STATE OF MICHIGAN

COURT OF APPEALS

HEALTHPLUS OF MICHIGAN, INC., Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,	UNPUBLISHED October 11, 2007
v	No. 268110 Saginaw Circuit Court
SAGINAW COOPERATIVE HOSPITALS, INC., Defendant/Counter-Plaintiff-Appellee/Cross-Appellant.	LC No. 01-037788-CK

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant under MCR 2.116(C)(8) and (C)(10). Defendant cross-appeals as of right the trial court's order denying summary disposition on defendant's counterclaim. We affirm both orders.

In 1997 plaintiff and defendant entered into a contract to provide services to Saginaw area Medicaid patients. The contract required plaintiff to provide administrative services and required defendant to provide primary health care services. The contract also required plaintiff and defendant to establish a budget for the annual anticipated expense of providing these services. At the end of each year of the contract, the parties agreed to arrive at a final settlement based on the difference between the budgeted and actual expenses. Any negative balance was to be apportioned between plaintiff and defendant according to a risk allocation formula in the contract. The formula assigned 66 2/3 percent of the risk to defendant, and 33 1/3 percent to plaintiff. More specifically, in the event of a negative balance, the contract required defendant to repay 66 2/3 percent of the deficit to plaintiff after setoff from an amount plaintiff had withheld in a risk account.

During the two years of the contract, the actual expense consistently exceeded the budgeted expense. In September, 1999, defendant notified plaintiff that it would be exercising its option to terminate the contract. Defendant refused to reimburse plaintiff the risk allocation amount for the 1999 contract year, claiming that the contract was void for failure to comply with a Medicaid regulation concerning stop-loss protections. 42 CFR 417.479(a)(2), (g)(2). In response, plaintiff withheld the money in the risk account and withheld monthly payments to defendant. Plaintiff filed a breach of contract action against defendant, seeking payment of approximately one million dollars due under the risk allocation formula. Defendant

counterclaimed for reimbursement of approximately $290,000, the risk allocation amounts it had paid for the 1998 contract year.

The trial court concluded that the contract was void and unenforceable due to lack of compliance with the Medicaid stop-loss regulation, and granted summary disposition to defendant on plaintiff's breach of contract claim. The court further determined that the doctrine of in pari delicto prevented defendant from recovering on its counterclaim.

Plaintiff maintains that the trial court erred in finding that the stop-loss regulation applies to the contract. Plaintiff contends that defendant is not a physician group within the meaning of the regulation. Plaintiff also argues that the regulation is designed to address physician incentive plans that may affect treatment decisions, and that the contract at issue did not affect treatment decisions. We disagree.

The parties agree that the regulation imposing the stop-loss requirement applies only to physician incentive plans between health maintenance organizations (HMOs) and physician groups. 42 CFR 417.479. Plaintiff does not contest its status as an HMO for this purpose, but it argues that defendant is not a "physician group." The regulation defines physician group as a "partnership, association, corporation, individual practice association, or other group that distributes income from the practice among the members." 42 CFR 417.479(c). Plaintiff also argues that the contract does not constitute a "physician incentive plan" subject to the regulation. The regulation defines physician incentive plans as "any compensation arrangement between an HMO . . . and a physician group that may directly or indirectly have the effect of reducing or limiting services furnished to . . . Medicaid recipients . . . ." *Id.*

The record here contains sufficient evidence to support the trial court's determination that defendant is a physician group within the meaning of the regulation, and that the contract at issue could directly or indirectly have the effect of limiting services to Medicaid recipients. Defendant operates a "Practice Plan" with its physician employees, through which the physicians can receive bonuses pursuant to a revenue formula. This constitutes a distribution of income sufficient to render defendant a physician group within the meaning of the regulation. Regarding whether the contract could directly or indirectly have the effect of limiting services to Medicaid recipients, the record indicates that as defendant became aware of the mounting deficits, defendant sought advice from plaintiff concerning whether changes in the services provided to the Medicaid patients would reduce the budget deficit. In a letter to plaintiff, defendant's director of patient care noted the "huge deficit" in its department of internal medicine, and requested that plaintiff provide "several specialized reports to review the reasons for the inordinate activity in this department." In another letter, defendant's interim chief operating officer requested information "to make effective and efficient decisions about our patient care activities." From these letters, the trial court could properly infer that the contract's risk-allocation provisions might become the impetus for clinical decisions. The trial court did not err

in determining that the contract was subject to the federal regulation requiring stop-loss protection for physician incentive plans.[1]

Plaintiff next argues that, even if the contract was subject to the federal regulation, the lack of compliance with the regulation does not render the contract void. We disagree.

Plaintiff cites several federal court cases standing for the proposition that federal statutes do not create private rights or remedies unless Congress intended to confer such rights. See, e.g., *Harris v Olszewski*, 442 F3d 456, 461 (CA 6, 2006) (finding that Medicaid's freedom of choice provisions created a private right of action enforceable under 42 USC 1983). However, these precedents are not applicable here. As defendant correctly states, the issue is not whether the Medicaid stop-loss regulation creates a private right of action. The issue is whether the contract is void for lack of compliance with the stop-loss regulation. This issue is a matter of state contract law. See *Nursing Home Consultants, Inc v Quantum Health Services, Inc*, 926 F Supp 835, 842 (ED Ark, 1996).

Our Supreme Court has generally held that a contract that violates a statute or regulation is void and unenforceable. *American Trust Co v Michigan Trust Co*, 263 Mich 337, 339; 248 NW 829 (1933). However, this Court has explained that this general rule does not preclude enforcement of a contract if the statute provides a remedy to the contracting party who is prejudiced by non-compliance. In *Maids Int'l, Inc v Saunders*, Inc, 224 Mich App 508; 569 NW2d 857 (1997), our Court considered a plaintiff franchisor's contract claim seeking recovery of royalties and fees from a defendant franchisee. The defendant sought to avoid the contract on the ground that the plaintiff had violated certain disclosure requirements under Michigan's franchise law, MCL 445.1501. The trial court granted summary disposition in favor of the defendant on the ground that the plaintiff's violation of the franchise law rendered the contract unenforceable, but this Court reversed:

> . . . The requirement plaintiff violated in this case, the provision of a disclosure statement, provides as remedies the franchisor's liability for damages or rescission of the franchise agreement. . . . There is no support for the trial court's conclusion plaintiff's violation rendered the contract void and unenforceable. Defendants' attempt to use a general public policy argument must fail where the Legislature has clearly addressed the public policy of the matter at issue. [*Id*. at 512 (citations omitted).]

The regulatory scheme at issue here provides for "intermediate sanctions" that may be administratively imposed against plaintiff for its failure to comply with the stop-loss rule. 42 CFR 417.500(a)(9), (d)(1)-(3). However, those sanctions do nothing to remedy the prejudice experienced by defendant because plaintiff failed to ensure that defendant had stop-loss protection. There being no regulatory remedy available to defendant, it can rely on the general

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[1] The regulation applies only to plans that place physician groups at substantial financial risk. Plaintiff concedes that the contract placed defendant at substantial financial risk within the meaning of the regulation.

rule that plaintiff's noncompliance rendered the parties' agreement nugatory. The trial court did not err in finding the contract void and unenforceable.

On cross-appeal, defendant contends that the trial court erred in dismissing its counterclaim for repayment of the amounts defendant paid pursuant to the contract, as well as the amounts plaintiff withheld in the risk sharing account. We disagree. This Court has explained that "[i]n pari delicto, as a common law doctrine, expresses the principle that wrongdoers ought each to bear the untoward consequences of their wrongdoing without legal recompense or recourse." *Pantely v Garris, Garris, & Garris, PC*, 180 Mich App 768, 774; 447 NW2d 864 (1989). Our Supreme Court confirmed that when parties are equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them. *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). Here, the record indicates that, at the time the parties entered into the contract, neither knew that the contract was subject to the stop-loss requirement. Plaintiff, which was obliged by the regulation to ensure that defendant had stop-loss protection, did not knowingly ignore that obligation. And defendant failed to raise the issue or alert plaintiff to the "Practice Plan" because of which, in part, the regulation applied to the contract, until after terminating the contract. We do not conclude that either of these sophisticated parties was so much more at fault than the other that application of the in pari delicto doctrine was inequitable. The trial court correctly determined that defendant was not entitled to recover sums paid by plaintiff or withheld by defendant under the terms of the contract they had negotiated without regard to a regulatory scheme that neither knew could apply.

We affirm.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens