THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Honorable Carolyn Matthews

Docket No.: 13-ALJ-08-0159-AP

Peter Brown,
Appellant,

v.

South Carolina Department of Health and Human Services,
Respondent.

AFFIDAVIT OF PATRICIA LOGAN HARRISON

Patricia Logan Harrison, file under penalties of perjury this Affidavit in support of a petition for fees in this case based on personal knowledge of the facts set forth herein.

1. The South Carolina Department of Health and Human Services and/or its agent, the South Carolina Department of Disabilities and Special Needs have been defendants in every appellate case I have won in the Fourth Circuit, the South Carolina Supreme Court and the South Carolina Court of Appeals.

2. In 2004, the South Carolina Supreme Court upheld the ruling of the circuit court judge in *Ex Parte: SCDHHS v. Jackson*, 364 S.C. 527 (2005), preventing DHHS from taking a large part of the settlement of a lawsuit in behalf of the two severely disabled children I represented.

3. That case was decided in 2004 and reaffirmed in my client's favor by the Supreme Court after the State's motion for rehearing was granted.

4. Three times, my cases filed against the defendant(s) in this case have been certified to the South Carolina Supreme Court pursuant to SCRCP 204, which provides for that court to hear cases of extreme public importance and we have prevailed in each of those cases.

5. Prior to, and since this lawsuit was filed, I have litigated cases in the probate court, including hotly contested will contests, guardianships and cases involving large trusts.

6. In one guardianship case, I was awarded a fee by the circuit court of $105,000 in a contested guardianship matter (the amount I requested).

7. Much of my legal work is for poor and/or disabled persons, like the Appellant in this case, where I charge either a reduced fee or no fee, or take the case on a contingency basis.

8. I have an AV rating with Martindal Hubbel and I have been named as a "Superlawyer" for several years.

9. I have been practicing law for approximately twenty-five years and my resume is attached.

10. The attached affidavit of Lynn S. Carman describes the complexity and difficulties inherent in litigating Medicaid cases. Exhibit 1.

11. This case has been one of the most difficult cases of my career, in part due to retaliation by DHHS and its agents.

12. I am currently charging and receiving rates of up to $395.00 an hour in noncontested matters in the probate court, where the demands of the court and the parties are significantly less than in this case and the payment of fees is not contingent.

13. In those fee-paying cases, my fees are normally paid promptly by the client without haggling about rates or performance.

14. I frequently turn away paying clients due to the demands on my time in Medicaid appeals.

15. This case and others are referred to me by probate court attorneys who do not have litigation experience outside of the probate court and are not willing to take on a case that requires hundreds of hours of work.

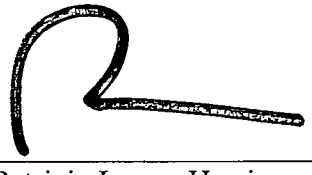
16. I frequently try to encourage other attorneys to take on cases involving Medicaid appeals, but my experience is that private attorneys will only take on cases where they are getting paid and they will not even consider these cases that go on for years and years.

17. I have spent in excess of 700 hours in the state appeals in this case.

18. Peter or his family have paid in excess of $60,000 for legal services during the course of these proceedings.

19. I request permission to provide affidavits in support of an hourly rate of $450.00 per hour in this case.

I declare that the foregoing is true, under penalty of perjury, to the best of my knowledge, information and belief. Executed in Columbia, South Carolina on this 6th day of March, 2014.



Patricia Logan Harrison
611 Holly Street
Columbia, South Carolina 29205
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pharrison@loganharrisonlaw.com
803 256 2017

Sworn to before me this 6th day
of March, 2014

Notary Public for South Carolina
My Commission Expires: 8.14.2014

STATE OF CALIFORNIA

COUNTY OF MARIN

DECLARATION OF LYNN S. CARMAN

Now comes Lynn S. Carman, who swears and affirms:

1. I have been a member of the State Bar in the State of California for 54 years and I am admitted to practice in all state and federal courts in California, the Ninth Circuit Court of Appeals and the United States Supreme Court.

2. I graduated from Stanford in 1950 and from Golden Gate University School of Law in 1959..

3. I formerly served as the Deputy District Attorney for El Dorado County, as the Public Defender in El Dorado County and as the President of the El Dorado County Bar Association.

4. I have more than 31 years of experience litigating Medicaid cases in the state and federal courts.

5. In 2004, I founded the Medicaid Defense Fund, as an organization to assure that the State Medicaid programs follow federal law, in particular that the reimbursements to providers are sufficient to ensure that quality care is furnished.

6. For many years, I have successfully litigated Medicaid budget cuts to providers which violate the Medicaid Act, on the basis that rates which have been set for purely budgetary reasons preclude quality care being furnished.

7. Some of the non-Medicaid cases I have litigated include:

Mallick v. Superior Court, 89 Cal.App.3d 434 (1979): In this case, the Golden Gate

Bridge District was ordered to set aside the bridge toll increase of 25 cents from $1 to $1.25. This case settled, by reducing the toll to collect back the overcharge and an agreement to spend $2.2 million to purchase the Bay Area's first fleet of handicapped-equipped buses. I was awarded $40,000 attorneys' fees.

McGhee v. Bank of America, 60 Cal.App.3d 442 (1976), (tried as Wilson v. Bank of America, (unreported). I was lead counsel in obtaining $101 million judgement against Bank of America in 7-day court trial. This case settled for agreement to cease requiring impounds to be paid to the bank, and payment of approximately $35 million to the victim borrowers. I was awarded $1.4 million attorneys' fees. This and others in which I was lead counsel, established class action and trust law precedents for class actions against banks in California, (such as Wilson v. San Francisco Federal S&L Assn., 62 Cal.App,3d 1 (1976); Bodle v. Well Fargo (unreported); in each of which attorneys' fees were awarded.

8. Some of the Medicaid cases I have litigated include:

Cowan v. Myers, 187 Cal.App.3d 968 (1986): In this case, the Superior Court ruled that limiting Medicaid coverage only to care, which is medically necessary to prevent death or significant disability, violated the federal Medicaid Act. The legislature then amended the state Medicaid Act to increase Medicaid coverage as a result of this case.

10% Medicaid fee cut case: In 1987 the State Department of Health Services cut payments to all Medicaid providers by 10%. In this litigation, the U.S. District Court in Sacramento permanently enjoined the cut. I was awarded $90,000 attorneys fees.

Medicaid budget case: In 1990 I obtained an injunction in U.S. District Court in Sacramento requiring the State of California to pay all Medicaid providers whether there was a budget or no budget. As result of this case the legislature enacted a provision for a continuing appropriation to pay all Medicaid providers during these annual budget impasses.

5% Medicaid fee cut case: Clayworth v. Bonta, 295 F.Supp.2d 1100 (E.D.Cal.2003). In 2003 the legislature enacted a 5% cut in Medicaid reimbursement for all fee-for-services doctors and pharmacies. I obtained injunction to enjoin the 5% rate cut. (*Reversed, other grounds*).

10% Medicaid payment cuts of 2008: Independent Living Center ("ILC") v. Shewry, 543 F.3d 1047 (9th Cir. 2008); ILC v. Maxwell-Jolly, 572 F.3d 644 (9th Cir. 2009): In 2008 the legislature enacted a 10% across-the-board cut in Medicaid reimbursement for fee-for-service providers. I obtained two injunctions to stop the cut for doctors, pharmacies, dentists, adult care health centers, optometrists, home health providers, and non-emergency transporters. (Not overruled, though vacated, other grounds, Douglas v. Independent Living Center, 565 U.S. __, 132 S.Ct. 1204 (2012); currently, in court-ordered mediation).

10% Medicaid payment cut of 2009: In 2009 the legislature enacted a 5% rate cut to Medicaid pharmacies. Through the Medicaid Defense Fund, I obtained an injunction to

stop the cut. Affirmed, (Managed Pharmacy Care v. Maxwell-Jolly, unreported, 9th Cir. 2010; not overruled, though vacated, other grounds, Douglas, *supra*; currently, in court-ordered mediation).

10% Medicaid payment cut to pharmacies: The state legislature enacted a 10% reimbursement cut to providers to commence on June 1, 2011. As lead attorney for the Medicaid Defense Fund, I obtained injunction to stop this cut in the district court. This decision was reversed May 24, 2013, (Managed Pharmacy Care v. Douglas, __ F.3d __ 9th Cir. 2013; *certiorari petition pending*, No. 13-253).

9. The issue in the 2008-2009 cases was whether a person threatened with injury from continuous State action contrary to federal law, has standing to sue for injunctive relief under the Supremacy Clause. The new issue in the 2011 Medicaid rate cut, is whether courts must defer to decisions of the Secretary of the U.S. Dept. of Health and Human Services, without any findings but only conclusions that Medicaid provider payment cuts comply with the quality of care provision of the Medicaid rate statute, 42 U.S.C. § 1396a(a)(30)(A). This provision requires states to assure that its payments to Medicaid providers are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available to the general population in the geographic area.

10. Currently, the implementation of the 10% Medicaid pharmacy payment cuts, in the Managed Pharmacy Care case, has been temporarily postponed to January, 2014, because

even the Director of the state Department of Health Care Services has determined that the 10% cuts, if not delayed or rescinded, for some or all pharmaceuticals, will injure access of pharmacies to pharmacy services; and, the Director is possibly awaiting determination by the Supreme Court whether it will issue, or not issue, cetiorari at the confere nce presently scheduled for January 10, 2014.

11. I became acquainted with Patricia Logan Harrison as a result of her work in the *Doe v. Kidd* cases when I was preparing briefs to file in the United States Supreme Court in the 208-2009 rate reduction cases.

12. Ms. Harrison is well respected nationally as a result of her work in Medicaid litigation cases and she has been of tremendous assistance to me in editing briefs, discussions of litigation strategy and in sharing information on Medicaid cases from other parts of the country.

13. Medicaid litigation is the most complex of the litigation I have done during my 54 year career as a lawyer and there are extremely few lawyers in the country, like Ms. Harrison, who are intellectually capable of taking on these cases and willing and courageous enough to persist through years of appeals.

14. The *Doe v. Kidd* case was a landmark case in the field of Medicaid law, because it established the right to bring a private action to enforce the Medicaid Act in the Fourth Circuit. It is especially important, considering that circuits such as the Ninth Circuit have, now, indicated they may not continue to enforce the quality of care and equal access provisions of the Medicaid Act. Her achievement bodes that recipients may nevertheless continue to obtain adequate access to Medicaid services, by appropriate judicial

enforcement of the "prompt services" requirement of 42 U.S.C. § 1396a(a)(8).

15. *Doe v. Kidd* has been cited in briefs filed by the United States Department of Justice, by attorneys around the country and by other courts.

16. I have reviewed the docket sheet, the motion for fees (Entry 236), the summary of legal fees by category (Entry 245-5) and the timesheets of Patricia Logan Harrison (Entry 236-1) and I find them to be most reasonable and necessary to encourage the enforcement of the Medicaid Act. First: I have reviewed Ms. Harrison's total time requestsed and the breakdown of the time between the different phases and tasks in the case. I found the time she spent overall and in each category to be most reasonable and necessary, given the complicated nature of Medicaid appeals which were compounded by the defenses put up by the state agency. Second, the time MKs. Harrison has spent is not out of line compared with the time I spend in complicated Medicaid litigation. Third, specifically, as to the 489 hours spent on the first appeal to the Fourth Circuit, this amount of time is not out line with the appeals I have done and I, myself, have spent upwards to 500 hours in a single appeal to the Court of Appeals. Fourth, unless appropriate fees, with multipliers for the risk and length of these monstrous cases, particularly this one, are awarded by the courts pursuant to the intent of Congress in 42 U.S.C. § 1982/1988, the Act will simply not be enforced because attorneys will not take these cases, with their complexity and absorption of their capacities, unless they are paid appropriately.

17. It appears that Ms. Harrison spent slightly less than 500 hours preparing briefs and the joint appendix on the first appeal to the Fourth Circuit. First of all, this is one of the most

complicated Medicaid cases I have ever seen, on so many different levels of complexities. In my experience litigating complex class actions and complex Medicaid cases, this is a conservative amount of time for an appeal from a district court in a case like this, and I would have expected briefing and preparation of arguments in the Court of Appeals of such a complicated issue to require more time.

18. At the time this case was on appeal, there was a fear, and still is a fear of, a national trend toward restricting access to the federal courts in Medicaid cases after *Gonzaga*, but this trend has since been reversed, in part as a result of exceptional cases like *Doe v. Kidd*, where attorneys were willing and courageous enough to undertake litigation at great expense with no certainty of being paid for their work.

19. The fact that there was not a team of lawyers doing this briefing for the plaintiff is remarkable, especially considering the resources available to the State and the nearly insurmountable obstacle Doe faced in both the district court and the Court of Appeals of overcoming the presumption that the State acted lawfully.

20. Spending just 120 hours in preparing briefs and the joint appendix in *Doe v. Kidd II* is even more remarkable and only a well experienced Medicaid lawyer could prepare a joint appendix, a successful brief and reply brief in that amount of time.

21. Ms. Harrison frequently communicates with me to share recently decided Medicaid cases from the federal courts and I have found her to be a great resource in a field where few lawyers understand the "language," let alone the alphabet of Medicaid law.

22. The requested fee in federal proceedings of less than $1 million in a federal case like *Doe v. Kidd* that has gone on for more than a decade is reasonable and necessary to encourage

other private lawyers to defend the rights of disabled persons like Doe, who do not have funds to hire private counsel; and anything less will discourage them.

23. If costs of associated state actions were not recoverable under 42 U.S.C. 1988, the State could simply avoid compliance with the law by terminating eligibility.

24. In my experience, the federal Medicaid Agency, CMS, provides no oversight of federal Medicaid programs in respect to the minimum amount or minimum services furnished by a state. In its entire history CMS has never penalized a state for paying too little or not furnishing sufficient services in its Medicaid program. The manifest reason is, that every billions of dollars a state profits by skirting the minimum requirements of the Act for provider payments or services, is an equal billions of dollars saved by the federal government. Indeed, this conflict of interest was frankly reported to the Supreme Court in the *Douglas* cases by a host of former Secretaries of HHS, (Amicus Brief August 25, 2011, filed in *Douglas*, at page 25:

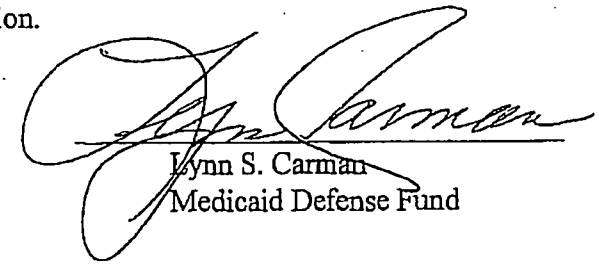
> Finally, it bears noting that there is no realistic financial incentive for CMS aggressively to enforce § (30)(A)-quite to the contrary. Because [Federal Financial Participation] is a function of the funds the state actually expends reimbursing providers, state non-compliance with § 30(A) necessarily results in lower reimbursement rates, *thereby saving the federal government money.* See Moncrief, Assault on Litigation, supra, at 2341. In that framework, CMS is unlikely to enforce something like the Equal Access Provision [of § 30(A)], which would, in its violation, save federal money.

(Emphasis supplied).

Accordingly, due to lack of oversight, or conflicted oversight, by the federal government, litigation like *Doe v. Kidd* is useful and necessary, and was envisioned by Congress in enacting § 1988, to prevent States from accepting federal funds and failing to use them

for the intended purpose.

I have read this statement and I swear under penalty of perjury that it is true to the best of my knowledge and information.



Lynn S. Carman
Medicaid Defense Fund

October 22, 2013