NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

BRUCE D. WHITE, CHIEF JUDGE
RANDY I. BELLOWS
ROBERT J. SMITH
BRETT A. KASSABIAN
MICHAEL F. DEVINE
JOHN M. TRAN
GRACE BURKE CARROLL
DANIEL E. ORTIZ
PENNEY S. AZCARATE
STEPHEN C. SHANNON
THOMAS P. MANN
RICHARD E. GARDINER
DAVID BERNHARD
DAVID A. OBLON
DONTAÈ L. BUGG

JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

THOMAS A. FORTKORT
J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIEREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL
JAN L. BRODIE

RETIRED JUDGES

June 30, 2020

Daniel G. Glynn
Merrifield Law Firm, PLLC
2755 Harland Road, Suite 204
Falls Church, VA 22043

Mary C. Zinsner
Troutman Sanders, LLP
401 9th Street, NW, Suite 1000
Washington, D.C., N.W. 20004

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

Dear Counsel:

This matter is before the court on Anthem Healthkeepers, Inc.'s ("Anthem") motion for reconsideration of this court's February 10, 2020 Opinion and Order overruling Anthem's demurrer to Count I ("Duty to reimburse providers for out-of-network providers for emergent care") of Dominion Surgical Specialist's ("Dominion") Amended Complaint. Dominion has filed an opposition to Anthem's motion. For the reasons set forth below, the motion is denied.

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. This court's Order of February 10, 2020 overruled Anthem's demurrer to Count I, sustained the demurrer to Count II (with leave to amend), and sustained the demurrer to Count III (without leave to amend). Anthem now requests the court to reconsider its decision as to Count I.

ANALYSIS

Anthem makes three arguments: that the court erred in holding that Code § 38.2-3445 creates a private right of action; that, if there is a private right of action, it does not apply to providers; and that the enactment of 2020 Va. Acts of Assembly, Chapters 1080 and 1081, "throws additional light on the previous state of the law."

1) With respect to Anthem's argument that the court erred in holding that Code § 38.2-3445 creates a private right of action, Anthem asserts that the court erred in concluding that *Vansant & Gusleer, Inc. v. Washington*, 245 Va. 356 (1993), and *Sch. Bd. of Norfolk v. Giannoutsos*, 238 Va. 144 (1989), "stand for the proposition that the statute *must* create a remedy for the victim for it to be an exclusive remedy" and that the court has "conflated what is *sufficient* to establish an exclusive remedy with what is *necessary* to do so." Motion at 4 (emphasis in original). As Anthem cites nothing from either case which would cause the court to revisit its prior analysis of those cases, the court adheres to its prior analysis of *Vansant & Gusleer, Inc.* and *Giannoutsos*.

Anthem also argues that "Virginia case law also supports the lack of a private right of action in court where the regulatory framework establishes a primary enforcement body, such as the SCC." Motion at 4. The court agrees with this characterization -- but, other than baldly asserting that "the remedy for violation of the Virginia's (*sic*) insurance regulations is provided for in Virginia Code § 38.2-218 through § 38.2-221" (Motion at 5), Anthem has not shown that those Code sections establish the SCC as the primary enforcement body nor has Anthem countered the court's previous analysis of the applicable Code provisions.[1] Accordingly, the court adheres to its prior analysis.[2]

2) Anthem contends that, "[e]ven if there is a private right of action for the insured, this does not mean that providers have any rights under the statute." Motion at 5. Anthem bases this conclusion on the fact that Code § 38.2-3445 is entitled "Patient access to emergency services" and the fact that it "sets forth the obligations of a health insurance carrier *to its members* in circumstances where he or she receives out of network care in an emergency." *Id.* (emphasis added).

The title of the Code section, however, does not preclude providers having a right under the statute. Indeed, if providers did not have a right under the statute to recover from carriers for emergency services, the right of patients to access to emergency services would, in many cases, be a

---

[1] Dominion attached to its Opposition a letter from the SCC dated June 15, 2018 in which, consistent with this court's previous opinion, the SCC states that, under then current law, the SCC is "not in a position to direct the company to make additional payments on Ms. Jxxx's expenses."

[2] That analysis includes this court's disagreement with the reasoning and conclusion of the court in *Riverside Hospital, Inc. v. Optima Health Plan,* 13 Cir. CL1088, 82 Va. Cir. 250 (2011).

practical nullity since carriers could deny payment with impunity.

Moreover, the actual language of the statute -- "the health carrier shall provide coverage for emergency services" -- imposes a duty on the carrier; it does not indicate, as Anthem suggests by its reference to "obligations of a health insurance carrier *to its members*," that the duty is limited to payments to the patient/member, nor does it indicate that the provider does not have a right to recover since it is, after all, the provider to whom funds are owed. Indeed, in light of the current statutory structure which directly involves carriers with providers and where carriers have a statutory duty to provide coverage, it would almost be nonsensical to require the patient to recover from the carrier, just so the funds could then be turned over to the provider.[3]

3) Turning to Anthem's contention that the enactment of 2020 Va. Acts of Assembly, Chapters 1080 and 1081, "throws additional light on the previous state of the law."

At the outset, the court would note that, while the principle has apparently not been adopted by the Virginia appellate courts, the United States Supreme Court has held that so-called "subsequent legislative history" is a "hazardous basis for inferring the intent of an earlier" Congress. *United States v. Texas,* 507 U.S. 529, 539, n.4 (1993) (rejecting Texas' reliance on amendment to 7 U.S.C. § 2022) (citations omitted). This court agrees and believes that the Virginia appellate courts would so find in light of the current canons of statutory construction.

It is well-established in Virginia that, in construing statutes, "courts are charged with ascertaining and giving effect to the intent of the legislature" and that such "intention is initially found in the words of the statute itself . . . ." *Crown Central Petroleum Corp. v. Hill,* 254 Va. 88, 91 (1997). Plainly, if a court was to consider the actions of the legislature in a subsequent session in attempting to discern the meaning of an act of the legislature in a previous session, the court would not be giving effect to the intent of the legislature that enacted the statute, but would be giving effect instead, at least in part, to the intent of the legislature in a subsequent session; the court would also be ascertaining the words of the statute enacted by the legislature in a subsequent session, not merely the words of the statute itself as enacted by the legislature in a previous session. In short, Virginia's extant canons of statutory construction do not permit the court to consider "subsequent legislative history."

Moreover, even if this court was inclined to consider "subsequent legislative history," the enactment of 2020 Va. Acts of Assembly, Chapters 1080 and 1081, suggests, if anything, that the court's prior conclusion that Code § 38.2-3445 creates a private right of action was correct.

---

[3] The court acknowledges that there is privity of contract between the patient/member and the carrier, but, because the General Assembly has elected to impose a duty on the carrier, the court views that privity as having been legislatively limited.

Newly-enacted Code § 38.2-3445.01(F) provides in pertinent part:

> If the carrier and provider do not agree to a commercially reasonable payment amount within 30 calendar days and either party chooses to pursue further action to resolve the dispute, the dispute shall be resolved through arbitration as provided in § 38.2-3445.02.

Moreover, newly-enacted Code § 38.2-3445.02(K) provides:

> K. The provisions of the Uniform Arbitration Act, Article 2 (§ 8.01-581.01 *et seq.*) of Chapter 21 of Title 8.01, shall not apply to arbitration proceedings initiated pursuant to this section.

The Uniform Arbitration Act includes provisions allowing court involvement in the arbitration process. See Code § 8.01-581.02, § 8.01-581.03, § 8.01-581.09, § 8.01-581.10, § 8.01-581.11, and § 8.01-581.12.

Thus, the General Assembly has now expressly provided a remedy for the vindication of providers' rights which expressly excludes judicial involvement, thereby suggesting, by implication, that there now exists a private right of action by providers which the General Assembly is extinguishing in favor of arbitration.

In sum, the court finds again that Code § 38.2-3445 creates a private right of action and DENIES Defendant's motion for reconsideration.

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 motion for reconsideration of this court's February 10, 2020 Opinion and Order overruling Defendant's demurrer to Count I of Plaintiff's 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 Defendant's motion for reconsideration is DENIED.

ENTERED this 30th day of June, 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:

Daniel G. Glynn
Counsel for Plaintiff

Mary C. Zinsner
Counsel for Defendant