

STATE OF MAINE
Cumberland, ss.

BUSINESS AND CONSUMER DOCKET
Docket No. BCD-WB-CV-10-53

NICOLE RICHMAN, JULIE HOWARD,
JOHN THIBODEAU and MARYANN
CARROLL, on behalf of themselves and
others similarly situated,

Plaintiffs

v.

POSSIBILITIES COUNSELING
SERVICES, INC., WENDY L.
BERGERON, AFFILIATE FUNDING,
INC. EMILE L. CLAVET, KEVIN DEAN,
AND FOSTER CARE BILLING, LLC
d/b/a PROVIDER FINANCIAL

Defendants

ORDER APPOINTING REFEREE

Before the court is a motion for appointment of referee. On January 19, 2011, the court held a hearing with counsel for the named provider plaintiffs and the proposed provider class [hereinafter "the providers"], Possibilities Counseling Services, Inc. (PCSI), Wendy Bergeron, and Affiliate Funding, Inc. (AFI). The proposed referee, John Fidrych, was also present.

Background

Because of the somewhat circuitous path this litigation has taken, some discussion of background is appropriate.

Possibilities Counseling Services, Inc., originally moved for appointment of a referee in the context of Possibilities' dispute with Affiliate Funding, Inc. in the fall of 2010. *See Motion, Affiliate Funding, Inc. v. Possibilities Counseling Services, Inc.*, Docket No. ANDSC-CV-10-155 (Me. Super. Ct., Nov. 5, 2010).

Before the Superior Court acted on the motion, Possibilities was involuntarily placed in a chapter 7 liquidation proceeding in the United States Bankruptcy Court for the District of Maine. Although the bankruptcy proceeding was terminated soon after it was filed, the Bankruptcy Court appointed Mr. Fidrych as referee for purposes of monitoring implementation of a settlement agreement between Possibilities and Affiliate. See Stipulation of Debtor, Affiliate Funding, Inc., and Provider Plaintiffs and Order, *In re Possibilities Counseling Servs., Inc.*, No. 10-21895 (Bankr. D. Me. Nov. 18, 2010). The Stipulation contemplated that provider claims would be addressed under the supervision of State authorities following a “protocol” for processing and payment developed by the State of Maine Department of Health and Human Services. However, due to a change in State administration resulting from the November 2010 gubernatorial election, the DHHS Protocol became nugatory as the vehicle for dealing with provider concerns.

At least partly as a result of the disappearance of the Protocol and the State oversight it would have brought, counsel for the named plaintiff providers and the proposed class moved for a temporary restraining order prohibiting any use of State funds by Possibilities, Affiliate or any related persons or entities, claiming that injunctive relief was necessary to assure appropriate application of available funds. (Pls.’ M. Temp. Restraining Order 16-18.) In their motion, the plaintiffs also requested that the court appoint a referee to oversee the processing and payment of the provider claims at issue in the case [“Provider Claims”].

Affiliate, Possibilities and the other defendants opposed the request on all grounds, including their assertions, supported by affidavit, that there are more than sufficient available funds to pay all valid provider claims, rendering judicial intervention unnecessary. (Defs.’ Opp’n M. Temp. Restraining Order 4; Dean Aff.)

The court held a hearing on the motion for injunctive relief on January 13, 2011. In the course of that hearing, counsel for the providers asked that, if their request for an injunction against payments was denied, that the court at least appoint a referee to oversee the payment of claims, and to verify the representations of Affiliate and Possibilities that the providers are protected and do not need an injunction. The court took the matter under advisement pending a hearing on the motion for a referee.

For reasons articulated at the January 19 hearing and in the order issued herewith, the court declines to grant a temporary restraining order. However, the denial of the temporary restraining order rests in part on the court's view that appointment of a referee to oversee the processing and payment of provider claims would address most, if not all, of the provider concerns underlying their request for injunctive relief, and render such relief unnecessary.

Based on this history, the court has determined to appoint a referee to oversee the Provider Claims, as the plaintiffs have requested in their injunction papers. In that regard, it should be noted that the court could legitimately appoint a referee without agreement on its own motion for purposes of an accounting, based on the quantity of provider claims in question. See M.R. Civ. P. 53(b)(2). Moreover, based on the linkage between the relief sought in the plaintiffs' injunction motion and the role of a referee, the issue of whether the defendants should be enjoined would have to be addressed again were the court not to appoint a referee.

As the court indicated January 19, the overarching immediate goals of all concerned should be to assure that any and all funds that should be applied to provider claims are in fact collected; that all pending provider claims are processed; that payments due to providers are made; and that all of the foregoing occurs expeditiously and appropriately. The appointment of a referee will not

obstruct payment, as the grant of injunctive relief would have done, but will provide assurance that the foregoing goals are achieved.

Terms and Conditions of Appointment

Based on the information made known to the court in the original motion, supplemented by means of the filings since then and the presentations at the January 19 hearing, the court finds John Fidrych is qualified, able, and willing to serve as referee in this matter, and hereby appoints him as referee according to the following terms and conditions:

A. Scope of the Referee's Appointment: In general terms, the purpose of this appointment is to aid the court in adjudicating the issues regarding the processing and payment of Provider Claims raised by the named plaintiffs for themselves and on behalf of the proposed provider class. For purposes of M.R. Civ. P. 53(c), it is the intent of this Order to authorize and empower the referee to provide an appropriate degree of impartial and neutral oversight and review of the following functions and to help assure that they are carried out accurately and expeditiously: the collection of amounts due from persons and entities obligated to pay for the services underlying Provider Claims, as defined herein; the processing of Provider Claims, and the payment of Provider Claims.

In fulfillment of that general task, the referee shall:

1. Verify that PCSI and AFI (and any other third-party claim processing contractors) are processing in a timely and appropriate manner all outstanding claims for reimbursement by independent contractor affiliates of PCSI for services performed before October 31, 2010 and unpaid as of October 31, 2010 ("Provider Claims").
2. Oversee the accounting, analysis, verification and reconciliation of the amount of Provider Claims of independent contractor provider affiliates of PCSI ("Provider Plaintiffs"), in conjunction with the work performed by PCSI, AFI, and any other claim processing contractor and consistent with the DHHS Protocol.

3. Review, analyze, summarize, and reconcile all disbursements made by PCSI, AFI, and any affiliated persons or entities that purport to make full or partial payment of Provider Claims.
4. Establish the relevant period of review and analysis of financial institution account records internal accounting records, and related sources of documentation for Provider Claims.
5. Review (1) the original Purchase Agreement dated April 2, 2006, between Funding Resources, Inc. and PCSI for purposes the contractual relationship between PCSI and AFI; (2) the standard form of contract between PCSI and Provider Plaintiffs (the "Provider Agreement"); and (3) any other materials, including federal and state regulatory materials, bearing on the scope of his work and the past and present contractual relationships between PCSI, AFI, and Provider Plaintiffs.
6. Identify all accounts holding funds that are available to pay Provider Claims, whether held by a financial institution or state agency.
7. Prepare and submit an initial report comparing the total amount of Provider Claims with the total amounts of funds available to pay Provider Claims. (Based on the January 19 discussion, the court assumes such a report can be submitted by January 31 or very soon thereafter). The initial report shall list the operative documents (including but not necessarily limited to those listed in paragraph 5 above) that the referee understands to govern the process governing analysis and payment of Provider Claims, and shall set forth in general terms the referee's understanding of that process. The report shall also identify the accounts listed in paragraph 5: the institution or state agency holding the funds, the balance of these accounts as of January 31, 2011, and, if applicable, the account holder or signatory. The referee may include supporting documents in the initial report.
8. Produce and submit a final report at the appropriate time, documenting the required versus the actual allocation of funds per the contracts between providers and PCSI or as per subsequent court instructions. The referee will prepare a draft of the final report and circulate it for review and comment among the parties before filing it with the court.
9. Report to the court and/or the parties periodically as needed regarding any issues that the referee deems appropriate to bring to the court's or the parties' attention.¹ Such report may include any recommendation for modifying any aspect of this Order.

¹ As an example, the referee would be expected to bring to the court's and the parties' attention any concern on his part regarding conflict between the work associated with his appointment by the Bankruptcy Court and his work under this Order. The potential for such conflict was discussed at the January 19 hearing, and the court is satisfied that it is not a concern at this point.

10. Communicate with individual providers and with persons involved in the collection of amounts due for services, and in the processing and payment of claims, as necessary to fulfill his responsibilities under this order. The referee will maintain a log of such communications indicating the date, medium (e.g. e-mail or telephone or in person), the identity of the person contacted, and a phrase briefly summarizing the substance or purpose of the contact. The log will be disclosed to all counsel on request, no more frequently than on a weekly basis. Should the referee sample the claims of the Provider Plaintiffs, whether currently a party or later joined in the proposed class, as discussed at the hearing, the referee shall alert the attorneys in advance of referee's intent to conduct the sampling and how the individual clinicians were selected.
11. Establish at least one account at a financial institution to hold any funds designated for use in paying Provider Claims, in the name of the referee in his capacity as referee. He may establish additional such accounts as he deems appropriate. If any funds are deposited into any such account (whether by a State agency, a party, or a non-party), the Referee shall make only such disbursements from the account as he deems appropriate to enable valid Provider Claims to be paid appropriately.
12. Establish a separate account for potential use as an escrow account for purposes of any fees, costs and expenses associated with this litigation.²
13. Maintain appropriate records of his activity pursuant to this Order.

The referee is authorized to perform any and all acts that in his judgment should be performed to enable him to fulfill any of the foregoing responsibilities.

B. Compensation: The referee shall be paid provisionally by Possibilities and/or Affiliate, who shall share the referee's cost equally unless they agree on a different provisional allocation. To the best of his ability, the referee will separate his time and expenses attributable to this Order and the time and expenses attributable to other work, including but not limited to, his appointment by the Bankruptcy Court regarding matters between Affiliate and Possibilities. The court reserves the right to re-allocate the cost of the referee's work under this Order among any named party and the proposed Provider class.

² The court invites all parties to consider whether some amounts otherwise payable to any provider or claims processor, should be placed in escrow to fund the referee's expenses as well as other expenses of this litigation, so that the court has a meaningful and realistic ability to assess and allocate expenses fairly.

C. Communication with the Court, Counsel and Parties: Counsel, the court, and the referee will follow these guidelines in their communications:

1. Referee-Judge Communications: Because the referee is “a person appointed by the court, whose function is to aid the judge in carrying out the judge’s adjudicative responsibilities” for purposes of the Maine Code of Judicial Conduct Canon 3(B)(7)(c), the presiding justice may contact and communicate with the referee outside the presence of the parties and counsel, and the referee may contact and communicate with the presiding justice outside the presence of the parties and counsel. The court and/or the referee will advise the parties and counsel of the fact and the general nature of such communication afterwards.
2. Referee-Counsel Communications: There shall be no communications by any means between the referee and any attorney (or person assisting any attorney) regarding any substantive aspect or issue in this case unless other counsel are included in any oral communication and sent a copy of any written communication. This paragraph does not apply to matters solely involving scheduling or administrative matters of a ministerial nature.
3. Referee-Party Communications: It is understood that, in the course of his appointment in this case and the bankruptcy case, the referee will need to spend substantial time at the offices of Affiliate and other defendants, and will need to have significant interaction with some of the individual and corporate defendants. However, as far as his work in this case is concerned, that interaction should be primarily for the defendants to answer the referee’s questions and respond to his requests for information or documents. No one, including any party, should attempt to advocate to or influence the referee with regard to the content of his reporting in this case, unless opposing counsel are present and able to participate. The intent of paragraphs 2 and 3 is to enable the parties, counsel and the referee to have discussions about any and all areas and issues, but only if all parties are represented and able to participate.

This Order shall remain in effect until further order. Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this Order by reference in the docket.

Dated January 25, 2011


A. M. Horton
Justice, Superior Court