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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

AMBER WINTERS, *et al*., on behalf of themselves and all others similarly situated, Plaintiffs, vs. BANNER HEALTH NETWORK, *et al*., Defendants.	**Case No. CV2012-007665** **PLAINTIFFS' RESPONSE TO DEFENDANTS' SUPPLEMENT TO MOTION FOR NEW TRIAL** **(The Honorable Dawn Bergin)**

I. INTRODUCTION

Roughly twice-a-year for five years, Defendants have come to the Court with a "new" published decision, federal regulation, phrase from the Arizona Medicaid Plan or something else and alleged it is "fatal" to all Plaintiffs' claims and that Defendants are now allowed to violate federal statutes with impunity. Each time, the Court has discovered they have misstated, misrepresented, or misconstrued their "new" authority. Defendants' latest

claim regards *Armstrong v. Exceptional Child Care Center*, 135 S.Ct. 1378 (2015), and like all the others, is wholly without merit and, incredibly, cites a plurality portion of the opinion as the "law of the land." It does not deprive this court of jurisdiction to determine whether an Arizona state statute is preempted by federal law.

II. LAW

In order to obtain federal subject matter jurisdiction in a non-diversity case, plaintiffs must have a cause of action arising under the Constitution, laws or treaties of the United States. 28 U.S.C. § 1331.

In *Armstrong, supra*, Idaho Medicaid providers argued Idaho was paying them less than what was required under § 30(A) of the Medicaid Act (42 U.S.C. § 1396a(a)(30)(A)) and sued in federal court to enjoin Idaho to pay them the amount of money they claimed federal law required. *Id*. at 1382-83.

The Idaho healthcare providers claimed the federal courts had subject matter jurisdiction to render an injunction, because the providers' claims arose from a cause of action created by the Supremacy Clause. *Id*. at 1385 (noting the case concerns "[t]he power of federal courts of equity to enjoin unlawful executive action").

The Supreme Court held the Supremacy Clause "does not create a cause of action by itself." *Id*. at 1383. The Court held plaintiffs could sue in federal court to enjoin state officers from violating federal laws, but the subject matter jurisdiction to adjudicate these claims arose from federal courts' equitable powers, not the Supremacy Clause. *Id*. at 1384 ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action").

With regard to § 30(A) of the Medicaid Act, the Court then chose not to exercise its

equitable power to enjoin the Idaho officials, because:

1) Section 30(A) "is phrased as a directive to the federal agency charged with approving state Medicaid plans," (*Id*. at 1387);

2) Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right (*Id*. at 1385) (citing the holding from *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74, 116 S.Ct. 1114 (1996)); and

3) Congress has created an express administrative remedy for the violation of § 30(A) at 42 U.S.C. § 1396c, (*Id*. at 1385).

In other words, Congress has made it overwhelmingly clear: it wanted the Department of Health and Human Services, and only the Department, to determine Medicaid reimbursement rates under 30(A), not federal judges. *Id*. at 1388 ("Reading § 30(A) underscores the complexity and nonjudicial nature of the rate-setting task.") (Breyer, J., concurring in part).

All of the foregoing is set forth in §§ I-III of *Armstrong* and it is all very carefully limited to § 30(A) of the Medicaid Act and only § 30(A).

In § IV of the opinion, Justice Scalia tried to take it further and argue the Medicaid Act as a whole did not create a private right of action. *Id*. at 1387-88. This was not the opinion of the Court. Justice Breyer explicitly rejected this argument and § IV as a whole, while concurring in §§ I-III. *Id*. at 1388-90. Justices Sotomayor, Kagan, Ginsburg and Kennedy wrote a scathing dissent rejecting § IV (*Id*. at 1390-96) and the opinion itself says § IV is not the opinion of the Court or part of its holding. *Id*. at 1382 ("Justice Scalia delivered the opinion of the Court, *except as to Part IV*.").

The argument that the Medicaid Act does not provide a private cause of action was considered by all the Justices and explicitly rejected by five of them, so § IV of the opinion

is a plurality—which is effectively a dissent (given 5 Justices expressly rejected § IV) and does not represent the majority of the Court. This dissent is the part of *Armstrong* cited by Defendants in their Supplement, and the part Defendants aggressively and incorrectly portray as the ultimate holding of the case and the law of the land. *See, e.g.*, Defs. Supp. to Mtn for New Trial at 5:7-22.

III. DISCUSSION

Armstrong has no impact on this case because:

1) Plaintiffs are asserting state law causes of action in a state court of general jurisdiction – they have no burden to show a federal cause of action or federal subject matter jurisdiction;

2) all of the criteria which led the Supreme Court to find no cause of action under § 30(A) weigh in the exact opposite direction for § 25(C), the statute at issue in this case; and

3) the Supreme Court has explicitly rejected the argument that the Medicaid Act does not give rise to a private cause of action.

A. Plaintiffs Are Entitled to Move for Declaratory Relief in State Court

1. Plaintiffs Are Entitled to Seek Declaratory Relief in State Court

Plaintiffs are not required to show a cause of action under the Supremacy Clause, because they are in a state court of general, rather than limited, jurisdiction and therefore are not required to satisfy 28 U.S.C. § 1331.

The Arizona State Legislature has seen fit to confer standing upon and allow Arizona citizens to invoke the jurisdiction of the Arizona Superior Court if they can show they are:

1) a person;

2) whose rights, status or other legal relations are affected by a statute; and they desire to

3) have determined any question of construction or validity arising under the . . . statute and to obtain a declaration of rights, status or other legal relations thereunder. A.R.S. § 12-1832. Thus, there need only be a justiciable controversy between the parties to the action. *See Farmers Ins. Group v. Worth Ins. Co.*, 8 Ariz.App. 69, 71, 443 P.2d 431, 433 (1968). And, Arizona courts liberally construe "justiciable controversy" in declaratory judgment actions; essentially, "[t]he mere existence of a cloud, denial of a right, the assertion of an unfounded claim, * * * may constitute the operative facts entitling a party to declaratory relief." *Id*. (citing *Trossman v. Trossman*, 24 Ill.App.2d 521, 531-32, 165 N.W.2d 368, 373 (1960).

Plaintiffs are under no obligation, however, to show a cause of action arising under the Supremacy Clause, because they do not have to satisfy 28 U.S.C. § 1331. Indeed, such a requirement runs contrary to the scope of the Arizona Declaratory Judgment Act. *See McMann v. City of Tucson*, 202 Ariz. 468, 474 ¶ 20, 47 P.3d 672, 678 (App. 2002) (declaratory judgment statute allows courts "to construe **any contract, statute**, or municipal ordinance and to declare rights, duties, and legal relationships.") (emphasis added).

Indeed, Arizona citizens routinely bring suit in Arizona Superior Court under the Arizona Declaratory Judgment Act to determine whether their rights are being violated under state or federal law. *E.g.*, *Estate of Bohn v. Scott,* 185 Ariz. 284, 287, 915 P.2d 1239 (App. 1996) (4 U.S.C. § 111 violated); *Arizona Assoc. of Providers v. State*, 219 P. 3d 216, 223 Ariz. 6, 18 n.9 (App. 2009) (42 C.F.R. § 438.206(b)(1) not violated); *Planned Parenthood v. Maricopa County*, 92 Ariz. 231, 239-40, 375 P.2d 719 (1962) (state statute

was not preempted); *State of Arizona v. Direct Sellers Ass'n*, 108 Ariz. 165, 167-70, 494 P.2d 361 (1972) (state statute was not preempted).

For decades, state courts have issued declaratory judgments regarding whether a plaintiff's rights were being violated under the statute at issue here, § 25(C) of the Medicaid Act. *E.g., Olszewski v. Scripps Health*, 135 Cal.Rptr.2d 1, 69 P.3d 927 (Cal. 2003); *Public Health Trust v. Dade Cty.*, 693 So.2d 562 (Fla.App. 1996), W*est v. Shelby Cty. Healthcare Corp.*, 2013 WL 500777 (Tenn.App. 2013), *affirmed in part, reversed in part on other grounds*, No. W2012 00044 SC R11 CV, 2014 WL 7242746 (Tenn. 2014); *Smallwood v. Central Pen. Gen.*, 151 P.3d 319 (Alaska 2006); *Abbott v. Banner Health Network*, 341 P. 3d 478, 236 Ariz. 436 (App. 2014), *reversed on other grounds*, 239 Ariz. 409, 372 P.3d 933 (2016). Indeed, the Arizona Supreme Court wrote an opinion on this case a year and a half after *Armstrong*.

2. Defendants' Citations are Totally Irrelevant

Defendants cite a series of cases arguing Plaintiffs cannot move for declaratory judgment without showing a federal cause of action under the Supremacy Clause. All of Defendants' cited cases, however, concern only whether the requirements of **federal jurisdiction** are met and they are irrelevant to whether a state court case can adjudicate a question of federal preemption without a concomitant federally created private cause of action.

In *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), the Court stated: "[r]aising up causes of action where a statute has not created them may be a proper function for commonlaw courts, but not for federal tribunals." In *Cannon v. Univ. of Chicago*, 441 U.S. 677, 680 (1979), the court framed the question as whether petitioner has a "right of action against respondents that may be asserted in a federal court." Similarly, *Medtronic v.*

Mirowski, 134 S.Ct. 843, 849 (2014), concerned whether the federal Declaratory Judgment Act shifted the burden of proof in a federal patent case.

These cases are all irrelevant to whether an Arizona Superior Court case brought under the Arizona Declaratory Judgment Act can declare whether private parties, such as Defendants here, are violating federal law. Instead, every case focuses on questions concerning federal question jurisdiction and the scope of the federal Declaratory Judgment Act, both non-issues here.

B. The Criteria That Led the Supreme Court to Find No Cause of Action Under Section 30(A) Are All Absent for Section 25(C)

1. The Section 30(A) Criteria Do Not Apply to Section 25(C)

The Supreme Court declined to exercise its equitable powers and find a cause of action because § 30(A) "is phrased as a directive to the federal agency charged with approving state Medicaid plans" (*Id*. at 1387). The same is not true of § 25(C). It is a clearly stated prohibition designed to protect an identified class of persons, with no reference to the agency.

The Supreme Court declined to exercise its equitable powers and find a cause of action because § 30(A) has a detailed enforcement scheme for setting reimbursement rates and a mandate for the federal agency to set said rates. (*Id*. at 1385). The same is not true of § 25(C). There is no detailed scheme for an agency to enforce this prohibition.

The Supreme Court declined to exercise its equitable powers and find a cause of action because Congress has created an express administrative remedy for the violation of § 30(A) at 42 U.S.C. 1396c. While there are general prohibitions, there is simply nothing comparable for § 25(C).

Many courts have considered whether to provide declaratory and injunctive relief

under § 25(C) in light of its statutory scheme and none have had any problem doing so. *Olszewski, supra; Public Health Trust of Dade Cty., supra; West v. Shelby Cty. Healthcare Corp., supra; Smallwood, supra; Abbott, supra; Evanston Hosp. v. Hauck*, 1 F.3d 540 (7th Cir. 1993); *Taylor v. Louisiana DHH*, 7 F.Supp.3d 641 (M.D. La. 2013); *Mallo v. Public Health Trust of Dade Cty.*, 88 F.Supp.2d 1376 (S.D. Fl. 2000). Given the long history of courts construing rights under § 25(C) of the Medicaid Act, it defies logic to extend the holding in *Armstrong*, an analysis specifically limited to § 30(A) of the Medicaid Act—not the entire statute as argued by Defendants—to the entire Medicaid Act to preclude continued private enforcement of federal prohibitions found in § 25(C).

2. The *Tohono O'odham* Case is Instructive

Eight months after *Armstrong*, the District Court of Arizona was presented with the exact same argument Defendants are making here. An Indian tribe requested a declaratory judgment on whether state officials were in violation of 25 U.S.C. § 2710(d)(c)(3). The State argued that the tribe had no federal cause of action under the Supremacy Clause and that *Armstrong* required dismissal.

The District Court held it might have been inappropriate for a federal court to exercise its equitable powers under § 30(A) after *Armstrong*, but it was entirely appropriate for a Court to exercise its equitable powers under 25 U.S.C. § 2710(d)(c)(3). In reaching its conclusion, the Court stated § 30(A) "was unusually complex and contained standards that reasonably could be applied only with the expertise of the executive branch agency. The same is not true here." *Tohono O'odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1316 (D.Ariz. 2015).

It bears noting that unlike in *Tohono O'odham, supra*, Plaintiffs herein are under no obligation to show a federal cause of action. It also bears noting the statute at issue in

Tohono O'odham, *supra*, 25 U.S.C. §§ 2710(d)(c)(3), made far more provision for government agency involvement (by approving Indian gaming compacts) than § 25(C) does. Even so, the Arizona court still provided injunctive and declaratory relief, eight months after *Armstrong*.

C. The Supreme Court Rejected Defendants' General Proposition

Defendants' reliance on *Armstrong* to argue a private right of action is not available under the Medicaid Act is not even supported by *Armstrong* itself. *Armstrong* explicitly rejected this argument and made it clear: there was no private cause of action **solely** because of the unique characteristics of § 30(A), which makes it crucial for the agency (and not a federal judge) to determine reasonable Medicaid reimbursement rates. *See Armstrong*, at 1385 ("In our view the Medicaid Act precludes private enforcement of § 30(A) . . . ."); *see also id*. at 1388-96 ("Reading § 30(A) underscores the complexity and nonjudicial nature of the rate-setting task.") (Breyer, J., concurring in part). Such is not the case here and the issue of whether a state statute violates federal law is precisely the kind of judicial task contemplated by the Constitution, the Supremacy Clause and the Declaratory Judgment Act.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully move the Court to deny Defendants' Motion for New Trial in its entirety.

RESPECTFULLY SUBMITTED this 7th day of October, 2016.

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