld a lower court's order stopping California from reducing state Medicaid reimbursement rates to certain medical providers. The opinion in that case, *Independent Living Center of Southern California Inc. v. Maxwell-Jolly*, said that the plaintiffs could sue the state under the U.S. Constitution's supremacy clause, which says federal laws trump conflicting state laws.

The court also declared that a prior 9th Circuit case involving Medicaid reimbursement was applicable even though the plaintiffs in that case focused on their rights under the Medicaid Act and not the supremacy clause. "In both cases, the central question is the purpose underlying" the Social Security Act's state reimbursement language, wrote Judge Milan D. Smith Jr.

The California Attorney General's Office, which represented all of the state defendants in the 9th Circuit case, did not respond to a request for comment.

Lynn S. Carman, chief counsel for Medicaid Defense Fund, who handled the appeal for the plaintiffs in the 9th Circuit case, said the ruling is important because it "establishes on the merits" that these Medicaid rate cuts made by legislatures violate the Medicaid Act and that Medicaid beneficiaries can have standing to get injunctions.

[Frederick "Rick" Ball](#), a [Chicago litigation](#) partner at Philadelphia's Duane Morris who represents the pharmacy groups in the Delaware case, said the 9th Circuit ruling is important because "it reaffirmed that the states have to comply with federal law, and the supremacy clause provides a pathway," for cases against states that fail to comply. He also represented the plaintiffs in the Washington case that was dismissed.

In the Delaware case, the plaintiffs hope the court will invalidate April and July reimbursement cuts and reset rates at their pre-April levels, said Ball. He represents two national pharmacy groups that sued Delaware's governor, the Delaware Health and Social Services department and the department's secretary. He said it's clear that many states have legitimate budget issues and spend a significant portion of their budgets on Medicaid, but he said reimbursement cuts harm beneficiaries because they reduce pharmacies' willingness to participate in the programs.

"It's easier for states to try to balance their budgets on people who are the most vulnerable in society, but if the states are going to participate in Medicaid, they have to comply with federal law."

The Delaware Health and Social Services department did not respond to a request for comment.

Ball's pharmacy clients in the Western District of Washington quickly persuaded Washington state officials to drop a planned reduction in prescription drug reimbursement rates. In that case, a trio of national and state pharmacy groups, several small pharmacies and a Medicaid beneficiary sued the governor, the Washington state Department of Social and Health Services and the health department's secretary in late March to stop the April 1 rate cut.

Washington state officials "saw the writing on the wall" when District Judge Benjamin H. Settle granted the plaintiffs' request for a temporary restraining order on the rate cuts at the end of March, Ball said.

They realized "the reduction was going to be unsupportable for them to pursue," Ball said. The Washington state Office of the Attorney General, which is handling the case for the state, did not respond to requests for comment.

The state reversed the rate cut on April 10, and the case was dismissed in May.

Washington state expected the reimbursement cut to help close a massive budget shortfall in the final three months before the state would get a new two-year budget starting on July 1, said Social and Health Services Department spokesman Jim Stevenson.

The agency based its 6% reimbursement cut on a U.S. Department of Health and Human Services study, but Washington state's Senate and House were each debating different reimbursement cuts at the time of the lawsuit.

The legislature ultimately ordered the agency to do a market survey and decrease reimbursement by up to 2%. The 2% cut took effect on July 1, he said. "Our only recourse, given the time frame, was to abandon that [regulatory] effort and then let the legislature direct us as to what reimbursement they wanted," Stevenson said.

Reprinted by permission.