UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

MDL No. 1334
Master File No. 00-1334-MD-MORENO

IN RE: MANAGED CARE LITIGATION

THIS DOCUMENT RELATES TO
PROVIDER TRACK CASES

ORDER GRANTING CAPITATION DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON REMAINING CAPITATION CLAIMS

Presently before the Court is the Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Capitation Claims **(D.E. No. 3901)**, filed on **April 21, 2005**. In their motion, which was filed before this Court's recent ruling on class certification, the Capitation Defendants seek summary judgment on all of the Plaintiffs' capitation claims. For the reasons set forth below, the Defendants' motion for partial summary judgment is **GRANTED** as to all remaining capitation claims.

I. Legal Standard

Summary judgment is authorized where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The party opposing the motion for summary judgment may not simply rest upon mere allegations or denials of the pleadings; the non-moving party must establish the essential elements of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The nonmovant must

present more than a scintilla of evidence in support of the nonmovant's position. A court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). A jury must be able reasonably to find for the nonmovant. *Id.* at 252.

II. Analysis

Pursuant to this Court's recent order granting the Plaintiffs' amended motion for class certification, capitation claims related to actuarial soundness and negotiated capitation rates are not part of the class definitions and, thus, are no longer part of this class action.[1] Similarly, all claims relating to pharmacy risk pools are no longer part of this case. Thus, as Plaintiffs themselves conceded at oral argument, only the"missing months" capitation claims remain. *See, e.g.*, Transcript of June 7, 2005 Oral Argument at 52 ("In terms of missing months, which is what we are down to . . ."). While it is clear that only the missing month claims remain, the Plaintiffs' most recent descriptions of the remaining claims have been far from clear.

According to the Plaintiffs, the Court has previously "appropriately and succinctly described" the remaining capitation claims as follows:

> "Defendants delay furnishing providers with initial capitation payments. Moreover, Plaintiffs allege that the Providers possessing capitation agreements with one or more of the Defendants receive monthly capitation rolls supposedly listing the patients in their group, but that the rolls do not include enrolled patients who have yet to seek any treatment, allowing Defendants to retain the full premiums for 'well' members and forcing the doctors to absorb the costs of treating a group artificially inflated with sick patients."

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[1] For a detailed description of the factual and procedural background of this case, see the Eleventh Circuit's decision affirming in part this Court's initial class certification order, *Klay v. Humana, Inc.*; 382 F.3d 1241 (11th Cir. 2004).

Plaintiffs' Response to Defendants' Omnibus Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Capitation Claims and Motion for Dismissal Under Rule 19 at 129 (quoting *In re Managed Care Litigation*, 298 F. Supp. 2d 1259, 1278-79 (S.D. Fla. 2003)) (citations omitted) [hereinafter "Plaintiffs' Response"]. Thus, throughout the course of this litigation, including in their response, the Plaintiffs have repeatedly represented that their "missing months" claims are based on the Defendants' failure to assign new members upon enrollment. In the remainder of their response, however, the Plaintiffs emphasize that the "missing months" claims relate not only to delayed assignments, but also to *any* missed capitation payments. Plaintiffs have apparently reconstituted their missing months claims. Examining the evidence presented by the parties, however, whether premised on delayed assignment of members or on any missed capitation payments, the Plaintiffs' "missing months" claims cannot survive summary judgment.

First, with regard to allegations of delayed assignment of members, the Defendants state that they all automatically assign new members to physicians or IPAs if the members fail to choose a primary care physician, which automatically leads to capitation payments. Thus, the Defendants state that summary judgment must be granted in their favor on all claims based on delayed assignments. In support of their position, the Defendants point to the following testimony with respect to each Defendant:

1. PacifiCare

"Q. When a member does not select a primary care physician, you auto assign. PacifiCare auto assigns, correct? A. Yes." January 7, 2004 Deposition Transcript of Larry McIntosh at 41.

2. HealthNet

"Q. Is it possible for an enrollee not to select a PCP? A. There is a possibility that the enrollee may

not have selected a PCP on their application, and if that happens the Membership Department randomly chooses someone within that zip code to assign the member to that primary care physician." May 13, 2004 Deposition Transcript of Ronald Lawrence at 16.

3. WellPoint

"A. "[W]e get enrollment applications that come in that are filled out to varying degrees of completion, and we follow up with the member to try and determine who they have selected as their medical group and try to attain that information. And after – if we have not been successful, then we auto assign that member to a medical group." December 11, 2000 Deposition Transcript of Curtis Terry at 125.

In response to each of the three quotes regarding autoassignment, the Plaintiffs state: "Plaintiffs do not dispute the accuracy of this quote, but do contend that it is incomplete and out of context." Plaintiffs' Response to Defendants' Statement of Undisputed Facts at 8. Beyond arguing that the quotes are taken out of context, however, the Plaintiffs offer no evidence tending to show that the Defendants do not autoassign new members who fail to select a physician or IPA. Without any proof that the Defendants actually delayed assigning members, all of the Plaintiffs remaining capitation claims must fail. Accordingly, the Plaintiffs have not demonstrated a dispute of material fact suitable for the jury on their claim based on delayed assignments.

Perhaps because the evidence is undisputed that the Capitation Defendants all automatically assign new members if they fail to choose a doctor, the Plaintiffs have recently recharacterized their missing months claims to include claims for *any* missed capitation payments. Now, relying almost entirely on the declaration of Dr. Teresa Waters, the Plaintiffs argue that the Defendants "routinely fail to pay for all eligible months." Plaintiffs' Response at 132 (citing Waters Declaration at ¶ 3).

According to the Plaintiffs, "[t]hese gaps can occur due to a delayed assignment, or can simply be a drop in payment in the middle of an eligible period for that member." *Id.* at 131. Thus, rather than alleging that the Defendants use computer manipulation to systematically delay initial assignments, the Plaintiffs now seek to hold the Defendants liable for any missed capitation payments.

In her declaration, Dr. Waters states: "The first of my capitation analyses focused on identifying member months for which members are eligible (covered) according to enrollment data, but for whom assigned physicians were not paid. I found that there were indeed missing capitation payments for WellPoint (both in California and Georgia), HealthNet, and Pacificare." Waters Declaration at ¶ 3. Basing her opinion on her analyses of the Defendants' computer data, Dr. Waters concludes that the Defendants failed to make some capitation payments. *Id.* at ¶¶ 3, 5.[2] However, Dr. Waters' declaration and earlier report show, at most, that the computer data indicates some monthly capitation payments were not made. Dr. Waters did not take account of situations in which the Defendants manually made capitation payments or situations in which valid reasons existed for not making a capitation payment. Further, Dr. Waters' declaration does not offer any specific facts in support of her conclusions. An expert's affidavit that fails to point to specific facts in the record is insufficient to create an issue of material fact. *See, e.g., Evers v. General Motors Corp.*, 770 F.2d 984, 986-87 (11th Cir. 1985).

Examining the only other evidence cited by the Plaintiffs in support of their missing months claims not only does not assist the Plaintiffs in avoiding summary judgment, but actually further illustrates why Dr. Waters' analyses and conclusions do not create an issue of material fact. Plaintiffs

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[2] At oral argument, Plaintiffs' counsel conceded that the numbers of missed months "are going down as we work through things" since the filing of expert reports. *See* Transcript of June 7, 2005 Oral Argument at 10.

direct the Court to several communications between WellPoint employees "regarding numerous complaints on accuracy of retroactive capitation payments." Plaintiffs' Response at 140 (citing Plaintiffs' Response, Ex. 18). While the documents cited by the Plaintiffs note the presence of complaints, the substance of the communications demonstrates that manual adjustments were made to capitation payments. *See* Plaintiffs' Response, Ex. 18 (discussing administratively resolving payment discrepancies on the "back-end"). Further, the documents indicate attempts to correct system problems and administrative procedures leading to member and physician complaints. *Id.* Thus, rather than supporting the Plaintiffs' claims of missed payments due to intentional conduct by the Defendants, these communications actually support the Defendants' arguments and further demonstrate why Dr. Waters' declaration does not raise an issue of material fact.

Finally, even assuming for the sake of argument that the Plaintiffs could show a dispute of material fact over missed capitation payments, they have not presented evidence connecting any missed capitation payments to anything other than computer error. The Plaintiffs have not presented any evidence tending to show that any missed months were the result of intentional conduct on the part of the Defendants. Further, assuming that the Plaintiffs can show that a conspiracy existed to cheat doctors, the Plaintiffs have not presented any evidence connecting any missed *capitation* payments to the alleged conspiracy to cheat doctors.

§ 17200 Claims

As just discussed, none of the remaining capitation claims can survive summary judgment. Accordingly, the Cal. Bus. & Prof. Code § 17200 claims based on the Defendants' capitation practices fail for the same reasons.

III. Conclusion

Because the Plaintiffs have not submitted evidence that would allow a jury to find reasonably in their favor on the remaining capitation claims, the Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Capitation Claims **(D.E. No. 3901)** is **GRANTED** as to all remaining capitation claims. Accordingly, capitation claims, whether related to negotiated rates or missed months, are no longer part of this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of August, 2005.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

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THE FEBRUARY 8, 2005 SERVICE LIST