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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

The Coalition for Reliable Medical Access,
Inc., the Alaska State Medical Association, the
Alaska Medical Group Management
Association, the Alaska Podiatric Medical
Association, the Alaska Physical Therapy
Association, Inc., and the Alaska Chiropractic
Society,

Plaintiffs,

v.

State of Alaska, Department of Commerce,
Community and Economic Development,
Division of Insurance,

Defendant.

Case No. 3AN-23- 09425 CI

COMPLAINT FOR EQUITABLE RELIEF

COME NOW plaintiffs the Coalition For Reliable Medical Access, Inc., the Alaska State Medical Association, the Alaska Medical Group Management Association, the Alaska Podiatric Medical Association, the Alaska Physical Therapy Association, Inc., and the Alaska Chiropractic Society, by and through counsel, and for their Complaint for Equitable Relief state and allege:

1. Plaintiff Coalition For Reliable Medical Access, Inc., is a nonprofit corporation organized under the laws of the State of Alaska. Its principal place of business is Anchorage, Alaska.
2. Plaintiff Alaska State Medical Association is a nonprofit corporation organized under the laws of the State of Alaska and represents Alaska medical providers. Its principal place of business is Anchorage, Alaska.
3. Plaintiff Alaska Medical Group Management Association is a nonprofit corporation organized under the laws of the State of Alaska comprised of medical group practice administrators, managers, health care executives, consultants and vendors. Its principal place of business is Anchorage, Alaska.
4. Plaintiff Alaska Podiatric Medical Association is a nonprofit chapter of the American Podiatric Medical Association representing podiatrists in Alaska. Its principal place of business is Anchorage, Alaska.
5. Plaintiff Alaska Physical Therapy Association, Inc., a chapter of the American Physical Therapy Association, is a nonprofit corporation organized under the laws of the State of Alaska whose mission is to promote physical therapy throughout Alaska. Its principal place of business is Anchorage, Alaska.
6. Plaintiff Alaska Chiropractic Society is a nonprofit corporation organized under the laws of the State of Alaska. Its principal place of business is Anchorage, Alaska.
7. Defendant State of Alaska, Division of Insurance ("DOI"), is a division of the Alaska Department of Commerce, Community, and Economic Development.

8. This Court has jurisdiction of this matter pursuant to AS 22.10.020(g) and Alaska R.Civ.P. 65.

Facts Common to All Claims for Relief

9. In 2004, defendant DOI by regulation adopted what became known as the 80th Percentile Rule (“Rule”).
10. The Rule is found in 3 AAC 26.110(a), which states in relevant part: “a person who provides coverage in this state for health care services or supplies on an expense incurred basis for which benefits are based on an amount that is less than the actual amount billed for the health care services or supplies . . . shall determine the final payment . . . equal to or greater than the 80th percentile of charges (based on a statistically credible profile for each geographical area) for the health care services or supplies.”
11. As a result of the Rule, when consumers receive medical treatment or supplies from a provider not within a healthcare insurer’s contractually formed “network,” the insurer is required to pay at least as much as the 80th percentile of billed charges in the same geographical area.
12. The DOI adopted the Rule to protect consumers from unexpected and large “balance billing.”
13. The DOI determined that the Rule has been effective in greatly reducing large balance billing and thus is a benefit for consumers.
14. However, health insurers, and in particular Blue Cross Blue Shield of Alaska, the largest health insurer in the state, lobbied in favor of repeal of the rule.

15. In 2016, DOI Director Lori Wing-Heier told the Senate Health and Social Services Standing Committee that the mission of DOI is to regulate the insurance industry in a manner that protects Alaska consumers.
16. In 2017, the DOI held hearings where witnesses presented their views on the Rule.
17. In May 2018, the DOI issued a Notice of Public Scoping for possible changes to the Rule. The DOI informed the public that it was seeking alternatives that would provide equal or greater protection for Alaska consumers.
18. In December 2020, the federal “No Surprises Act” (“NSA”) was signed into law as a part of the Consolidated Appropriations Act of 2021. The law became effective January 1, 2022.
19. The NSA bans balance billing for out-of-network emergency care.
20. The NSA also prohibits balance billing for out-of-network providers for patient visits to in-network health care facilities absent notice and consent. The facilities include hospitals, hospital outpatient departments, critical access hospitals and ambulatory surgery centers.
21. However, the protections of the NSA do not apply to most primary and specialty care, which is routine. For example, the NSA does not apply to patient visits to physician offices or to urgent care centers. The NSA does not apply to the vast majority of healthcare encounters.
22. In January 2023, the DOI gave notice that it intended to abolish the Rule. The notice stated the principal reason for the rule change was the federal adoption of the NSA.

23. On February 20, 2023, DOI director Wing-Heier told the Senate Labor and Commerce Committee that under the Rule Alaskans rarely received large surprise medical bills. However, she said the NSA would protect consumers from most such bills.
24. During the February 2023 hearing, however, Ms. Wing-Heier admitted the NSA primarily addresses emergency room visits and some other procedures. She acknowledged the NSA left gaps in consumer protection. Those gaps do not exist under the Rule.
25. The DOI has adopted no alternative methodology or rule for consumer protection relating to out-of-network balance billing that would fill the gaps left in consumer protection by the NSA.
26. The DOI intends to abolish the Rule on January 1, 2024.
27. In its notice of proposed regulation changes, the DOI also gave as a rationale that abolishment of the Rule “may lower the costs of health care in the state”
28. For its conclusion that rescinding the Rule may lower Alaska healthcare costs, the DOI relied in part on data from Fair Health, an organization that tracks health insurance claims.
29. Substantial parts of the Fair Health data were based on guesswork, however, a fact that was made known to the DOI.
30. The DOI also relied on a 2018 study by Mouhcine Guettabi and published by the Institute of Social and Economic Research (“ISER”) at the University of

Alaska, Anchorage. ISER has stated that the study is the work of its author, and not of ISER or of UAA.

31. The Guettabi study suggested that the Rule might have contributed to healthcare cost increases in Alaska. However, the study admitted that it was unable to correlate healthcare cost increases to higher prices, as opposed to Alaskan consumers taking advantage of more physician offices, more physical therapy clinics, and more healthcare facilities, all of which came into being since the early 2000's, and which could have been responsible for higher healthcare expenditures in Alaska. Nor did the study account for the fact that Alaska's population is aging much faster than the national average, and that older populations generally consume more, and more expensive, health care.
32. The DOI also received data from Premiera Blue Cross Blue Shield of Alaska. But Premiera was advocating for repeal of the Rule and its data should have been viewed with suspicion.
33. The DOI was informed that while health insurance premiums have increased year over year, reimbursement to providers has not kept pace.
34. With very few exceptions provider payments in Alaska have not increased while health insurance premiums have climbed steadily year over year.
35. The DOI was told by numerous healthcare providers that repeal of the Rule would result in less bargaining power for providers, and in particular for small provider offices, and would lead to an exodus of providers to locations outside of Alaska, leaving consumers with fewer choices for obtaining health care.

36. The DOI received information that numerous healthcare providers have had to forego involvement in Premera's "network" due to steep reductions in reimbursement rates such that the providers could no longer operate profitably, leaving open the possibility of a loss of providers who choose to move to states with lower costs.
37. As a part of its lobbying effort, Premera contacted Alaska employers, misleadingly blaming insurance premium increases on the Rule.
38. At least some of the increases in health insurance premiums have resulted from the conduct of the DOI itself. For example, Moda Health Plan, Inc., which also operates in Alaska, applied to the DOI for a rate change for 2024 that was below the rate change requested by Premera. The DOI denied Moda's request and instead issued a rate more than five percent **higher** than the rate Moda actually had requested. Moda was required to charge premiums at the higher, DOI-approved, rate. The Moda DOI-approved rate ended up being less than one percent lower than the DOI-approved rate for Premera for 2024, even though Moda's requested rate was more than five percent lower than Premera's requested rate for that year.
39. On July 14, 2023, the Alaska Department of Law advised the Lieutenant Governor that based on the enactment of new federal laws related to medical billing, in other words the NSA, the consumer protection purposes of the Rule were no longer necessary.
40. Due to administrative proceedings, the protections of the NSA are not fully in place.

FIRST CAUSE OF ACTION

41. Paragraphs 1-40 above are incorporated herein by reference.
42. Alaska Statute 21.06.090(a) provides authority for the DOI to adopt or amend regulations. Under the statute such action must be "reasonable."
43. An administrative agency may modify or repeal a regulation as long as such action is not unreasonable or arbitrary.
44. An administrative decision is arbitrary if the agency fails to consider an important factor or factors in making its decision, and must engage in reasoned decision-making.
45. An agency must have a reasonable basis for promulgating revised regulations and its action must be reasonably necessary to meet its goals.
46. While the Rule applies to all Alaska consumers, the protections of the NSA apply only in limited circumstances.
47. The NSA does not provide equal or greater consumer protection, the goal stated by the DOI for rescinding the Rule, and without the Rule in place a large segment of Alaska consumers will once again face unexpected and potentially large balance billing.
48. The DOI did not adequately consider whether repeal of the Rule would result in cost savings for consumers, or a loss of providers on whom Alaskans rely for medical care. Instead, the DOI relied on flawed and unverified analyses to conclude that repeal "may" reduce costs without adequately considering whether consumers would be protected, and thus failed to act reasonably or in a manner that was reasonably designed to further its own goals.

49. DOI's decision-making regarding repeal of the Rule was unreasonable and arbitrary.

50. Accordingly, plaintiffs are entitled to a judicial declaration that the proposed regulatory change repealing the Rule is invalid.

SECOND CAUSE OF ACTION

51. Paragraphs 1-50 above are incorporated herein by reference.

52. Alaska Civil Rule 65(a) provides authority for the issuance of preliminary injunctions.

53. Based upon the facts as set forth above, the plaintiffs respectfully request that the Court issue an injunction restraining the DOI from carrying out its proposed repeal of the Rule.

THIRD CAUSE OF ACTION

54. Paragraphs 1-53 are incorporated herein by reference.

55. On September 13, 2023, plaintiff Coalition for Reliable Medical Access hand-delivered a Public Records Request to the DOI.

56. The request asked for communications regarding rate setting for individual and small group health insurance policies for the years 2022-2024 between state employees and a variety of persons affiliated with Moda Health and Premera; data used in determining adjustments in rates for those years; actuarial memoranda and certifications for Moda Health, Premera and United HealthCare for those years; responses by the insurance companies; and all letters, emails, texts and memos between Ms. Wing-Heier and Premera for the same years.

57. Under state law, the DOI had ten working days to respond to the request by furnishing the records requested or advising that some or all of the records were not disclosable. 2 AAC 96.325.
58. On September 25, 2023, the DOI responded by email stating it received the request on September 14, 2023, and that it required a ten-day extension to respond, until October 12, 2023.
59. By letter dated September 28, 2023, the tenth working day after DOI's receipt of the request, it notified the Coalition that it would request payment for the cost of producing electronic records, pursuant to AS 40.25.120(b).
60. On October 10, 2023, after receiving the DOI's cost estimate the Coalition tendered payment of \$70.06, the amount that had been requested.
61. The DOI still did not produce the records.
62. On November 13, 2023, a representative of the Coalition followed up by email, requesting that the agency address the Public Records Request.
63. On November 15, 2023, the DOI emailed that the Alaska Office of Information Technology did not have a record of receiving the check – even though it had been sent in accordance with the DOI's instructions.
64. On November 16, 2023, the Coalition issued a replacement check and asked that “[s]ince we have lost approximately a month due to the mysterious misplacement of my 10/1023 letter and payment, I ask that this request be processed on an expedited basis.”
65. The DOI did not produce the records.
66. The DOI has not made any claim that the requested records are not subject to public disclosure.
67. The Coalition is entitled to injunctive relief requiring that the DOI honor the Public Records Request, and a declaration that the DOI has violated the Alaska Public Records Act by failing to produce the requested records.

WHEREFORE plaintiffs pray:

1. For a judicial declaration that the DOI's repeal of the Rule is unreasonable and arbitrary.
2. For the issuance of an injunction barring the DOI from repealing the Rule.
3. For the issuance of an injunction requiring the production of the public records requested by the coalition and a declaration that the agency has violated the Alaska Public Records Act.
4. For an award of attorney fees and costs.
5. For such further relief as the Court deems just and proper.

DATED at Anchorage, Alaska this 20th day of November, 2023.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Plaintiffs

By: 

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