



CDCAN REPORT

#325-2009 DECEMBER 22, 2009 (TUESDAY)

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State Budget Crisis:

US COURT OF APPEALS STRONGLY REBUKE SCHWARZENEGGER ADMINISTRATION AND ATTORNEY GENERAL BROWN'S OFFICE – ACCUSE STATE OFFICIALS OF LYING TO THE COURT IN MEDI-CAL PROVIDER RATE CUT CASE

US 9th Circuit Court of Appeals Says Attorneys for State Committed "Clear Violation" of State Bar Rules That Prohibit Lawyers from Misleading Judges



SACRAMENTO, CALIF (CDCAN) [Updated 12/22/09 01:40 AM (Pacific Time)] - In a major victory for disability and senior advocates, a three judge panel of the US 9th Circuit Court of Appeals on Monday (December 21) issued a stunning and strongly worded rebuke against the Schwarzenegger Administration and Attorney General Jerry Brown accusing their representatives of lying to the court in "clear violation" of California State Bar rules against misleading judges. All attorneys practicing law in the state must be licensed by the California State Bar.

The federal appeals court's decision Monday was connected to two Medi-Cal provider rate reduction lawsuits (*Independent Living Center of Southern California, et al v. David Maxwell Jolly, Director the Department of Health Care Services*) originally filed in 2008 on behalf of Medi-Cal recipients and advocacy organizations and several Medi-Cal providers by Lynn Carman, lead attorney with the Medicaid Defense Fund [*pictured above left in photo taken November 2009*].

Those two lawsuits stopped nearly all of the 10% Medi-Cal provider rate reductions just weeks or months after those cuts went into effect on July 1, 2008. A copy of the December 21, 2009 US 9th Circuit Court of Appeals order can be viewed or downloaded from the CDCAN website at www.cdcan.us

The federal appeals court included its rebuke in their decision Monday that rejected the State's motion to vacate or withdraw the court's previous decision it made on July 9, 2009, that upheld federal District Court Judge Christina Synder's rulings (issued in August and November 2008), in favor of the two Medi-Cal provider rate cut lawsuits.

The Schwarzenegger Administration through its lawyers from the Attorney General's office, argued that the federal appeals court did not have the authority (jurisdiction) to intervene in the case when it issued its decision in July 2009 because the Legislature passed and the Governor approved budget related legislation that changed the Medi-Cal provider rates effective March 1, 2009.

The 3 judge panel of the 9th US Circuit Court of Appeals said Schwarzenegger Administration officials in the Department of Health Care Services which oversees the state's Medicaid program (called Medi-Cal), through their lawyers in the Attorney General's office, lied and misled the court about why the reasons the State delayed for more than a year to make its current arguments in the Medi-Cal provider rate reduction case.

The federal appeals court, in their order today, said that the Department of Health Care Services officials "feigned ignorance" of the facts they had already presented to the US Supreme Court on June 1, 2009. The appeals court, referenced California State Bar rules that make it illegal for attorneys to mislead judges by making false statements, and that the state lawyers were in "...clear violation ... gives us pause about accepting the veracity of future pleadings filed by the attorney general on behalf of the [Department of Health Care Services] director, if not more generally."

Attorney General's Office Says Issue A "Misunderstanding"

Attorney General Brown's office, in response, said the rebuke by the court was "based on a misunderstanding" that they hoped to clear up in the next few days when it files an explanation to the federal appeals court.

One of the responsibilities of the Attorney General – a state constitutional officer elected by voters – is to defend in court lawsuits against the State, regardless of the party of the Governor.

Jerry Brown, a Democrat and a former governor from 1975-1982, is likely at this point to run unopposed in the 2010 Democratic primary for Governor in June and is leading in the latest recent polls against possible Republican rivals.

Carman Says State Lawyers Have "Consistently Lied"

Carman, an 82 year old attorney from Novato, strongly agreed with the federal appeals court's unusual rebuke, saying that lawyers from the Attorney General's office representing the Schwarzenegger Administration have "consistently lied" in their defense of the Medi-Cal provider and other cuts, and that "...in this business you only have your word going for you, and when your word is no good anymore, you are finished with a court."

Court's Rebuke Could Have Major Impact on Other Cases Impacting Medi-Cal, In-Home Supportive Services and Other Cuts

The unusual rebuke by the federal appeals court against the lawyers and officials representing the Schwarzenegger Administration, could have major repercussions on other cases where lower federal courts have stopped or blocked other cuts to Medi-Cal and other human service programs including In-Home Supportive Services, Adult Day Health. The Schwarzenegger Administration is seeking to reverse those court rulings – in most instances – before the same federal appeals court that said their lawyers and official representatives had misled and lied to the court.

The 9th Circuit Court of Appeals order of December 21, does not impact the rates now being paid to Medi-Cal providers – since previous lower federal court rulings in August and November 2008 stopped the 10% cuts from taking effect, and a later federal district court ruling in March 2009 stopped a 5% reduction from going forward.

However the federal appeal court's decision does require the State to reimburse many of those providers who had their payments reduced during the period of July 1, 2008 through August 18, 2008 and re-affirmed the federal court's authority to be involved in the Medi-Cal provider rate reduction case.

The federal appeal court's decision does not impact a previous lawsuit – also filed by the Medicaid Defense Fund in the summer – that unsuccessfully attempted to stop the permanent elimination of 9 Medi-Cal optional benefits.

BACKGROUND OF MEDI-CAL PROVIDER RATE CASE

The following is a partial chronology of the major lawsuits related to Medi-Cal provider rates connected to the US 9th Circuit Court of Appeals decision on Monday. This summary was compiled by CDCAN:

December 2009

- On December 21, 2009, a three judge panel of the US 9th Circuit Court of Appeals issued an order that rejected a motion by the lawyers (from the Attorney General's office) representing the Schwarzenegger Administration, that wanted the previous July 9, 2009 order by the court "vacated" – meaning withdrawn. The lawyers from the Attorney General's office representing the Schwarzenegger Administration argued that the federal court did not have the authority (jurisdiction) to stop the 10% Medi-Cal cuts or the authority to order the State to reimburse providers whose payments were reduced before the reductions were stopped because the state law requiring those cuts expired on March 1, 2009.
- The federal appeals court in its decision, completely rejected the motion by the State and said that it did have jurisdiction (authority) to uphold the lower federal district court's rulings that stopped and reversed the Medi-Cal rate cuts. The appeals court also said it had the authority to order the State to reimburse the Medi-Cal providers whose payments were reduced between July 1, 2008 and August 18, 2008. .
- The federal court of appeals included in its December 21, 2009 order, a strong rebuke of Schwarzenegger Administration officials and the Attorney General's office,

accusing those state officials and representatives of lying to the court because it never raised in their previous court filings the change in reimbursement rates (that took effect March 1, 2009) that occurred as a result of the passage of the 2008-2009 State Budget in September 2008. The federal appeals court said the issue was not raised in court documents filed or in oral arguments made before the court by the Schwarzenegger Administration lawyers from the Attorney General's office, until after July 2009 – when it filed a motion asking the appeals court to “vacate” or withdraw its previous order.

- The federal appeals court said that Department of Health Care Services officials had explained to the court that their lawyers became aware of the issue regarding the change in Medi-Cal rates made by the 2008-2009 State Budget passed in September 2008 only recently - while preparing a potential appeal to the US Supreme Court.
- However the appeals court said Schwarzenegger Administration officials “feigned ignorance” of the facts they had already presented on June 1, 2009 to the US Supreme Court that discussed the latest change in Medi-Cal rates that went into effect March 1, 2009 and how it impacted the federal appeals court's jurisdiction over the issue.
- Citing California State Bar rules that make it illegal for lawyers to mislead judges by making false statements, the 9th Circuit Court of Appeals said lawyers from the Attorney General's office representing the Schwarzenegger Administration were in "clear violation ... gives us pause about accepting the veracity of future pleadings filed by the attorney general on behalf of the (state health) director, if not more generally."
- In response the Attorney General's office said it had not tried to hide the March 1, 2009 rate change, which it said was well known to all sides in the case and that their case made to the appeals court was made "entirely in good faith."
- Attorney General's office said it would be filing documents with the appeals court in the next few days that would “clear up” what they are calling a “misunderstanding”.

July 2009

- On July 9, 2009, US 9th Circuit Court of Appeals upheld federal District Court Judge Christina Synder's rulings made in August and November 2008 that stopped the Schwarzenegger Administration from implementing the 10% rate cut to most Medi-Cal providers (doctors, dentists, pharmacies, clinics, adult day health centers, home health agencies and non-emergency medical transportation (NEMT) providers).
- The federal appeals court however did overrule Judge Synder - in favor of the disability and senior advocates - on the issue of whether the State would be required to pay those Medi-Cal providers included the August 18, 2008 injunction, for cuts in their reimbursements from the period between July 1, 2008 (when the cut first took effect) to August 18, 2008 (the date the injunction stopped those cuts). The federal appeals court said that the State would have to pay the money cut from the reimbursements of those Medi-Cal doctors, dentists, pharmacies, adult day health centers and clinics as a result of the 10% cut during that period.
- The Medicaid Defense Fund and other legal observers said that the July 9, 2009^t decision by the 9th Circuit Court of Appeals had major sweeping impact for future cases, especially those dealing with Medicaid funded services because it clearly established that individuals and organizations can sue the State under the federal

“Supremacy Clause” to protect one’s self against injury from the State's violation of federal law.

- July 24, 2009 - Legislature passed and the Governor approved (on July 28th) revisions to the 2009-2010 State Budget that was passed four months earlier, with more additional cuts to health and human services – though no additional Medi-Cal provider cuts, except those impacting prescription drugs and pharmacies (which is the focus of a separate lawsuit filed by the Medicaid Defense Fund in federal district court in Los Angeles in November 2009)

March 2009

- March 9, 2009 - Federal District Court Judge Christina Synder issued a preliminary injunction that blocked the State from implementing the 5% Medi-Cal rate cut to adult day health centers (lawsuit “*California Pharmacists Association, et al. v. David Maxwell Jolly*” filed by a coalition of provider groups)

February 2009

- February 27, 2009 - Federal District Court Judge Christina Synder issued preliminary injunction that stopped the State from implementing the 5% Medi-Cal rate reductions to pharmacies (lawsuit filed by the Medicaid Defense Fund “*Managed Pharmacy Care, et al v. David Maxwell Jolly, et al*”)
- February 19, 2009 - Passage by the Legislature and approval by the Governor (on February 20, 2009) of additional reductions made mid-year to current 2008-2009 State Budget and the 2009-2010 State Budget (passed four months early) that included permanent elimination of 9 Medi-Cal optional benefits, major cuts to regional centers, SSI/SSP and In-Home Supportive Services (IHSS) – but no additional cuts to Medi-Cal provider rates. The Medi-Cal optional benefits cuts are the subject of a later (and not successful) lawsuit by the Medicaid Defense Fund.

November 2008

- November 18, 2008 - Federal District Court Judge Christina Synder issued preliminary injunction that stopped the State from implementing the 10% Medi-Cal rate cut to home health agencies and non-emergency medical transportation (NEMT) providers (Medicaid Defense Fund lawsuit “*Independent Living Center of Southern California, et al v. Sandra Shewry, et al*” – Shewry was the director of the Department of Health Care Services at the time of the suit)

September 2008

- September 19, 2008 - Legislature passed and the Governor approved (on September 23) – nearly three months late – the 2008-2009 State Budget that includes budget related (trailer bill) language that would end the 10% Medi-Cal rate reduction to most providers effective March 1, 2009 .
- The budget related legislation (trailer bill) replaced that 10% cut with a lower cut of 1% for most providers (and 5% for other Medi-Cal providers) – even though federal court orders before and after that budget was enacted, stopped the 10% rate reductions and ordered the State to reimburse providers for any cuts to their reimbursements.
- No lawsuits are filed to block the 1% reductions from taking place, but two separate lawsuits are filed later in federal court to stop the 5% cuts.

August 2008

- August 18, 2008 - Federal District Court Judge Christina Synder issued ruling, in the *Independent Living Center of Southern California, et al. v. Sandra Shewry* lawsuit filed by the Medicaid Defense Fund, that blocked the State from implementing the 10% Medi-Cal provider rate cuts to doctors, pharmacists, adult day health centers and clinics that went into effect July 1, 2008.
- The judge's order originally required the State to reimburse those Medi-Cal providers the money that was cut from their rates from the period of the effective date of the injunction (August 18) forward [the Medicaid Defense Fund successfully appealed this to the US 9th Circuit Court of Appeals that decided the State must pay providers for money cut from their reimbursements also from the period of July 1, 2008 to August 18, 2008]
- The judge's ruling also said that Medi-Cal state officials and legislators in making a budget cut to simply to close a state budget deficit violated federal Medicaid laws by failing to study the impact of the cuts on the persons receiving those Medi-Cal services before implementing the reductions.

July 2008

- July 1, 2008 - 10% permanent rate reductions to most Medi-Cal providers go into effect.

April 2008

- April 21, 2008 - Medicaid Defense Fund files lawsuit in federal district court in Los Angeles to stop many of the Medi-Cal provider rate reductions (lawsuit: *Independent Living Center of Southern California, et al. v. Sandra Shewry* - then director of the Department of Health Care Services)

February 2008

- February 15, 2008 - Legislature passed and Governor approved (February 16) additional mid-year reductions to the current year 2007-2008 State Budget that had a growing deficit then projected at over \$14 billion.
- Those new reductions included a permanent 10% reduction to most Medi-Cal providers effective July 1, 2008.

REMEMBERING THE LIVES OF EDWARD M. KENNEDY, EUNICE KENNEDY SHRIVER, JOAN B. LEE, DONALD ROBERTS & BILL YOUNG.

URGENT!!!!

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MANY, MANY THANKS TO the CALIFORNIA ASSOCIATION OF ADULT DAY HEALTH CENTERS, Valley Mountain Regional Center, Toward Maximum Independence, Inc (TMI), Friends of Children with Special Needs, UCP of Los Angeles, Ventura and Santa Barbara Counties, Southside Arts Center, San Francisco Bay Area Autism Society of America, Hope Services in San Jose, FEAT of Sacramento (Families for Early Autism Treatment), RESCoalition, Sacramento Gray Panthers, Easter Seals of Southern California, Tri-Counties Regional Center, Westside Regional Center, Regional Center of the East Bay, UCP of Orange County, Alta California Regional Center, Life Steps, Parents Helping Parents, Work Training, Foothill Autism Alliance, Arc Contra Costa, Pause4Kids, Manteca CAPS, Training Toward Self Reliance, UCP, California NAELA, Californians for Disability Rights, Inc (CDR) including CDR chapters, CHANCE Inc, , Strategies To Empower People (STEP), Harbor Regional Center, Asian American parents groups, Resources for Independent Living and many other Independent Living Centers, several regional centers, People First chapters, IHSS workers, other self advocacy and family support groups, developmental center families, adoption assistance program families and children, and others across California