**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

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| CALIFORNIA HOSPITAL ASSOCIATION, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>BLUE CROSS OF CALIFORNIA, et al.,<br><br>Defendants. | LASC Case No: BC353609<br><br>COURT'S RULING AND ORDER RE: PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION<br><br>Hearing Date: July 14, 2006 |

## I.

## BACKGROUND

Plaintiffs, a group of approximately 400 hospitals and 21 other named Plaintiffs, have brought this action against Blue Cross and others to challenge recently adopted payment policies with respect to endoscopic procedures. The named Plaintiffs (or members of the plaintiff California Hospital Association) currently offer endoscopic procedures to Blue Cross members on an outpatient basis. According to Plaintiffs, Blue Cross policy at issue in this case provides a substantial financial incentive to physicians to perform endoscopic procedures either in their

offices or in free standing surgical centers rather than in hospitals. Specifically, beginning July 1, 2006, Blue Cross began paying physicians 5% more than prior payment rates for endoscopic procedures performed outside of a hospital setting, and 20% less than the prior payment rates for endoscopic procedures performed in a hospital. According to Plaintiffs, the magnitude of the inducement is such that it would cause physicians to make critical medical decisions based on financial considerations, rather than the best medical interests of their patients.

The type of financial inducement that Blue Cross intends to pay is precisely the type of inducement that is prohibited under California law, according to Plaintiffs, and Plaintiffs have moved for a preliminary injunction to block the practice.

## II.

## DEFENDANTS' EVIDENTIARY OBJECTIONS

### Objections to Declaration of Dietmar Grellmann

**1. ¶4, p. 1-2, l.25-2:** Overruled.

**2. ¶5, p. 2:3-12:** Overruled.

**3. ¶6, at 2:13-18:** Overruled.

**4. ¶10 at 3:6-15:** Overruled.

### Objections to Declaration of Henry W. Zaretsky, Ph.D.

**1. ¶3 at 1:14-24:** Sustained as to statement "I also understand that this 25-percent differential does not discriminate with respect to patient-safety concerns, as long as the procedures are performed on an outpatient basis" on foundational grounds. The remainder of the objections to this paragraph are overruled.

**2. ¶4 at 1-2, l. 25-3:** Sustained.

**3. ¶5 at 2:4-10:** Sustained.

**4. ¶6 at 2:11-13:** Sustained.

**5. ¶7 at 2:14-26:** Sustained.

**6. ¶8 at 3:1-16:** Sustained.

**7. ¶9 at 3:17-28:** Sustained.

**Objections to Declaration of Suzanne S. Chou**

**1. ¶2 at 1:8-9:** Overruled.

**2. ¶3 at 1:10-11:** Overruled.

**3. ¶4 at 1:12-13:** Overruled.

**Objections to Declaration of Bradley Kramer**

**1. ¶2 at 1:7-8:** Hearsay objection is sustained; remainder of objections are overruled.

**2. ¶3 at 1:9-10:** Hearsay objection is sustained; remainder of objections are overruled.

**Objections to Declarations of Kurt Weinmesiter, Arnold Schaffer, James Yoshioka, Michael Rembis, John Edwards, Dennis Lee, and Roger Seaver**

**1. ¶3 of the Declarations:** Sustained on foundation grounds.

## III.

## MOTION FOR PRELIMINARY INJUNCTION

CCP §526 provides the basis for which the Court may issue (or deny issuance of) an injunction. CCP §527(a) authorizes issuance of injunctions before trial "if sufficient grounds exist therefore."

Injunctions will rarely be granted (absent specific statutory authority) where a suit for damages provides a clear remedy. *Thayer Plymouth Center, Inc. v. Chrysler Motors* (1967) 255 Cal.App.2d 300, 307; *Pacific Designs Sciences Corp. v. Sup.Ct. (Maudlin)* (2004) 121 Cal.App.4th 1100, 1110. Conversely, injunctive relief is more likely to be granted where a

damages remedy is precluded by law. *Department of Fish & Game v. Anderson-Cottonwood Irrig. Dist.* (1992) 8 Cal.App.4th 1554, 1564.

Further, CCP §526(a)(2) lists the traditional consideration of "irreparable harm." "Irreparable harm is often related to the 'inadequate legal remedy' (i.e., the damages remedy is inadequate *because* some immeasurable harm is threatened. But it is also a separate consideration. The judge is looking for more than a mere dispute. Relief is unlikely unless someone will be badly hurt in a way which cannot be later repaired." California Practice Guide, Civil Procedure Before Trial, The Rutter Group, ¶9:522 (referencing *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater* (1981) 118 Cal.App.3d 863, 870-871).

Moreover, the threat of "irreparable harm" must be imminent, as opposed to a mere possibility of harm some time in the future: "An injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future. It must be supported by actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited activity." *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084.

While the statute makes no reference to the traditional equitable concern of "balancing equities," it is a crucial factor in the judge's determination: i.e., the court must exercise its discretion "in favor of the party most likely to be injured....If denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins v. Sup. Ct.* (1985) 38 Cal.3d 199, 205.

While the Court has broad discretion in ruling on an application for preliminary injunction, such discretion must be exercised in light of the following interrelated factors:

> 1) Are the plaintiffs likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted? *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 633.

2) Is there a reasonable probability that plaintiffs will prevail on the merits? *Robbins, supra,* 38 Cal.3d at 206.

The Court's determination must be guided by a "mix" of the potential-merit and interim-harm factors: the greater plaintiff's showing on one, the less must be shown on the other to support an injunction. *Butt v. State of California* (1992) 4 Cal.4th 668, 678; *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cla.App.4th 678, 696.

Importantly, the avowed purpose of a preliminary injunction is to preserve the status quo pending a trial on the merits. *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528. See also California Practice Guide, Civil Procedure Before Trial, The Rutter Group, ¶9:558 (2006 Supp.)

The burden is on the plaintiff to show all elements necessary to support issuance of a preliminary injunction. California Practice Guide, Civil Procedure Before Trial, The Rutter Group, ¶9:632.1 (2006 Supp.).

With these standards in mind, the Plaintiffs have requested a preliminary injunction prohibiting defendants from implementing its new payment policy pertaining to physicians who perform outpatient endoscopy procedures, and which pays physicians more to perform such procedures in ambulatory surgery centers ("ASCs"), their offices, or other non-hospital settings than to perform such procedures in a hospital. The Court must examine: 1. whether Plaintiffs are likely to succeed on the merits, and 2. whether the balancing of hardships requires issuance of an injunction.

**1. Likelihood of Success on the Merits**

Plaintiffs have asserted a claim for violation of California's Unfair Competition Law (UCL), claiming the proposed endoscopy payment program violates the "unlawful" and "unfair" prongs of the UCL.

Initially, it appears the purpose of the endoscopy payment policy, in concept, is to influence physicians to refer patients to ASCs rather than hospitals for the performance of endoscopic procedures. The question is whether this practice is "unlawful", "unfair," and/or "fraudulent," and if so, whether Plaintiffs have established a likelihood of prevailing.

Preliminarily, under Business and Professions Code § 17200, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." B&P §17204, which was amended by Proposition 64, allows a private person to bring an action for violation of the UCL when he "has suffered injury in fact and has lost money or property *as a result of* such unfair competition."

**Likelihood of prevailing on the "unlawful" prong**

**Violation of Business and Professions Code §650**

The first basis upon which Plaintiffs allege a violation of the unlawful prong of the UCL is the alleged violation of Business and Professions Code §650. This provision, labeled the "Anti-Kickback Law", provides in applicable part:

> [T]he offer, delivery, receipt, or acceptance by any person licensed under this division or the Chiropractic Initiative Act of any rebate, refund, commission, preference, patronage dividend, discount, or other consideration, ***whether in the form of money or otherwise***, as compensation or ***inducement for referring patients, clients, or customers to any person***, irrespective of any membership, proprietary interest or coownership in or with any person to whom these patients, clients, or customers are referred is unlawful. (Emphasis added.)

To constitute a violation of §650, five elements must be satisfied:

"(1) An offer, delivery, receipt or acceptance,

"(2) by any person licensed under [the healing arts provisions],

"(3) consideration to any person,

"(4) as compensation or inducement for,

"(5) referral of patients, clients or customers." *Mason v. Hosta* (1984) 152 Cal.App.3d 980, 984; 63 Ops. Cal. Atty. Gen. 89 (1980).

The Court determines that Plaintiffs have not established a likelihood of prevailing on the "unlawful" prong of §17200, insofar as it is based on a violation of §650. Plaintiffs essentially contend that in this case, the endoscopy payment policy constitutes: 1) an offer and acceptance; 2) from the Blue Cross Defendants to licensed physicians; 3) of consideration (by virtue of the 25% ASC/hospital fee differential); 4) as an inducement; 5) for the referral of patients to ASCs instead of hospitals. Plaintiffs contend the referral of patients to ASCs instead of hospitals, solely on the basis of the fee differential, may constitute a rebate (i.e., "other consideration" under the statute) in violation of §650.

However, the evidence demonstrates the referrals are not made solely on the basis of the fee differential. Plaintiffs have filed the Declaration of Emmett B. Keefe, M.D. in support of the injunction. Keefe was the Chairman of the Board of the American Gastroenterological Association (AGA) from June 1, 2005 through May 23, 2006.[1] He notes the AGA "has carefully reviewed and considered" the policy, and has consulted with two other professional organizations which focus on gastroenterology – the American College of Gastroenterology (ACG) and the American Society for Gastrointestinal Endoscopy (ASGE).[2]

Keefe states that "[i]n my opinion, it may be clinically inappropriate, and not in the best medical interest of the patient, to perform certain endoscopic procedures in an ASC or office setting. The decision as to whether an endoscopic procedure should be performed in an office, ASC, or hospital setting should be made by the treating physician **in the exercise of that physician's best clinical judgment**, and such judgment should be ***unaffected by financial considerations***."[3]

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[1] Keefe Declaration, ¶2.

[2] Keefe Decl., ¶4.

[3] Keefe Decl., ¶7 (emphasis added).

The problem, however, is that this ultimately is not for the Court to decide. Plaintiffs have provided no evidence demonstrating that the policy will interfere with a physician's medical opinion as to what is best for his or her patient. There is nothing to demonstrate that the policy changes the services the members have access to.

To the contrary, the Supplemental Declaration of I. Jeff Kamil, M.D. demonstrates that the policy will *not* interfere with a physician's medical opinion as to what is best for his or her patients. The Declaration includes two exhibits. Exhibit A is a letter from Julie Bietsch, the Vice President of Provider Operations for Blue Cross of California, to the PPO providers. The letter notes that Blue Cross has decided to exclude three CPT procedure codes from the fee schedule changes. The letter also notes that "if any of the [nine procedures referenced in the letter] are performed in an emergency department setting, no fee schedule reduction will be applied."[4]

Exhibit B to Kamil's Supplemental Declaration is a letter to the providers from Anthony Nguyen, MD (Blue Cross of California's Medical Director of Clinical Quality & Innovations). The letter[5] notes that a provider "may request Blue Cross's medical review" if the provider is "intending to perform an endoscopic procedure in a hospital outpatient setting and the medical condition and/or history indicate that it is medically necessary[6] to have the procedure performed in this setting...." The letter further states that "[i]f Blue Cross authorizes the endoscopy

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[4] Kamil Supplemental Declaration, Exh. A.

[5] Kamil Supplemental Declaration, Exh. B.

[6] "Medically necessary" is defined in the letter as "health care services that a medical practitioner, exercising prudent clinical judgment, would provide to a patient for the purpose of preventing, evaluating, diagnosing or treating an illness, injury, disease or its symptoms, and that are: In accordance with generally accepted standards of medical practice; and clinically appropriate, in terms of type, frequency, extent, site and duration, and considered effective for the patient's illness, injury or disease; and not primarily for the convenience of the patient, physician, or other health care provider, and not more costly than an alternative service for sequence of services at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of that patient's illness, injury or disease."

service to be performed in the hospital outpatient setting, [the provider's] professional fee ***will not be reduced by 20 percent.***"[7] Instead, the letter states, the provider "will receive the same fee as if [the provider] had performed the procedure in an ASC or in [the provider's] office."[8] If Blue Cross does not authorize the endoscopy to be performed in the hospital outpatient setting, the provider's professional fee will be as described in Blue Cross's letter to the providers dated March 28, 2006.[9] These supplemental exhibits demonstrate, to the Court's satisfaction, that the provider's professional medical opinion is paramount, and is not affected by the payment policy.

The Court recognizes the endoscopy payment policy may encourage the use of ASCs. However, this is no different than many other aspects of managed healthcare that have the potential to influence the provision of medical care. Clearly, hospitals are impacted on a daily basis by the length of stay guidelines imposed by managed care providers. Similarly, doctors are influenced by group capitation rates and other fee limitations imposed by health care service plans. On the evidence offered, the Court cannot say that the payment policy reflects a "referral" fee; in fact, it appears just as likely that the payment policy is reflective of a cost differential in services provided by outpatient facilities and hospitals. The payment policy at issue does nothing to designate a particular ASC, and thus is not tied to the referral of patients to any particular provider.

Accordingly, the endoscopy policy, on its face, is not unlawful or prohibited under §650. Thus, Plaintiffs have not established a likelihood on the success of the merits as to this particular violation of the UCL.

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[7] Kamil Supplemental Declaration, Exh. B (emphasis added).

[8] Kamil Supplemental Declaration, Exh. B.

[9] Kamil Supplemental Declaration, Exh. B.

**Violation of the Knox-Keene Act**

Plaintiffs also rely on violations of the Knox-Keene Act (codified at H&S Code §§1342, et seq.) as a basis for the claims of a §17200 violation under the "unlawful" prong of the UCL.

**(1) H&S Code §1342(a) and (b)**

H&S Code §1342 (a) and (b) provide:

> It is the intent and purpose of the Legislature to promote the delivery and the quality of health and medical care to the people of the State of California who enroll in, or subscribe for the services rendered by, a health care service plan or specialized health care service plan by accomplishing all of the following:
>
> (a) Ensuring the continued role of the professional as the determiner of the patient's health needs which fosters the traditional relationship of trust and confidence between the patient and the professional.
>
> (b) Ensuring that subscribers and enrollees are educated and informed of the benefits and services available in order to enable a rational consumer choice in the marketplace.

Here, Plaintiffs have not provided sufficient evidence demonstrating that the Blue Cross policy will prevent from exercising their professional judgment in determining their patients' care. Again, Plaintiffs' position would undermine the physicians' professional duties to their patients and there is no evidence that such a result will occur.

The Court is not satisfied that the payment policy at issue is any different than any other pay policy routinely adopted by health care service plans throughout California. Plaintiffs' suggestion that the payment policy for outpatient endoscopic procedures will influence the professional judgment of doctors performing these procedures, if taken to its logical conclusion, would suggest a marked lack of integrity and professionalism in the medical profession that this Court will not accept.

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Accordingly, Plaintiffs have not established a likelihood of prevailing on the merits of their §17200 claim at this time, insofar as it is based on a violation of H&S Code §§1342(a) and (b).

**(2) H&S Code §1348.6 and Insurance Code §10175.5**

H&S Code §1348.6(a) provides:

> (a) No contract between a health care service plan and a physician, physician group, or other licensed health care practitioner shall contain **any incentive plan** that includes specific payment **made directly**, in any type or form, to a physician, physician group, or other licensed health care practitioner as **an inducement to *deny, reduce, limit, or delay* specific, medically necessary, and appropriate services provided** with respect to a specific enrollee or groups of enrollees with similar medical conditions. (Emphasis added.)

Insurance Code § 10175.5 contains essentially the same language, and states:

> (a) No disability insurance contract with a physician and surgeon, physician and surgeon group, or other licensed health care practitioner shall contain any incentive plan that includes specific payment made in any type or form, to a physician and surgeon, physician and surgeon group, or other licensed health care practitioner as an inducement to deny, reduce, limit, or delay specific, medically necessary, and appropriate services provided with respect to specific insureds or groups of insureds with similar medical conditions.

Here, Plaintiffs have not produced sufficient evidence that the inducement is being offered to deny, reduce, limit, or delay endoscopy services. As discussed *supra* under the analysis of the UCL claim premised on a violation of B&P Code §650, Dr. Keefe states in his declaration that "[i]n my opinion, it ***may*** be clinically inappropriate, and not in the best medical interest of the patient, to perform certain endoscopic procedures in an ASC or office setting." Keefe states that the factors a physician ***should*** consider include the nature of the gastrointestinal condition, other medical conditions affecting the patient, the availability of ASCs, the clinical judgment of a

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physician as to whether endoscopies can be performed safely in a non-hospital setting, and whether the physician has access to an ASC.[10]

This evidence does not demonstrate that the endoscopy policy is being offered to deny, reduce, limit, or delay endoscopy services. Plaintiffs merely speculate that endoscopy services will be less available and/or delayed under the payment policy, but there is no evidence to back this up. Similarly, there is no evidence, and Plaintiffs conceded in oral argument, that the quality of endoscopic services varies between services provided in a hospital and services provided in an ASC.

For these reasons, Plaintiffs have not shown a likelihood of success on the violation of the UCL "unlawful" claims premised on violations of H&S Code §1348.6 and Insurance Code §10175.5.

**(3) H&S Code §1367(g)**

H&S Code §1367(g), governing health plans, provides:

> The plan shall have the organizational and administrative capacity to provide services to subscribers and enrollees. The plan shall be able to demonstrate to the department **that medical decisions are rendered by qualified medical providers, *unhindered* by fiscal and administrative management.**

As with the violation of §650, while the very nature of the endoscopic payment policy gives physicians a financial incentive to use ASCs over hospitals, Plaintiffs have supplied no evidence demonstrating that the medical decisions of any qualified medical provider are hindered by fiscal management. Even by giving the physicians a financial incentive to use ASCs over hospitals, this does not lead to the conclusion that the medical decision to use ASCs over hospitals in a given instance are hindered by fiscal management.

Accordingly, there is not a substantial likelihood that Plaintiffs would prevail on the UCL claim premised on a violation of H&S Code §1367(g).

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[10] Keefe Decl., ¶7.

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**(4) H&S Code §1367(h)(1)**

H&S Code §1367(h)(1) provides that "[c]ontracts with subscribers and enrollees, including group contracts, and contracts with providers, and other persons furnishing services, equipment, or facilities to or in connection with the plan, shall be fair, reasonable, and consistent with the objectives of this chapter."

Here, to the extent Plaintiffs have not demonstrated a likelihood of success on the merits as to the UCL claim premised on a violation of H&S Code §1367(g), Plaintiffs have also not shown that the endoscopic payment policy is not consistent with the objectives of Chapter 2.2 of Division 2 of the H&S Code.

**Likelihood of prevailing on "unfair" prong**

"Because §17200's definition of the five proscribed 'wrongs' is set forth in the disjunctive, a business practice can be 'unfair' – and violative of §17200 – even if it is not 'deceptive' and even if it is 'lawful.'" California Practice Guide, Bus. & Prof. C. §17200 Practice, ¶3:112, The Rutter Group (2006) (referencing *Cel-Tech Communications , Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; *Committee on Children's Television, supra,* 35 Cal.3d at 210; *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169).

The "unfair" standard is intentionally broad, allowing courts maximum discretion to prohibit new schemes to defraud. California Practice Guide, Bus. & Prof. C. §17200 Practice, ¶3:113, The Rutter Group (2003) (referencing *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 740).

"There are two lines of appellate opinions addressing the definition of "unfair" within the meaning of the UCL in consumer actions. One line defines "unfair" as prohibiting conduct that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 718-719 [113 Cal. Rptr. 2d 399] (*Smith*); *Pastoria v. Nationwide Ins.* (2003) 112 Cal.App.4th 1490, 1498 [6 Cal. Rptr. 3d 148].) The other line of cases holds that the public policy which is a predicate to a consumer unfair competition action under the "unfair" prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions. (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917 [134 Cal. Rptr. 2d 101] (*Scripps*); *Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845 [128 Cal. Rptr. 2d 389] (*Gregory*).)" *Bardin v. DaimlerChrysler Corporation* (2006) 136 Cal.App.4th 1255, 1260-1261.

Here, by virtue of the Court's finding that Plaintiffs have not satisfied their burden of showing that the endoscopic payment policy is unlawful (insofar as the claim is based on a violation of B&P Code §650 and H&S Code §1367), the Court also finds Plaintiffs have not demonstrated the policy is "unfair", under *Scripps Clinic.*

Applying the "unfair" test under the *Smith* line of cases produces the same result. Plaintiffs have not produced evidence at this time that the endoscopic payment policy is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Further, as discussed *infra*, when weighing the utility of the Defendant's conduct in implementing the endoscopic payment policy against the gravity of the harm to the Plaintiffs and the general public, there is not sufficient evidence that such harm outweighs the utility of Blue Cross's conduct.

Accordingly, under either the *Scripps* or *Smith* standard, Plaintiffs have not established a likelihood of success on the merits as to the UCL "unfair" claim.

**Likelihood of prevailing on "fraudulent" claim**

A business practice is "fraudulent" within the meaning of §17200 if "members of the public are likely to be deceived." *Committee on Children's Television v. General Foods Corp.* (1983) 35 Cal.3d 197, 211; *Kasky v Nike, Inc.* (2002) 27 Cal.4th 939; *Prata v. Sup. Ct.* (2001) 91 Cal.App.4th 1128, 1144.

Plaintiffs' final theory is that implementing the endoscopy payment policy would constitute a fraud on consumers and violate B&P Code §17500. This is allegedly because patients who participate in a Blue Cross PPO plan will be misled into believing that: 1) they have access to all health care providers in the PPO network; and 2) the decisions of their physicians concerning the selection of a network provider in which to perform an outpatient endoscopic procedure is based on the physician's professional judgment concerning the patient's medical needs, and not financial considerations. Plaintiffs have not made a sufficient showing that Plaintiffs' customers will likely be "misled" into believing they have access to all health care providers in the PPO network. Nor have they demonstrated that the customers (i.e., the patients) will likely be misled into believing the performance of the procedure is based on the physician's professional judgment and not financial considerations. While financial considerations may play a part, there has been no showing that financial considerations will compromise the physicians' professional judgment and duties to their patients.

**Standing**

Finally, the Court notes that it also has reservations concerning the Plaintiffs' standing to assert the UCL claims under Proposition 64. The standing requirement of Prop 64, and thus a prerequisite to maintenance of a UCL claim, are not in all respects the same as Article III standing requirements. See *Pfizer v. Superior Court (Galfano)*, (2d Dist., Div. 3, July 11, 2006) 2006 Cal.App. Lexis 1068. There is no showing that the *Plaintiffs* (i.e., the hospitals and their associations) are the parties who have or will suffer "injury in fact" as required under §17204

and have lost money or property *as a result of* the endoscopic payment policy. Further, even considering the harm to "others" potentially affected by non-issuance of the injunction, Plaintiffs have not sufficiently demonstrated the harm they allege will come to the individual patients.

For these reasons, the Court finds that Plaintiffs have not satisfied their burden of demonstrating a likelihood of success on the merits.

**2. Balancing of Hardships**

The Court must next consider whether an order denying the injunction would impose greater burdens on the Plaintiffs, and whether an order granting the injunction would impose greater burdens on the Defendants.

Plaintiffs offer only speculative and unsubstantiated opinions from Dr. Zaretsky to support their claim of economic loss.[11]

Zaretsky also states that "[u]nder economic theories, however, it is highly likely volume will shift from hospital to non-hospital settings, and this is likely to impact all hospitals where such procedures are currently provided." Dr. Zaretsky indicates that he cannot say whether the alleged "volume shift" towards non-hospital settings will be negligible, overwhelming, or somewhere in between.

Zaretsky concedes that "[f]urther compounding the question of predicting the economic impact of the payment policy change, is measuring the policy's impact after the policy has been implemented, and thus calculating actual damages."[12]

Thus, the Plaintiffs' experts essentially opine that determining economic impact of the endoscopic payment policy would be "difficult." This belies the contention that the harm

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[11] Declaration of Henry W. Zaretsky, Ph.D. in support of motion for preliminary injunction at ¶¶ 4 and 5.

[12] Zaretsky Declaration, ¶8.

Plaintiffs would suffer should the injunction not issue outweighs the Defendants' harm should the injunction be issued. The harm, in other words, is speculative.

Plaintiffs have also submitted the Declarations of Kurt Weinmesiter, Arnold Schaffer, Dietmar Grellmann, James Yoshioka, Michael Rembis, John Edwards, Dennis Lee and Roger Seaver. Declarants Weinmesiter, Schaffer, Yoshioka, Rembis, Edwards, Lee, and Seaver (all CEOs or top officials at various California hospitals) have submitted essentially the same pro forma declarations, stating that they "believe that the Hospital will be harmed because, among other reasons, physicians will reduce significantly the number of outpatient endoscopies they perform at the hospital."[13] Again, such evidence is not sufficient to establish that the burdens to Plaintiffs in not issuing the injunction outweigh the burdens on Defendants should the injunction issue.

Importantly, the Court also notes that Plaintiffs indicate in their reply brief that the injury to Blue Cross resulting from the issuance of an injunction would be "purely monetary" if an injunction were to issue, thus arguably supporting maintenance of the status quo by issuance of the injunction. The corollary to this argument is that the injury, if any, to Plaintiffs will be purely economic, and to the extent appropriate, may be satisfied by a money judgment. Equitable relief is appropriately denied when an action at law provides an adequate remedy. *See North Side Property Owners' Association v. Hillside Memorial Park* (1945) 70 Cal.App.2d 609, 615.

Plaintiffs have not demonstrated the balance of harms tips in their favor. Accordingly, the "balance of hardships" factor weighs against granting the preliminary injunction.

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[13] See, e.g., Weinmesiter Declaration at ¶3.

**3. Primary Jurisdiction and Equitable abstention**

Finally, even assuming Plaintiffs could meet their evidentiary burden on the injunction, the Court believes that the statutory and regulatory scheme governing health care service plans justifies the application of the doctrines of primary jurisdiction and of equitable abstention in this case. Plaintiffs' request for relief seeks to directly impact the economics of the provision of managed care. This is an area of complex economic and social policy that is best left to the Department of Managed Health Care, its Director, and the legislature. See *Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 795-796. *See also Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal. App. 4th 554, 564-565 ("Assuming for discussion's sake only that appellant can state a cause of action for unfair trade practices[,] . . . that by itself does not permit unwarranted judicial intervention in an area of complex economic policy.")

The doctrine of primary jurisdiction comes into play whenever enforcement of a claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. The doctrine of primary jurisdiction advances two related policies. It enhances court decision-making and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws. The Department of Managed Health Care (DMHC) is the California state agency statutorily empowered to "to ensure that health care service plans provide [subscribers] with access to quality heath care services and protect and promote the interests of [subscribers]" (Health & Saf. Code, § 1341, subd. (a)). In this case the DMHC has involved

itself in the debate over the proposed endoscopic procedures pay policy at issue as evidenced by the Blue Cross response to the DMHC's letter dated April 21, 2006.[14]

## III.

## CONCLUSION AND ORDER

On balance, the Court finds Plaintiffs have not met their burden of demonstrating a likelihood of success on the merits, nor have they demonstrated the balance of hardships falls in their favor. The motion for a preliminary injunction is denied.

Applying the doctrines of primary jurisdiction and equitable abstention, the Court hereby stays these proceedings for a period of 60 days to permit the Department of Managed Health Care to determine whether the proposed endoscopic pay policy is, in the Department's view, violative of Health & Safety Code §§ 1342 (a) and (b), Health & Safety Code §1367, or Business & Professions Code §650. While the Court recognizes that such a determination may not be binding on this Court in further proceedings in this case, it is appropriate for the Court to seek the views of the state agency with particular expertise in the field of managed care. See *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal. 4th 377, 390-391.

## IV.

## FURTHER PROCEEDINGS

Plaintiffs are directed to serve a copy of this Ruling on the Director of the Department of Managed Health Care within 5 days. This case is set for a further status conference on October 4, 2006 at 9:00 a.m. in Department 311. The parties are to file a joint statement advising

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[14] See Exhibit A to Supplemental Declaration of Dietmar Grellmann filed with Plaintiffs' Reply to Opposition to Motion for Preliminary Injunction filed June 11, 2006.

the Court of any determination by DMHC, the scope of discovery proposed by any party, and the parties' views on the timing of future proceedings in the case, including certification proceedings and trial.

Dated: August 1, 2006

Carl J. West
Judge of the Superior Court