IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CHARLESTON DIABETES AND ENDOCRINE CONSULTANTS, PLLC, and PRASUNA JAMI, M.D.,

Plaintiffs,

v.

Civil Action No. 16-C-457
Judge Jason Wharton

HIGHMARK WEST VIRGINIA INC.,

Defendant.

DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS AND OPPOSITION TO PLAINTIFFS' MOTION TO AMEND

I. INTRODUCTION

Plaintiffs' claims against Highmark West Virginia Inc. ("Highmark WV") are not ripe when Plaintiffs have suffered no injury because they have repaid nothing to Highmark WV. With no injury-in-fact, Plaintiffs have no standing, and the Court has no jurisdiction over their claims. Notice pleading containing nothing more than unsupported conclusions does not overcome these facts.

Plaintiffs' claims also fail to state claims on which relief can be granted because Plaintiffs incorrectly base their claims on a statute of limitations argument. A statute of limitations, itself, is not the basis for any claim but rather provides a defense to a claim. Plaintiffs are free to assert their statute of limitations defense in response to Highmark WV's claim of overpayment—although, during a year of negotiations, Plaintiffs did not raise that defense. Plaintiffs, however, cannot assert that defense as the basis for legal claims, particularly when, again, they have repaid nothing to Highmark WV. Moreover, to the extent that Plaintiffs mischaracterize Highmark WV's audit results letter as a "notice of retroactive denial," the Prompt Pay Act permits Highmark WV to send such a notice. No statutorily permitted notice could breach the parties'

contract. Furthermore, the Prompt Pay Act does not place any limits on the parties' agreed-to contractual audit process. The investigatory process of an audit cannot possibly violate the Prompt Pay Act.

Implicitly acknowledging the deficiencies of their Complaint, Plaintiffs now seek to amend it. Their proposed additional conclusory allegations, however, cannot overcome the pertinent facts that Plaintiffs fail to plead. Plaintiffs still have repaid nothing to Highmark WV, so no additional allegations could possibly ripen their unripe claims. Additional allegations also cannot change the fact that Highmark WV audited Plaintiffs' records, pursuant to its contractual right, and found that Plaintiffs consistently up-coded the complexity of office visits, resulting in overpayments to Plaintiffs.

II. ANALYSIS

A. Plaintiffs' Response does not refute Highmark WV's Motion to Dismiss.

Nothing in Plaintiffs' Response refutes Highmark WV's arguments in support of its Motion to Dismiss. Nonetheless, the following clarifies several points of confusion introduced by Plaintiffs' Response.

1. Plaintiffs have repaid nothing to Highmark WV, so Plaintiffs have no injury.

Plaintiffs cannot fail to plead facts and then insist that they sufficiently plead claims when they ignored facts that they find inconvenient. Highmark WV's Motion to Dismiss Memorandum establishes that Plaintiffs have not pleaded any facts that show that they have been injured. (Def.'s Mem. at 7-8.) Plaintiffs cannot change the fact that they have repaid nothing to Highmark WV. Plaintiffs currently retain all amounts paid to them by Highmark WV, including

overpayments that Highmark WV identified as the result of its audit.[1] Because Plaintiffs have not been injured, their claims are unripe and this Court lacks subject-matter jurisdiction over such claims. (*Id.* at 5-7 (citing cases).)

In this case, Highmark WV asserts that the Court lacks subject-matter jurisdiction pursuant to W. Va. Rule of Civil Procedure 12(b)(1). Notice pleading is not sufficient to establish a justiciable controversy when subject-matter jurisdiction has been challenged. "The standard for dismissal based on lack of subject matter jurisdiction, while similar to the standard for the rule governing motions to dismiss for failure to state a claim, permits the court to consider a broader range of materials in resolving the motion." Franklin D. Cleckley, *et al.*, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 12(b)(1)[2], at 327 (4th ed.) (citing *Williams v. Wynne*, 533 F.3d 360 (5th Cir. 2008)). "Trial courts are not bound to the pleadings in making a subject matter determination. A court may, when necessary, hear evidence outside the pleadings to determine the issue of subject matter jurisdiction." *Id.* (citing *Hammond v. Clayton*, 83 F.3d 191 (7th Cir. 1996); *Barrera-Montenegro v. DEA*, 74 F.3d 657 (5th Cir. 1996); *Rosales v. United States*, 824 F.2d 799 (9th Cir. 1990)).[2] Accordingly, Plaintiffs are incorrect that they plead injury merely through conclusory assertions.[3] (Plfs.' Resp. at 3-10.)

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[1] If any party is injured at this point, it is Highmark WV which regularly overpaid Plaintiffs based on materially misrepresented claims submissions.

[2] Moreover, Plaintiffs mere conclusory allegations also are insufficient to establish claims with respect to Highmark WV's independently sufficient Rule 12(b)(6) arguments for dismissal. As Highmark WV observed in its original Memorandum, a court may "ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Forshey v. Jackson*, 222 W. Va. 743, 756, 671 S.E.2d 748, 761 (2008) (*quoting* Franklin D. Cleckley, *et al.*, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 12(b)(6)[2], at 347); *see Kopelman and Assocs., L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996) (while plaintiff "enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted").

[3] Plaintiffs are incorrect that an inference of "nominal damages" for breach of contract establishes that they have been injured in this case. (*See* Plfs.' Resp. at 7-9.) *Executive Risk Indemnity* stands for the proposition that nominal damages may be inferred *only if* a plaintiff otherwise pleads an actual contract

Indeed, Plaintiffs' own assertions show that they have not been injured. Plaintiffs assert that if they "[had] not filed their lawsuit when they did, they would be at the total mercy of Defendant Highmark, who could, at any time, start offsetting the alleged overpayment amount against future claims payments." (Plfs.' Resp. at 7.) Plaintiffs thus concede that they have repaid nothing to Highmark WV. They acknowledge that Highmark WV has not yet "start[ed]" any offsets of "future claims payments" (which offsets may never occur). Plaintiffs merely speculate about what may occur in the future. In doing so, they confirm that they have no current claim, breach of contract or otherwise, because any claim is contingent on future events.

2. The Prompt Pay Act's separate limitations period is a defense, not the basis for any affirmative claim.

Plaintiffs incorrectly insist that they can base their claims on a defense. Plaintiffs assert that their "theory of the case, in part, is that Defendant Highmark illegally 'Retroactive Denied' previously paid claims past the applicable one (1) year statute of limitations." (Plfs.' Resp. at 5.) A limitations period defense, however, is not an element of any affirmative claim.

The Prompt Pay Act lists six reasons for which a previously paid claim may be retroactively denied.[4,5] Then in a separate subsection, the Prompt Pay Act provides a limitations

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breach. *Executive Risk Indem., Inc. v. Chaleston Area Med. Ctr., Inc.* 681 F. Supp. 2d 694, 726 (S.D. W. Va. 2009). In this case, Plaintiffs have not alleged a breach of contract from which nominal damages could be inferred. Plaintiffs have not pleaded and cannot plead that Highmark WV breached the parties' contract by recouping any amount from Plaintiffs. (Def.'s Mem. at 10.) Plaintiffs' purported limitations period argument is only a defense, not the basis for an affirmative claim. *See infra* § II(A)(2). Nominal damages cannot be inferred when Plaintiffs' fail to plead any actual breach of contract.

[4] Highmark WV has not "retroactively denied" any claim submitted by Plaintiffs. Highmark WV has not told Plaintiffs that any claim has been or will be denied or that Highmark WV is seeking complete repayment for any particular claim. By discussing these issues in the context of its Motion to Dismiss, Highmark WV does not concede that Plaintiffs have properly characterized Highmark WV's audit process and the resultant payment adjustments as "retroactively denying" any provider claims. Highmark WV simply asserts that even if any claims adjustments resulting from routinely up-coded claims submissions are mischaracterized as retroactive denials under the Prompt Pay Act—although they are not—Plaintiffs nonetheless fail to state any injury or claim.

period of "one year from the date the claim was originally paid" if a denial is for one of four reasons—(iii) the provider was previously paid or did not provide services; (iv) the provider was not entitled to reimbursement; (v) the service was not covered; or (vi) the insured was ineligible. W. Va. Code § 33-45-2(a)(7)(C). Denials for fraud and material misrepresentations have no limitations period. *Id.*

The Prompt Pay Act limitations period for certain denial reasons is only a defense. *See, e.g., Cotrill v. Cottrill*, 219 W. Va. 51, 55, 631 S.E.2d 609, 613 (2006) (*per curiam*) ("The statute of limitations is an affirmative defense which must be pled in a responsive pleading. West Virginia Rule of Civil Procedure 8(c)."). The defense of a limitations period is not the basis for Plaintiffs' purported affirmative claims. Plaintiffs are free to assert their limitations period claims in response to Highmark WV's notice of overpayments in the course of the Prompt Pay Act's dispute resolution process.[6] The Prompt Pay Act's limitations period, however, provides no basis for affirmative claims such as the ones that Plaintiffs attempt to assert in this action.

3. The Prompt Pay Act's dispute resolution process permits the notice of which Plaintiffs complain.

Plaintiffs incorrectly assert that their "breach of contract claim matured when Defendant Highmark sent its 'Retrospective Post-Payment Audit' results to [Dr. Jami] on or about September 9, 2015, seeking an overpayment . . . ." (Plfs.' Resp. at 5.) The Prompt Pay Act, however, contains a dispute resolution process that specifically begins with the provider

[5] The Prompt Pay Act permits an insurer to "retroactively deny a previously paid claim" to a provider for six reasons: (i) the provider's fraud; (ii) the provider's material misrepresentations; (iii) the provider was previously paid or did not provide services; (iv) the provider was not entitled to reimbursement; (v) the service was not covered; or (vi) the insured was ineligible. W. Va. Code § 33-45-2(a)(7)(A). The Prompt Pay Act does not rank these six reasons (other than listing them in this order) and certainly nowhere refers to any of the circumstances as "extraordinary."

[6] Interestingly, in a year of negotiations between Plaintiffs' attorneys and Highmark WV, Plaintiffs, through counsel, never asserted that they should not have to repay any amount because of the Prompt Pay Act's one-year limit on certain retroactive denials.

responding to a "notice of retroactive denial by the plan."[7] W. Va. Code § 33-45-2(a)(7)(B). Although Highmark WV's audit results letter was not a "notice of retroactive denial," to the extent that Plaintiffs characterize it as such, the Prompt Pay Act permits Highmark WV to send the notice of which Plaintiffs complain. No breach of contract claim could possibly "mature" from a notice that is part of the Prompt Pay Act's statutory dispute resolution process.[8]

4. Even if the Prompt Pay Act were to apply, Highmark WV has no limit on seeking repayment of overpayments that result from a provider's "material misrepresentations."

If a provider's claim submission contains material misrepresentations or is fraudulent, the Prompt Pay Act imposes "no time limitations for retroactively denying a claim for [those] reasons." *See* W. Va. Code § 33-45-2(a)(7)(C). In addition to attempting to ignore that a limitations period is merely a defense, Plaintiffs attempt to ignore that the Prompt Pay Act's limitation period is not universally applicable. Highmark WV seeks return of overpayments because of Plaintffs' systemic material misrepresentations in claims submitted for office visits. Thus, even if Highmark WV had retroactively denied Plaintiffs' claims and the Prompt Pay Act applies—although the Act does not apply to payment adjustments—the Act imposes no time limit on Highmark WV.

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[7] Again, Highmark WV does not concede that it retroactively denied any claim previously paid to Plaintiffs when Highmark WV claims, as the result of its audit, that it is entitled to reimbursement for the amounts overpaid to Plaintiffs as a result of their systemic up-coding of office visit claims (*i.e.*, not as a result of any denied claim). Accordingly, Highmark WV's letter to Plaintiffs notifying them of the results of Highmark WV's audit was not a "notice of retroactive denial by the plan." Highmark WV simply observes that even as Plaintiffs articulate their purported claims, they fail to state any injury or claim.

[8] Plaintiffs' citation of *McKenzie v. Cherry River Coal & Coke Co.*, 195 W. Va. 742, 466 S.E.2d 810 (1995), for the proposition that Plaintiffs did not have to wait for "total forfeiture by Highmark," is completely inapposite. (*See* Plfs.' Mem. at 7.) *McKenzie* concluded that the *plaintiffs'* assertion of a forfeiture more than ten years after the alleged breaches leading to the forfeiture was time-barred. *Id.* at 749-50, 466 S.E.2d at 817-18. Plaintiffs have not asserted a forfeiture in this case, as did the *McKenzie* plaintiffs, and nowhere has Highmark WV asserted or indicated that it contemplates asserting that Plaintiffs have forfeited their contract. *McKenzie* provides no guidance regarding whether Plaintiffs have validly asserted a breach of contract claim based on the facts of this case, which Plaintiffs have not done.

The complexity of an office visit is coded Level 1 through Level 5 with a Level 1 office visit being the most cursory and the a Level 5 being the most extensive. Coding manuals provide the criteria for determining which level office visit a provider should submit for payment based on time spent with the patient and the number of systems examined. Plaintiffs overwhelmingly and consistently submitted claims for Level 4 office visits in most instances. Highmark WV's audit, which compared Plaintiffs' claim submissions with Plaintiffs' records, found that Plaintiffs routinely materially misrepresented the complexity of office visits, *i.e.*, up-coded claims submitted for such visits. In short, Plaintiffs' records did not support the complexity level of office visits that Plaintiffs submitted and were paid for by Highmark WV.

When a provider submits a claim for a Level 4 office visit but has performed only a Level 3 or Level 2 office visit, then the provider has misrepresented the level of service that the provider actually performed. When the provider routinely submits office visit claims at a higher complexity level not supported by medical records, the misrepresentation is material.

Plaintiffs cannot avoid these facts by failing to plead them. To the extent that the Prompt Pay Act applies at all to Highmark WV asserting that payments made to Plaintiffs should be adjusted following an audit, the Act places no limits on Highmark WV seeking overpayments as a result of material misrepresentations. Even if incorrectly characterized as "retroactive denials," Highmark WV's adjustments for Plaintiffs' material misrepresentations are permitted at any time by the Prompt Pay Act. *See* W. Va. Code § 33-45-2(a)(7)(A)(ii), (C).[9]

[9] Again, by discussing these issues in the context of its Motion to Dismiss, Highmark WV does not concede that Plaintiffs have properly characterized Highmark WV's audit process and any resultant payment adjustments as "retroactively denying" any provider claims. *See supra* n.4 & n.7.

5. Highmark WV's audit rights are contractual and not limited by the Prompt Pay Act; its audits "disguise" nothing.

As Highmark WV establishes in its original Memorandum, Plaintiffs contractually agreed to be audited. Plaintiffs contractually agreed to "keep accurate and current medical records . . . and [to] furnish such records to [Highmark WV] upon request, without change, alteration or omission." (Def.'s Mem. at 3-4 (quoting Network Agreement attached to Plfs.' Compl.),) Plaintiffs further agree to permit Highmark WV to "conduct on-site or off-site audits without charge, examine such original records of Provider as may be necessary to verify performance under this Agreement, or any contract between [Highmark WV] and its Accounts . . . ." (*Id.* at 4 (quoting Network Agreement § IV(B).) The Prompt Pay Act places no limitations on this agreed-to audit process.

An audit, by definition, is an investigatory process. It disguises nothing. In the case of the audit performed on Plaintiffs' records, after discovering that Plaintiffs submitted claims for Level 4 office visits approximately 95% of the time, Highmark WV obtained Plaintiffs' records of 150 office visits to compose a statistically valid random sample of all such visits. The audit revealed that in many cases Plaintiffs' records did not support the high level office visit that Plaintiffs had submitted to and were paid for by Highmark WV.

Plaintiffs, without basis in law or fact, seek to limit the time period for which Highmark WV may conduct an audit in the first place. Plaintiffs' reasoning, however, is circular. Plaintiffs assert that the potential *results* of an audit should be consistent with the limitations period in the Prompt Pay Act for only certain types of denials *before* the audit results are known. This cannot be correct. Because an audit may uncover fraud or material misrepresentations, which have no limitations period, Highmark WV certainly is permitted to investigate whether either occurred for periods greater than one year. Otherwise, providers could submit materially misrepresented

or fraudulent claims and then be immune to discovery of their misrepresentations or fraud after one year. The Prompt Pay Act expressly states that this is not the case. *See* W. Va. Code § 33-45-2(a)(7)(C) ("There shall be no time limitations for retroactively denying a claim for the reasons set forth in subparagraphs (i) and (ii) above [fraud and material misrepresentations].").

B. Plaintiffs' proposed amendment of their complaint is futile.

Plaintiffs seek to amend their Complaint "to add additional allegations in support of the already existing causes of action." (Plfs.' Resp. at 11.) No additional conclusory allegations can salvage Plaintiffs' unripe claims. Plaintiffs submitted hundreds of claims for Level 4 office visits and were paid more for those higher level visits than they would have been paid for appropriately coded lower level visits. Plaintiffs currently retain every penny that they were paid, even though Plaintiffs' records do not support the full amounts that Highmark WV paid to Plaintiffs. Plaintiffs cannot manufacture an injury when they have not yet suffered any. Plaintiffs continued failure to plead facts and instead plead unsupportable conclusions adds nothing that states any claim for which they have standing or this Court could grant relief. Accordingly, Plaintiffs' motion to amend their Complaint should be denied. The West Virginia Supreme Court has repeatedly affirmed similar denials of motions to amend. *See, e.g.*, *Bee v. W. Va. Supreme Ct. App.*, Case No. 12-1111, 2013 WL 59670465, at *4 (W. Va. Nov. 8, 2013) (unpub. mem. dec.) (affirming denial of motion to amend complaint and granting of motion to dismiss when "no factual development could [establish alleged] improper conduct"); *Triad Insulation, Inc. v. Nationwide Mut'l Fire Ins. Co.*, Case No. 12-1110, 2013 WL 3184656, at *4 (W. Va. June 24, 2013) (unpub. mem. dec.) (affirming Circuit Court denial of motion to amend complaint and dismissal of bad faith and property damage claims); *Gassaway v. Dominion Exploration & Prod., Inc.*, Case No. 11-0535, 2011 WL 8193596, at *4-*5 (W. Va. Oct. 11, 2011) (unpub. mem. dec.) (affirming denial of motion to amend complaint when "the motion

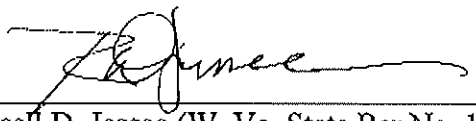
was futile because petitioner cannot prevail on either her current claims or those in her proposed amended complaint").

III. CONCLUSION

For the reasons in Highmark WV's original Memorandum and the additional clarifications, above, Plaintiffs have not pleaded and cannot plead that Highmark WV currently has injured them. Accordingly, they lack standing to bring any of their claims and this Court has no subject-matter jurisdiction. For similar reasons, Plaintiffs fail to plead any claim upon which this Court could currently grant relief. Accordingly, all Plaintiffs' claims should be dismissed for both of these independently sufficient reasons. Furthermore, because amending Plaintiffs' Complaint cannot ripen their unripe claims, amendment would be futile and should be denied.

Respectfully submitted this 1st day of March, 2017.

HIGHMARK WEST VIRGINIA INC.
By Counsel,



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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2017, I served the foregoing **"Defendant's Reply Memorandum of Law in Support of Its Motion to Dismiss and Opposition to Plaintiffs' Motion to Amend"** upon the following counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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