

STATE OF MICHIGAN
IN THE 30th CIRCUIT COURT FOR THE COUNTY OF INGHAM

In the Matter of:
E.L. COX, COMMISSIONER OF INSURANCE,
FOR THE STATE OF MICHIGAN,

Petitioner,

File No. 98-88265-CR
Hon. James R. Giddings

vs.

MICHIGAN HEALTH MAINTENANCE
ORGANIZATION PLANS, INC., a
Michigan health maintenance organization,

Respondent.

MOTION BY DETROIT MEDICAL CENTER
FOR INSTRUCTIONS REGARDING DISTRIBUTION OF SETTLEMENT PROCEEDS

The Detroit Medical Center, for the reasons stated in the accompanying brief, respectfully seeks instructions from the Court regarding distribution of proceeds arising from the settlement of the case *Providers Creditors Committee v United American Health Care Corp., et. al.*, Wayne County Circuit Court No. 07-724978-CK.

This motion, together with the supporting brief and exhibits, were provided to the Michigan Attorney General in late 2009. The Attorney General and Petitioner have had a full opportunity to consider the motion. In addition, Assistant Attorney General Christopher Kerr and DMC's counsel Charles Raimi have discussed the matter on several occasions. The Attorney General's office recently advised that DMC should proceed with this motion.

DETROIT MEDICAL CENTER, LEGAL AFFAIRS

By:  _____

Charles N. Raimi
Attorney for The Detroit Medical Center
4707 St. Antoine, Suite W514
Detroit, MI 48201
(313) 966-2226
craimi@dmc.org

Dated: September 29, 2010

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LEGAL AFFAIRS

By: Charles N. Raimi
Attorney for The Detroit Medical Center
4707 St. Antoine, Suite W514
Detroit, MI 48201
(313) 966-2226
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INTRODUCTION

By Order dated September 7, 2004 (ex. 1), this Court created the “Providers Creditors Committee.” The Committee consists of the six Detroit area hospital systems, and one large physician group, that collectively provided a substantial majority of the care to OmniCare members. There are roughly 3800 Omnicare provider creditors in addition to the Committee members.

The September 2004 Order assigned to the Committee all of OmniCare’s claims against its parent company, United American Health Care Corporation (UAHC), and UAHC’s current and former officers and directors. The Committee, in early 2005, filed suit in this Court against UAHC and various individuals. By decision of the Michigan Court of Appeals, the lawsuit was thereafter transferred to Wayne County Circuit Court.

The litigation was difficult and protracted, and was settled in late 2009 for the gross amount of \$3,250,000. The net proceeds after deducting legal fees and costs is roughly \$2 million. The Detroit Medical Center (“DMC”), one of the members of the Committee, brings this motion seeking the Court’s instruction concerning distribution of the settlement proceeds.

The Order suggests that the settlement proceeds are to be distributed among all OmniCare provider creditors. However, the Order is ambiguous in that it provides no clear direction as to how distributive shares are to be determined. Rather, the Order suggests that the Court should consider a non-exclusive list of “relevant factors.” *See* ex. 1, ¶ 6, in turn referencing ¶ 2.

The Detroit Medical Center respectfully submits that when all relevant factors are considered, the net settlement proceeds should be distributed among only the Committee members. The Committee members provided a substantial majority of care to OmniCare

members and, in turn sustained by far the most serious financial losses as a result of OmniCare's insolvency. Moreover, under the First Amended Rehabilitation Plan, the Committee members as a group recovered only 30% (approximately) of their pre-rehabilitation debt. Non-Committee members, as a group, recovered roughly 45%. The Committee members' receipt of the settlement proceeds would increase their recovery from roughly 30% to roughly 34% – still far below the non-Committee members' recovery.

The Committee members, over the past five years, have devoted significant time and effort to pursuit of the claims against UAHC. The defendants have vigorously contested the claims and the litigation has been difficult and expensive. In addition to funding provided from the OmniCare estate, the Committee members have advanced some \$90,000 of their own funds in support of the litigation.

Finally, if non-Committee members were to share in the distribution, each "small" provider's distribution would be *de minimis* – perhaps \$100. However, attempting to calculate thousands of small shares, and tracking down thousands of providers, many years after OmniCare's liquidation, would entail extensive cost, effort and delay. The DMC respectfully submits that upon consideration of all of these relevant factors, the distribution should be limited to Committee members.

If the Court is inclined to consider this request, the DMC proposes that non-Committee members receive notice of the DMC's proposal in a reasonable and cost-effective fashion. That might be publication in various newspapers. The matter would be set for hearing at which non-Committee members could be heard on the matter.

FACTS

A. The DMC.

The DMC operates eight hospitals, six of which are in the City of Detroit. Those City hospitals provide the primary “safety net” for the hundreds of thousands of indigent, uninsured or underinsured individuals residing in and around the City of Detroit. The DMC was by far the single largest creditor of OmniCare and sustained devastating financial losses as a result of OmniCare’s insolvency.

Specifically, the DMC was owed roughly \$34 million by OmniCare (including a \$5 million surplus note) at the time OmniCare was placed into rehabilitation. Under the 2002 First Amended Rehabilitation Plan, the DMC received less than \$10 million and, hence, the DMC incurred some \$24 million in financial loss. As a result of those losses and other factors, in 2003 the DMC was itself almost rendered insolvent. The DMC was almost forced to close two critical safety net hospitals – Detroit Receiving Hospital, the City’s primary trauma resource, and Hutzel Women’s Hospital, the City’s primary resource for Medicaid-funded births. The DMC was “rescued” by a \$50 million state, city and county “bailout” which allowed the DMC to continue operating Detroit Receiving and Hutzel Hospitals.

Through a great deal of very hard work, the DMC’s finances thereafter stabilized. But, as the Court can imagine, due to the severe economic downturn and accompanying high unemployment, and ongoing cuts in Medicaid reimbursement, the DMC continues to face difficult challenges.

B. OmniCare's insolvency, creation of the Committee and assignment of the claims against UAHC.

This Court placed OmniCare into a conservator status in 1998. On July 31, 2001, this Court placed OmniCare into rehabilitation. In the course of the rehabilitation proceedings, the responsible state officials engaged the Devito Consulting Firm to investigate possible wrongdoing by OmniCare's parent corporation, United American Health Care Corporation ("UAHC"). Devito thereafter issued a report concluding that OmniCare had possible claims against UAHC, for reasons which included the following:

United American completely controlled OmniCare. Under United American's contract with OmniCare, United American received 14% (later reduced) of OmniCare's gross revenues. In return, United American was supposed to ensure proper operations by OmniCare such as timely processing and payment of claims. However, as recognized in the DeVito report, United American used OmniCare's revenue for UAHC's own purposes, such as ventures in other states, and, as a result, OmniCare was unable to properly or timely process and pay claims. By the time OmniCare was placed into receivership, OmniCare was deeply insolvent and was unable to pay tens of millions of dollars in provider claims.

The Rehabilitator never pursued OmniCare's claims against United American. Rather, in September 2004, some six years after OmniCare was placed in a conservator status, and more than three years after OmniCare was placed into rehabilitation, OmniCare's possible claims against UAHC were assigned to a "Providers Creditors Committee."

The September 7, 2004 Court Order establishing the Committee is appended as exhibit 1. The members of the Committee, in addition to DMC, are:

- Henry Ford Health System
- St. John Health System
- Oakwood Healthcare System
- Trinity Health
- William Beaumont Hospital
- Wayne State University Physician Group, f/k/a University Physicians Group

All Committee members, except University Physicians Group, are hospital systems which operate multiple hospitals in the Detroit metropolitan area. University Physicians Group, now known as Wayne State University Physician Group (“WSUPG”), as its name suggests, is a physician group associated with Wayne State University. Because of its affiliation with Wayne State and its contractual relationships with DMC, WSUPG provided substantial services to OmniCare members.

The Order (¶ 2(C)) permitted other interested providers to join the Committee. No other provider ever expressed interest in doing so.

C. Funding of the lawsuit.

The assignment of this complex claim to a “committee” consisting of 7 diverse health care organizations created a host of practical and logistical problems. Those problems were exacerbated by inadequate funding for the case.

The Order provided for \$200,000 in funding for the lawsuit - \$50,000 to investigate the merits of pursuing the case, and an additional \$150,000 for prosecution of the case. Ex. 1, ¶¶ 3-4. Those funds proved to be seriously inadequate to prosecute this difficult and complex case, hire the necessary experts, etc. The Committee members later advanced some \$90,000 of their own funds and, had the case not settled, additional funding would have been required.

D. Engagement of counsel and filing of the lawsuit.

Initially, the Committee engaged attorney Joseph Aoun on a partial hourly rate, partial contingency fee arrangement, together with attorney Gerard Mantese on a straight contingency fee. The hourly rate bills generated by Aoun early in the case made clear that arrangement would not work, and Mantese agreed to take sole responsibility for the case for a straight 38% contingency fee. Given the difficulty of the case and risks involved, that appeared to be a reasonable arrangement. The Committee, however, was responsible for payment of expenses such as expert witness fees, deposition costs, etc.

E. Filing of the case and transfer to Wayne County.

The Committee's lawsuit against UAHC and several of its officers and directors was filed in February 2005. UAHC was represented by the Rodger Young law firm, and the individual defendants, current and former UAHC officers and directors, were represented by Dickinson Wright.

The defendants moved for a change of venue to Wayne County Circuit Court. The Committee opposed the motion and it was denied by this Court.

The Court of Appeals, in September 2005, granted defendants' application for leave to appeal. On March 29, 2007, the Court of Appeals reversed this Court's order and transferred the case to the Wayne County Circuit Court. *Providers Creditors Committee v United American Health Care Corporation*, 275 Mich App 90 (2007).

The case was assigned to the Hon. Isidore Torres, under Wayne County Circuit Court case number 07-724978-CK. The venue issue effectively derailed this case for almost three years.

F. The Committee encountered serious problems in the prosecution of this case.

Both United American and the individual defendants were represented by highly capable counsel. They vigorously defended the litigation and attacked the Committee's case on all fronts. For example, defendants argued that this Court's assignment of OmniCare's claims to the Committee was unauthorized and void. Ex. 2. Judge Torres denied that motion, however, it was clear that defendants would pursue that argument on appeal if the Committee were to prevail at trial.

Defendants' counsel also vigorously defended on statute of limitations grounds. Ex. 3. This Court had placed OmniCare into a conservator status in 1998 and then into rehabilitation in 2001. The Committee, however, was not even created until late 2004, and the Committee then filed suit as promptly as possible in early 2005. The lengthy delay in the filing of the lawsuit (which was not the Committee's fault) resulted in the Committee's claims being barred entirely or severely compromised.

Defendants also vigorously attacked the Committee's damages theories. Although the Committee members had collectively sustained tens of millions of dollars in losses as a result of OmniCare's insolvency, those losses arguably were not relevant to the case. Rather, because the Committee was legally limited to pursuing claims on behalf of OmniCare, the Committee had to demonstrate how OmniCare itself had been damaged. Because OmniCare had been insolvent for a number of years before it was placed into rehabilitation, the Committee's counsel asserted a "deepening insolvency" damages theory. Defendants vigorously argued that theory was not recognized under Michigan law. Ex. 4.

G. Committee members' active involvement in, and support for, the litigation.

During the more than five years since the Committee's creation, the Committee members have spent enormous time and effort in pursuing OmniCare's claims. Committee members actively assisted counsel in preparing the complaint and thereafter assembled important factual support for the lawsuit. Committee members worked with counsel in engaging experts and identifying fact witnesses.

Committee members actively participated in discovery. The undersigned counsel for DMC was deposed by defendants at length. Ex. 5. DMC's counsel communicated regularly with the Committee's counsel and other Committee members. DMC's counsel reviewed and verified Committee discovery responses, and reviewed and commented on the Committee counsel's substantive motions and briefs.

The \$200,000 in funding provided for this case proved to be inadequate, particularly in view of the defendants' vigorous defense. When the \$200,000 was exhausted, the Committee members individually contributed an additional \$90,000 to fund expert fees and other ongoing expenses. At the time the case was settled, the \$90,000 had been exhausted and significant additional funding would have been required to try the case.

Because Judge Torres was unfamiliar with the Committee or the background of this case, Committee members regularly attended Court hearings to impress upon the Judge the importance of the case to the Committee members. Committee members spent days at various mediation and case evaluation proceedings, as well as settlement conferences before the Court.

H. The settlement.

Throughout the case defendants regularly rejected all settlement initiatives and communicated that they would never make any meaningful settlement payment. Defendants'

position was that they had sound defenses to the case – as evidenced by exhibits 2, 3 and 4. Defendants further argued that even if the Committee were to prevail, defendants had no resources to pay any sizeable judgment.

The individual defendants did have insurance coverage for “fraud,” but defendants and their insurer denied that such coverage could possibly apply to the Committee’s claims. United American also claimed poverty. The Committee learned that during the pendency of the case, United American lost its last substantial revenue-producing contract. Hence, United American had no incoming revenue at the time the case was settled.

After the case was transferred to Wayne County, the defendants all moved for summary disposition. Judge Torres granted parts of the defendants’ dispositive motions but refused to dismiss the Committee’s entire case. Arguing that Judge Torres’ ruling was unclear, defendants, shortly before trial, filed yet another dispositive motion on the grounds that the Committee had no viable damages claim.

While that motion was pending, and shortly before the scheduled trial date of September 28, 2009, there were a series of settlement conferences before Judge Torres. After several days and innumerable meetings with the Judge, the parties agreed to settle the case for \$3,250,000. Ex. 6.¹

The Committee received the settlement payment and the case was dismissed. The Committee issued payment to Gerard Mantese in the sum of \$1,200,800, representing the agreed 38% contingency fee. The Committee is now holding some \$2,050,000. However, the Committee has a fee dispute with one expert witness, who has asserted an unfounded and

¹ The parties agreed that the settlement terms were to be confidential. That confidentiality, however, does not limit the Committee members’ ability to seek instructions from this Court on the distribution of the funds. Ex. 6.

exorbitant claim. The Committee (together with the Mantese firm) has filed a lawsuit in Wayne County Circuit Court to resolve the fee dispute. Ex. 7.

I. Post-settlement communications with the Attorney General.

This motion, together with the supporting brief and exhibits, were provided to the Michigan Attorney General in late 2009. The Attorney General and Petitioner have had a full opportunity to consider the motion. In addition, Assistant Attorney General Christopher Kerr and DMC's counsel Charles Raimi have discussed the matter on several occasions. The Attorney General's office recently advised that DMC should proceed with this motion.

DISCUSSION

I. THE DMC ASKS THAT THE SETTLEMENT PROCEEDS BE DISTRIBUTED ONLY AMONG THE COMMITTEE MEMBERS.

The Court order creating the Committee addresses distribution of the settlement funds. Ex. 1, ¶ 6. Although section 6(C) suggests that all OmniCare provider creditors should share in the recovery, the Order is ambiguous as to the determination of the amount (if any) of each provider's distributive share. To determine distributive shares, ¶ 6(C) references ¶ 2, which in turn requires consideration of "relevant factors such as OmniCare claims volume, the extent of write-offs [etc.]."

DMC respectfully submits that when all "relevant factors" are considered here, the only logical, reasonable and just course of action is to limit the distribution to Committee Members.

A. The Committee members' claims represent some 75% or more of all pre-rehabilitation medical claims' liabilities.

The First Amendment to Rehabilitation Plan (ex. 8) is attached. The Debt Restructure Table-Payment Option A (ex. 8, tab B) indicates that Omni's medical claims' liabilities were distributed roughly as follows (column titled "restated for look-back"):

	<u>Total</u>	<u>%</u>
• Individually large hospital providers, i.e., Detroit Medical Center and Henry Ford Health System	\$37 million	58% ²
• Other hospitals.....	\$9 million	14%
• Physicians and non-physician providers	\$17 million	26%
• Other.....	<u>\$1 million</u>	<u>2%</u>
	\$64 million	100%

The hospitals that are Committee members comprise all of the large hospital providers' debt and, DMC believes, the vast majority of the "other hospital" providers' debt. DMC further believes that the only non-hospital Committee member, Wayne State University Physician Group, comprises a significant portion of the physician and non-physician providers' debt. DMC conservatively estimates that the Committee members' debt collectively represents well in excess of 75% of OmniCare's pre-rehabilitation medical claims liabilities.

B. The Committee members, as a group, received a much lower percentage of their pre-rehabilitation debt than did the non-committee members.

Under the First Amended Rehabilitation Plan (ex. 8, p. 6), under "Payment Option A" (which DMC believes was implemented), providers received the following recovery percentages as to their pre-rehabilitation debt:

Individually large hospitals, DMC and HFHS	30%, plus 5% for payment delay ³
Other hospitals.....	30%
Physicians and non-physician medical providers.....	45%

² The 58% figure does not include a \$5 million surplus note held by DMC, which was eliminated as part of the first amended rehabilitation plan.

³ The large hospitals received 35%, rather than 30% like the other hospitals, to compensate the large hospitals for the fact that their distributions were to be paid out over several years. All other providers received immediate payment. In addition, the large hospital percentage does not reflect the DMC's write-off of a \$5 million surplus note, which further reduced its effective percentage of recovery.

Thus, the non-Committee members – physicians and non-physician medical providers – as a group received roughly 15% more of their pre-rehabilitation debt than did the Committee members. If the Committee members receive the net settlement proceeds of roughly \$2 million, their collective recovery percentage will increase from roughly 30% to roughly 34% – still far less than non-Committee members’ recovery.

- C. **There are roughly 3,877 non-Committee member providers. There would be a very substantial cost and delay attendant to attempting to calculate and distribute *de minimis* shares to such providers – if it were even possible to do so.**

The original Rehabilitation Plan (p. 44) indicates that there are 3,877 physician and non-physician medical providers. Based on the breakdown in the Debt Restructure Table, as shown above, the physician and non-physician providers represented roughly 26% of the pre-rehabilitation debt. 26% of the net settlement proceeds (of roughly \$2 million) equals \$520,000. That amount, divided by 3,877 providers, would produce an average pre-tax payment of about \$134 per provider. That amount would be further reduced by the costs incurred in calculating the amounts, communicating with the providers and distributing the checks, and the distributions would be further reduced by federal and state tax.

In view of the passage of time, and the fact that some of the 3,877 providers have moved, relocated or retired, it is difficult to estimate how many could be tracked down. Indeed, it is not clear if it would be possible to do so. What is certain is that it would be enormously costly and time consuming to attempt to do so, and would likewise be costly and difficult to attempt to determine and distribute proper distributive shares for the thousands of small providers. The end result would be a wasteful dissipation of the limited settlement funds, and distribution of *de minimis* amounts to the small providers.

D. Conclusion – summary of grounds for DMC’s request that distribution be limited to Committee members.

The Committee pursued this matter for more than five years, under trying circumstances. The Committee members have invested substantial money, time and effort into this case. Other providers had the opportunity to join the Committee but none chose to do so.

The Committee members collectively received roughly 30% of their pre-rehabilitation debt, as opposed to roughly 45% for non-Committee members. If the net settlement proceeds are distributed only to Committee members, their recovery will increase by roughly 3-4% – still leaving them far behind the percentage recovery of the non-Committee members.

Finally, there will be substantial cost and delay attendant to any effort to distribute a portion of the settlement funds to non-Committee members. The result would be, at best, distribution of *de minimis* amounts to the small providers.

For all of these reasons, DMC asks that the settlement proceeds be distributed only to Committee members.

II. PROCEDURAL ISSUES.

A. Notice to other providers.

If the Court is receptive to DMC’s proposal, DMC believes it would be appropriate to provide notice to other providers in a form which is both cost-effective and reasonable under the circumstances. DMC would suggest publication (i) on the “OmniCare” website maintained by the Department of Energy, Labor & Economic Growth, and (ii) in selected newspapers in Detroit and Lansing.

B. Distribution plan among the Committee members.

If the Court ultimately approves a distribution limited to Committee members, the members are optimistic they can agree on an appropriate methodology. The Committee

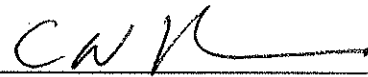
members may seek the assistance of state representatives to provide information relevant to that undertaking.

CONCLUSION AND RELIEF

The DMC respectfully asks that the Court :

- A. Enter an order specifying a reasonable and cost-effective procedure for notifying non-Committee member providers of the DMC's motion asking that the lawsuit proceeds be distributed only to Committee members;
- B. Include in such order a date for hearing upon DMC's motion;
- C. Following such hearing, approve DMC's motion;
- D. Provided the Committee members can then agree on an appropriate distribution plan, order such plan implemented;
- E. Direct appropriate representatives of the state of Michigan to assist Committee members in obtaining information relevant to such distribution plan;
- F. Grant such further or additional relief as the Court deems just and equitable.

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