

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
San Francisco County Superior Court

IMAGE
MAR 03 2004

MAR 03 2004
CORSON PARKER, Clerk
BY: *[Signature]*
Deputy Clerk

CALIFORNIA SUPERIOR COURT, UNLIMITED JURISDICTION
COUNTY OF SAN FRANCISCO
DEPARTMENT 301

KEVIN CONLAN, ASHER
SCHWARZMER and THOMAS
STEVENS,

Petitioners,

vs.

DIANA BONTA, DIRECTOR,
CALIFORNIA DEPARTMENT OF
HEALTH SERVICES; CALIFORNIA
DEPARTMENT OF HEALTH SERVICES,
et al.,

Respondents.

987697

**ORDER DENYING MOTION TO
APPROVE THE CALIFORNIA
DEPARTMENT OF HEALTH
SERVICES'S COMPLIANCE PLAN
WITHOUT PREJUDICE**

Respondents' Motion to Approve the Compliance Plan of the California Department of Health Services came on regularly for hearing on January 29, 2004, in Department 301 before the Honorable James L. Warren. This action was remanded by the Court of Appeal with instructions for the trial court to oversee the Respondents' adoption and implementation of a revised and expanded plan to reimburse Medi-Cal recipients. This motion was originally heard on November 18, 2003. Following that hearing, the Court requested supplemental

ORDER DENYING APPROVAL OF COMPLIANCE PLAN WITHOUT PREJUDICE

1 briefing on four issues: (1) how to place potential beneficiaries of reimbursements on notice
2 of their claims; (2) whether to apply *Conlan v. Bonta*, 102 Cal. App. 4th 745 (2002)
3 retroactively; (3) whether reimbursement should be limited to the Medi-Cal rates for the
4 services provided or whether the beneficiaries are entitled to full reimbursement at a non-
5 Medi-Cal provider's rate; and (4) whether the Administrative Law Judges who will be
6 conducting hearings pursuant to the *Conlan* decision are subject to the 90-day time limitation
7 imposed by *Ball v. Swoap*, an Alameda trial court decision.
8

9 During the hearing, the Court and the parties focused primarily the wording of the
10 draft notice that Respondents created to alert potential beneficiaries of their opportunity to
11 request reimbursement (the "Notice"). That focus raised nearly all of the issues addressed by
12 the parties in their supplemental briefs. The remaining issues were addressed independently
13 at the end of the hearing. Following the hearing, the Court took the matter under submission.
14 After the hearing date, each side filed additional briefing on the issues and Respondents
15 provided a revised, but still inadequate, version of the Notice for the Court's review.
16

17 Respondents indicated in their papers and at oral argument that they intended to send
18 the Notice to potential beneficiaries with their next *Jackson v. Rankin* letters in early
19 February. While the Court appreciates the importance of providing notice to the potential
20 beneficiaries as soon as possible, it also recognizes that the substance of the Notice must be
21 accurate. Such accuracy mandates that the Court issue this order, then review the Notice
22 once more before it is mailed.
23

24 Rather than dictate the exact wording that Respondents must use in the Notice, the
25 Court sets forth here its determinations with respect to a number of legal issues over which
26 the parties have been unable to reach accord. With this guidance, the Court trusts that
27 Respondents will be able to fashion an acceptable Notice.
28

1 **1. Who should receive the Notice?**

2 Respondents have agreed to send the Notice to all current Medi-Cal recipients. They
3 have indicated that they have no addresses for past recipients. It is unacceptable that all
4 former Medi-Cal recipients, even those who terminated their participation yesterday, will be
5 unable to recover their covered expenses simply because Respondents may not maintain a
6 database of recipients. The Court encourages Respondents to locate a source of information
7 that will identify former Medi-Cal recipients. While the Court understands that Respondents
8 may not have current addresses for several of these individuals, Respondents should attempt
9 to send the Notice to both current and former Medi-Cal recipients.
10

11 **2. Should *Conlan* be applied retroactively?**

12 Yes. Every Medi-Cal recipient who received eligible medical services on or after
13 June 27, 1997, the date this petition was filed, should receive the Notice.
14

15 **3. Should covered services provided during the “evaluation period” be covered?**

16 Yes. Under the current Notice, reimbursement would be possible for covered
17 services administered during the three months before the application is submitted to Medi-
18 Cal for review, and for expenses incurred between a denial of coverage and the determination
19 that that denial was erroneous. Under *Conlan*, DHS must also reimburse expenses incurred
20 while the application is pending. This is precisely the situation in which petitioner Kevin
21 Conlan found himself. He applied for coverage in October 1997 when his baby was born and
22 the application was not granted until April 1998. When he applied for reimbursement for
23 expenses incurred between October 1997 and April 1998, DHS denied reimbursement. The
24 Court of Appeal found this treatment unacceptable and ordered DHS to create a plan that
25 would cover the situation that Kevin Conlan faced. Accordingly, the Notice should indicate
26 that recipients can apply for reimbursement for the three-month period before they applied
27 for coverage.
28

1 for Medi-Cal benefits, for the time period during which their application was pending, and
2 for the time period between a denial of their application and the reversal of that decision.

3 **4. Will covered services rendered by non-Medi-Cal providers be eligible for**
4 **reimbursement?**

5 Yes. Under *Conlan*, recipients must be made whole for their out-of-pocket expenses.
6 *Conlan v. Bonta*, 102 Cal. App. 4th at 757. As a part of the Medicaid program, Medi-Cal
7 must provide comparable medical services to every participant. Accordingly, each
8 participant must be reimbursed whether they received covered services from a Medi-Cal
9 provider or from a non-Medi-Cal provider. Respondents' suggest that non-Medi-Cal
10 providers could apply for temporary Medi-Cal participation. This proposed solution creates
11 a new version of the same problem presented in *Conlan*. The non-Medi-Cal providers have
12 no financial incentive to apply for temporary Medi-Cal status and thus, most likely will not.
13 If even one doctor does not apply, the comparability provision of the Medicaid Act would be
14 violated. In order to comply with *Conlan*, this Court requires that Respondents' Notice
15 inform Medi-Cal recipients that they may be entitled to reimbursement for covered services
16 provided by either Medi-Cal providers or non-Medi-Cal providers.

17 **5. Full reimbursement is required.**

18 The compliance plan must fully reimburse Medi-Cal participants for their out-of-
19 pocket expenses. As stated above, participants are entitled to seek reimbursement for
20 expenses paid to non-Medi-Cal providers. In addition, the Medi-Cal recipients are entitled to
21 full reimbursement, not simply reimbursement at the Medi-Cal rate for their covered
22 services. As Petitioners point out, singling out a group of recipients for only partial payment,
23 while other participants receive full payment, would violate the comparability provision of
24 the Medicaid Act relied upon by the Court of Appeal. *Id.* at 754.
25
26
27
28

1 **Briefing Schedule**

2 This order is intended to clarify the issues necessary to draft an accurate Notice. The
3 Court request that Respondents provide a revised draft of the Notice by March 16, 2004.
4 Petitioner shall have until March 23, 2004, to file any comments about the revised Notice,
5 and the Court will hold a hearing on March 29, 2004, to discuss the Notice.
6

7
8 IT IS SO ORDERED.

9
10
11 Dated: 3/2/04

By: 

The Honorable James L. Warren
Judge of the Superior Court

California Superior Court
City and County of San Francisco
Law & Motion Department • Room 301

KEVIN CONLAN, ASHER
SCHWARZMER and THOMAS
STEVENS,

Plaintiffs,

vs.

DIANA BONTA, DIRECTOR,
CALIFORNIA DEPARTMENT OF
HEALTH SERVICES; CALIFORNIA
DEPARTMENT OF HEALTH SERVICES,
et al.,

Defendants.

No. **987697**

**Certificate of Service by Mail
(CCP § 1013a(4))**

I, Gordon Park-Li, Clerk of the Superior Court of the City and County of San Francisco, certify that:

1) I am not a party to the within action;

2) On **MAR - 3** 2004 , I served the attached:

**ORDER DENYING MOTION TO APPROVE THE CALIFORNIA DEPARTMENT
OF HEALTH SERVICES'S COMPLIANCE PLAN WITHOUT PREJUDICE**

by placing a copy thereof in a sealed envelope, addressed to the following:

Donald L. Nelson
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

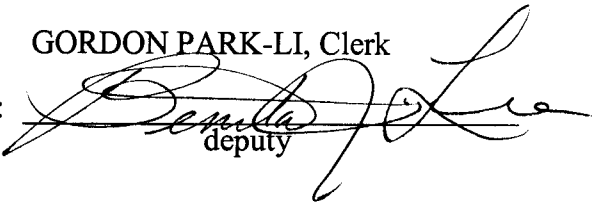
Michael Keys, Esq.
Bay Area Legal Aid

50 Fell Street
San Francisco, CA 94102

and,

3) I then placed the sealed envelope in the outgoing mail at 400 McAllister St., San Francisco, CA 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practice.

Dated: **MAR - 3 2004**

GORDON PARK-LI, Clerk
By: 
deputy