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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2018-00845

HENRY AND EVA HIRVI,

Plaintiffs,

v.

MARYLOU SUDDERS, et al.,

Defendants.

Notice sent
10/12/2018
R. B.
H. & H. S.
A. S.
P. T. O.
N. G. K.
E. & D. LAW A.
S. C. B.
E. K.
B. F. B.
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B. E. B.

(sc)

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CONSOLIDATED WITH

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2018-000129

JEAN MAAS,

Plaintiff,

v.

MARYLOU SUDDERS, et al.,

Defendants.

DEFENDANTS' EMERGENCY RESPONSE AND MOTION TO DISMISS COMPLAINT(S) FOR CONTEMPT

10/11/18 See # 19,

WILKINS, J

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Notice sent
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JEAN MAAS
Plaintiff,
v.
MARY LOU SUDDERS et al.
Defendants.

CIVIL ACTION
NO. 18-129-D

HENRY HIRVI and EVA HIRVI
Plaintiffs,
v.
MARY LOU SUDDERS, Secretary of the Executive Office of Health and Human Services, et al.[1]
Defendants

CIVIL ACTION
NO. 18-845-D

(sc)

ORDER ON PLAINTIFFS' MOTION FOR CLARIFICATION AND FOR A FINDING OF CONTEMPT OF DECISION AND ORDER OF DECLARATORY JUDGMENT

The plaintiffs, Jean Maas ("Maas") and Henry and Eva Hirvi ("Hirvis") (collectively, "Plaintiffs") brought the underlying declaratory judgment action against Marylou Sudders, Secretary of the Executive Office of Health and Human Services and Kim Larkin, Director of the Board of Hearings of the Office of Medicaid of the Executive Office of Health and Human Services (collectively, "Office" or "Defendants"). After hearing on May 30, 2018, the Court allowed in part the Plaintiffs' Memorandum in Support of Class

[1] Kim Larkin, Director of the Board of Hearings of the Office of Medicaid of the Executive Office of Health and Human Services.

Certification, Declaratory Judgment and Preliminary Injunction and denied it in part. As relevant to the present motions, the Court ruled:

> 3. The Court DECLARES that, in cases where the defendants count trust assets for Medicaid eligibility purposes, the defendants' standard notices of denial of eligibility violate 42 C.F.R. § 431.210(b) by failing to provide a clear statement of the specific reasons supporting the intended action. ["The Declaration"].

Memorandum of Decision and Order on Plaintiffs' Motions for Declaratory Judgment, dated June 22, 2018 ("June Order").

The plaintiffs now seek clarification and contempt findings against the defendants under G.L. c. 231A, § 5, claiming that the Office's notices, issued after the Declaration, do not set forth all reasons for the agency's denial of benefits.[2] The Hirvis, for instance, attach a notice dated August 15, 2018, which lists six specific paragraphs of the Irrevocable Trust at issue and sets forth a sentence explaining why the Office believes that "trust principal can be paid to you or your spouse or can be paid for your or your spouse's benefit." There is no evidence that the Office in fact has any reasons -- beyond the six reasons so stated – for denying benefits to the Hirvis. The notice does, however, state that the disqualifying provisions "include, but are not limited to" the six provisions specifically set forth. It is this "include, but are not limited to" language that, the plaintiffs assert, violate the Declaration.

[2] The court does not address the various arguments challenging the reasons set forth in post-Declaration notices of denial. See, e.g. Hirvi Mem at 10-16. Those arguments must be presented to the agency in the first instance. See Gill v. Board of Registration of Psychologists, 399 Mass. 724, 726 (1987). Moreover, nothing in the Declaration addressed the validity of any particular reasons for denying any of the plaintiffs' applications.

The court now clarifies that, without more, inclusion of the phrase "include, but are not limited to" does not violate the Declaration.[3] It is possible to use that phrase while, at the same time, providing a clear statement of the specific reasons supporting the intended action. For instance, that phrase may legitimately reflect the possibility - potentially present in every case – that, after the denial notice issues, the Office may learn information, discover arguments, encounter new case law or realize that it had inadvertently omitted one or more reasons for denial. The plaintiffs have not pointed to any notice that fails to provide a statement of any of the then-known "specific reasons supporting the intended action." Only such a notice would violate the Declaration. Use of the phrase "include but are not limited to" is not a substitute for actual proof of a violation of the regulation or the Declaration.

The court also clarifies that, this phrase (or equivalent language) cannot justify withholding any "of the specific reasons" which the Office has used to "support[] the intended action." Because the Office must set forth "a clear statement of the specific reasons supporting the intended action," a violation of both the regulation and this court's declaration has occurred if the Office only provides an incomplete statement, but not all of the "reasons" "supporting the intended action." The plain meaning of the phrase, "the specific reasons" – in the plural – is inclusive. It does not mean "some of the reasons." Where more than one reason exists, providing a single reason squarely violates the regulatory choice to use the plural. While it might technically be possible to argue that providing two reasons satisfies the use of the plural even if three or more reasons exist, the defendants wisely do not make such an argument. That construction would non-sensical. There is no linguistic or regulatory-policy reason to construe

[3] As in the June Order, the court relies upon the federal regulation, which exceeds minimum constitutional due process requirements and makes it unnecessary to reach any constitutional question.

the regulation as imposing an "at least two reasons" minimum.[4] Indeed, withholding any of the "reasons supporting the intended action" would squarely defeat the regulatory purposes, discussed on pp. 8-12 of the June Order. The only reasonable interpretation of the regulation's plain language is that the Office's notice of denial must include each of the "specific reasons supporting the intended action," at least when based upon including of trust assets.

Clarification of this point is particularly important, because there appears to be some residual confusion. In particular, the defendants (Opp. at 6) assert that "once MassHealth identifies in its denial notice a single circumstance (or circumstances) under which trust assets may be payable to or for the benefit of the applicant, it has explained why the assets are countable." One reason may well be enough to support a denial. But if that is the reason why the Office includes the "but not limited to" language in the notice, then it is a non-sequitur. The fact that the Office's notice identifies "a single circumstance (or circumstances)" warranting denial does not mean that it has given a "statement of the specific reasons supporting the intended action" if it also relies upon unstated reasons to support its denial (Emphasis added). Supplying one or two reasons among many is not the same as stating "the reasons." The defendants do not explain how their "single circumstance" argument can be squared with the use of the plural. If a reason "support[s] the intended action" it must be included in the notice. The court so clarifies the Declaration.

Nothing in the complaints for contempt (or otherwise before the court) suggests that the Office has violated the Declaration, even as so clarified. While the post-Declaration notices use the phrase "include, but are not limited to," there is no allegation or proof that the Office has gone beyond that language to give partial statements of its reasons for denying benefits, or that it

[4] As noted in the next paragraph of this Memorandum, the defendants do contend that providing a single reason is enough.

has (or will) rely upon reasons not stated in a denial notice at a later stage of the proceeding without complying with federal and state law regarding notification of reasons for denial. As noted at the hearing, if the Office wishes to rely upon a reason not stated in the original notice and an applicant objects, the possible outcomes include: (1) issuance of a revised notice, (2) waiver by the applicant of any notice problem (perhaps with a continuance or other accommodation, (3) withdrawal by the agency of the new "reason" that did not appear in the notice or (4) insistence by the agency upon proceeding without a notice that sets forth a clear statement of the specific reasons supporting the denial. Only in the fourth situation might an issue arise under the Declaration.

Because the complaints for contempt set forth no alleged violations beyond the use of the phrase "include, but are not limited to," which does not violate the Declaration, the plaintiffs have not pled facts sufficient to show "a clear and undoubted disobedience of a clear and unequivocal command." Cooper v. Keto, 83 Mass. App. Ct. 798, 804 (2013), quoting In re Birchall, 454 Mass. 837, 851-852 (2009). The post-Declaration notices before the court reflect multiple reasons for denial – six in the Hirvis' case. At least on their face, these notices appear to reflect a serious attempt to comply with the Declaration and the regulations discussed in the June 2018 Order. The court therefore declines to require the defendants to file an answer, allow discovery, conduct a hearing or trial or to order further proceedings at this time. Mass. R. Civ. P. 65.3(d). The complaints for contempt are dismissed as premature at this time, without prejudice to challenging agency action that may violate the Declaration or applicable regulations in fact.

Of course, delayed articulation of reasons supporting the denial of benefits might encounter other regulatory difficulties, but no such circumstances are presently before the court. A declaration on those hypothetical situations would be premature and inappropriate under G.L.

c. 231A. The court mentions these possibilities so that the parties will not construe the Declaration more broadly than intended.

Some hypothetical scenarios might run afoul of the strong statutory and regulatory prohibitions on delay in processing Medicaid applications. For instance, federal law requires the Office to handle Medicaid applications "with reasonable promptness. 42 U.S.C. § 1396a(a)(8). See also 42 C.F.R §43.917(a), (b)(2) (Medicaid denial notices must be "timely and adequate" and must comply with 42 C.F.R. § 431.210). The controlling regulation, 42 C.F.R. § 431.210 requires that the notice itself contain the clear statement of the specific reasons for agency action. The regulation applies "[a]t at the time the agency denies an individual's claim for eligibility, benefits or services , , ,," 42 C.F.R. § 431.206(c)(2). Information provided outside the notice, at a much later time, may violate that command. It may be possible for a belated assertion of a reason for agency action to violate the requirement that it be "timely." Massachusetts law requires issuance of a decision on an appeal of a rejection of a Medicaid application "within forty-five days after the date of filing of said appeal." G.L. c. 118E, § 48. State regulations likewise require "adequate" notice of an intended agency action, including the reasons for the action and citations to regulations. 130 Code Mass. Regs. § 610.026(A). They also require written notice of MassHealth eligibility determinations, including notice of an applicant's appeal rights and must "either provide[] information so the applicant or member can determine the reason for any adverse decision or direct[] the applicant or member to such information." 130 Code Mass. Regs. § 516.008. Since there is no evidence of belated assertion of reasons supporting denial of benefits currently before the court, it will be time enough to address any such problems if and when they occur.

CONCLUSION

For the above reasons,

Notice sent
10/12/2018

1. The complaints for contempt are dismissed as premature at this time, without prejudice.

2. The court clarifies its Declaratory Judgment of June 22, 2018 ("Declaration") as follows: (sc)

   a. In a notice of benefits denial that counts trust assets, the defendants' use of the phrase "include, but are not limited to" preceding a clear statement of the specific reason(s) for denial, without more, does not violate the Declaration.

   b. Paragraph 2a, above, does not mean that use of the phrase "include, but are not limited to" (or equivalent language) in such a notice of benefits denial justifies withholding any "of the specific reasons" which the Office has in fact used to "support[] the intended action."

   c. Because the Office must set forth "a clear statement of the specific reasons supporting the intended action," the Declaration prohibits denial notices that omit some or all of the reasons for counting trust assets then "supporting the intended action."

   d. Nothing in the Declaration precludes the Office from taking action based upon information learned after issuance of the denial notice or from revising or correcting a denial notice.

3. The court declines to enter any declaration regarding the process or circumstances justifying issuance of a revised or corrected notice, as no ripe dispute exists on that question.

Douglas H. Wilkins
Justice of the Superior Court

Dated: October 11, 2018

COMMONWEALTH OF MASSACHUSETTS

Norfolk

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COUNTY OF SUFFOLK

SUPERIOR COURT
DOCKET NO: 1884CV00129

JEAN MAAS
Plaintiff

v.

MARYLOU SUDDERS,
Secretary of the Executive Office of
Heath and Human Services,

And

KIM LARKIN,
Director of the Board of Hearings
of the Office of Medicaid of the
Executive Office of Health and
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SUFFOLK SUPERIOR COURT
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CONSOLIDATED WITH:

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF SUFFOLK

SUPERIOR COURT ✓
DOCKET NO: 1884CV00845

HENRY E. HIRVI and EVA E. HIRVI,
Plaintiffs

v.

MARYLOU SUDDERS,
Secretary of the Executive Office of
Heath and Human Services,

And

KIM LARKIN,
Director of the Board of Hearings
of the Office of Medicaid of the
Executive Office of Health and
Human Services
Defendants

10/11/18 After hearing to Care Providers clarification and dismisses the contempt Complaints without prejudice. See Memo of this date.

WILKINS, J