David L. Abney, Esq. (009001)
LAW OFFICE OF DAVID L. ABNEY
4025 East Chandler Blvd., No. 70-A8
Phoenix, Arizona 85048
(480) 734-8652; abneymaturin@aol.com
Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THOMAS E. BLANKENBAKER, D.C., an Arizona licensed chiropractic physician; SHAWN WHERRY, D.C., an Arizona licensed chiropractic physician; EMILIA INDOMENICO, an Arizona resident, Plaintiffs, v. CHRISTINA URIAS, in her official capacity as Director of the Arizona Department of Insurance, Defendant.	**Case No. CV 2011-093099** **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** (Hon. Larry Grant) (Court Reported and Oral Argument Requested)

Christina Urias is the Director of the Arizona Department of Insurance. Under A.R.S. § 20-142(A), the Director "shall enforce" Arizona statutes regulating the insurance industry. The Plaintiffs asked the Director to enforce A.R.S. § 20-461(B) against a specific insurer, Blue Cross Blue Shield of Arizona ("Blue Cross"). A.R.S. § 20-461(B) requires that Blue Cross, like all other all health insurers, must apply deductibles or co-payments to all types of physicians, "without discrimination to the usual and customary procedures of any type of

physician." "Shall" is mandatory, not discretionary. "Shall" requires action.

The Director refused to enforce A.R.S. § 20-461(B). The Director's refusal to enforce A.R.S. § 20-461(B) harms the Plaintiffs, who cannot enforce A.R.S. § 20-461(B) themselves. They must depend on the Director to act. The motion to dismiss confirms that the Director still refuses to act—despite demands and despite this lawsuit. Plaintiffs respectfully ask that the Court deny the motion to dismiss and order that the Director has a mandatory duty to enforce A.R.S. § 20-461(B).

Memorandum of Points and Authorities

1. For the purposes of resolving this motion to dismiss, the Director has admitted the Verified Complaint's factual allegations.

By filing a motion to dismiss, the Director has legally admitted the Verified Complaint's alleged facts. Arizona law does not favor motions to dismiss, which a court should *never* grant "unless it appears certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated."[1] For a motion to dismiss, "*all* of the material allegations of the pleadings of the non-moving party are taken to be true."[2] The test is whether the allegations, if true, "would entitle plaintiff to some kind of relief on some theory."[3]

A court must deny a motion to dismiss if the alleged facts, viewed in the

---

[1] *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304 (1983) (citations and internal punctuation omitted).

[2] *Sierra Madre Development, Inc. v. Via Entrada Townhouses Ass'n*, 20 Ariz. App. 550, 552, 514 P.2d 503, 505 (1973) (emphasis added).

[3] *Mackey v. Spangler*, 81 Ariz. 113, 114, 301 P.2d 1026, 1027 (1956).

light most favorable to the plaintiff, show an entitlement to relief under *any* legal theory.[4] Since Arizona is a notice-pleading state, "a complaint need only have a statement of the ground upon which the court's jurisdiction depends, a statement of the claim showing that the pleader is entitled to relief, and a demand for judgment."[5] In deciding if there are facts upon which relief can be granted, a court may *only* consider the facts actually alleged.[6]

2. The alleged facts prove that the Director's inaction directly harmed Plaintiffs, that they asked the Director to enforce a specific statute, and that the Director refused.

The parties: Plaintiffs Thomas E. Blankenbaker, D.C. and Shawn Wherry, D.C. ("Doctors") live in Maricopa County. They are chiropractic physicians licensed to practice, and practicing, chiropractic medicine in Arizona.[7] Plaintiff Emilia Indomenico ("Indomenico") also lives in Maricopa County, and has regularly received chiropractic treatments from the Doctors.[8] The Director is an Arizona resident serving as the Director of the Arizona Department of Insurance.[9]

The basic problem: The Doctors have many chiropractic patients with modest incomes. Those patients cannot take full advantage of the Doctors'

---

[4] *Maldonado v. Southern Pac. Transp. Co.*, 129 Ariz. 165, 166-67, 629 P.2d 1001, 1002-03 (App. 1981).

[5] *Mackey v. Spangler*, 81 Ariz. 113, 114, 301 P.2d 1026, 1027 (1956).

[6] *Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, 533 ¶ 10, 115 P.3d 124, 127 ¶ 10 (App.2005) (citations an internal punctuation omitted).

[7] Verified Complaint at ¶¶ 9-10.

[8] Verified Complaint at ¶¶ 11-12.

[9] Verified Complaint at ¶ 13.

chiropractic procedures because health-insurance companies, including Blue Cross Blue Shield of Arizona ("Blue Cross"), charge a higher co-payment for chiropractic procedures than the same health-insurance companies charge patients obtaining medical or osteopathic procedures for identical physical ailments, injuries, and complaints.[10] Indomenico is one of those disadvantaged patients.[11]

Demands for action: Indomenico, the Doctors, and other chiropractic physicians sent letters to the Director advising her that Blue Cross was imposing a higher co-payment on patients seeking chiropractic procedures than Blue Cross imposes on patients seeking medical procedures for identical physical ailments, injuries, and complaints. They explained to the Director that what Blue Cross was doing violated Arizona law, specifically, A.R.S. § 20-461(B). And they demanded that the Director enforce A.R.S. § 20-461(B)'s terms against Blue Cross.[12]

Refusal to act: But in response to the demands by Indomenico, the Doctors, and other chiropractic physicians, the Director refused to take *any* steps to stop Blue Cross's illegal practices.[13]

"Beneficially interested": Within the meaning of A.R.S. § 12-2021, Indomenico and the Doctors are "beneficially interested" in having the Director enforce the provisions of A.R.S. § 20-461(B) against Blue Cross. Indomenico is

[10] Verified Complaint at ¶¶ 14-15.
[11] Verified Complaint at ¶¶ 16-17.
[12] Verified Complaint at ¶¶ 18-19, 23-25.
[13] Verified Complaint at ¶¶ 23, 26.

"beneficially interested" because lowering co-payments for chiropractic procedures through her Blue Cross plan means that she can more easily afford the chiropractic procedures that she needs and desires. That will benefit her medically, physically, and economically. The Doctors are "beneficially interested" because lowering co-payments for chiropractic procedures means that Indomenico, and other present and future chiropractic patients, will procure more of the chiropractic procedures that they offer. That will benefit them economically.[14]

Discrimination by playing favorites: As of January 1, 2011, Blue Cross contracted with American Specialty Health, Inc. ("American Specialty") to manage Blue Cross's chiropractic benefits.[15] Unlike other medical and osteopathic physicians, all out-of-network Blue Cross chiropractic physicians are only allowed to treat patients for five visits before the chiropractic physicians must get pre-authorization for more treatment visits. Blue Cross's in-network chiropractic physicians can work themselves up to looser limits, but still start out at five visits. Out-of-network medical and osteopathic physicians are not required to get pre-authorization to see their patients with the same conditions after the fifth visit, and are not required to start with a five-visit limit and then work up to looser in-network limits.[16]

---

[14] Verified Complaint at ¶¶ 35-37.
[15] Verified Complaint at ¶ 42.
[16] Verified Complaint at ¶¶ 43-45.

Standing: This discrimination among physicians violates A.R.S. § 20-461(B).[17] Under that law, the Director has the duty to avoid playing favorites, to avoid discriminating against chiropractic physicians and in favor of medical and osteopathic physicians.[18] Directly affected by the discrimination, Plaintiffs have standing to ask for a writ of mandamus to compel the Director to require Blue Cross, and its agent, American Specialty, to end the discrimination.[19]

Coverage discrimination. The Arizona Department of Insurance, through action that the Director consented to (directly or indirectly), approved Blue Cross's hiring of American Specialty to manage Blue Cross's chiropractic benefits.[20] The Director did that despite the fact that American Specialty has a long, well-known history of limiting chiropractic-treatment programs to less than 12 visits per episode of care.[21] American Specialty has done this regardless of objective and subjective findings, with an estimated average range of 6.5 visits per episode of care and treatment.[22] But chiropractic professional guidelines almost universally recommend 25 visits as a reasonable course of care for a chiropractic patient.[23] American Specialty only allows two procedures per visit, although the standard is

---

[17] Verified Complaint at ¶ 46.
[18] Verified Complaint at ¶ 47.
[19] Verified Complaint at ¶ 48.
[20] Verified Complaint at ¶ 50.
[21] Verified Complaint at ¶ 51.
[22] Verified Complaint at ¶ 52.
[23] Verified Complaint at ¶ 53.

four procedures per visit.[24] American Specialty has hampered, or effectively prohibited, chiropractors from ordering advanced imaging and other necessary diagnostic techniques.[25] The Director knows about the coverage discrimination described in this claim for relief, or should know about it, but has done nothing substantive to end it, in violation of A.R.S. § 20-461(B).[26] Plaintiffs are directly affected by this coverage discrimination, and therefore have standing to ask for a writ of mandamus to compel the Director to order Blue Cross, and its agent, American Specialty, to end the coverage discrimination.[27]

Discriminatory coverage exclusions. The Blue Cross BluePortfolio Plus policy ("Policy") has exclusions that apply to all care performed by a chiropractic physician.[28] But the Policy only has exclusions for "maintenance services" that medical and osteopathic physicians perform.[29] In practical terms, the Policy does not cover a chiropractic physician's treatment of chronic-pain patients whose function is not expected to improve.[30] On the other hand, the Policy *will* cover treatment of those patients by medical and osteopathic physicians.[31] The Policy will effectively only pay for short-term chiropractic care if that care is leading to a

---

[24] Verified Complaint at ¶ 54.
[25] Verified Complaint at ¶ 55.
[26] Verified Complaint at ¶ 56.
[27] Verified Complaint at ¶ 57.
[28] Verified Complaint at ¶ 59.
[29] Verified Complaint at ¶ 60.
[30] Verified Complaint at ¶ 61.
[31] Verified Complaint at ¶ 62.

functional improvement with gains that are objectively measurable.[32] That discrimination does not apply to medical and osteopathic physicians.[33] Plaintiffs are directly affected by the Director's approval of this insurance-policy coverage discrimination, and have standing to seek a writ of mandamus to compel the Director to order Blue Cross to end the insurance-policy coverage discrimination.[34]

Sanctioned consumer fraud: The Director knows, or reasonably should know, that Blue Cross has represented to policyholders and to the public that its healthcare insurance policies cover all medically necessary chiropractic care.[35] But under American Specialty's anti-chiropractor guidelines, reimbursement for a chiropractic adjustment is a mere $26. The highest reimbursement for therapy is a mere $18. Together, that is just $44. The patient copay, however, is a whopping $40.[36] That means that Blue Cross will actually pay only $4 per chiropractic visit after the chiropractic patient pays the $40 copay (which rarely to never happens).[37]

Blue Cross, therefore, is providing an illusory benefit.[38] In other words, for chiropractic care, Blue Cross ends up paying nothing, or next to nothing, in real dollars. That contradicts Blue Cross's marketing materials, which claim that Blue

[32] Verified Complaint at ¶ 63.
[33] Verified Complaint at ¶ 64.
[34] Verified Complaint at ¶ 65.
[35] Verified Complaint at ¶ 67.
[36] Verified Complaint at ¶ 68.
[37] Verified Complaint at ¶ 69.
[38] Verified Complaint at ¶ 70.

Cross is covering chiropractic care when it is not doing that. Blue Cross is therefore effectively deceiving the public and defrauding its consumers (its policyholders).[39] The Director has a duty to keep Arizona insurers, including Blue Cross, from deceiving the public and defrauding policyholders.[40] Plaintiffs are directly affected by her failure to stop Blue Cross from deceiving the public and defrauding policyholders. Plaintiffs have standing to ask for a writ of mandamus to compel the Director to stop Blue Cross from deceiving the public and defrauding its policyholders concerning the actual coverage it is providing for chiropractic care.[41]

Discriminatory designations: The Director has let Blue Cross create discriminatory designations between chiropractic physicians on the one hand and medical and osteopathic physicians on the other hand.[42] Because of the failure to enforce proper designations, Blue Cross has created a system that has prevented chiropractic patients from receiving proper reimbursement for chiropractic care.[43] The Director has a duty to end the discrimination by requiring the recognition of chiropractors as primary physicians, and not as some form of specialists.[44] The Director has a duty to end the discrimination by requiring the recognition and

[39] Verified Complaint at ¶ 71-72.
[40] Verified Complaint at ¶ 73.
[41] Verified Complaint at ¶ 74.
[42] Verified Complaint at ¶ 76.
[43] Verified Complaint at ¶ 77.
[44] Verified Complaint at ¶ 78.

designations of chiropractors as primary care physicians entitled to the same sort of recognition and designations as medical and osteopathic physicians.[45] Plaintiffs are directly affected by the Director's failure to end the improper designations.[46]

3. The Director has a specific duty to enforce A.R.S. § 20-142(A).

There is no ambiguity in A.R.S. § 20-142(A)'s directive that the Director "*shall enforce* the provisions" of Title 20. (Emphasis added.) It is true that "shall" can sometimes be slippery. Indeed, one authority has remarked that "shall" can have as many as eight different meanings.[47] But Arizona courts ordinarily interpret "shall" to mean a provision is mandatory.[48] That is, "shall" shows "a mandatory intent."[49]

The Arizona Supreme Court has held that a "mandatory statute" must be "literally construed and strictly applied," especially for statutory provisions that are "designated to safeguard substantial rights."[50] A.R.S. § 20-142(A) is undeniably a mandatory statute designated to safeguard the substantial rights of Arizona citizens who seek fair access to chiropractic treatment—as guaranteed by Title 20.

---

[45] Verified Complaint at ¶ 79.

[46] Verified Complaint at ¶ 80.

[47] Bryan A. Garner, *A Dictionary of Modern Legal Usage* 939 (2nd ed. 1995).

[48] *In re Maricopa County Superior Court No. MH 2003-000240*, 206 Ariz. 367, 369 ¶ 7, 78 P.3d 1088, 1090 ¶ 7 (App. 2003).

[49] *Matter of Appeal in Navajo County Juvenile Action No. JV-94000086*, 182 Ariz. 568, 570, 898 P.2d 517, 519 (App. 1995).

[50] *Biaett v. Phoenix Title & Trust Co.*, 70 Ariz. 164, 169, 217 P.2d 923, 926 (1950).

Specifically, A.R.S. § 20-461(B) of Title 20 provides that insurers commit an unfair claim-settlement practice if they fail to apply deductibles or co-payments to all types of physicians, "without discrimination to the usual and customary procedures of any type of physician." Under A.R.S. § 20-142(A), the Director has a mandatory duty to enforce all provisions of Title 20, including A.R.S. § 20-461(B). The "*specific intent*" of A.R.S. § 20-461 is to provide "an administrative remedy to the director for any violation of this section or rule related to this section." A.R.S. § 20-461(D) (emphasis added).

Despite the Legislature's "specific intent" to provide "an administrative remedy" to the Director for any violation of A.R.S. § 20-461(B), the Director wants to do nothing. Despite the mandatory terms of A.R.S. § 20-142(A) requiring that the Director "*shall enforce* the provisions" of Title 20, the Director wants to do nothing. Despite direct, repeated requests for enforcement, the Director wants to do nothing. Despite the violations that Blue Cross and its agents have committed, the Director wants to do nothing. In fact, the Director wants to do nothing so badly that she has directed her lawyers to file this motion to dismiss.

The Director argues that she can do nothing because, in the 2007 *Sensing* case, the Court of Appeals let the City of Phoenix's Chief of Police refuse to enforce a municipal anti-soliciting ordinance.[51] But the enforcement provision in

[51] *Sensing v. Harris*, 217 Ariz. 261, 172 P.3d 856 (App. 2007), *review*

Sensing was a namby-pamby statement that the Chief of Police "shall be responsible for the enforcement . . . of City ordinances."[52] Unlike A.R.S. § 20-142(A), there was no mandate that the Chief of Police "shall enforce" anything. And unlike the Arizona Legislature in A.R.S. § 20-461(D), the City of Phoenix's Council did not provide "an administrative remedy" for "any violation" of the City's anti-soliciting statute. The strength and specificity of the mandatory statutes in our case far exceeds the weaker, nonspecific ordinance in *Sensing*.

Still, the Director argues that she can do nothing because *Sensing* held that the Chief of Police had "discretion to choose what, if any, enforcement actions will be taken."[53] But discretion on what steps to take to enforce the provisions of a statute is different from the Director's asserted discretion to do nothing at all to enforce A.R.S. § 20-461(B). In any event, the Director *already* has instructions on what to do. The Arizona Legislature has explained that its "specific intent" in passing A.R.S. § 20-461 was to provide "an administrative remedy to the director for any violation of [A.R.S. § 20-461] or rule related to this section."[54]

So what must the Director to do? The answer is that the Director must administratively order Blue Cross to comply with the terms of A.R.S. § 20-461(B). Between A.R.S. § 20-142(A) and A.R.S. § 20-461(D), the Director has no

---

denied (June 3, 2008).

[52] *Id*. at 264 ¶ 8, 172 P.3d at 859 ¶ 8.

[53] *Id*.

[54] A.R.S. § 20-461(D).

discretion. What happens after the Director administratively orders Blue Cross to comply with A.R.S. § 20-461(B) is up to Blue Cross. If Blue Cross complies, that will be that. If Blue Cross defies the Director, the Director will need to do whatever is needed to force compliance. But that issue is not before us.

All we confront here is the simple question of whether the Director has any duty to act. And the answer to that is, "Yes, the Director has a duty to act. The Director must initiate an administrative remedy against Blue Cross." After all, the *only* remedy that the Director has under A.R.S. § 20-461(D) is "solely an administrative remedy." And the only "administrative remedy" the Director has is to order Blue Cross to comply with Title 20. The Director has no smorgasbord of choices. The Director has one, and only one, available course of action.

4. The "political-question doctrine" plays no part in this case.

The motion to dismiss argues that the political-question doctrine means that the Director can do nothing. But the motion to dismiss also admits that the requirement of A.R.S. § 20-142(A) that the Director "shall enforce" the provisions of Title 20 is a "traditional" duty that the Legislature has imposed on the Director. The political-question doctrine might come into play if the Title 20 statutes gave any discretion to the Director. But the Title 20 statutes offer no discretion for the Director to do nothing. The Director *must* act by implementing an administrative remedy against Blue Cross and its agents. That is the combined impact of A.R.S. §

20-142(A) and A.R.S. § 20-461(D).

5. Disagreement with the Director is irrelevant to the Director's duty.

The motion to dismiss argues that the fact that Plaintiffs disagree with the director is not a basis for mandamus. The argument is irrelevant. There is a disagreement, of course. The trigger for the disagreement is the Director's decision to do nothing, despite demands to act and despite specific statutes requiring her to act.

The basis for mandamus is the interaction of A.R.S. § 20-142(A) and A.R.S. § 20-461(D), which mandate the Director to enforce A.R.S. § 20-461(B) through an administrative remedy. Instead of imposing any administrative remedy, however, the Director has done nothing. And that is why mandamus is needed, to force the Director to perform a specific duty that Arizona law imposes upon her.

Conclusion

Blue Cross has violated A.R.S. § 20-461(B). Despite repeated demands made upon her to take action to halt the unfair, illegal claims practices of Blue Cross and its agents, the Director has done nothing. A.R.S. § 20-142(A) and A.R.S. § 20-461(D), however, require action—require the Director to impose an administrative remedy against Blue Cross and its agents. There is no discretion to remain inert, no political question, and no choice of remedies over which the Director may endlessly dither.

Plaintiffs respectfully ask the Court to deny the motion to dismiss and to order the Director to administratively enforce A.R.S. § 20-461(B).

DATED this 9th day of May, 2011.

KNAPP & ROBERTS

/s/ David L. Abney, Esq.
David L. Abney, Attorneys for Plaintiffs

Certificate of Service

The above-signing legal counsel certifies that he electronically filed this document on this same date with the Clerk of the Maricopa County Superior Court and that, on this same date, he sent copies of this document, by first-class mail, to the following:

- Hon. Larry Grant, **MARICOPA COUNTY SUPERIOR COURT**, Southeast Facility—2F, 222 E. Javelina Ave., Mesa AZ 85210, (602) 506-5033.
- Thomas C. Horne, Esq. and Alyse C. Meislik, **OFFICE OF THE ARIZONA ATTORNEY GENERAL**, 1275 W. Washington St., Phoenix, AZ 85007, (602) 542-7727, Fax: (602) 542-4377, Attorneys for Defendant.

/s/ David L. Abney, Esq.
David L. Abney