

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

CIVIL DIVISION

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AETNA BETTER HEALTH, INC.;  
DBA AETNA BETTER HEALTH :  
OF OHIO, :

Plaintiff, :

vs. : Case No. 12CV-7968

MICHAEL B. COLBERT, :  
DIRECTOR, OHIO DEPARTMENT :  
OF JOB AND FAMILY :  
SERVICES, ET AL., :  
Defendants. :

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ORAL DECISION

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Before the Honorable Richard S. Sheward, Judge, on  
Thursday, August 16, 2012.

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APPEARANCES:

Messrs. Dan L. Cvetanovich and Marc J. Kessler,  
On behalf of the Plaintiff.

Messrs. J. Stephen Teetor and Mark Landes,  
On behalf of the Defendants.

Mr. Albert J. Lucas,  
On behalf of Molina Healthcare of Ohio, Inc.

Mr. Alan F. Berliner,  
On behalf of Buckeye Community Health Plan, Inc.

Messrs. John Kapacinskas, Jesse M. Coleman and  
Eric A. Jones,  
On behalf of United Healthcare Community Plan  
of Ohio, Inc.

Messrs. Jeffrey A. Lipps and Joel Sechler,  
On behalf of CareSource.

Mr. Marshall A. Bennett, Jr.,  
On behalf of Paramount Advantage

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1                                    Thursday Afternoon Session,  
2                                    August 16, 2012.

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4                    THE COURT: Thank you. Anything further with  
5 regard to that motion?

6                    I will proceed then.

7                    This motion, obviously you know, came up  
8 quickly for me also. So I will try to take it in an  
9 orderly fashion as best I can.

10                   First of all, it should be noted that the  
11 motion that's before the Court is pursuant to  
12 41(B)(2) as opposed to what we might anticipate  
13 under Rule 50. The distinction is that under this  
14 motion, 41(B)(2), the Court weighs the facts,  
15 decides the credibility, et cetera. So that is the  
16 first thing I want to note.

17                   This case was obviously brought by Plaintiff  
18 and I think we should go back to the very beginning  
19 so as not to lose focus. Aetna brought this lawsuit  
20 as the Plaintiff and their prayer was that they did  
21 not ask for the process to be totally redone. They  
22 simply asked that they be awarded the agreement to  
23 put them back where they would have been had it not  
24 been for the rescoring.

25                   They also asked that I make a declaration

1 that the original award of the contract to Aetna was  
2 properly based on the RFA and Answer 30 in the  
3 definitions of full risk and Aetna should be  
4 declared reinstated as the recipient of a provider  
5 agreement pursuant to the RFA.

6 It is my belief that -- first of all, let's  
7 go to the heart of the allegations in this case  
8 which is whether or not the State abused the  
9 discretion -- abused their discretion. And I'm  
10 firmly convinced that they did not. The abuse of  
11 discretion as we know, and we've all certainly  
12 talked about it almost endlessly in this case  
13 throughout the motions because that's such a large,  
14 large part of the consideration here, is whether or  
15 not the State of Ohio Department of Job and Family  
16 Services abused the discretion. I think clearly  
17 they did not.

18 You can take any of the definitions you like  
19 for abuse of discretion and we all know there are  
20 many that have been cited in this case in the last  
21 few weeks. But at the very heart of the abuse of  
22 discretion is an ill will, an intention, a malice, a  
23 prejudice, a bias. It's not mens rea as we know it  
24 in criminal law but it is a state of mind. It's  
25 more than an act of poor judgment. It's much more

1 than a mistake. It has an intention behind it. And  
2 that is the distinguishing characteristic that sets  
3 aside or sets apart abuse of discretion and a  
4 mistake in judgment or execution.

5 I've seen no evidence in this case in all the  
6 filings, all the testimony, all the evidence of any  
7 abuse of discretion on the part of the State of  
8 Ohio. It was mentioned that regarding the claim  
9 approached by due process that Aetna had a property  
10 interest. I held that at the very outset of this  
11 case simply because they were awarded the contract  
12 and then it was taken away. But that does nothing  
13 for us with regard to the second prong of the test,  
14 if you will, i.e., abuse of discretion. So I think  
15 that should be clear.

16 The RFA set forth the rules. The RFA  
17 referred to the Ohio Administrative Code on either  
18 four or five separate occasions within the RFA.  
19 They were certainly part and parcel of the RFA.  
20 They were certainly part of the instructions of the  
21 RFA along with federal statutes that were also  
22 cited.

23 So I find that the State of Ohio based on the  
24 facts presented did not abuse its discretion in any  
25 way, shape or form; moreover, I think had a duty to

1 withdraw the offer to Aetna once they found out that  
2 Aetna was simply not qualified based on its, what I  
3 would call, clear misrepresentation of its position,  
4 vis-a-vis, management agreements in California,  
5 Arizona and Maryland.

6           Additionally, starting with, let's say, a  
7 simple layman's projection of full risk the new  
8 interpretation asserted by Aetna, in my view, is  
9 unbelievable, absurd, ridiculous. I don't know how  
10 in the world in good sense you can say that full  
11 risk means we risk our fee. What are we talking  
12 about here? We're not talking about issuing a  
13 contract for the purchase of widgets. We're talking  
14 about a contract that proposes to provide insurance.  
15 Isn't it a form of insurance we're talking about? I  
16 think so. And therefore, the concept that full risk  
17 has nothing to do with standing behind, guaranteeing  
18 or supporting claims makes no sense to me at all.

19           I think what happened here is clear. The  
20 three senior executives, because they started their  
21 research early, early 2011, realized that if Ohio  
22 took the same position with regard to risk that they  
23 took in 2009 they didn't have a prayer. They knew  
24 that going in. And to suggest to us that, well,  
25 these people were -- they were too stupid to know

1 anything about the definition of full risk but what  
2 was on 6, question 6 I think it was. I don't accept  
3 that. It's ridiculous. I don't accept it. I don't  
4 believe it.

5 I think they knew they didn't have a chance  
6 without somehow, some way declaring that they were  
7 full risk in California, Arizona and Maryland. And  
8 I don't believe the testimony of these witnesses for  
9 a second that they didn't know what full risk meant.  
10 I don't believe Tom Kelly for a second. He knows  
11 what full risk is.

12 So we start off with a very, very  
13 complicated, sophisticated case that comes hauled  
14 into court in volumes and volumes and volumes and  
15 volumes of paperwork, details, complicated analysis  
16 and so forth. And where does it end up? It ends up  
17 like 99.999 percent of all cases. We got witnesses  
18 we can't believe.

19 I don't believe, nor do I accept based on  
20 credibility, which I'm allowed to evaluate in this  
21 role, of Tom Kelly. I don't believe him. I don't  
22 accept his testimony. I don't think it's credible.  
23 I don't think it's worthy of belief. For that man  
24 to sit here for two days and tell us that he didn't  
25 know what full risk is, I don't accept that. I

1 don't believe it for a second. I'm sorry, Mr. Tom  
2 Kelly.

3 This lady, Debra Bacon, it didn't make any  
4 difference whether or not she knew what the  
5 definition was because she was ordered what to do.  
6 And we may sit here and say, well, you know, she  
7 should have checked the Ohio Administrative Code.  
8 And she didn't. And she admitted she didn't. We  
9 should have checked the federal regulations. We  
10 think she should have. But she didn't. Why didn't  
11 she? What difference does it make?

12 The three big guys upstairs said we're  
13 adopting, what was it they called it? The new  
14 interpretation. A new interpretation.

15 So I don't think Ms. Bacon really had a  
16 choice. That's what I think. And so I don't think  
17 there's any question in my mind but I must dismiss  
18 this case. There has been no evidence presented  
19 that I can find that's been presented in this case  
20 that even suggests abuse of discretion by the State.  
21 I think that's step one. Based on that, Plaintiff's  
22 remedies are eliminated.

23 Step two is, which is really perhaps a  
24 reconsideration of step one, were the directions set  
25 forth of how to complete the application so twisted

1 or biased that they might constitute an abuse of  
2 discretion, an intentional misleading of Aetna? I  
3 don't see any way in the world to believe that for a  
4 second in the face of this evidence. I have a  
5 difficult time accepting that they actually thought  
6 that, the three kingpins, that anybody would buy  
7 this theory. I don't believe it. I'm disappointed.  
8 I would have thought they'd have come up with  
9 something a little bit more creative.

10 At any rate, it is -- I hate to even bring  
11 this up, but I must. Under Rule 41(B)(2) there is  
12 an indication that, if requested, I have to submit a  
13 Findings of Fact and Conclusions of Law. If  
14 requested. Is anybody requesting? Hearing no  
15 request I guess there's not.

16 MR. KESSLER: Your Honor, could I have a  
17 moment?

18 THE COURT: All right.

19 MR. KESSLER: Your Honor, we will not request  
20 a Findings of Facts and Conclusions of Law and we'll  
21 allow the record to stand.

22 THE COURT: What's the last thing you said?

23 MR. KESSLER: We will allow the record to  
24 stand.

25 THE COURT: Okay. My only concern about

1 that, frankly, is the month it would take to get a  
2 transcript out to do that for you. Because it also  
3 provides that if you requested it I could request  
4 submissions from you, which I would certainly do.

5 I should also at this point indicate that  
6 pursuant to Rule 54(B) this will be a final  
7 appealable order. This concludes the issues brought  
8 in this case and, therefore, there's no just reason  
9 for delay.

10 I hesitate for just a moment regarding the  
11 intervening parties. I don't remember that any of  
12 the intervening parties have any further claims that  
13 we haven't addressed. There are none. This makes  
14 our verdict, I think.

15 MR. LIPPS: I think you've already taken care  
16 of the intervening Plaintiffs by virtue of the  
17 rulings on orders. The Defendants have just been  
18 defending the claims.

19 MR. KAPACINSKAS: Correct.

20 THE COURT: That's what I thought. So that  
21 covers everything.

22 I am going to request that Mr. Teetor present  
23 me with an entry to conclude this matter which is to  
24 be a final appealable order. It should include the  
25 54(B) language. There's no just reason for delay.

1 I think also that that entry clearly should indicate  
2 that any and all restraining orders, injunctions,  
3 whatever, previously issued against the State of  
4 Ohio are dismissed, withdrawn, dissolved I guess is  
5 the term. So there is no further restraining order  
6 on the State.

7 I hope in the interest of time and clarity, I  
8 hope I've set forth sufficient reasons for my  
9 decision notwithstanding the fact that I've had no  
10 time to prepare any decision. But it is clearly  
11 that I want to emphasize this and based on  
12 credibility, believability of those witnesses and  
13 that is critical and on the other side of the coin  
14 by virtue -- on the other side of the coin, the  
15 State of Ohio, I don't see one bit of evidence that  
16 they abused their discretion in any way, shape or  
17 form. All right?

18 That will be all.

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CERTIFICATE.

I do hereby certify that the foregoing is a true and correct ORAL DECISION in this matter, upon the date of filing but not thereafter, taken on August 16, 2012, taken by me and transcribed from my stenographic notes.

Lahana DuFour, RPR, CRR  
Assistant Official  
Court Reporter

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