NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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February 10, 2020

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Re: *Dominion Surgical Specialists, LLC v. Anthem Healthkeepers, Inc.*, *CL-2019-0010310*

Dear Counsel:

This matter came before the Court on January 10, 2020 upon Anthem Healthkeepers, Inc.'s ("Anthem") demurrer to Dominion Surgical Specialist's ("Dominion") Amended Complaint.

BACKGROUND

Dominion provided medical services from March 5, 2017 to September 21, 2017 to a patient for whom Anthem provided insurance coverage. Dominion billed Anthem $249,946.80. When Anthem paid Dominion only $14,454.19, Dominion sued for the difference on three theories: 1) "Duty to reimburse providers for out-of-network providers for emergent care"; 2) *Quantum Meruit;* and 3) Unjust Enrichment. Anthem demurs, arguing that Dominion failed to state claims upon which relief can be granted.[1]

[1] "The function of a demurrer is to test whether a bill of complaint states a cause of action upon which relief can be granted. . ." *Penick v. Dekker*, 228 Va. 161, 166 (1984). "A demurrer accepts as true all facts properly pled, as well as reasonable inferences from those facts." *Steward ex rel. Steward v. Holland Family Properties, LLC*, 284 Va. 282, 286 (2012).

OPINION LETTER

Count I
("Duty to reimburse providers for
out-of-network providers for emergent care")

Dominion alleges that Anthem failed to reimburse Dominion in accordance with Code § 38.2-3445, which provides in relevant part:

> [I]f a health carrier providing individual or group health insurance coverage provides any benefits with respect to services in an emergency department of a hospital, the health carrier shall provide coverage for emergency services[,] . . . [w]ithout the need for any prior authorization determination, regardless of whether the emergency services are provided on an in-network or out-of-network basis.[2]

Anthem demurs to this count by arguing that Code § 38.2-3445 does not create a private right of action by which Dominion can recover. To support this contention, Anthem cites, *inter alia*, *Am Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212 (4th Cir. 2004), where the Fourth Circuit held that Code § 38.2-3408 (which provides for reimbursement from insurance companies for services that are performed by certain licensed practitioners) did not create a private right of action because it "does not contain any specific statutory language creating such an action." 367 F.3d at 232.

Anthem's reliance on *Am Chiropractic Ass'n* is misplaced. The Fourth Circuit emphasizes the limits of its holding by quoting a warning from another federal case, *A & E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669, 674 (4th Cir. 1986), that:

> "federal courts should be reluctant to read private rights of action into state laws where state courts and state legislatures have not done so. Without clear and specific evidence of legislative intent, the creation of a private right of action by a federal court abrogates both the prerogatives of the political branches and the obvious authority of states to sculpt the content of state law."

367 F.3d at 229.

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[2] Code § 38.2-3445 mandates that the individual cannot pay a higher copayment or coinsurance rate than what would be paid for in-network care and, if there is an amount due for those services after the individual patient's copay, the health carrier is required to pay:

> in an amount equal to the greatest of (i) the amount negotiated with in-network providers for the emergency service, or if more than one amount is negotiated, the median of these amounts; (ii) the amount for the emergency service calculated using the same method the health carrier generally uses to determine payments for out-of-network services, such as the usual, customary, and reasonable amount; and (iii) the amount that would be paid under Medicare for the emergency service.

Thus, *Am Chiropractic Ass'n* held that "§ 38.2-3408 does not create a private right of action because it does not contain any specific statutory language creating such an action." 367 F.3d at 230.

This limitation is, of course, inapposite in this court. Indeed, *Am Chiropractic Ass'n* is not cited by either of Virginia's appellate courts and, although *A & E Supply Co.* is cited once, the purpose for the citation had nothing to do with the argument at bar. The reason for that is clear: state courts, including this one, are not in the same position as federal courts.

Anthem further argues that Code § 38.2-3445 does not create a private right of action because the State Corporation Commission retains enforcement authority for alleged violations of the insurance code, citing, *inter alia*, *Vansant & Gusleer, Inc. v. Washington*, 245 Va. 356, 360 (1993) ("[I]t is well-settled [as a principle of statutory construction] that '[when] a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise.'") (quoting *Sch. Bd. of Norfolk v. Giannoutsos*, 238 Va. 144, 147 (1989).

To apply this principle of statutory construction to Title 38.2 requires an understanding of the breadth of the principle. Resort must thus be had to the statutes at issue in, and the reasoning of, *Sch. Bd. of Norfolk v. Giannoutsos* and *Vansant & Gusleer, Inc. v. Washington*.

The statute at issue in *Sch. Bd. of Norfolk v. Giannoutsos* provided Giannoutsos with an "exclusive remedy" for failure to receive notice of nonrenewal: "entitlement to a contract for the ensuing year . . . ." 238 Va. at 146-147. The Court explained:

> With regard to teachers who have not attained continuing contract status, the statute creates a right to notice of nonrenewal. No such right exists in absence of the statute. The statute also provides a remedy for the violation of that right: "If no such notice is given a teacher by April fifteenth, the teacher shall be entitled to a contract for the ensuing year in accordance with local salary stipulations including increments."

238 Va. at 147.

Thus, the statutory right was a right of the victim of a violation of the statute and the remedy was for that victim. As a result, the remedy was exclusive and no private right of action could be implied.

In *Vansant & Gusleer, Inc.*, the plaintiff relied upon a criminal statute, Code § 43-13 (proscribing certain conduct as larceny) as creating a private right of action. Because it was a criminal statute (which may only be enforced by the Commonwealth), it did not expressly, or by implication, create a private right of action.

Thus, the principle of *Sch. Bd. of Norfolk v. Giannoutsos* and *Vansant & Gusleer, Inc. v. Washington* is that the statute must create a remedy for the victim of the violation for it to be an exclusive remedy. Based upon the

statutes at issue in *Sch. Bd. of Norfolk v. Giannoutsos* and *Vansant & Gusleer, Inc. v. Washington*, the principle is not so broad as to encompass statutes which provide *some* form of remedy to *some* entity.[3]

There is, moreover, no doctrine in Virginia that a private right of action cannot be created unless there is an express statutory statement that a private right is created. *Cherrie v. Virginia Health Services*, 292 Va. 309 (2016), explained:

> When a statute is silent, however, we have no authority to infer a statutory private right of action *without demonstrable evidence that the statutory scheme necessarily implies it.* (citations omitted). The necessity for such an implication must be palpable. We would never infer a "private right of action" based solely on a bare allegation of a statutory violation. *Vansant & Gusler, Inc.*, 245 Va. at 359-60, 429 S.E.2d at 33. For similar reasons, we do not infer a private right of action when the General Assembly expressly provides for a different method of *judicial* enforcement.

292 Va. at 315-316 (emphasis added).

Cherrie presented the question of whether there was a private right of action to enforce a regulation promulgated by the Board of Health. The Court concluded that there was not given that the governing statutes and regulations:

> recognize only two methods of enforcing the Board's regulations: (i) administrative sanctions and adjudications subject to the Virginia Administrative Process Act and (ii) civil enforcement actions filed by the Commissioner in circuit court.

292 Va. at 316.

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[3] This court respectfully disagrees with the reasoning and conclusion of the court in *Riverside Hospital, Inc. v. Optima Health Plan*, 13 Cir. CL1088, 82 Va. Cir. 250 (2011), that there was no private right of action implied in Code § 38.2-4312.3(B) (HMO must reimburse hospital emergency facility and provider for medical screening and stabilization services) because there was a remedy in Code § 38.2-4316(A)(8) which allowed the Commission to:

> suspend or revoke any license issued to a health maintenance organization under this chapter if it finds that any of the following conditions exist: . . . The health maintenance organization has otherwise failed to substantially comply with the provisions of this chapter.

At *3.

As this court understands *Sch. Bd. of Norfolk v. Giannoutsos* and *Vansant & Gusleer, Inc. v. Washington* (the only Virginia Supreme Court cases cited), the fact that there was a remedy available to the Commission should not deprive the hospital emergency facility of its own remedy.

Significantly, the Court added that "[p]rivate parties nevertheless play a role in this process" because they may "file administrative complaints against a licensed nursing home" which the Department of Health has the responsibility to investigate. 292 Va. at 316.[4]

The enforcement authority of the State Corporation Commission with respect to insurance and insurers is found in three provisions, starting with Code § 38.2-200(A), which charges the Commission with:

> the execution of all laws relating to insurance and insurers. All companies, domestic, foreign, and alien, transacting or licensed to transact the business of insurance in this Commonwealth are subject to inspection, supervision and regulation by the Commission.

Code § 38.2-219(A) provides the Commission authority to conduct hearings "[w]henever the Commission has reason to believe that any person has committed a violation of this title" and to issue orders "to cease and desist from the violation" or "any other appropriate order as the nature of the case and the interests of the policyholders, creditors, shareholders, or the public may require."

Finally, Code § 38.2-221 grants the Commission the power to "impose, enter judgment for, and enforce any civil penalty or other penalty pronounced against any person for violating any of the provisions of this title," with the caveat that the "power and authority conferred upon the Commission by this section shall be in addition to and not in substitution for the power and authority conferred upon the courts by general law to impose civil penalties for violations of the laws of this Commonwealth."

Turning first to Code § 38.2-200(A). The plain language of this provision refers to the "execution of" all laws relating to insurance and insurers and requires that all companies transacting, or licensed to transact, the business of insurance in this Commonwealth "are subject to inspection, supervision and regulation by the Commission." This language does not create a right nor provide a remedy for the vindication of that right; thus, the principle expressed by *Sch. Bd. of Norfolk v. Giannoutsos* and *Vansant & Gusleer, Inc.* does not control. Indeed, the fact that the authority is placed in the hands of the Commission, just as the criminal statute in *Vansant & Gusleer, Inc.* placed authority in the hands of the Commonwealth (by virtue of being a criminal statute) suggests that no right was created. Accordingly, as Code § 38.2-200(A) does not create a right and provide a remedy for the vindication of that right, it does not detract from any implication that Code

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[4] Similarly, in *Eslami v. Global One Communications, Inc.*, 19 Cir. L174096, 48 Va. Cir. 17 (1999), private parties played a role in the process because the statute afforded employees:

> the right to submit grievances concerning wage and hour disputes to the Commissioner and provides that the *Commissioner*, with the consent of the aggrieved employee, may institute an action to remedy violations of the Act's provisions.

§ 38.2-3445 creates a private right of action.

With respect to Code § 38.2-219(A), while it grants the Commission authority to issue orders "to cease and desist" from violations of Title 38.2 and to issue "any other appropriate order as the nature of the case and the interests of the policyholders, creditors, shareholders, or the public may require," and thus provides *a* remedy for a violation of Code § 38.2-3445, it does not create a remedy for the victim of a violation of that right; it creates a remedy for the Commission.

By comparison, the remedy in *Sch. Bd. of Norfolk v. Giannoutsos*, which caused the Court to find that there was no private right of action was a remedy for the victim of a violation of the statutorily created right. And in *Cherrie*, the Court noted that "[p]rivate parties nevertheless play a role in this process" because they may "file administrative complaints against a licensed nursing home" which the Department of Health has the responsibility to investigate. 292 Va. at 316. No such role is afforded to health care providers under Title 38.2. Thus, Code § 38.2-219(A) does not create a right and provide a remedy for the vindication of that right, and does not suggest that Code § 38.2-3445 does not create a private right of action.

As to Code § 38.2-221, because it grants the Commission a uniquely governmental power (to "impose, enter judgment for, and enforce any civil penalty or other penalty pronounced against any person for violating any of the provisions of this title"), as in *Vansant & Gusleer, Inc.*, it neither creates a right nor provides a remedy for the vindication of that right.

That Code § 38.2-3445 creates a private right of action is evident from its plain language: "the health carrier shall provide coverage for emergency services . . . ." This language "necessarily implies" a private right of action in that it imposes a duty on the health carrier and creates a benefit for the insured; if that duty to provide a benefit is not enforceable by a private right of action, it is a right without a meaningful remedy. To hold that there is not a private right of action would be to recognize "a right without a remedy – a thing unknown to the law." *Norfolk City v. Cooke*, 68 Va. (27 Gratt.) 430, 439 (1876). This court is not persuaded that the General Assembly would pass a feckless law that had no remedy for the victim of an entity which violated that law.

Moreover, Code § 38.2-3445 does not "expressly provide[] for a different method of *judicial* enforcement." (Emphasis added). On the contrary, other than by implication, it is silent as to any method of judicial enforcement.

In sum, Code § 38.2-3445 creates a private right of action. Accordingly, the demurrer to Count I is OVERRULED.

Count II
Quantum Meruit

It is well-settled that:

[H]e who gains the labor or acquires property of another must make

> reasonable compensation for the same. Hence, when one furnishes labor to another under a contract which, for reasons not prejudicial to the former, is void and of no effect, he may recover the value of his services on a *quantum meruit*.

Hendrickson v. Meredith, 161 Va. 193, 198 (1933).

The Court further adopted the following:

> "Where one renders services for another at the latter's request, the law, in the absence of an express agreement, implies a promise to pay what the services are reasonably worth, unless it can be inferred from the circumstances that the services were to be rendered without compensation." *Burks Pleading and Practice* (2d Ed.) 116.

161 Va. at 200-201.[5]

See also *Po River Water and Sewer v. Indian Acres Club,* 255 Va. 108, 114 (1998) (under *quantum meruit* theory, to "avoid unjust enrichment, equity will effect a 'contract implied in law,' requiring one who accepts and receives the services of another to make reasonable compensation for those services.").

In support of its *quantum meruit* claim, Dominion alleges that it "performed emergent medical services for a covered member of [Anthem]" (First Amended Complaint (("FAC") ¶ 14), that "[Anthem] had knowledge of the conferred benefit," and that "acceptance of this benefit by [Anthem] in these circumstances would be inequitable." FAC ¶¶ 16-17. When Dominion "requested payment from [Anthem] for the reasonable value of its services," Anthem "refused to pay . . . ." FAC ¶ 18. Finally, as a direct result of Anthem' failure to pay, Dominion has suffered damages.

Anthem demurs to Counts II (and III), arguing Dominion:

> does not, and cannot, allege any facts that show that (1) [Anthem] benefitted from the services rendered by [Dominion] or that (2) [Anthem] requested and accepted services from [Dominion].

Anthem's Memorandum 5.

To support Anthem's argument that Dominion was not unjustly enriched, Anthem relies on a case from the Middle District of Florida holding that a necessary element for unjust enrichment is that the benefit must be "direct, not indirect or attenuated as would be any putative 'benefit' conferred on an insurer by treating its insureds." *Adventist Health Sys./Sunbelt Inc. v. Med. Say. Ins. Co.*, No. 03-cv-1121, 2004 WL 6225293, at *6 (M.D. Fla. 2004). Along with *Adventist,* Anthem lists almost a dozen cases with a similar holding.

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[5] For a court to award a *quantum meruit* recovery, the court "must conclude that there is no enforceable express contract between the parties covering the same subject matter." *Mongold v. Woods*, 278 Va. 196, 204 (2009).

Four years after *Adventist*, however, the Middle District of Florida stated:

> Whether healthcare treatment to insureds constitutes a "direct" benefit to the insurance company, or a benefit at all, is unclear, and is a source of disagreement in courts within the Middle District of Florida.

Baycare Health Sys., Inc. v. Med. Sav. Ins. Co., No. 8:07-CV-1222-T-27TGW, 2008 WL 792061, at *9 (M.D. Fla. Mar. 25, 2008).

Accordingly, *Adventist* is unhelpful in resolving the issue of whether the benefit must be direct.

Anthem also argues that Dominion did not allege that Anthem referred its member to Dominion or requested any medical services from Dominion. Anthem argues that "[m]erely rendering services alone does not create a contract implied-in-law, nor is such a contract implied when one officiously confers benefits upon another." *R.M. Harrison Mech. Corp. v. Decker Indus., Inc.*, 75 Va. Cir. 404 (City of Hopewell 2008)(citing *Wiezel v. Brown-Meil Corp.*, 152 F.Supp. 540, 549 (1957)). Anthem's Memorandum 9. Anthem argues that those services must be "requested and accepted" to create an obligation. *Burke v. Gale*, 193 Va. 130 (1951). Lastly, Anthem asserts that the Complaint is void of any factual allegations that indicate that Anthem had any knowledge of the alleged benefit[6] or "promised to pay anything for such services." *Mullins v. Mingo Lime & Lumber Co.*, 176 Va. 44, 49 (1940).

Turning first to Anthem's argument that it did not receive any benefit for Dominion's emergent services for a patient covered under Anthem's insurance plan, Anthem cites no decision of a Virginia appellate court directly on this issue. Nonetheless, the law in Virginia regarding *quantum meruit* recovery expressly requires that "one render[] services for another . . . ." *Hendrickson v. Meredith,* 161 Va. at 200. See also *Po River Water and Sewer v. Indian Acres Club,* 255 Va. at 114 (under *quantum meruit* theory, to "avoid unjust enrichment, equity will effect a 'contract implied in law,' requiring one who accepts and receives the services of another to make reasonable compensation for those services.).

The only reasonable understanding of the language from *Hendrickson* and *Po River Water and Sewer* is that the person who must pay compensation is the person to whom the service was rendered; a third person who did not receive the services cannot be deemed responsible under a *quantum meruit* theory of recovery. Accordingly, the court agrees with Anthem that Dominion may not recover from Anthem under a *quantum meruit* theory of recovery based upon the allegations in the current complaint.

In an effort to rescue its complaint, Dominion alleges additional unpled facts in its Opposition:

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[6] In fact, Dominion alleged that Anthem "had knowledge of the conferred benefit." FAC ¶ 16.

> Defendant benefitted from the services rendered to its member in that the benefit inured to Anthem by allowing Anthem to demonstrate the quality of its network and health plan to its members and plan sponsors. Medical provider networks are a critical competitive component on how health plan sponsors . . . compete for business . . . .

Opposition at 3.

Additionally, Dominion argues that HIPAA concerns caused it to "minimize" its complaint, but that Anthem "actively participated in authorizing the services rendered . . . ." *Id.*

On demurrer, the court is restricted to the four corners of the complaint. *Glazebrook v. Bd. of Sup'rs of Spotsylvania Cty.*, 266 Va. 550, 554 (2003) ("demurrer tests the legal sufficiency of facts alleged in pleadings").[7]

While the first unpled facts would not change the *quantum meruit* analysis since "allowing Anthem to demonstrate the quality of its network and health plan to its members and plan sponsors" does not change the fact that Anthem did not receive the services, if it was true that Anthem "actively participated in authorizing the services rendered," such a fact may change the *quantum meruit* analysis.[8]

The demurrer to Count II is SUSTAINED, with leave to amend.

Count III
(Unjust Enrichment)

Unjust enrichment is "an implied contract action based upon the principle that 'one person ... may not enrich himself unjustly at the expense of another.'" *CGI Fed. Inc. v. FCI Fed., Inc.*, 295 Va. 506, 519 (2018) (quoting *Rinehart v. Pirkey*, 126 Va. 346, 351 (1919)). An action for unjust enrichment:

> will lie whenever one has the money of another which he has no right to retain, but which *ex aequo et bono* [what is just and good] he should pay over to that other. This action has of late years been greatly extended, because founded on principles of

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[7] Additionally, the conclusory statement of law in paragraph 17 of the FAC, that "[a]cceptance of this benefit . . . would be inequitable," falls short of alleging facts to show that Anthem accepted such services or promised to pay. Although for the purposes of a demurrer, the court accepts as true any facts alleged in a complaint, a demurrer "does not admit the correctness of the pleader's conclusions of law." *Fox v. Custis*, 236 Va. 69, 71 (1988).

[8] Dominion argues an alternate theory under quasi-contract: "reasonable expectation." *Id.* at 4. Dominion offers no Virginia appellate authority for this theory to the extent it actually differs from the well-established recovery for unjust enrichment. This court thus declines to adopt this theory of recovery.

> justice; and now embraces all cases in which the defendant is bound by ties of natural justice and equity to refund the money.

Rinehart v. Pirkey, 126 Va. 346, 351 (1919) (internal quotation marks and citations omitted).

In support of its unjust enrichment claim, Dominion alleges that Anthem "benefitted by virtue of the fact that [it] did not remit appropriate payment to [Dominion] for its medical services" and that retaining the monies owed to Dominion was "unjust and inequitable." FAC ¶ 25.

The fact that Anthem "benefitted" because it did not pay Dominion is not a sufficient allegation because it is not alleging that Anthem "has the money of" Dominion which Anthem "has no right to retain . . . ." What is encompassed by the theory of unjust enrichment is exemplified in *Rinehart* where "money was advanced by the plaintiff for the benefit of the defendants . . . ." 126 Va. at 357.

Defendant's demurrer to Count III is SUSTAINED, without leave to amend.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

DOMINION SURGICAL SPECIALISTS, LLC	)	
Plaintiff	)	
v.	)	CL 2019-10310
ANTHEM HEALTHKEEPERS, INC.	)	
Defendant	)	

ORDER

THIS MATTER came before the court on Defendant's demurrer to Counts I, II, and III of Plaintiff's First Amended Complaint.

THE COURT, having considered the arguments of the parties and for the reasons set forth in the court's letter opinion of today's date, hereby

ORDERS that the demurrer to Count I is OVERRULED; the demurrer to Count II is SUSTAINED, with leave to amend within 14 days; and the demurrer to Count III is SUSTAINED, without leave to amend.

ENTERED this 10th day of February, 2020.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

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