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Cohen, Silvestri & Hammer, P.C. and Michael P. Adams, D.D.S.

v.

Dental Service of Massachusetts, Inc., d/b/a Delta Dental Plan of Massachusetts

Docket No. B2014-01

Order on Respondent's Motion for Summary Decision

Procedural History

On July 11, 2014, Cohen, Silvestri & Hammer, P.C. ("CSH") and Michael P. Adams, D.D.S. ("Dr. Adams") (collectively, the "Petitioners") sent to the Commissioner of Insurance ("Commissioner") a copy of a complaint that CSH had filed on May 9, 2012 in the Massachusetts Superior Court for Suffolk County against Dental Service of Massachusetts, Inc., d/b/a Delta Dental Plan of Massachusetts ("Delta Dental"). Because the trial court had dismissed the case, declining jurisdiction on the ground that Petitioners had failed to exhaust their administrative remedies, Petitioners sought a hearing before the Board of Review ("Board") in the Division of Insurance ("Division") pursuant to M.G.L. c. 176E, §12 ("§12").

On October 15, 2014, the Chair of the Board notified the Petitioners and Delta Dental that the matter had been docketed and that she would convene a Board as prescribed by §12. On April 1, 2015, she advised the parties that members of the Board had been appointed and issued an initial order that required Petitioners to submit a prehearing statement by April 30, 2015, and Delta Dental to submit a response by June 1, 2015.¹ Petitioners timely filed their statement; Delta Dental responded by filing a motion for summary decision.

Delta Dental did not request a hearing on its motion. Petitioners submitted an opposition to that motion on June 25, 2015, but did not request a hearing at that time. On July 10, Delta Dental filed a memorandum responding to the Petitioners' opposition. Petitioners, on July 15, filed a motion to amend their petition to include the amended complaint it had filed in Superior

¹ Members of the Board are Jean F. Farrington, Esq., Counsel to the Commissioner of Insurance, who serves as the Chair, Emily Gabrault, Esq., appointed by the Attorney General, and Samuel Leadholm, Esq., designee of the Chair of the Board of Registration in Dentistry.

Court and a motion to schedule oral argument.² Delta Dental opposed the motion to amend. On July 29, 2015, after reviewing both the motion and Delta Dental's opposition, the Board issued an order allowing the motion to amend. Delta Dental did not oppose the motion for oral argument. The hearing, initially scheduled for June 15, 2016, took place on July 28, 2016.

Prior Judicial Proceedings

On May 9, 2012, CSH filed a complaint against Delta Dental in the Superior Court; on May 30, 2012, it amended that complaint to add Dr. Adams as a plaintiff. The complaint was brought on behalf of a putative class of Massachusetts dentists and dental practices and, in brief, alleged that: 1) Delta Dental breached its provider contracts by limiting reimbursement rates, or increases to those rates, through application of data from the Consumer Price Index ("CPI") to data on dentists' actual charges; 2) the contracts did not permit application of such a limitation, nor was it approved by the Division; 3) even if Delta Dental were allowed to apply a CPI adjustment to cap the maximum allowed payment, it breached its contract by applying a CPI that did not relate specifically to the practice of dentistry; and 4) Delta Dental's alleged acts were unfair and deceptive practices that violated M. G. L. c. 93A, §11. Petitioners sought certification of a class, entry of judgment in favor of that class, double or treble damages as permitted under M.G. L. c. 93A ("c. 93A"), and an award of attorneys' fees.

Delta Dental moved to dismiss the Superior Court complaint on the grounds that it alleged matters which, pursuant to M. G. L. c. 176E, §4, lie within the Commissioner's purview and that Petitioners had failed to exhaust their administrative remedies under §12. On November 19, 2012, the Superior Court allowed Delta Dental's motion. On January 24, 2014, the Appeals Court affirmed the Superior Court's decision; on June 10, 2014, the Supreme Judicial Court denied further appellate review.³

The Administrative Proceeding

Petitioners' Arguments

The Petitioners' prehearing statement in response to the Board's April 1, 2015 order expanded on the allegations in the Superior Court complaint. To their breach of contract and c. 93A claims, Petitioners add claims for fraud, promissory estoppel and unjust enrichment. Petitioners contend that Delta Dental adopted a change to the reimbursement formula in April 1990, implemented that methodological change without first obtaining the Division's approval and did not communicate it to participating dentists. Petitioners assert that as a result of Delta Dental's action their payments from Delta Dental were reduced.

The Petitioners' dispute arises from Delta Dental's approach to calculating "customary" fees, a construct that, in effect, sets an upper bound on payments to dentists who participate in

² In that memorandum, Delta Dental pointed out that the complaint Petitioners submitted on July 11, 2014 was their initial class action complaint, which did not name Dr. Adams as a party. Petitioners, on July 15, moved to substitute the Amended Complaint that had been filed in the Superior Court on May 30, 2012.

³ Petitioners submitted, as part of their prehearing statement, records of the proceedings at the Superior Court and Appellate Courts.

the Delta Premier program.⁴ The Petitioners chronicle Delta Dental's approaches to methodologies through a series of documents, including documents and decisions in administrative proceedings considering those methodologies that were held in 1996 and 2008.⁵

The methodology for developing Premier plan fees has two principal components. For each participating dentist or dental practice group, Delta Dental calculates a "usual" fee profile, a value derived from what the individual dentist or the group practice actually charges patients for a particular procedure. A "customary" fee, applicable to determining fees for all participating dentists, is then calculated at the 90th percentile of Massachusetts dentists' aggregate "usual" charges for a particular procedure. If the participating dentist or dental practice group's "usual" fee exceeds the customary fee, Delta Dental reduces the payment to no more than the customary fee.⁶ Both the "usual" and "customary" fees are adjusted periodically to reflect fee data that dentists report to Delta Dental.⁷ Before implementing the adjusted fees, Delta Dental files a statement at the Division of Insurance reporting the proposed fee changes in the Premier plan.⁸ It attaches an "Outline of Reimbursement for Participating and Nonparticipating Dentists and Participating Group Practices" to its agreement with participating dentists.⁹

Beginning in April 1990, in adjusting its customary fees, Delta Dental calculated the effect of the CPI on the most recent periodic set of customary fees, comparing it to the effect, on that same set of customary fees, of increased usual fees reported by participating providers. If the latter exceeded the former, Delta Dental limited the customary fee adjustment to the CPI increase. The Petitioners' dispute with Delta Dental arises from that choice.

The Petitioners' petition to the Board echoes the complaint filed in the Superior Court. They assert that, following the court decisions, "it appears that [the Commissioner] has the authority to hear class claims and claims under 93A." They reiterate that position in their Prehearing Statement, arguing that the Appeals Court ruled that the Division has the authority to hear class action claims. Further, Petitioners contend, the class action complaint is timely because M.G.L. c. 176E, §4 has no time limitation. In any event, they argue, any statute of limitation is tolled when a class action is pending. They assert as well that the discovery rule applies to their allegations of breach of contract and fraud. Petitioners ultimately seek the same relief from the Board as that requested in the Superior Court: 1) certification of a class; 2)

⁴ Delta Dental does not have a single methodology for compensating participating dentists. Plans, for example, may pay participating dentists according to a Table of Allowances, or a Schedule of Maximum Covered Charges. Some plans require the patient to pay a portion of the dentist's charges. Petitioners' complaint relates only to Delta Premier.

⁵ Pursuant to M.G.L. c. 176E, §4, the fees that Delta Dental pays to participating providers, or the methodology for determining such fees, is subject to a public hearing. Such hearings are administrative proceedings, conducted by the Commissioner or his or her designee pursuant to M.G.L. c. 30A, §2, that focus on whether the proposed methodology will produce rates that satisfy the statutory standards. In contrast, a proceeding before the Board reflects a dispute between a participating dentist and a dental service corporation.

⁶ According to the materials submitted by the Petitioners, the payment must be within the 90th percentile. In 1976, the Commissioner issued a decision approving Delta Dental's proposal to modify the customary payment methodology from one based on a statistical analysis (mean plus one) to one setting the maximum customary payment at the 90th percentile of charges by all dentists.

⁷ In May, 1979, the Commissioner issued a decision approving Delta Dental's request to adjust usual and customary fees every six months. Before then, those fees were subject to a single annual adjustment.

⁸ See Petitioner's Exhibit I to its preliminary statement.

⁹ Four examples of that Outline are attached as exhibits B, C, D and Q to Petitioners' statement. They cover various periods beginning in 1979, 1989, 2007 and 2008.

judgment in their behalf pursuant to their contract and related claims under c. 176E, §4; 3) a ruling that Delta Dental knowingly or willfully violated c. 93A and an award of treble damages and attorney's fee; and 4) an order requiring that Delta Dental provide each of its dentists with an accounting for all payments made to them between April 1, 1990 and December 31, 2010.

Delta Dental's Response

Delta Dental moved for summary decision on May 29, 2015, contending, in brief, that Petitioners' claims are time-barred and therefore should be dismissed. Delta Dental points out that §12 permits disputes between participating dentists and a dental service corporation to be submitted to a Board within 30 days after the date on which the dispute or controversy arises. In this matter, it argues, the essence of the dispute is Delta Dental's application of a CPI in calculating increases to customary fees. Delta Dental comments that Petitioners do not identify any actions occurring later than January 1, 2011 as the basis for their claims.

Delta Dental contends that any dispute between the Petitioners and Delta Dental over the use of a CPI to calculate increases in customary fees arose in 1990, and terminated well before the Petitioners' submitted this dispute to the Board. Delta Dental points out that the Commissioner considered the use of such a cap in an administrative proceeding initiated by the Massachusetts Dental Society in 2008, and that it stopped applying a CPI cap on December 31, 2010.¹⁰

Delta Dental argues that Petitioners attempted to avoid application of the limitations period in §12 by filing a complaint with the Superior Court, requesting a hearing before a Board only after the judicial action was dismissed on the ground that Petitioners failed to exhaust their administrative remedies. Massachusetts law, it asserts, in such circumstances bars a litigant who did not pursue its administrative remedy within the applicable time frame from initiating an administrative action after such dismissal.

Jurisdictional Issues

The Petitioners offer no legal support for the premise that two of the four specific forms of relief they seek are available from the Board. They ask for certification as representatives of a class pursuant to Mass. R. Civ. P. 23.1, and they seek rulings that Respondent violated c. 93A and that those alleged violations support an award of treble damages and attorney's fees. Petitioners, in their petition for a Board hearing, contend that they initially filed a civil action in the Superior Court because they did not believe the Division provided the proper forum for class claims and that by statute it did not have jurisdiction over c. 93A claims. Because the Superior Court dismissed the action for failure to exhaust administrative remedies, a decision that the Appeals Court affirmed and that the Supreme Judicial Court declined to review further, Petitioners suggest that the Appeals Court ruled that the Division of Insurance has authority to conduct a class action and to hear 93A claims.¹¹ Their arguments are not persuasive.

In *Massachusetts State Pharmaceutical Association v. Rate Setting Commission*, 387 Mass. 122 (1982), the Supreme Judicial Court affirmed a decision by the Division of Hearing

¹⁰ A decision in that proceeding was issued on April 14, 2009.

¹¹ The argument seems to infer that such authority would devolve both on the Commissioner and on an entity such as the Board.

Officers (“Division”) that it had no authority to consider a class action.¹² The court pointed out that the Division had no rule permitting such actions, and that absent any statutory authorization or agency rule the class action aspect of the plaintiff’s appeal was properly dismissed.¹³ Hearings on petitions before the Board are conducted as adjudicatory proceedings pursuant to M.G.L. c. 30A and the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 and 1.03. Those rules make no provision for class actions.¹⁴

With respect to Petitioners’ claims under c. 93A, the statute confers jurisdiction on the superior court or the housing court. It creates no jurisdiction in administrative agencies. The Petitioners offer no support for setting aside the principles on class actions articulated by the Supreme Judicial Court or the statutory jurisdictional requirements for claims under c. 93A. For those reasons, the Petitioners claims for certification as a class action and for a hearing on claims under c. 93A are hereby dismissed.

Petitioners Claims under M.G L. c. 176E, §4

The Petitioners base their claims on c. 176E, §4, which addresses a range of issues, among them regulatory oversight of a dental service corporation’s contracts and fee arrangements with participating dentists. The form of the agreement with participating dentists is subject to the Commissioner’s written approval; the fees, or the method of determining such fees, are subject to a public hearing under M.G.L. c. 30A, §2 and the Commissioner’s written approval.¹⁵ By statute, those fees may not be equal to or higher than the fees participating dentists on average charge patients who are not Delta Dental subscribers. Section 4 also sets a schedule for paying claims submitted by participating dentists; if payment is not made within 45 days after Delta Dental receives the notice of claim, it must specify to the dentist the reasons for nonpayment or what must be submitted to support payment of the claim. Chapter 176E, §4 does not create a framework for participating dentists to contest, in an administrative forum, the fees they personally receive from Delta Dental. Under §12, such disputes may be submitted to the Board in compliance with the time frame prescribed by that statute.

¹² The Division of Hearing Officers is now the Division of Administrative Law Appeals.

¹³ M.G.L. c. 176B, §12, which permits disputes or controversies between a medical service corporation, *i.e.*, Blue Shield, and participating health care providers to be heard by a Board of Review, permits some cases that the Board is unable to resolve to be heard as a class action in Superior Court under Mass. R. Civ. P. 23.1. There is no parallel provision in c. 176E, §12.

¹⁴ In addition to arguing that the Board can certify a class, Petitioners contend that the proposed class action is timely because c. 176E, §4 requires Delta Dental to respond to a notice of claim [for payment] by a participating dentist within 15 days after receiving the notice. They argue that because the statute imposes no time limitation on when dentists must submit that notice of claim, they can submit then at any time, regardless of when they arose. Petitioners do not reconcile that statement with language in the Participating Dentists’ Handbook that requires participating dentists to report services provided to Delta Dental subscribers monthly or within 30 days from completing the service. At issue in this proceeding is when Petitioners became, or should have become, aware of the incorporation of a CPI factor into calculating the maximum customary fee. By 2008, that issue was a matter of public review, and was specifically described by Delta Dental in a document submitted as Delta Dental Exhibit 9 in the regulatory proceeding on its fee methodologies initiated in December 2008, Docket No. G2008-10. Petitioners’ argument that their current objections to the amount of payment they received in the past should be viewed as “claims” for payment is no more persuasive.

¹⁵ In practice, the Commissioner does not approve the specific fees paid to participating dentists, but approves the method of determining those fees. As noted above, those hearings on fee methodologies are regulatory, not adjudicatory.

Delta Dental moved for summary decision, arguing that the petition should be dismissed because it was not filed within the statutory time limits applicable to petitioners for Board hearings. It points out that the underlying issue, Delta Dental's use of the CPI in calculating the "customary" fees for dentists participating in its Premier Plan, was the subject of a public hearing at the Division initiated in 2008 and decided in 2009.¹⁶ Delta Dental argues, further, that some years earlier the CPI issue was widely known in the dental community.¹⁷

The Petitioners oppose summary decision, contending that their petition was timely submitted to the Board. They allege that, in April 1990, Delta Dental implemented a methodological change to the formula used to calculate the "customary" component of fee payments to dentists participating in its Premier Network plan without first obtaining the Commissioner's approval, and did not communicate the change to its participating dentists. Framing those events as a breach of the contract between Delta Dental and its participating providers, Petitioners contend that, as a result of that breach, they incurred monetary losses in the form of reduced payments from Delta Dental. Petitioners argue that between 1990 and 2008 Delta Dental failed to comply with an obligation to inform them of alleged changes in its reimbursement formula, asserting that it did not revise the Outline of Reimbursement for Participating and Nonparticipating Dentists and Participating Group Practices to include a specific reference to use of a CPI to measure increases to the customary fee range.¹⁸ They assert that they became aware of their breach of contract claim only in 2012, shortly before filing their suit in the Suffolk Superior Court.

Petitioners' claims are based on assertions about Delta Dental's rate filings over an eighteen year period that ended in 2008, and the purported effect of those filings on reimbursements to them as participating dentists.¹⁹ Petitioners argue that because they frame their complaints as a breach of contract and under c. 93A, the statutes of limitation applicable to such actions should apply. They offer no support for that theory.²⁰

Petitioners' seek relief before a Board convened pursuant to §12. That statute establishes its own timeliness requirement for bringing a matter to the Board. Petitioners offer no persuasive evidence that they were unaware of the 2008 proceeding, or Delta Dental's March 2008 revision to the reimbursement guidelines, asserting that they were unaware of the basis for complaints

¹⁶ *Concerning Fees that Dental Services of Massachusetts, Inc., d/b/a Delta Dental Plan of Massachusetts, Pays Participating Providers and the Method Used to Determine Such Fees Pursuant to M.G.L. c. 176E, §4*, DOI Docket No. G2008-10.

¹⁷ Exhibit 6 to Delta Dental's motion is a "Delta Task Force Advisory," dated January 2005, that the Massachusetts Dental Society distributed to its members. It states that the Task Force was investigating the possibility of eliminating the Delta Dental 5 percent discount and the cap on statewide maximum fees.

¹⁸ Petitioners attached to their prehearing statement copies of outlines of reimbursement that refer to periodic adjustments to the customary fees. Exhibit Q, titled *Methods of Reimbursement for Delta Dental Premier*, Revised 3/2008, refers to the use of a CPI in calculating increases to the customary maximum fee.

¹⁹ CSH executed a group practice agreement with Delta Dental on June 16, 1994, that Delta Dental executed on June 13, 1995, and has been a participating practice in the Premier Network since then. Dr. Adams executed a participating dentists' agreement with Delta Dental in 1998. Their complaint, however, is not limited to alleged events occurring after those dates.

²⁰ Further, they allege that because Delta Dental concealed information from them, the discovery rule delayed the running of the statute of limitations for such claims. Even assuming, *arguendo*, that 1) Delta Dental was required to notify participating dentists individually of the CPI factor, and 2) did not do so, we are not persuaded that the information was not available to the Petitioners some six years before they petitioned the Board for relief.

against Delta Dental until the spring of 2012. They offer no explanation for the delayed assertion of a connection between their reimbursement levels and the issues raised in the 2008 proceeding.

Conclusion

On the record in this proceeding, we conclude that Petitioners’ dispute over Delta Dental’s use of a CPI factor to adjust the customary fees that serve as an upper bound on fees for dentists participating in its Premier plan arose before May 2012, when it filed its civil suit in Suffolk Superior Court. At that time, Petitioners elected to pursue their claims through the judicial system.²¹ Petitioners offer no support for their attempt to revive their option for an administrative proceeding under §12. Even if that were permissible, in light of prior Division hearings and decisions on Delta Dental’s use of a CPI factor, we find that the alleged actions that form the basis for this dispute had been abandoned long before Petitioners sought a hearing at the Board. Petitioners identify no event occurring within thirty days before they sought this hearing that affected their reimbursement levels. Their efforts to construct a framework to justify their delayed petition are not persuasive.

For the above reasons, Delta Dental’s motion for summary decision is allowed. The Petitioners’ request is hereby dismissed.

Date: October 23, 2017

Jean F. Farrington, Esq.
Chair, Board of Review

Samuel Leadholm, Esq.
Board of Review

Emily Gabrault, Esq.
Board of Review

²¹ Petitioners were apparently unable to persuade the trial or appellate courts that their claims should be distinguished from those in *Nelson v. Blue Shield of Massachusetts, Inc.*, 377 Mass. 746 (1979).