

MASSACHUSETTS Lawyers Weekly

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Administrative – AG investigation – Declaratory relief

Appeals Court

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Where an orthodontist sought a declaration that he had a right to bill for mouthguards during the course of an investigation by the Massachusetts Attorney General's Office into allegedly fraudulent Medicaid claims, a judge's dismissal of the declaratory judgment complaint must be reversed because there was no lack of jurisdiction despite the ongoing investigation.

"This case involves an investigation by the Massachusetts Attorney General's office (AGO) into allegedly fraudulent Medicaid claims made by the plaintiff, Mouhab Rizkallah, DDS, who runs several orthodontic practices in the Commonwealth. The case raises issues regarding how the subject of such an investigation might challenge the Commonwealth's positions before the investigation has run its course, where in the meantime the Commonwealth is withholding the subject's Medicaid reimbursements.

"In April 2019, the Commonwealth's agency that administers the Massachusetts Medicaid program, MassHealth, began withholding certain payments that

ordinarily would have been due to Rizkallah for orthodontic services rendered. In January 2020 the Attorney General issued a civil investigative demand (CID) to Rizkallah, pursuant to G.L.c. 12, §5N, seeking the orthodontic files of 220 of Rizkallah's patients. Rizkallah responded in February 2020 by (1) filing an emergency motion to set aside the CID or to issue a protective order (motion for protective order), and (2) filing a declaratory judgment lawsuit (declaratory judgment complaint), seeking among other things a declaration of 'Dr. Rizkallah's right to bill' the charges under investigation. A Superior Court judge denied the motion for protective order. Thereafter, a different Superior Court judge dismissed the declaratory judgment complaint, reasoning among other things that the court lacked jurisdiction to interfere as requested with the AGO's ongoing investigation. We find no error in the denial of the motion for protective order, but we vacate the dismissal of the declaratory judgment complaint, as the court was not without jurisdiction to decide that claim. ...

"While Rizkallah's objection to the CID was properly rejected, we reach a different conclusion as to the dismissal of the declaratory judgment complaint. On its face, the declaratory judgment complaint not only requested relief with respect to the pending CID, but also requested relief that went to the heart of a pending dispute – that is, Rizkallah sought a declaration that he had a right to bill for mouthguards 'as he has always done.' MassHealth was withholding reimbursement for mouthguards from Rizkallah at the time.

RIZKALLAH v. ATTORNEY GENERAL



(Lawyers Weekly No. 11-120-21) (15 pages) (Englander, J.) A motion for a protective order was heard by Kathleen M. McCarthy, J., and a motion to dismiss was heard by James Lang, J., in Superior Court. Joel Rosen for the plaintiff; David R. Marks (Stephany G. Collamore also present) for the Attorney General (Docket No. 20-P-927) (Dec. 3, 2021).

Under those circumstances a suit for a declaratory judgment – or indeed, a suit seeking payment of monies owed (which was not requested in the complaint) – would seem to be an entirely appropriate means to resolve such a dispute. ...

“We are not persuaded that jurisdiction was or is lacking with respect to the declaratory judgment complaint. We first analyze the issue as of the time the judge dismissed the case – that is, before the AGO had filed its false claims complaint. Under the declaratory judgment statute, the Superior Court has the authority to ‘make binding declarations of right, duty, status and other legal relations ... in any case in which an actual controversy has arisen. ...’ G.L.c. 231A, §1. At the time of dismissal there was an actual controversy; MassHealth was withholding payments from Rizkallah to which Rizkallah claimed entitlement, and moreover, Rizkallah was apparently continuing to provide patients with mouthguards, despite the withholding. That controversy was appropriate for judicial resolution; a judge would have had to find the facts regarding Rizkallah’s billing practices, and to analyze those facts against the applicable regulatory framework.

“Nor are we persuaded that ‘prosecutorial discretion,’ or separation of powers doctrine, would have prevented the judge from determining the propriety of the withholding, even where

the AGO claimed that its investigation was ongoing. The AGO’s argument that a judge would be working an ‘intolerable interference’ by exercising declaratory judgment jurisdiction under such circumstances proves too much. Where as here a plaintiff is directly out of pocket as a result of government action (and has no administrative recourse), the plaintiff should be able to obtain relief through the courts, if warranted. ... The AGO’s suggestion that the courts would not be available amounts to the contention that the Commonwealth has the unilateral power to deprive a person of property to which he or she may be entitled, without any enforceable restrictions on the length of time it may do so. To the contrary, the courts must be available to provide a forum for potential recourse in such circumstances. ...

“We also are not moved by the Commonwealth’s assertion that the withholding was required by Federal law, once the Commonwealth received a ‘credible allegation’ of fraudulent charges. 42 C.F.R. §455.23(a)(1). The fact that it may be proper to initiate withholding under such circumstances does not mean that the courts are unavailable to test the basis for the ongoing withholding. Here, Rizkallah’s suit was not instituted until nine months after withholding began. The availability of judicial recourse at that point would seem to be appropriate. The

declaratory judgment statute was designed to provide relief in such situations: ‘[i]ts purpose is to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations.’ G.L.c. 231A, §9.

“In its brief to this court, the AGO argues that jurisdiction is lacking for a new reason – it argues that because it has now filed a civil enforcement action, Rizkallah’s claims are ‘moot.’ We disagree. The actual controversy did not vanish merely because the AGO filed another lawsuit that raises most (or perhaps all) of the same issues, and the declaratory judgment action is not moot. Rather, there are now two Superior Court lawsuits raising the same or similar issues, and those lawsuits need to be addressed in accordance with the usual case management discretion that judges have in such circumstances. ...

“Accordingly, we shall vacate the judgment dismissing the declaratory judgment complaint and remand the action for further proceedings consistent with this opinion. On remand, the judge may exercise the usual discretion as to management of the case going forward, having in mind that there is now pending another case that raises many (if not all) of the issues raised by the declaratory judgment count. ...

“The judgment is vacated, and the matter is remanded for further proceedings consistent with this opinion.”