

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
KANAWHA COUNTY JUDICIAL BUILDING
CHARLESTON, WEST VIRGINIA 25301

Irene C. Berger Judge

February 13, 1997

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Washington, D.C. 2004

Re: Darrell V. McGraw Jr. v. The American Tobacco Company, et al. Civil Action No. 94-C1707

Dear Counsel:

The court has reviewed the Joint Motion of the Moving Defendants to Dismiss Counts One Through Eight and Eleven Through Thirteen of the Third Amended Complaint, the Plaintiff's Memorandum in Opposition, the Moving Defendants' Reply, as well as the oral arguments of counsel.

In its simplest form, the question posed by this motion to dismiss is whether either of two state agencies, namely West Virginia Public Employees Insurance Agency (hereinafter PEIA) and West Virginia Department of Health and Human Resources (hereinafter DHHR) has authority to bring the causes of action alleged in the applicable counts of the complaint. It should be clear to all concerned that an administrative agency has no authority except that conferred under governing statutes. *Appalachian Regional Health Care Inc. v. West Virginia Human Rights Commission*, 180 W. Va. 303, 376 S.E. 2d. 317 (1988) and *West Virginia Public Employees Insurance Board v. Blue Cross Hospital Services.*, 174 W. Va. 605 328 S.E. 2d 356 (1985). So, then, the question becomes whether the legislature has expressly or impliedly (in keeping with the scopes of the particular agency' responsibilities) given either or both of these agencies the authority to maintain the causes of action alleged in Counts One through Eight and Eleven through Thirteen. Therefore, it is imperative that this court review the applicable statutes.

The statutory framework for PEIA is contained in West Virginia Code Section 5-16-1 to Section 5-16-27 Section 5-16-3(c) reads as follows:

"The director is responsible for the administration and management of the public employees insurance agency as provided for in this article and in connection with his or her responsibility shall have the power and authority to make all rules necessary to effectuate the provisions of this article. Nothing in section four or five (Section 5-16-4 or Section 5-16-5) of this article shall limit the director's ability to manage on a day-to-day basis , the group insurance plans required or authorized by this article, including, but not limited to, administrative contracting, studies, analyses and audits, eligibility determinations, utilization management provisions, and incentives, provider negotiations, provider contracting, and payment, designation of

covered and noncovered services, offering of additional coverage options or cost containment incentives, pursuit of coordination of benefits and subrogation, on any other action which would serve to implement the plan designed by the finance board

The argument is made that the clause "including but not limited to" impliedly gives PEIA the ability to maintain this action. The clear language of this portion of Section 5-16-3(c) outlines certain actions the PEIA director can take in the day to day management of the group insurance plans authorized by Article 16, and does not limit his action to those that are enumerated. It would be a stretch for this Court to find that the legislature intended a lawsuit such as alleged here to be a part of the commissioner's day to day management of group insurance plans. The moving defendants argue that the subrogation is the exclusive remedy under the statutory construction rule of *expressio unius est exclusio alterius*" Since the statute is not ambiguous, the Court declines to apply a rule of statutory construction. Too clearly, the commissioner can invoke other means of day-to-day management" by virtue of the "but not limited to" language in the statute. This Court simply does not find implied authority for the instant causes of action. Taking into consideration the whole of this section, it is the opinion of this court that there is no implied authorization to bring causes of action such as those outlined in Counts One through Nine and Eleven through Thirteen.

Too, the argument is advanced that the last clause of this section which reads "or any other actions which would serve to implement the plan or plans designed by the finance board" give implied authority because the finance board is responsible for bringing fiscal stability to the PEIA, and thus a lawsuit such as this would serve as an action by PEIA to implement a plan of the finance board, namely a plan for fiscal stability. Again after careful reading and re-reading ,this Court does not find that this section gives implied authority to maintain the questioned causes of action.

West Virginia Code Section 5-16-13 reads as follows:

"Any person who knowingly secures or attempts to secure benefits payable under this article to which the person is not entitled, or who knowingly secures or attempts to secure greater benefits than those to which the person is entitled, by willfully misrepresenting the presence or extends of benefits to which the person is entitled under a collateral insurance source, or by willfully misrepresenting any material fact relating to any other information requested by the director or by willfully overcharging for services provided, or by willfully misrepresenting the diagnosis ,or nature of the service provided, may be found to be overpaid and shall be civilly liable for any overpayment. In addition to the civil remedy provided herein, the director shall withhold payment of any benefits due to that person until any overpayment has been recovered or may directly set off, after holding internal administrative proceedings to assure due process, any such overcharges or improperly derived payment against benefits due such person hereunder. Nothing in this section shall be construed to limit any other remedy or civil or criminal penalty provided by law."

The plaintiff, PEIA argues that the last of this section" evidences a clear policy to permit PEIA to resort to any legal theory permitting recovery of funds wrongfully obtained at the State's expense." This Court disagrees. The obvious and reasonable meaning of this sentence is that if there are other civil or criminal remedies or penalties applicable or available(by law) for the conduct described in Section 5-16-12 then those remedies or penalties are not limited or precluded by this section. This Court does not construe this language to impliedly be legally assigned the rights of the recipient against the person so liable, but only to the extent of the reasonable value of the medical assistance paid and attributable to the sickness, injury, disease or disability for which the recipient has received damages. . . . (c) Nothing contained herein shall be authorize the department of health and human resources to institute a class action or multiple plaintiff action against any manufacturer, distributor or vendor of any product to recover medical care expenditures paid for by the Medicaid program."

Reading these two statutory provisions together, Section 9-2-6 gives the commissioner the authority to invoke Section 9-5-11. Section 9-2-6 is a general statute, while 9-5-11 specifically provides for DHHR's recovery of Medicaid benefits from third parties. Even if one assumes that Section 9-2-6(18) relates to the commissioner's recovery of Medicaid benefits from third parties, our case law requires that the specific

statute be given priority. Additionally, where a statute provides for a remedy, that remedy is exclusive unless the statute states otherwise. (See *Bullman v. D&R Lumber Company*, 195 W.Va. 129, 464 S.E. 2d 771 (W.Va. 1995)). Thus, since Section 9-5-11 creates a cause of action for collection of Medicaid benefits from third parties, and since there is no other remedy provided for in the statute, subrogation is the exclusive remedy for recovery of such benefits from third parties. Section 9-5-11(c) is instructive as to legislative intent relative to this type of action as well. The limiting language contained in section (c) was only added by the legislature in 1995, and clearly evidences an intent by the legislature to preclude the very "type" of lawsuit brought in the instant case. Under the current statutory scheme, there is no direct cause of action for DHHR against these defendants as alleged. The Court notes an objection and exception for DHHR. This Court recognizes that the legislature cannot foresee every case scenario, and that every agency has certain implied authority co-extensive with its duties and purposes. However, this Court does not find such implied authority with respect to the instant causes of action.

The moving defendants argue that a direct cause of action as alleged raises substantial constitutional issues. Since this Court has ruled that neither agency has implied or express statutory authority to maintain the causes of action, this Court does not find it necessary to address this issue.

Under the facts as alleged and assumed to be true, there can be no doubt that our State has suffered great loss in monetary damages and, more importantly, in human lives and the quality of human life. However, without proper legal remedy, there exists no claim upon which relief can be granted. This Court finds that to be the case here. Further, the Court finds no such reason for delay, and will, therefore, order judgment be entered pursuant to Rule 54(b). Mr. King, please prepare an order consistent with my ruling. My apologies to all counsel for the delay in issuing this ruling.

Sincerely,

/s/ Irene C. Berger, Judge
Thirteenth Judicial Circuit