

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

MISSOURI HOSPITAL ASSOCIATION, et al.)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 15AC-CC00300
)	
MISSOURI DEPARTMENT OF SOCIAL SERVICES, et al.)	
)	
Defendants.)	

JUDGMENT

This matter came before the Court on the 30 day of December, 2015, for final determination on Plaintiffs’ petition for declaratory judgment and injunctive relief. An evidentiary hearing was held on Plaintiffs’ application for preliminary judgment on July 19, 2015, and the parties have stipulated to submission of the case for judgment on the record made at that hearing. The Court having fully considered the evidence and the arguments of the parties, and being fully apprised in the premises, does hereby ORDER, ADJUDGE and DECREE as follows:

FINDINGS AND CONCLUSIONS

The Court makes the following findings and conclusions as to the matters before it:

1. Plaintiffs have standing. The Missouri Hospital Association (“MHA”) is an association of Missouri hospitals that has a number of members that are subject to the requirements imposed by Defendants that are being challenged in this matter. Further, Plaintiff Citizens Memorial Hospital District is also subject to those requirements with respect to at least one outpatient clinic that is not a “340B facility”.

2. Defendants issued a Provider Bulletin on May 22, 2015, announcing that effective July 1, 2015, all hospitals seeking Medicaid reimbursement for covered drugs administered in an outpatient or clinical setting (“covered outpatient drugs”) were to submit the claims using the National Drug Code designation and, absent the NDC, the claims would be denied. Prior to July 1, 2015, hospitals submitted claims for Medicaid reimbursement for covered drugs without the NDC and such claims were approved and paid by the Defendants. The Provider Bulletin has not gone through the rulemaking procedures of §536.021. The evidence was, further, that Defendants filed its Emergency Rule and its proposed order of rulemaking with the Secretary of State on June 19, 2015, because it could not enforce its Provider Bulletin as a rule.

3. “Any agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a ‘rule.’” *Dep’t of Soc. Services, Div. of Med. Services v. Little Hills Healthcare, L.L.C.*, 236 S.W.3d 637, 641 (Mo. banc 2007). “[A] statement of general applicability that interpreted the law and prescribed policy...require[s] promulgation, pursuant to section 536.021, to have any force and effect of law as a ‘rule.’” *Mo. Ass’n of Nurse Anesthetists, Inc. v. State Bd. of Registration for the Healing Arts*, 343 S.W.3d 348, 357 (Mo. banc 2011).

4. The substance of the Provider Bulletin of May 22, 2015, is a rule as defined by §536.010(6), RSMo. The requirements being imposed by the bulletin are generally applicable to providers of covered outpatient drug services under the MO HealthNet program. The statement is not confined to a specific set of facts, but instead, has a future effect and potential impact on any such healthcare provider. *Mo. Ass’n of Nurse Anesthetists, Inc. v. State Bd. of Registration for the Healing Arts*, 343 S.W.3d 348, 357 (Mo. banc 2011); *Dep’t of Soc. Services, Div. of Med. Services v. Little Hills Healthcare, L.L.C.*, 236 S.W.3d 637, 641 (Mo. banc 2007).

5. The Provider Bulletin of May 22, 2015, was required to be duly promulgated under the requirements of §536.021, RSMo, if it is to be enforceable. MO HealthNet's policy statement was not properly promulgated as a "rule," as required by Section 536.021, RSMo 2000. The provisions of the Provider Bulletin of May 22, 2015 are therefore "null, void and unenforceable." Section 536.021.7, RSMo.

6. Defendants filed an Emergency Rule with the Missouri Secretary of State on June 19, 2015. By its terms, the Emergency Rule implemented the NDC requirement effective July 1, 2015.

7. An emergency rule must meet specific requirements set out by §536.025, RSMo. Otherwise, it is not effective or enforceable. §536.025.1, RSMo. The conditions justifying an emergency rule are:

A rule may be made, amended or rescinded by a state agency without following the provisions of section 536.021, only if the state agency:

- (1) Finds that an immediate danger to the public health, safety or welfare requires emergency action or the rule is necessary to preserve a compelling governmental interest that requires an early effective date as permitted pursuant to this section;
- (2) Follows procedures best calculated to assure fairness to all interested persons and parties under the circumstances;
- (3) Follows procedures which comply with the protections extended by the Missouri and United States Constitutions; and
- (4) Limits the scope of such rule to the circumstances creating an emergency and requiring emergency action.

Id. Where, as here, the justification for the rule is an alleged compelling governmental interest, the agency must certify in writing the reasons why the compelling governmental interest justifies an early effective date for its enforcement. §536.025.2, RSMo. The proponent of the emergency rule is required to file the statutorily-required material with both the Secretary of State and the Joint Committee on Administrative Rules in such detail as to allow them to perform their review

functions associated with the emergency rule. §536.025.2-.5, RSMo. This material is to consist of the text of the proposed rule along with the specific facts, reasons and conclusions which support the agency's conclusion that an emergency rule is required. §536.025.2, RSMo. Among the material considerations for an emergency rule is the fiscal impact of the proposed rule as the Joint Committee reviews the proposed emergency rule for fiscal impact and may refer the matter to the respective appropriations committees of the Missouri House and Senate. §536.025.5, RSMo.

8. There is no compelling governmental interest requiring an early effective date for the requirement the Defendants seek to impose by their Emergency Rule. Based on the evidence, there is no certainty or even probability shown that Defendants will suffer a loss if the Emergency Rule is not enforced. Further, the potential and otherwise unsubstantiated loss to Defendants is not substantial enough to rise to the level of a compelling governmental interest.

9. Further, and as an alternative grounds for invalidating the Emergency Rule, even if there was a compelling government interest, the Emergency Rule is not limited to the circumstances creating the emergency and requiring emergency action, §536.025.1(4), because it denies hospitals the State share of such claims, even though the purpose of the rule is limited to a potential liability based on the federal share of the claims.

10. Further, and as an alternative grounds for invalidating the Emergency Rule, even if there was a compelling government interest, the emergency statement accompanying the Emergency Rule failed to state the specific facts, reasons and conclusions which supported the agency's conclusion that an emergency rule was required. The Emergency Rule omitted facts material to the reasons and conclusions affecting whether the Emergency Rule was required by not including information regarding the inability of hospitals to meet the requirements of the

Emergency Rule on the effective date of the rule, the resulting impact on them from the denial of claims, and the substantial costs of compliance they would incur in order to meet the requirements of the Emergency Rule. By virtue of these omissions, Defendants' emergency statement in the Emergency Rule was legally deficient.

11. The Emergency Rule was required to meet the requirements of §536.025.1, if it is to be enforceable. The Emergency Rule failed to meet those requirements in multiple respects as set out above. The Emergency Rule is therefore null, void and unenforceable. Section 536.025, RSMo.

ORDER, JUDGMENT AND DECREE

Judgment is hereby entered in favor of Plaintiffs and against Defendants, as follows:

1. It is hereby ORDERED that Plaintiffs' request for declaratory relief as to the Provider Bulletin of May 22, 2015, is hereby GRANTED and it is hereby DECLARED that (i) the Provider Bulletin is a rule pursuant to §536.010(6), RSMo.; (ii) that it was not duly promulgated as required by chapter 536, RSMo; and (iii) that it is "null, void and unenforceable" pursuant to §536.021.7, RSMo, for the failure to duly promulgate it.

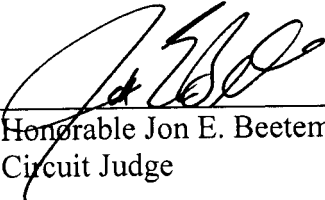
2. It is hereby ORDERED that Plaintiffs' request for a permanent injunction as to the Provider Bulletin of May 22, 2015, is hereby GRANTED and it is ORDERED that Defendants Missouri Department of Social Services and MO Healthnet Division, their respective officers, agents, representatives, employees and successors, and all other persons in active concert and participation with Defendants be and they are hereby permanently RESTRAINED AND ENJOINED from proceeding with any further action to enforce, apply, carry out or give validity to the Provider Bulletin of May 22, 2015, and any of its provisions.

3. It is hereby ORDERED that Plaintiffs' request for declaratory relief as to the Emergency Rule is hereby GRANTED and it is hereby DECLARED (i) that there was no compelling governmental interest justifying an early effective date for the Emergency Rule; that even if there was a compelling governmental interest, the Emergency Rule is not limited to the circumstances creating the emergency and requiring emergency action; and , even if there was a compelling government interest, the emergency statement accompanying the Emergency Rule failed to state the specific facts, reasons and conclusions which supported the agency's conclusion that an emergency rule was required; (ii) that the Emergency Rule failed to meet the requirements of §536.025.1, because of those deficiencies; and (iii) that the Emergency Rule is null, void and unenforceable pursuant to §536.025, RSMo, for failure to meet the requirements of §536.025.1, RSMo.

4. It is hereby ORDERED that Plaintiffs' request for a permanent injunction as to the Emergency Rule is hereby GRANTED and it is ORDERED that Defendants Missouri Department of Social Services and MO Healthnet Division, their respective officers, agents, representatives, employees and successors, and all other persons in active concert and participation with Defendants be and they are hereby permanently RESTRAINED AND ENJOINED from proceeding with any further action to enforce, apply, carry out or give validity to the Emergency Rule and any of its provisions.

5. The parties are to bear their own costs, expenses and fees, including attorney fees, related to this matter.

So ordered this 30 day of December, 2015.



Honorable Jon E. Beetem
Circuit Judge