

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER COURT
Location: West Bath
Docket No. BCD-WB-CV-07-27

CHRISTY STOUT, M.S.P.T., INDIVIDUALLY
& O/B/O ALL OTHERS SIMILARLY SITUATED,

Plaintiffs

v.

ORDER ON DEFENDANT'S MOTION
TO DISMISS COUNTS II, III, and IV

ANTHEM HEALTH PLANS OF MAINE, INC.,
D/B/A ANTHEM BLUE CROSS & BLUE SHEILD,

Defendant

Before the Court is the motion of Defendant Anthem Health Plans of Maine, Inc. ("Anthem") to dismiss Counts II, III and VI of the class action complaint filed by Plaintiff Christy Stout on behalf of herself and others similarly situated ("Plaintiffs").

BACKGROUND

Anthem is a health insurance provider. Plaintiffs are licensed physical therapists practicing in Maine. Members of Anthem's health plans are among those who receive Plaintiffs' services.

The business relationship between Anthem and Plaintiffs is formalized in two contracts under which Anthem agrees to reimburse Plaintiffs for services provided to members of Anthem's health plans – the "Blue Cross and Blue Shield of Maine Professionals' Service Division Agreement with Participating Professionals" ("Blue Shield Agreement") and the "Blue Cross and Blue Shield of Maine Health Maintenance Organization Professional Agreement" ("HMO Agreement").

Under the Blue Shield Agreement, Anthem reimburses Plaintiffs for services to Anthem clients who are members of one of Anthem's non-HMO plans ("Non-HMO Members"). The Blue Shield Agreement includes a fee schedule for physical therapy services that may only be modified with the mutual consent of Anthem and Plaintiffs.

Under the HMO Agreement, Anthem reimburses Plaintiffs for physical therapy services provided to members of Anthem's HMO plan ("HMO Members"). Like the Blue Shield Agreement, the HMO Agreement contains a fee schedule for reimbursement of services. Unlike the Blue Shield Agreement, however, the HMO Agreement contains an amendment provision in which Anthem reserves the right to unilaterally adjust the physical therapy fee schedule for services rendered pursuant to the HMO Agreement.

By letter dated January 1, 2006, Anthem notified Plaintiffs of its intention to unilaterally modify the physical therapy fee schedule for both HMO Members and non-HMO members. These modifications were scheduled to go into effect on April 1, 2006. The letter also indicated that should Plaintiffs refuse to accept the modified fee schedule Anthem would no longer provide reimbursement for services rendered to either its HMO members or its non-HMO members as of March 31, 2006.

Following receipt of Anthem's letter, Ms. Stout filed the class action complaint in this case. Anthem's motion to dismiss addresses only Count II (Quantum Meruit), Count III (Unjust Enrichment) and Count VI (Maine Antitrust Claim) of the complaint.

DISCUSSION

I. Quantum Meruit and Unjust Enrichment

Counts II and III seek recovery from Anthem under theories of quantum meruit and unjust enrichment.

[A] claim for relief pursuant to quantum meruit seeks “recovery for services or materials provided under an implied contract” . . . [while u]njust enrichment, on the other hand, provides damages based on principles of equity, not contract, and awards the successful party the value of benefits conferred on another when no contract exists

Cummings v. Bean, 2004 ME 93, ¶ 9, 853 A.2d 221, 224 (quoting *Paffhausen v. Balano*, 1998 ME 47, ¶ 6, 708 A.2d 271, 272) (internal citation omitted). Thus, where a written contract exists, recovery in quantum meruit for what is covered by the terms of the contract is not permissible. See *Paffhausen*, 1998 ME 47, ¶ 9, 708 A.2d at 272. Similarly, recovery will not lie under a theory of unjust enrichment where there exists an express contract. *Lynch v. Ouellette*, 670 A.2d 948, 950 (Me. 1996).

Anthem argues that Plaintiffs may not maintain their quantum meruit and unjust enrichment claims because, although the parties disagree on whether Anthem was permitted to make its fee schedule changes pursuant to the HMO Agreement or whether such changes, at least as applied to non-HMO members, were barred under the terms of the Blue Shield Agreement, they agree that there was an enforceable contract covering the permissibility of Anthem’s action in amending the fee schedule. In response, Plaintiffs note that they are explicitly permitted by the Maine Rules of Civil Procedure to plead alternative theories such as their breach of contract, quantum meruit and unjust enrichment claims, even where those claims are inconsistent with each other. See M.R. Civ. P. 8(e)(2). Additionally, Plaintiffs argue that judgment against their quantum meruit and unjust enrichment claims cannot be appropriate until the summary judgment phase of this case, at which point there will be evidence regarding which contract, if any, is applicable. See e.g. *June Roberts Agency v. Venture Props.*, 676 A.2d 46, 49 n.1 (Me. 1996) (party “not precluded from pleading [both breach of contract and unjust enrichment] because a

factfinder may find that no contract exists and may still award damages on the theory of unjust enrichment”).

Plaintiffs are correct that, as a general matter, counts alleging breach of contract, quantum meruit and unjust enrichment may be simultaneously plead. However, this does render those alternative counts immune to an analysis of whether they fail to state a claim upon which relief may be granted under M.R. Civ. P. 12(b)(6). Specifically, although Plaintiffs raise the possibility that a factfinder could determine that there is no express contract governing the level at which Anthem must reimburse Plaintiffs for their services to non-HMO members, there is no support in the pleadings for this proposition. In the complaint, Plaintiffs assert that Anthem breached the Blue Shield Agreement by unilaterally altering the fee schedule for non-HMO members, while Defendants argue that their action was permissible under the terms of the HMO Agreement. Therefore, if Plaintiffs are successful, Anthem is liable for breach of the Blue Shield Agreement and if Anthem is successful, the HMO Agreement applies to permit Anthem’s fee increase. In either event, an express contract is applicable. Therefore, Plaintiffs’ quantum meruit and unjust enrichment causes of action must be dismissed.

II. Antitrust Claims

(a) Illegal Tying Arrangement

In support of their antitrust claim, the plaintiffs assert that Anthem’s actions constitute an effort to impose an illegal tying arrangement, which is generally described as “an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.” *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.. 451, 461 (1992) (quoting *Northern*

Pacific R. Co. v. United States, 356 U.S. 1, 5-6 (1958)).¹ In opposition, Anthem first correctly observes that no court has yet upheld an illegal tying claim based on the actions of a buyer. From this premise, Anthem argues that Plaintiffs' claim must be dismissed because Anthem reimburses Plaintiffs for their services and, therefore, Anthem is the buyer in all transactions relevant to this case.

As a general matter, this court is not aware of any instance in which an antitrust case has been dismissed on the formulaic basis that health insurance companies are "buyers" instead of "sellers." The wording of the antitrust laws of Maine, 10 M.R.S. § 1101, and United States, 15 U.S.C.A. § 1 is extremely broad and neither expressly provides that applying the label of buyer or seller to a defendant is by itself determinative of whether an antitrust claim can be maintained.² This court declines to judicially infer such a requirement here.

More to the point of Plaintiff's claim, it must be noted that the illegal tying formulation described in the *Eastman Kodak* case would have to be applied somewhat differently in the present case because here it is the buyer who is alleged to be illegally tying a product, not the

¹ Plaintiffs allege that Anthem's actions in forcing them to accept an amended fee structure for services offered to Non-HMO Members in order to continue receiving reimbursement for services offered to HMO Members constitutes what is known in the health care industry as an "all products clause" — that is, a tactic in which an insurance company requires that a physician accept all coverage plans that an insurance company offers. Attempts by insurance companies to utilize all products clauses have resulted in at least two recent, but still pending, lawsuits by physician providers premised on alleged antitrust violations. *See Brook v. UnitedHealth Group, Inc.*, 2007 U.S. Dist. LEXIS 73640 (S.D.N.Y., Sept. 27, 2007) (determining that federal jurisdiction over claim was appropriate); *Austrian v. UnitedHealth Group, Inc.*, 2007 Conn. Super. LEXIS 1949 (Conn. Super. Ct. July 16, 2007) (granting motion to strike counts of complaint alleging antitrust violations).

² Under 10 M.R.S. § 1101, "[e]very contract, . . . or conspiracy, in restraint of trade or commerce in this State is declared to be illegal." This language is virtually identical to that contained in the Sherman Act. *See* 15 U.S.C.A. § 1 ("Every contract, . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.")

seller. Notwithstanding this distinction, and regardless of whether Plaintiffs proceed under the theory that Anthem's actions constitute a per se illegal tying arrangement or whether they proceed under the "rule of reason" method of demonstrating an illegal tying arrangement, an essential element that must be established is that Anthem tied two distinct products together.³ See *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1178-79 (1st Cir. 1994); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 483-84 (3d Cir. 1992) (distinguishing per se claims from rule of reason claims by noting that under rule of reason tying claims a plaintiff need not make the same showing of tying market power necessary for per se claims, but in its place can proffer evidence of actual anticompetitive effects of a defendant's market behavior.)

Anthem counters that the only "product" at issue in this case is Plaintiffs' services to Anthem's clients and, therefore, Plaintiffs' tying claim must fail. Anthem would be correct if this were a case alleging illegal tying by Plaintiffs. However, because Anthem is the party alleged to be illegally tying, Anthem's analysis must turn on whether it, not Plaintiffs, have tied two products together. Specifically, Plaintiffs argue that the *tying* product in this case is Anthem's HMO Plan while the *tied* products are Anthem's Non-HMO Plans. Therefore, it is necessary to determine whether these plans are distinct products.

The seminal case elaborating on what constitutes two "products" for purposes of an illegal tying arrangement analysis is *Times-Picayune Publ'g Co. v. United States*. 345 U.S. 594 (1953). That case provides guidance on how to characterize the products at issue here.⁴ Like the

³ Contrary to Anthem's position, *Illinois Tool Works v. Indep. Ink, Inc.*, 547 U.S. 28 (2006), only worked to abolish per se tying violations involving patents, not all per se violations.

⁴ The *Times-Picayune* case involved a single company that published two separate newspapers sold in New Orleans under different banners, one distributed in the morning and one in the

newspaper purchasers in *Times-Picayune*, Plaintiffs' patients may consider Anthem's HMO Plans and Non-HMO plans to be different products. Their perspective, however, is not germane to the analysis. Rather, because Plaintiffs have accused Anthem, the "buyer" of its services, of engaging in an illegal tying arrangement, the relevant question is what Plaintiffs' motivations are in participating in those two kinds of Anthem plans. *See id.* When framed this way, it is apparent that Plaintiffs' motivations for participating in any Anthem health plan are identical – that is, to receive compensation for their services to Anthem's clients. As a result, even extending the tying analysis to permit "sellers" such as Plaintiffs to bring illegal tying claims, their claim fails based on the absence of two distinct products that are tied together.

(b) Unreasonable Restraint of Trade

Although Plaintiffs' illegal tying claim fails, the analysis does not end there. Under the same facts supporting their tying claim, they also more generally allege that Anthem has engaged in an unreasonable restraint of trade within the meaning of 10 M.R.S.A. § 1101. Under federal precedent, whether a Sherman Act violation of this kind has occurred ordinarily requires that "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint" *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Given the fact-intensive nature of such an analysis, and Anthem's burden on the present motion to demonstrate that Plaintiffs could not succeed if all

evening. *Id.* at 596. The publishing company in that case instituted a policy of only selling advertising space in either paper if the advertiser was willing to purchase advertising space in both papers. *Id.* at 596-97. Despite the fact that "readers consciously distinguished between these two publications," the Court nevertheless held that the morning and evening papers were not distinct products from the standpoint of an illegal tying analysis. *Id.* at 613-14. The Court reached this conclusion by noting that it was the motivation of the advertisers not the readers that was paramount and that the advertisers were interested in reaching potential customers. *Id.* at 613. Therefore, from the advertisers' perspective, the fact that the newspapers may have differed in content did not change the essential nature of the "product" they purchased. *Id.*

their allegations are true, further development of the record is necessary in order to determine whether Anthem's actions rise to the level of an "unreasonable restraint on competition."

DECISION

Pursuant to M. R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is⁵

- A. Anthem's motion to dismiss Counts II and III of Plaintiffs' complaint is GRANTED. Judgment for Anthem on Counts II and III.
- B. Anthem's motion to dismiss Count VI of Plaintiffs' complaint is GRANTED to the extent that it alleges an illegal tying arrangement, and is DENIED to the extent that it alleges other claims under 10 M.R.S. § 1101.

Date: March 19, 2008



Chief Justice, Superior Court

⁵ As a courtesy, the parties are reminded that the Court's Scheduling Order, dated January 4, 2008 is and remains in effect, including those deadlines that are counted from the date of the foregoing Order on the Defendant's Motion To Dismiss Counts II, III and IV.