

No. GV 204523

THE STATE OF TEXAS,

v.

AMCARE HEALTH PLANS OF TEXAS, INC.
and AMCARE MANAGEMENT, INC.

In The District Court
In Travis County, Texas
200th Judicial District

**FURTHER RESPONSE OF THE SPECIAL DEPUTY RECEIVER
TO AMENDED MOTION OF MEDIMPACT HEALTHCARE SYSTEMS, INC.**

Jean Johnson, as Special Deputy Receiver of AmCare Health Plans of Texas, Inc. and AmCare Management, Inc. (the *SDR*) submits this further response to the Amended Motion of MedImpact HealthCare Systems, Inc. (*MedImpact*). This further response is directed to the Reply MedImpact filed on Friday, October 20, 2006, but served on the SDR on October 23, 2006 (the *Reply*). This Response is filed with permission of the Special Master, granted on October 23, 2006.

1. What Are Facts And What Are Assertions?

MedImpact wrongly states as a fact that it is undisputed that the 3 companies now in receivership in Texas, Oklahoma and Louisiana entered into an agreement as a unitary health plan. [See p. 1 of the Reply]. MedImpact does not attempt to explain to the Court

what a “unitary health plan” could be or what it means by that phrase. Clearly, the health plans offered by the AmCare entities were each regulated by the 3 respective states in which the companies offering them were incorporated. In its initial reply, the SDR pointed out the corporate uniqueness of each company and the regulatory control expended by the respective states over each company. The SDR also pointed out that MedImpact clearly contracted with distinct corporate entities and that this was set out in the agreement upon which it relies. The SDR further pointed out that MedImpact may not litigate here whether there was commonality in order to secure the relief it seeks in its motion. MedImpact ignores entirely this analysis in its Reply, choosing instead to merely restate that all 3 companies are one. MedImpact made that same claim in the proof of claim it presented to the SDR. That claim was rejected when the proof of claim was rejected. MedImpact has sought review of the action by the SDR as allowed by the Texas Insurance Code. It also seeks to wrongly hedge its position by filing suit in another state, away from this Court, and ultimately to shift the analysis away from a judge by placing it in arbitration.

MedImpact also wrongly states what has happened with other litigation brought by the SDR. As this Court well knows, the SDR sued a number of people and entities in this Court in connection with the failure of AmCare Health Plans of Texas, Inc., and AmCare Management, Inc., in an effort to recover assets to pay Texas claimants. The Louisiana

receiver had filed a lawsuit against some of those same persons and entities in that estate's receivership court in Baton Rouge. When it appeared that the Louisiana case would proceed to trial first, and that the resolution of issues there could preclude the litigation of claims in Texas, the SDR received permission to and did intervene in the proceeding in Baton Rouge in order to assert her claims against Defendants to recover for Texas claimants. The SDR tried her claims to a jury, receiving a verdict and a judgment (which is now being appealed). The Louisiana and Oklahoma receiver's tried their claims to the bench. Had the SDR sued MedImpact there as well, the briefs now filed by MedImpact might have merit. However, the SDR did not sue MedImpact in Louisiana. Indeed, the SDR has not sued MedImpact anywhere. This absence of litigation is a major pitfall to MedImpact's analysis.

2. The Only False Contention Here Is MedImpact's Claim That It Has Engaged In Direct Negotiation

MedImpact is correct when it says that a Court cannot rewrite a contract. [*See Reply* at p. 2, fn. 2]. Yet, that is exactly what it asks this Court to do. The Service Agreement upon which MedImpact relies is very specific about Direct Negotiation. The introductory sentence of the grievance procedure (par. 9.1 of the Service Agreement) states:

MedImpact and Health Plan hereby agree to handle a dispute, claim or grievance between the parties hereto, exclusively in the following manner: Should said direct negotiation, as

described elsewhere herein, fail to reach agreement with respect to any dispute, . . .

The grievance procedure paragraph goes on to state that:

Controversies or claims between MedImpact and Health Plan arising out of or relating to the interpretation or application of this Agreement, or breach thereof, must first be addressed and attempt to be resolved by direct negotiation.

Counsel for MedImpact says that he tried direct negotiation and therefore, the parties can move on to arbitration. He is wrong, but MedImpact then attempts to have the Court re-write the agreement when it states:

It would, however, be a nonsensical, Alice in Wonderland construction of the dispute resolution clause to precondition a party's right to demand arbitration of a dispute on the prior successful negotiation of a settlement of the dispute.

Perhaps MedImpact does not understand its own agreement. The agreement called for direct negotiation of disputes prior to the time that a party may seek arbitration. The evidence from the SDR is that she has attempted to gather from MedImpact further information from MedImpact with respect to the proof of claim it filed, the rejection of which it has appealed. MedImpact has not attempted to provide that further information or even to respond to the request.

It is true, counsel for MedImpact did send a settlement offer to the SDR after filing the motion now pending. The SDR would be pleased to share it with the Court if MedImpact

will waive the protection of Tex. R. Ev. 408. The Court can then evaluate for itself whether MedImpact has engaged in direct negotiation as it is required to do under its agreement.

There is no doubt that MedImpact did not.

The SDR has attempted to gain from MedImpact more information about its claim. MedImpact has refused to provide it. The SDR has attempted to involve a third party neutral to assist the parties in negotiating MedImpact's claim. MedImpact has refused. The agreement specifically provides, much to MedImpact's anguish, that MedImpact must directly negotiate as a condition precedent to seeking arbitration. Whether it views that as being in Alice in Wonderland or not, it is a world largely of MedImpact's own making.

MedImpact has failed to engage in direct negotiation with the SDR and therefore, it should not be allowed to circumvent that obligation by seeking from this Court permission to sue the SDR in Oklahoma federal court so that it can then seek to have arbitration enforced in San Diego.

3. Where Is The Claim?

While MedImpact has used a lot of words over a lot of pages, none of them can be organized in a way to reflect a coherent statement of what claim the SDR is allegedly pursuing against MedImpact that needs to be resolved in some forum outside this Court.

MedImpact filed a claim with the SDR in this Court. The SDR rejected the Claim.

MedImpact has sought further review by the SDR and the SDR has been attempting to conduct that further review. The proof of claim is premised on the right to recover from the Texas receivership estate money allegedly due MedImpact for the claims of member of health plans based in Oklahoma and Louisiana that are in receivership.¹ MedImpact does not like the disposition of its claim to date by the SDR and wants to litigate elsewhere the legitimacy of *its* claim. As the entirety of MedImpact's presentation is premised wrongly on the conclusion that the SDR is seeking relief against MedImpact, its Motion must fail.

4. It's Not Personal, It's The Money

In the Reply MedImpact presents a thorough, but inconsequential presentation on the various forms of jurisdiction. The important point MedImpact seeks to make is that it is seeking a personal judgment against the SDR, so it can do that where it pleases. That is ridiculous. What is the personal claim that MedImpact has against the SDR? In the multitude of pages that MedImpact has submitted on this matter, the Court will not find any. MedImpact is not claiming that the SDR has done anything wrong since her appointment. MedImpact is not seeking damages against her. MedImpact is not seeking to liquidate and otherwise unliquidated claim. MedImpact did not have on file anywhere a

¹ MedImpact concedes in the Reply: "No doubt, MedImpact asserts a substantial claim against the receivership estate for pharmacy benefits that its participating pharmacies dispensed to enrollees during the few months immediately preceding the insolvency of the AmCare entities. . ."

lawsuit that was interrupted by the receivership of a defendant. This is simply a case in which MedImpact wants to establish its right to any money that may be distributed by this Court in response to the SDR's rejection of the claim filed in the receivership. The SDR says that under the circumstances of this case, this Court gets to decide whether MedImpact has a claim, and if so, to what extent.

Missing from the analysis MedImpact presents is attention to the role the SDR plays in the liquidation process of the Texas AmCare entities. The SDR is merely an officer of the Court; the Court holding the assets of the companies in *custodia legis*. Farm & Home Saving & Loan Association v. Breeding, 115 S.W.2d 615 (Tex. 1938); Ex Parte: Griffitts, 711 S.W.2d 225 (Tex. 1986). The SDR acts for the Court with respect to the assets. Therefore, MedImpact is actually attempting to direct the Court what to do with assets as concerns MedImpact. Yet, MedImpact states that it is not seeking to establish the liability of the assets on its claim, but rather that it is seeking to enforce a personal obligation or right, that is a judgment, against the SDR rather than adjudication of rights to or in particular property. [See Reply at p. 9, ¶16]. What does that really mean? The SDR has no personal liability to MedImpact. That is why the Court has ordered persons to file claims against the assets of the estate. The SDR merely conducts the adjudication of those claims. Having seen what the SDR thinks of its claim, MedImpact now wants a judicial determination somewhere else of the

amount it should receive when a plan of distribution is approved. That adjudication, however, is a process articulated by this Court, which MedImpact has already invoked.

5. It's Arbitration So The Rules Do Not Matter

Finally, MedImpact argues that it has not waived its right to arbitration because all it has done is file a proof of claim. If this were the situation described in the cases to which MedImpact makes reference in its Reply, it might have an arguable position. This is not those cases, though.

MedImpact disregards Texas law with respect to waiver of a right to arbitration. That is understandable; that law is not helpful to MedImpact. Instead, MedImpact chooses to look to bankruptcy law. Obviously, MedImpact is more comfortable in forums outside this Court and relies on the law of those forums whenever possible. Yet, that law is not helpful either. The bankruptcy law cited by MedImpact relates solely to the filing of a claim. That is not the situation here. MedImpact responded to an order of this Court by filing a claim asserting a right to assets of the estates. The SDR processed that claim and rejected it. MedImpact then invoked further rights and sought a reassessment of that claim. The SDR then undertook to reassess that claim only to be then confronted with a demand by MedImpact for arbitration. Then MedImpact, by its own admission, decided to change gears to get the same result and now seeks to bring the SDR into a lawsuit in Oklahoma

either to have her sent to arbitration, or to litigate its right to the assets that the SDR has rejected. As noted by the SDR in her initial response, Texas law provides that under these facts, MedImpact has waived its right to arbitration because it is seeking to obtain a hearing by a different forum on a rejection of its claim. Since MedImpact likes federal law, it should know that waiver is dictated by federal law as well. See Kramer v. Hammond, 943 F.2d 176, 179 (2nd Cir. 1991) (“Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, . . .”)

Conclusion

MedImpact initiated the claims process in this Court. It received a rejection from the SDR, which it did not like. It has pursued in this Court the re-evaluation of that rejection, but at the same time is trying both a resort to arbitration, and to parallel federal litigation in another state in an effort to avoid the result obtained in this Court. MedImpact can re-characterize the situation all it wants, but essential to any re-characterization are the actions it has taken here. Those actions preclude the relief sought by MedImpact, and therefore, its Motion should be denied.

Request

The SDR requests that the relief sought by MedImpact be denied, and that she have such other and further relief to which she is entitled.

Respectfully submitted,

Wisener ★ Nunnally ★ Gold, L.L.P.

A handwritten signature in blue ink, appearing to be "Harold B. Gold", written in a cursive style.

By: _____

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Certificate of Service

This document was served by email on the service list on October 24, 2006.

A handwritten signature in blue ink, appearing to read "Harold B. Gold". The signature is stylized with large loops and a prominent initial "H".

Harold B. Gold