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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

MIKESHA MARTINEZ, ET AL.,	)	
	)	
	)	
PLAINTIFFS,	)	NO. C-09-2306 CW
	)	
VS.	)	THURSDAY, JUNE 25, 2009
	)	
ARNOLD SCHWARZENEGGER,	)	OAKLAND, CALIFORNIA
ET AL.,	)	
	)	
DEFENDANTS.	)	
	)	

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**FOR PLAINTIFFS:** ALTWSHULER BERZON LLP  
177 POST STREET, SUITE 300  
SAN FRANCISCO, CALIFORNIA 94108

BY: STACEY M. LEYTON, ESQUIRE  
PEDER J. THOREEN, ESQUIRE  
ANNE N. ARKUSH, ESQUIRE  
SCOTT A. KRONLAND, ESQUIRE  
STEPHEN P. BERZON, ESQUIRE

**FOR DEFENDANT**  
**STATE OF CALIFORNIA:** STATE OF CALIFORNIA  
DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL  
455 GOLDEN GATE AVENUE, STE. 11000  
SAN FRANCISCO, CALIFORNIA 94102

BY: SUSAN M. CARSON,  
DEPUTY ATTORNEY GENERAL

(APPEARANCES CONTINUED)

**REPORTED BY:** DIANE E. SKILLMAN, CSR 4909, RPR, FCRR  
OFFICIAL COURT REPORTER

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**FOR DEFENDANT**  
**FRESNO COUNTY:**

MCCORMICK BARSTOW LLP  
5 RIVER PARK PLACE EAST  
FRESNO, CALIFORNIA 93720  
BY: MICHAEL G. WOODS, ESQUIRE

1 THURSDAY, JUNE 25, 2009

3:00 P.M.

2

3 **THE CLERK:** CALLING THE MATTER OF MARTINEZ VERSUS  
4 SCHWARZENEGGER. CIVIL ACTION NUMBER C-09-2306.

5 COUNSEL, PLEASE STEP FORWARD AND STATE YOUR  
6 APPEARANCES FOR THE RECORD.

7 **MS. LEYTON:** YOUR HONOR, STACEY LEYTON FROM  
8 ALTSHULER BERZON LLP ON BEHALF OF THE PLAINTIFFS.

9 I AM HERE WITH STEPHEN BERZON, SCOTT KRONLAND, PEDER  
10 THOREEN AND ANNE ARKUSH.

11 **MS. CARSON:** GOOD AFTERNOON, YOUR HONOR, SUSAN  
12 CARSON FROM THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF  
13 SCHWARZENEGGER.

14 **MR. WOODS:** GOOD AFTERNOON, YOUR HONOR, MICHAEL G.  
15 WOODS FROM MCCORMICK BARSTOW ON BEHALF OF DEFENDANT COUNTY OF  
16 FRESNO AND FRESNO IN-HOME SUPPORTIVE SERVICES PROVIDER PUBLIC  
17 AUTHORITY.

18 **THE COURT:** JUST OUT OF CURIOSITY, DID YOU HAVE THE  
19 JUNE 4TH HEARING?

20 **MR. WOODS:** YES.

21 **THE COURT:** WHAT HAPPENED?

22 **MR. WOODS:** ARE YOU --

23 **THE COURT:** JUNE 4TH FACT FINDING HEARING PURSUANT  
24 TO THE FRESNO --

25 **MR. WOODS:** YES, WE DID.

1                   **THE COURT:**   -- CBA?

2                   **MR. WOODS:**   THAT HEARING WAS LIMITED TO THE  
3 REDUCTION BASED ON THE STATE'S REDUCTIONS OF THE REIMBURSEMENT  
4 RATE TO THE COUNTY.  AND THAT HAS BEEN SUBMITTED TO THE COURT  
5 BY THE STATE.  THAT ADVISORY OPINION WAS BY MR. TAMOUSH WHO  
6 FOUND THAT BASED ON THE FEDERAL FUND REIMBURSEMENT RATE, IN  
7 LOOKING ONLY AT THE REDUCTION BASED ON THE STATE LOWERING THE  
8 REIMBURSEMENT RATE, HE DIDN'T FEEL THERE WAS A REASON FOR THE  
9 COUNTY TO LOWER THE RATE BASED ON THE STATE'S LOWERING OF THE  
10 REIMBURSEMENT RATE.

11                   **THE COURT:**   SO WHAT EFFECT DOES THAT HAVE?

12                   **MR. WOODS:**   IT HAS NO EFFECT.

13                   **THE COURT:**   OH.

14                   **MR. WOODS:**   WELL, IT HAS NO EFFECT IN THIS CASE FOR  
15 THE COUNTY OF FRESNO BECAUSE THE COUNTY OF FRESNO -- THE  
16 PURPOSE OF THE INJUNCTION AS SET FORTH BY THE PLAINTIFFS --

17                   **THE COURT:**   I JUST MEANT WHAT EFFECT DOES IT HAVE IN  
18 THE REAL WORLD.

19                   **MR. WOODS:**   IN THE REAL WORLD, AGAIN, IT IS  
20 SOMETHING THAT THE BOARD OF SUPERVISORS CAN CONSIDER, IT'S NOT  
21 BOUND BY, IT IS AN ADVISORY OPINION, AND THE BOARD OF  
22 SUPERVISORS HASN'T YET CONSIDERED IT.

23                   **THE COURT:**   OKAY.

24                   I WOULD LIKE TO START WITH THE STATE TO GO AHEAD AND  
25 GIVE THE ARGUMENT AGAINST THE PRELIMINARY INJUNCTION.

1           **MS. CARSON:** SURE, YOUR HONOR.

2           WE ARE HERE TODAY BECAUSE PLAINTIFFS, UNIONS, A FEW  
3 PROVIDERS AND BENEFICIARIES ARE SEEKING TO ENJOIN THE STATE'S  
4 REDUCTION OF ITS CONTRIBUTION TO IN-HOME SUPPORTED SERVICES,  
5 WORKERS' WAGES AND BENEFITS TO A LEVEL THAT IS STILL HIGHER  
6 THAN A MAJORITY OF COUNTIES PAY, 36, INCLUDING LOS ANGELES  
7 COUNTY WHICH ACCOUNTS FOR 42 PERCENT OF THE CASELOAD.

8           THE PLAINTIFFS BASE THEIR CHALLENGE ON ALLEGED  
9 VIOLATIONS OF SECTION 1396(A)(30)(A) OF THE MEDICAID ACT AND  
10 THE INTEGRATION REGULATIONS FOR THE AMERICANS WITH DISABILITIES  
11 ACT AND THE REHABILITATION ACT.

12           **THE COURT:** LET'S START WITH --

13           **MS. CARSON:** NO REASONABLE -- I'M SORRY?

14           **THE COURT:** LET'S START WITH 30(A).

15           **MS. CARSON:** SURE.

16           PLAINTIFFS' CLAIM ESSENTIALLY THAT -- IT'S TWO PART,  
17 ACTUALLY, AND I THINK WE CAN DISPENSE WITH WHAT THEY CALL THE  
18 SUBSTANTIVE GUARANTEES RATHER QUICKLY.

19           THEY CLAIM THAT THEY HAVE --

20           **THE COURT:** START WITH THE OTHER ONE. THAT IS THE  
21 ONE THAT INTERESTS ME --

22           **MS. CARSON:** OKAY.

23           **THE COURT:** -- THE MOST.

24           **MS. CARSON:** THAT'S FINE. YOU ALREADY KNOW ABOUT  
25 THE OTHER ONE ANYWAY.

1           **THE COURT:** THE PROCEDURAL ONE.

2           **MS. CARSON:** SURE.

3           THE LEGISLATURE DID -- THE PLAINTIFFS CLAIM THAT THE  
4           LEGISLATURE DID NOT DO AN ANALYSIS OF EFFICIENCY ECONOMY  
5           QUALITY OF CARE AND ACCESS PRIOR TO REDUCING THE STATE'S  
6           CONTRIBUTION TO WAGES AND BENEFITS AND -- TO THE STATE'S WAGES  
7           AND BENEFITS. LEGISLATURE WAS NOT REQUIRED TO CONDUCT ANALYSIS  
8           IN THIS PARTICULAR CASE.

9           **THE COURT:** YOU CONCEDE THAT THEY DID NOT.

10          **MS. CARSON:** YES, I DO.

11          **THE COURT:** OKAY.

12          **MS. CARSON:** NOTHING IN THE STATUTE ITSELF REQUIRES  
13          THAT SUCH AN ANALYSIS TAKE PLACE. THERE IS NOTHING IN THE  
14          STATUTE WHICH IS A STATE PLAN PROVISION THAT SAYS THAT EVERY  
15          STATE PLAN MUST PROVIDE FOR METHODS AND PROCEDURES RELATING TO  
16          PAYMENTS FOR CARE AND SERVICES WHICH ARE TO ASSURE THAT  
17          PAYMENTS ARE CONSISTENT WITH THE EFFICIENCY, ECONOMY, AND  
18          QUALITY OF CARE, AND SHOULD PROVIDE SUFFICIENT ACCESS.

19          **THE COURT:** THAT'S WHAT THE REGULATION SAYS. YOU  
20          ARE SAYING IT DOESN'T SAY THAT?

21          **MS. CARSON:** NO, THAT'S WHAT THE STATUTE SAYS.  
22          THERE'S NOTHING ON THE FACE OF IT THAT SAYS THAT THE  
23          LEGISLATURE MUST CONDUCT AN ANALYSIS PRIOR TO DOING ANYTHING  
24          WITH REGARD TO THE SITUATION WE HAVE HERE, WHICH IS THE STATE  
25          STATUTE THAT PROVIDES FOR A CONTRIBUTION TO WAGES AND BENEFITS.

1           **THE COURT:** SOMEONE HAS TO DO SOMETHING BEFORE SUCH  
2 AN ACTION IS TAKEN --

3           **MS. CARSON:** NO, THEY DO NOT.

4           **THE COURT:** -- BASED ON THE STATUTE.

5           **MS. CARSON:** I AM SORRY, YOUR HONOR, I DON'T READ  
6 THE STATUTE THAT WAY. SO IT SAYS THEY HAVE TO PUT FORTH IN  
7 THEIR STATE PLAN METHODS AND PROCEDURES AS TO HOW THEY WILL  
8 DETERMINE WHAT THE PAYMENTS WILL BE.

9           IN FACT, THE STATE DID DO THAT AND STATE -- IN A  
10 STATE PLAN FOR PERSONAL CARE SERVICES, AND THEY ARE ALSO  
11 SUBSEQUENTLY -- THAT WAS IN 1994 -- SUBSEQUENTLY WE ALSO HAVE  
12 AN IHSS PLUS WAIVER WHICH WAS APPROVED BY THE FEDERAL  
13 GOVERNMENT IN 2004.

14           THE PLAINTIFFS HERE PRINCIPALLY RELY ON A RECENT  
15 NINTH CIRCUIT DECISION IN CAL PHARMACISTS WHICH HELD THAT  
16 HOSPITAL PLAINTIFFS IN THAT CASE WERE LIKELY TO PREVAIL ON  
17 THEIR (SMALL A)30(A) CLAIM BECAUSE THE LEGISLATURE HAD FAILED  
18 TO CONDUCT AN ANALYSIS POTENTIAL EFFECT OF AN ACROSS-THE-BOARD  
19 REIMBURSEMENT RATE REDUCTION FOR HOSPITALS.

20           **THE COURT:** I WOULD GO BACK FURTHER TO ORTHOPAEDIC  
21 V. BELSHE.

22           **MS. CARSON:** WE CAN GO THERE.

23           IN ORTHOPAEDIC, YOU HAD A SITUATION IN WHICH THE  
24 PLAINTIFFS CHALLENGED REIMBURSEMENT RATES TO HOSPITALS IN A  
25 SITUATION IN WHICH THE STATE, DEPARTMENT OF HEALTH SERVICES AT

1 THE TIME, DID NOT CONSIDER THE HOSPITAL'S COSTS. THE NINTH  
2 CIRCUIT IN THAT CASE, THE ONLY COURT IN THE ENTIRE COUNTRY TO  
3 EVER SO HOLD SAID THAT --

4 **THE COURT:** YET THE ONE THAT I MUST FOLLOW.

5 **MS. CARSON:** SURE.

6 -- THE STATE MUST CONSIDER COSTS, AND IT REMANDED  
7 BACK TO THE DISTRICT COURT AND SAID THAT THERE MUST BE -- THAT  
8 THE COURT HAD NOT -- EXCUSE ME, I AM SORRY.

9 THE DEPARTMENT HAD NOT ADEQUATELY CONSIDERED THE  
10 HOSPITAL COSTS WHEN RE-ADOPTING ITS RATES, AND THAT THAT ACTION  
11 WAS ARBITRARY AND CAPRICIOUS.

12 IT REMANDED BACK TO THE DISTRICT COURT TO ORDER THE  
13 DEPARTMENT TO UNDERTAKE RESPONSIBLE COST STUDIES THAT WOULD  
14 PROVIDE RELIABLE DATA AS TO THE HOSPITAL'S COSTS AND PROVIDING  
15 OUT-PATIENT SERVICES, WHICH WAS AT ISSUE IN THAT CASE, TO THE  
16 END TO DETERMINE THE COST TO AN EFFICIENT HOSPITAL ECONOMICALLY  
17 PROVIDING QUALITY CARE.

18 THE STATE MUST THEN SET THE RATES THAT HAVE SOME  
19 REASONABLE RELATIONSHIP TO SUCH COST, THE STATE BEARING THE  
20 BURDEN OF JUSTIFYING ANY RATE WILL SUBSTANTIALLY DEVIATE FROM  
21 SUCH DETERMINED COSTS.

22 SO HERE WE HAVE A SITUATION IN WHICH THE STATE DOES  
23 NOT DETERMINE THE RATE. THE STATE DETERMINES EVERY YEAR, UNDER  
24 AN ANALYSIS -- EXCUSE ME, UNDER A REIMBURSEMENT SCHEME THAT HAS  
25 BEEN APPROVED BY CMS, FEDERAL AGENCY, IN WHICH IT SETS A



1 CONTRIBUTION LEVEL.

2 SO WE ARE NOT TALKING ABOUT REIMBURSEMENT RATES  
3 DIRECTLY TO THE PROVIDERS HERE.

4 **THE COURT:** TRUE --

5 **MS. CARSON:** OKAY.

6 **THE COURT:** -- BUT THEY ARE CERTAINLY QUITE  
7 INFLUENTIAL AND --

8 **MS. CARSON:** WELL, I WOULD TAKE ISSUE WITH THAT,  
9 TOO, BUT I'LL GET THERE.

10 **THE COURT:** ARGUE IT BOTH WAYS BECAUSE IT MAY BE  
11 THAT IT IS INFLUENTIAL IF NOT DETERMINATIVE --

12 **MS. CARSON:** OKAY.

13 **THE COURT:** -- SO I WOULD LIKE TO HEAR YOUR  
14 POSITION.

15 **MS. CARSON:** SURE.

16 THERE HAS BEEN NO CHANGE IN THE METHODOLOGY HERE.  
17 THERE HAS BEEN ABSOLUTELY NO CHANGE TO THE METHOD AND  
18 PROCEDURES, AND THAT IS CONFIRMED, ACTUALLY, BY THE LETTER FROM  
19 CMS DATED MAY 20TH. THE METHODOLOGY HAS BEEN IN PLACE SINCE  
20 1994.

21 **THE COURT:** I'M SORRY, THE METHODOLOGY FOR WHAT?

22 **MS. CARSON:** FOR THE -- TO DETERMINE THE RATE, WHICH  
23 INCLUDES WAGES AND BENEFITS, BUT ALSO INCLUDES ADMINISTRATIVE  
24 COSTS AND ALL OF THAT FOR THIS PARTICULAR SERVICE.

25 SO, IN OTHER WORDS, WAGES AND BENEFITS ARE A

1 COMPONENT OF THE RATE THAT IS PAID TO THE -- THAT IS PAID FOR  
2 THIS PARTICULAR SERVICE, INCLUDING EMPLOYMENT TAXES AS WELL.

3 SECTION 12301.6 CLEARLY CONTEMPLATES CHANGES IN THE  
4 LEVEL OF FUNDING FOR THE STATE'S SHARE; INDEED, IT HAS  
5 INCREASED STEADILY OVER THE PAST EIGHT YEARS. THE REDUCTION,  
6 AS A RESULT OF SUBSECTION (SMALL D) (6) REDUCES THAT  
7 CONTRIBUTION BACK TO THE LEVEL IT WAS JUST TWO YEARS AGO. AND,  
8 AGAIN, I WILL POINT OUT TO YOUR HONOR THAT IT IS STILL HIGHER  
9 THAN IS PAID IN 36 COUNTIES THROUGHOUT THE STATE.

10 UNLIKE THE REIMBURSEMENT RATES SET BY THE STATE FOR  
11 HOSPITALS, THERE IS NO WAY TO KNOW -- EXCUSE ME.

12 UNLIKE WITH REIMBURSEMENT RATES FOR HOSPITALS, THE  
13 STATE DOES NOT SET THE RATES. IN FACT, UNIONS HAVE MORE SAY  
14 HERE IN THE LEVEL OF WAGES AND BENEFITS PAID THAN THE STATE  
15 DOES BECAUSE WAGES AND BENEFITS ARE DETERMINED THROUGH THE  
16 COLLECTIVE BARGAINING PROCESS BETWEEN THE COUNTY PUBLIC  
17 AUTHORITY AND THE UNION.

18 UNLIKE REIMBURSEMENT RATES SET BY THE STATE FOR  
19 HOSPITALS, THERE IS NO WAY TO KNOW IN ADVANCE WHAT THE COUNTIES  
20 WILL DO AND THE EVIDENCE NOW SHOWS THAT THAT IS IN FACT TRUE.

21 OUT OF THE 22 COUNTIES, WE ARE ONLY TALKING ABOUT 22  
22 COUNTIES HERE, TWO -- EXCUSE ME, SIX COUNTIES HAVE INDICATED  
23 THEY WILL REDUCE TO THE LEVEL THE STATE SET. SIX COUNTIES HAVE  
24 INDICATED THEY WILL REDUCE SOME AMOUNT, AS LITTLE AS 25 CENTS  
25 AN HOUR. TWO HAVE SAID THEY WILL INCREASE THEIR RATES. AND

1 SIX HAVE TAKEN NO POSITION WHATSOEVER. THEY HAVE MOU'S OR  
2 COLLECTIVE BARGAINING AGREEMENTS THAT ARE STILL IN FORCE AND  
3 EFFECT AND THEY HAVE NOT DONE ANYTHING -- THE COUNTY HAS NOT  
4 DONE ANYTHING TO CHANGE THAT.

5 MY UNDERSTANDING IS THAT THEY ARE COMING DUE  
6 PROBABLY THIS FALL, BUT WE HAVE NO INDICATION WHAT THEY WILL  
7 DO.

8 SO THE NINTH CIRCUIT FINDING, WHETHER YOU LOOK TO  
9 ORTHOPAEDIC OR CAL PHARMACISTS, 30(A) CAN BE VIOLATED BY  
10 FAILURE OF THE LEGISLATURE TO CONDUCT AN ANALYSIS IN THESE  
11 CIRCUMSTANCES BEFORE ENACTING A CHANGE IN THE STATE'S SHARE  
12 JUST DOESN'T FIT. THESE ARE NOT REIMBURSEMENT RATES. THERE'S  
13 BEEN NO CHANGE IN THE METHODOLOGY. WE DO NOT HAVE -- THERE'S  
14 NO STATE CONTROL OVER THE RATE, AND THE RATES VARY COUNTY BY  
15 COUNTY.

16 NOW, AS TO SUBSTANTIVE GUARANTEES --

17 **THE COURT:** WHAT IF THERE WAS STATE CONTROL OVER THE  
18 RATE? WHAT IF THE STATE CHANGE HYPOTHETICALLY DETERMINED THE  
19 RATE?

20 **MS. CARSON:** WELL, YOUR HONOR, QUITE FRANKLY, I'M  
21 REALLY STRUGGLING WITH THE REASONING OF CAL PHARMACIST. I  
22 DON'T THINK THERE'S ANYTHING IN THE STATUTE, AND THERE'S  
23 CERTAINLY NOTHING IN ORTHOPAEDIC THAT SUPPORTS THE NOTION THAT  
24 THE LEGISLATURE HAS TO CONDUCT AN ANALYSIS BEFORE IT DOES  
25 ANYTHING TO REIMBURSEMENT RATES.

1           **THE COURT:** AGAIN, IF IT'S THE NINTH CIRCUIT --

2           **MS. CARSON:** RIGHT --

3           **THE COURT:** -- I MUST FOLLOW IT.

4           **MS. CARSON:** I UNDERSTAND THAT.

5                   BUT I'M JUST SAYING I, MYSELF, AM STRUGGLING WITH  
6 THAT BECAUSE WHERE YOU GET THAT FROM ORTHOPAEDIC OR THE  
7 LANGUAGE OF THE STATUTE, I DON'T SEE IT. I HAVE NO IDEA.

8                   SO, IN TERMS OF THE CLAIM BY PLAINTIFFS THAT THEY  
9 HAVE -- THERE ARE SUBSTANTIVE GUARANTEES TO QUALITY AND ACCESS,  
10 THIS IS NOT -- THIS ACTION IS NOT BROUGHT UNDER 1983. AS YOUR  
11 HONOR WELL KNOWS, SANCHEZ DECIDED, THE NINTH CIRCUIT, YOU,  
12 YOURSELF, AND THE NINTH CIRCUIT SAID THERE'S NO PRIVATE RIGHT  
13 OF ACTION. CONGRESS DID NOT INTEND FOR BENEFICIARIES OR  
14 PROVIDERS TO HAVE ANY RIGHT TO ENFORCE THIS PROVISION, WE ARE  
15 SIMPLY UNDER THE SUPREMACY CLAUSE.

16           **THE COURT:** THE COURT SAID IT COULD BE PURSUED UNDER  
17 THE SUPREMACY CLAUSE, WHICH IS HOW THESE PLAINTIFFS ARE DOING  
18 IT.

19           **MS. CARSON:** RIGHT. AND CAL PHARMACISTS -- EXCUSE  
20 ME, INDEPENDENT LIVING IS MERELY JURISDICTIONAL, THEY HAVE  
21 STANDING TO BRING THE ACTION. THERE'S NO DISCUSSION ABOUT  
22 WHETHER THEY HAVE A RIGHT TO QUALITY AND ACCESS.

23                   IN OTHER WORDS, IT EVEN GOES BEYOND WHAT THE COURT  
24 CONSIDERED IN CAL PHARMACISTS. THE PLAINTIFFS HERE ARE SAYING  
25 WE HAVE A RIGHT TO QUALITY AND ACCESS. CAL PHARMACISTS DOESN'T

1 ADDRESS THAT. ORTHOPAEDIC DOESN'T ADDRESS IT, AND INDEPENDENT  
2 LIVING DOES NOT ADDRESS THAT ISSUE.

3 IN ADDITION, THERE IS, IN FACT, NO PROBLEM WITH  
4 QUALITY AND ACCESS HERE.

5 **THE COURT:** YOU ARE SAYING THEY DON'T HAVE A RIGHT  
6 TO IT?

7 **MS. CARSON:** THAT'S EXACTLY RIGHT.

8 THERE HAVE BEEN NO -- THERE'S NO COMPLAINT, NO  
9 ALLEGATION THE ACTUAL QUALITY OF THE SERVICE IS DEFICIENT. THE  
10 PROVIDER -- THE EVIDENCE WE PUT BEFORE THE COURT INDICATES THAT  
11 THE BENEFICIARIES HAVE THE POWER TO HIRE, FIRE, AND DIRECT THE  
12 SERVICES THAT ARE PROVIDED TO THEM.

13 **THE COURT:** THIS IS A FALLBACK. EVEN IF THEY DO  
14 HAVE A RIGHT TO QUALITY AND ACCESS, THEY HAVE QUALITY AND  
15 ACCESS.

16 **MS. CARSON:** EXACTLY.

17 I AM JUST TRYING TO COVER ALL MY BASES.

18 **THE COURT:** I JUST WANTED TO MAKE SURE I WAS  
19 FOLLOWING YOU.

20 **MS. CARSON:** SURE.

21 AND ALSO, AS IS SET FORTH ESPECIALLY IN THE IHSS  
22 PLUS WAIVER, WHICH I BELIEVE IS AN EXHIBIT TO TOBY DOUGLAS'  
23 DECLARATION, THE QUALITY THAT'S DELIVERED IS MONITORED BY THE  
24 COUNTIES, BY THE DEPARTMENT OF SOCIAL SERVICES, BY THE  
25 DEPARTMENT OF HEALTH CARE SERVICES, AND ALSO BY THE FEDERAL

1 GOVERNMENT.

2 SO, THE ONLY ARGUMENT WE ARE LEFT WITH HERE IS THAT  
3 BENEFICIARIES OR RECIPIENTS WILL GET INFERIOR CARE IN SNIPS,  
4 AND I QUESTION THAT. THERE IS NO EVIDENCE OF THAT, ACTUALLY.  
5 IT IS JUST HEARSAY OPINION.

6 THERE'S ALSO NO EVIDENCE THAT THERE IS A LACK OF  
7 ACCESS. THERE IS NO EVIDENCE BEFORE THIS COURT THAT THERE IS A  
8 SINGLE BENEFICIARY WHO HAS GONE WITHOUT CARE OR WHO WILL GO  
9 WITHOUT CARE COME JULY 1ST; THAT EVERY COUNTY MAINTAINS A  
10 REGISTRY, HAS AN EMERGENCY BACKUP SYSTEM, AND, IN FACT,  
11 62 PERCENT OF PROVIDERS ARE RELATED TO THE BENEFICIARIES THEY  
12 SERVE AND 50 PERCENT LIVE WITH THE BENEFICIARY WITH WHOM THEY  
13 SERVE. SO HIGHLY SUSPECT.

14 I DID ALSO WANT TO JUST ADDRESS THE ADA AND THE  
15 REHAB CLAIMS. PLAINTIFFS' ARGUMENT ESSENTIALLY IS THAT AS A  
16 RESULT OF THE STATE'S -- THE REDUCTION OF THE STATE'S  
17 CONTRIBUTION, RECIPIENTS WILL GO WITHOUT SERVICES AND SOME WILL  
18 GO INTO SKILLED NURSING FACILITIES.

19 THERE ARE SERIOUS PROBLEMS WITH CAUSATION HERE ALL  
20 BASED ON ASSUMPTION UPON ASSUMPTION. IN ORDER TO GET FROM THE  
21 REDUCTION OF THE STATE'S SHARE TO THE WAGES AND BENEFITS TO  
22 THOUSANDS OF PEOPLE WHO WILL BE ADMITTED TO SNF'S, YOU HAVE TO  
23 MAKE THE FOLLOWING ASSUMPTIONS. FIRST, THAT COUNTIES WILL  
24 REDUCE WAGES AND BENEFITS IN RESPONSE TO THE REDUCTION IN THE  
25 STATE'S SHARE.

1           **THE COURT:**   SOME AT LEAST HAVE.

2           **MS. CARSON:**   SOME HAVE INDICATED THAT THEY WILL,  
3   YES.

4           THEN THAT ASSUMES THAT THE CURRENT PROVIDER WILL  
5   LEAVE BECAUSE OF A DECREASE.   SO A DECREASE AS LITTLE AS 25  
6   CENTS AN HOUR IN THIS ECONOMY, GIVEN HIGH UNEMPLOYMENT  
7   ESPECIALLY FOR WAGE LOW WORKERS, THAT ASSUMES THEN THAT THAT  
8   CURRENT PROVIDER CANNOT BE REPLACED.

9           AND THEN YOU HAVE TO ASSUME THAT IF THE CURRENT  
10   PROVIDER IS NOT REPLACED, THAT ONLY, THE ONLY OPTION IS A  
11   SKILLED NURSING FACILITY.   SO, THIS IS JUST ENTIRELY TOO  
12   SPECULATIVE.

13           **THE COURT:**   WELL, ONE NECESSARILY CAN'T PRESENT  
14   EVIDENCE OF SOMETHING THAT WILL HAPPEN IN THE FUTURE THAT  
15   HASN'T HAPPENED YET, SO THE PLAINTIFFS HAVE SUBMITTED  
16   DECLARATIONS OF PEOPLE WHO NEED CARE, PEOPLE WHO GIVE CARE, OF  
17   AN EXPERT WHO SAY THAT THESE THINGS ARE VERY LIKELY TO HAPPEN.

18           WHAT IS YOUR FACTUAL COUNTERPOINT TO THAT?

19           **MS. CARSON:**   MY FACTUAL COUNTERPOINT IS THAT WE PUT  
20   IN EVIDENCE, I BELIEVE IT'S ATTACHED TO EILEEN CARROLL'S  
21   DECLARATION THAT THERE ARE REGISTRIES THAT ALL TOLLED, PROBABLY  
22   OVER 14,000 PEOPLE ARE ON, LISTED ON REGISTRIES.

23           THERE'S ALSO EVIDENCE IN THE RECORD THAT THERE ARE  
24   REGISTRIES THAT -- SOME COUNTIES HAVE CLOSED THEIR REGISTRIES  
25   AND WILL NOT ENROLL FURTHER.   THEY FEEL THEY HAVE ENOUGH PEOPLE

1 ON THE REGISTRIES; THAT THE COUNTIES ARE REQUIRED TO REPORT TO  
2 THE DEPARTMENT OF SOCIAL SERVICES WHICH THEN REPORTS TO THE  
3 LEGISLATURE, AND LOOKS AT ALL OF THESE ISSUES. THERE IS NOT  
4 ONE HINT THERE WILL BE A PROBLEM.

5 AGAIN, WE ARE GOING BACK TO THE STATE'S CONTRIBUTION  
6 THAT WAS PAID TWO YEARS AGO, AND WE HAVE IN THE RECORD AT LEAST  
7 42 PERCENT OF THE CASELOAD IS IN L.A. AND THEY DON'T EVEN PAY  
8 WHAT THE STATE PAYS RIGHT NOW. SO, ON TOP OF THAT, I DON'T  
9 KNOW WHAT THE ACTUAL PERCENTAGE IS, BUT IT'S STILL MORE THAN  
10 50 PERCENT, PROBABLY CLOSER TO 60 OR 70 PERCENT OF PEOPLE ARE  
11 MAKING LESS THAN WHAT THE RATE THAT THE STATE HAS SET, AND WE  
12 DON'T HAVE AN ACCESS PROBLEM HERE.

13 SO, A FEW PROVIDERS SAYING IF I MAKE LESS MONEY, IT  
14 WILL BE TOUGHER TO MEET EXPENSES, WELL, YES, THAT'S PROBABLY  
15 RIGHT, BUT I DON'T KNOW WHAT THAT MEANS. IT'S JUST SAYING IT'S  
16 GOING TO BE HARDER. AND I BELIEVE DR. BROWN REVEALED THAT  
17 DR. HOWES' EXPERT TESTIMONY, VERY FLAWED.

18 **THE COURT:** DO YOU AGREE THAT IT IS LESS EXPENSIVE  
19 FOR THE STATE TO HAVE AN IN-HOME PROVIDER THAN TO HAVE SOMEONE  
20 IN A STATE-FINANCED SKILLED NURSING FACILITY?

21 **MS. CARSON:** PROBABLY, BASED ON MY KNOWLEDGE ABOUT  
22 THIS, PROBABLY, YES, THAT'S PROBABLY TRUE. BUT, AGAIN, AS  
23 DR. BROWN SAID, DR. HOWES DID NOT BACK OUT THAT COST, SO I  
24 DON'T KNOW FOR SURE, BUT PROBABLY.

25 **THE COURT:** DID YOU WANT TO RESPOND?



1           **MS. LEYTON:** YES, YOUR HONOR. I HAVE A FEW  
2 RESPONSES.

3           THE STATE HAS TAKEN THE POSITION THAT IT DOES NOT  
4 READ THE STATUTE, DOES NOT READ SECTION 30 (A) TO REQUIRE THE  
5 LEGISLATURE TO HAVE CONSIDERED ACCESS AND QUALITY BEFORE  
6 IMPLEMENTING THE REDUCTION IN RATES. BUT SINCE 1997, IT HAS  
7 BEEN CLEAR THAT IN THE NINTH CIRCUIT, SECTION 30 (A) DOES IMPOSE  
8 THE REQUIREMENT THAT BEFORE PAYMENTS CAN BE MODIFIED, THE STATE  
9 MUST CONSIDER THE IMPACT THAT THE CHANGE WILL HAVE ON ACCESS  
10 AND QUALITY.

11           THE STATE OF CALIFORNIA HAS CHOSEN TO REPEATEDLY  
12 DISREGARD THAT --

13           **THE COURT:** YOU ARE REFERRING TO ORTHOPAEDIC  
14 HOSPITAL?

15           **MS. LEYTON:** YES, ORTHOPAEDIC HOSPITAL. THE STATE  
16 HAS CHOSEN TO REPEATEDLY DISREGARD THE MANDATE OF ORTHOPAEDIC  
17 HOSPITAL. TIME AND TIME AGAIN THE STATE HAS BEEN ENJOINED WHEN  
18 IT HAS DISREGARDED THAT MANDATE AND CLAIMED THAT THE BUDGET  
19 PROVIDES AN EXCUSE FOR THAT DISREGARD.

20           **THE COURT:** BY "THE STATE", YOU MEAN THE  
21 LEGISLATURE?

22           **MS. LEYTON:** THE NINTH CIRCUIT --

23           **THE COURT:** OR SOME STATE AGENCY THAT WOULD REPORT  
24 TO THE LEGISLATURE, OR WHAT?

25           **MS. LEYTON:** WELL, THE NINTH CIRCUIT HAS MADE CLEAR

1 THAT IT DOES NOT MATTER WHETHER IT IS THE STATE AGENCY THAT IS  
2 MAKING THE DECISION TO CHANGE THE RATE; THAT EVEN WHEN THE  
3 STATE AGENCY HAS DELEGATED THAT AUTHORITY TO SOME OTHER ENTITY,  
4 OR EVEN WHEN IT IS THE LEGISLATURE IMPOSING THAT DECISION UPON  
5 THE STATE AGENCY THAT THE MANDATES OF SECTION 30 (A) APPLY.

6 **THE COURT:** SOMEBODY HAS TO DO IT.

7 **MS. LEYTON:** THAT'S RIGHT. AND IT HAS TO BE THE  
8 DECISION-MAKER THAT DOES IT. SINCE IT IS THE LEGISLATURE THAT  
9 PASSED SB6, IT MUST BE THE LEGISLATURE THAT CONSIDERED THE  
10 IMPACT THAT THIS WOULD HAVE ON ACCESS AND QUALITY.

11 THE STATE SPENDS A LOT OF TIME RE-ARGUING THIS NINTH  
12 CIRCUIT PRECEDENT, BUT THERE'S CLEARLY NO BASIS TO DISREGARD IT  
13 IN THIS CASE. THE STATE ARGUES THAT IT SHOULD BE DISREGARDED  
14 BECAUSE IT DELEGATED PART OF ITS RATE SETTING AUTHORITY TO  
15 COUNTIES, AND SO SOMEHOW THAT EXEMPTS IT FROM SECTION 30 (A) .

16 THE STATE IS BOUND BY SECTION 30 (A) AND BOUND BY THE  
17 REQUIREMENTS OF THE MEDICAID STATUTE AS A CONDITION OF  
18 PARTICIPATION IN THE MEDICAID PROGRAM. THE STATE DOES NOT  
19 POINT TO ANY PROVISION OF FEDERAL LAW THAT PROVIDES AN  
20 EXEMPTION TO SECTION 30 (A) WHEN THE STATE HAS DELEGATED PART OF  
21 ITS RATE-SETTING AUTHORITY.

22 MOREOVER, THE STATE ENACTMENT SB6 OR 12306.1 (D) 6,  
23 RESCINDED THE APPROVAL OF ALL EXISTING COUNTY RATES THAT WERE  
24 ABOVE 9.50 PER HOUR, AND THE STATE THEN SUBSEQUENTLY TOLD  
25 COUNTIES THAT IF THEY HAD RATES THAT WERE ABOVE 9.50 PER HOUR,

1 THEY NEEDED TO SUBMIT RATE CHANGE REQUESTS.

2 WE PUT IN THAT EVIDENCE AS EXHIBITS TO THE CAROL  
3 GOLUBOCK DECLARATION --

4 **THE COURT:** THE COUNTIES CAN INCREASE IT IF THEY  
5 WANT TO PAY THE DIFFERENCE THEMSELVES, AS I UNDERSTAND IT.

6 **MS. LEYTON:** YES. THE COUNTIES COULD DECIDE THAT  
7 THEY WANT TO KICK IN ADDITIONAL MONEY IN ORDER TO KEEP THE RATE  
8 AT CURRENT LEVELS.

9 **THE COURT:** THE STATE DOESN'T FORCE THEM TO LOWER  
10 THE RATES, THEY JUST SAY WE ARE ONLY GOING TO CONTRIBUTE SO  
11 MUCH AND IF YOU WANT TO PAY MORE, YOU HAVE TO PAY IT YOURSELF.  
12 ISN'T --

13 **MS. LEYTON:** WELL, THE STATE DID CHANGE THE RATES.  
14 THE STATE HAS -- IF YOU LOOK AT THE EXHIBITS TO THE  
15 DECLARATIONS THAT WE HAVE SUBMITTED, AND WE SUBMITTED AS PART  
16 OF OUR REQUEST FOR JUDICIAL NOTICE, WE SUBMITTED THE ALL COUNTY  
17 LETTERS THAT THE STATE SENT OUT. THOSE LETTERS TOLD ALL  
18 COUNTIES, NOT JUST THOSE THAT WANTED TO REDUCE, THAT THEY HAD  
19 TO RE-SUBMIT ANY RATES ABOVE 9.50 PER HOUR BECAUSE THE STATE  
20 CONSIDERED THAT A RATE CHANGE.

21 AND THE REASON FOR THAT IS THAT THE STATE HAS  
22 INTERPRETED THAT -- THE STATE PROCESS SETS UP THAT THE AMOUNT  
23 THAT THE STATE WILL CONTRIBUTE TOWARDS THE RATE IS A PART OF  
24 RATE SETTING; THAT THE STATE'S APPROVAL OF ALL RATES IS  
25 CONDITIONAL UPON THERE BEING ENOUGH MONEY IN THE BUDGET TO FUND

1 THOSE RATES. SO THE STATE CONSTRUED 12301.6(D)6 TO RESCIND THE  
2 STATE'S APPROVAL OF ALL RATES THAT WERE ABOVE 9.50.

3 NOW, YOU ARE RIGHT, YOUR HONOR, THAT THE COUNTIES  
4 COULD KICK IN ADDITIONAL MONEY IF THEY WANTED TO IN ORDER TO  
5 KEEP THE RATES HIGHER AND IF THEY HAD THE RESOURCES TO DO SO.  
6 HOWEVER, THE ORTHOPAEDIC HOSPITAL CASE MAKES CLEAR THAT JUST  
7 BECAUSE THERE WILL BE DE FACTO ACCESS, JUST BECAUSE SOME OTHER  
8 LAW WILL REQUIRE THE PROVISION OF ACCESS, THAT DOESN'T MEAN  
9 THAT THE STATE CAN REDUCE ITS PAYMENTS TO AMOUNTS THAT DO NOT  
10 GUARANTEE ACCESS AND QUALITY.

11 IN ORTHOPAEDIC HOSPITAL, THERE WAS DE FACTO ACCESS  
12 BECAUSE HOSPITALS WERE REQUIRED BY OTHER PROVISIONS OF FEDERAL  
13 LAW TO PROVIDE EMERGENCY CARE, BUT THE NINTH CIRCUIT REJECTED  
14 THAT DEFENSE AND HELD THAT THE STATE STILL HAD TO SET ITS  
15 PAYMENTS AT A LEVEL THAT GUARANTEED ACCESS AND QUALITY, AND  
16 STILL HAD TO CONSIDER ACCESS AND QUALITY WHEN IT WAS REDUCING  
17 THOSE PAYMENTS.

18 IN ADDITION, THE STATE ACKNOWLEDGES THAT IT REVIEWS  
19 AND APPROVES ALL RATE CHANGES. SO ANY RATE CHANGE THAT A  
20 COUNTY SUBMITS WILL BE REVIEWED BY THE STATE, AND THE STATE  
21 SAYS THAT IT REVIEWS THOSE REQUESTS FOR COMPLIANCE WITH STATE  
22 AND FEDERAL LAW. BUT THEN THE STATE ACKNOWLEDGES THAT IT DOES  
23 NOT CONSIDER SECTION 30(A) OF THE MEDICAID STATUTE TO BE PART  
24 OF WHAT IT REVIEWS THOSE RATES FOR. INSTEAD, IT WILL APPROVE  
25 ALL RATES AS LONG AS THEY PAY ABOVE THE MINIMUM WAGE.

1 THE NINTH CIRCUIT LAW MAKES CLEAR THAT THE FACT THAT  
2 SOMEONE OTHER THAN THE SINGLE STATE AGENCY MADE THE DECISION TO  
3 REDUCE RATES DOES NOT INSULATE THAT DECISION FROM COMPLIANCE  
4 WITH THE REQUIREMENTS OF SECTION 30 (A) .

5 IN ADDITION, THE STATE SEEMS TO BE MAKING THE  
6 ARGUMENT HERE THAT THE WAGES AND BENEFITS THAT ARE PAID TO  
7 PROVIDERS DO NOT COUNT AS REIMBURSEMENT RATES. THE SECTION  
8 30 (A) SPEAKS OF PAYMENTS TO PROVIDERS. THERE IS NO QUESTION  
9 THAT THESE ARE PAYMENTS TO PROVIDERS AND THAT IF THEY -- AND  
10 THAT THESE PAYMENTS EFFECT THE ACCESS TO CARE AND QUALITY OF  
11 CARE OF IHSS RECIPIENTS.

12 WE WOULD SUBMIT THAT WE HAVE ALSO DEMONSTRATED  
13 IRREPARABLE HARM, THAT UNDER THE CALIFORNIA PHARMACISTS CASE,  
14 IT IS CLEAR THAT THE LOSS OF INCOME TO MEDICAID PROVIDERS  
15 COUNTS AS IRREPARABLE HARM FOR PURPOSES OF OBTAINING AN  
16 INJUNCTION UNDER THE MEDICAID STATUTE.

17 BUT HERE WE ARE NOT DEALING WITH PHARMACIES, WE ARE  
18 DEALING WITH LOW-WAGE WORKERS WHERE 25 CENTS AN HOUR, A DOLLAR  
19 PER HOUR CAN MAKE THE DIFFERENCE FROM BEING ABLE TO PAY FOR  
20 MEDICATION OR NOT PAY FOR MEDICATION, PAY FOR BASIC LIFE  
21 NECESSITIES, AND WE HAVE SUBMITTED SUBSTANTIAL EVIDENCE OF THE  
22 HARM THAT PROVIDERS WILL SUFFER IF THIS RATE CHANGE GOES INTO  
23 EFFECT.

24 WE HAVE ALSO SUBMITTED SUBSTANTIAL EVIDENCE FROM  
25 CONSUMERS, AND THOSE ARE NOT, AS YOUR HONOR ACKNOWLEDGED, IT IS

1 NECESSARILY PREDICT UPON, THESE CHANGES HAVE NOT YET GONE INTO  
2 EFFECT. SO PROVIDERS AND CONSUMERS ARE PREDICTING WHAT WILL  
3 HAPPEN IF THESE RATE CHANGES TAKE EFFECT.

4 WE HAVE SUBMITTED SUBSTANTIAL EVIDENCE AND  
5 EXPLANATION OF WHY CONSUMERS BELIEVE THEY WILL LOSE THEIR  
6 PROVIDERS, WHY PROVIDERS WILL BE FORCED TO TAKE OTHER JOBS AND  
7 WHY THEY HAVE JOBS THAT ARE AVAILABLE TO THEM EVEN IN THIS  
8 ECONOMY, AND WE HAVE SUBMITTED SUBSTANTIAL EVIDENCE THAT THIS  
9 TURNOVER WILL RESULT IN VACANCIES AND WHAT THIS WILL MEAN FOR  
10 IHSS CONSUMERS.

11 THE STATE HAS SUBMITTED EVIDENCE THAT THERE ARE  
12 PEOPLE ON REGISTRIES, BUT THE STATE'S OWN EVIDENCE ACKNOWLEDGES  
13 THAT THERE ARE ALREADY IHSS CONSUMERS HAVING TREMENDOUS  
14 DIFFICULTY FINDING PROVIDERS TO PENCIL FILL THOSE NEEDS. THOSE  
15 TEND TO BE PEOPLE WHO REQUIRE OVERNIGHT CARE, PEOPLE WHO HAVE  
16 MENTAL HEALTH ISSUES, PEOPLE WHO NEED TO BE LIFTED BY THEIR  
17 PROVIDERS; THAT THOSE INDIVIDUALS ARE ALREADY FACING ACCESS  
18 DIFFICULTIES. AND THIS COURT CAN CONSIDER THAT AS PART OF  
19 DETERMINING THE LIKELIHOOD THAT CONSUMERS WILL SUFFER IF THIS  
20 RATE CHANGE GOES INTO EFFECT.

21 WE'VE ALSO EXPLAINED THAT THE NUMBER OF PEOPLE ON  
22 THOSE REGISTRIES ARE THE NUMBER OF PEOPLE WHO ARE ON THE  
23 REGISTRIES AT THE CURRENT WAGE RATE. AND WE'VE SUBMITTED  
24 DECLARATIONS FROM IHSS CONSUMERS WHO HAVE EXPLAINED THAT WHEN  
25 THEY HAVE TRIED TO OBTAIN HELP THROUGH THE PROVIDER REGISTRIES,

1 IT HAS NOT WORKED FOR THEM.

2 **THE COURT:** THESE ARGUMENTS ALSO GO TO YOUR  
3 SUBSTANTIVE 30 (A) CLAIM AND YOUR ADA INTEGRATION CLAIM --

4 **MS. LEYTON:** YES.

5 **THE COURT:** -- YOUR IRREPARABLE HARM CLAIM IS  
6 BASICALLY THE SAME ARGUMENT, I TAKE IT?

7 **MS. LEYTON:** YES, YOUR HONOR. AS FAR AS THE  
8 CONSUMERS, IT IS BASICALLY THE SAME ARGUMENT.

9 WE WOULD SUBMIT THAT THE HARM TO THE PROVIDERS ALONE  
10 WOULD ESTABLISH IRREPARABLE HARM SUFFICIENT TO JUSTIFY  
11 PRELIMINARY INJUNCTION ON THE PROCEDURAL MEDICAID CLAIM. BUT  
12 THE HARM TO CONSUMERS IS RELEVANT TO BOTH THE IRREPARABLE HARM  
13 INQUIRY AS WELL AS THE SUBSTANTIVE MEDICAID AND SUBSTANTIVE ADA  
14 CLAIMS.

15 WE ARE ALSO ASKING YOU --

16 **THE COURT:** THE PROCEDURAL ISSUE WOULD BE SUFFICIENT  
17 TO ENJOIN THE REDUCTION, I TAKE IT?

18 **MS. LEYTON:** THAT IS CORRECT. WE ACKNOWLEDGE THAT  
19 YOU DO NOT NEED TO REACH THE SUBSTANTIVE MEDICAID CLAIM AND THE  
20 ADA CLAIM IF YOU RULE IN OUR FAVOR ON THE PROCEDURAL MEDICAID  
21 CLAIM, ALTHOUGH WE WOULD ASK THAT YOU REACH THOSE ISSUES, AND  
22 WE BELIEVE THAT WE HAVE DEMONSTRATED, DESPITE BEING HAMPERED BY  
23 THE STATE'S FAILURE TO ANALYZE THE EFFECT OF THESE CUTS ON  
24 ACCESS AND QUALITY, WE BELIEVE THAT WE HAVE SUBMITTED ADEQUATE  
25 EVIDENCE TO ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON

1 THOSE CLAIMS AS WELL, AND TO OBTAIN A STATUS QUO INJUNCTION IN  
2 RELATION TO THOSE CLAIMS.

3 **THE COURT:** IN THAT EVENT, THE STATE, I SUPPOSE, CAN  
4 GO BACK AND DO THE ANALYSIS AND SEE WHAT IT FOUND.

5 **MS. LEYTON:** YES. IF THIS COURT ENJOINED THE CUTS  
6 FOR THE PROCEDURAL VIOLATION ONLY, THEN THE STATE CAN GO BACK  
7 AND DO AN ANALYSIS.

8 AND WE WOULD SUBMIT THAT IF THE STATE DOES THAT  
9 ANALYSIS, IT WILL CONCLUDE THAT THERE WILL BE A NEGATIVE IMPACT  
10 ON ACCESS AND QUALITY. AND WE WOULD HOPE THAT THE STATE WOULD  
11 NOT BE BACK BEFORE YOU WITH A NEW PROVIDER PAYMENT CUT.

12 HOWEVER, IF THIS COURT WANTS TO ENSURE THAT THE  
13 STATE DOES NOT GO THROUGH THAT EXERCISE BECAUSE THE COURT  
14 BELIEVES THAT WE HAVE ALREADY SUBMITTED ADEQUATE EVIDENCE OF  
15 IRREPARABLE -- OF HARM TO CONSUMERS BASED ON THE DEPRIVATION OF  
16 ACCESS AND THE DECLINE IN QUALITY, THEN THIS COURT CAN REACH  
17 THOSE.

18 I ALSO WOULD LIKE TO MAKE ONE POINT IN RELATION TO  
19 THE QUALITY POINT. THE STATE POINTS OUT THAT IT DOES HAVE  
20 MEASURES OF QUALITY AND OTHER WAYS OF ENSURING QUALITY IN THE  
21 IHSS PROGRAM. THAT HAS BEEN TRUE IN OTHER NINTH CIRCUIT CASES  
22 AS WELL, INCLUDING ORTHOPAEDIC HOSPITAL WHERE THE STATE MADE  
23 THE ARGUMENT THAT IT HAD OTHER MEASURES TO ASSURE QUALITY IN  
24 THE PROGRAM. BUT WHAT ORTHOPAEDIC HOSPITAL HELD IS THAT THE  
25 STATE MUST SET PAYMENTS THAT ARE CONSISTENT WITH QUALITY.



1           AND THE SPECIFIC QUALITY ISSUE THAT WE ARE TALKING  
2 ABOUT IS THE QUALITY, THE DEPRIVATION OF QUALITY THAT WILL  
3 RESULT IF PEOPLE LOSE THEIR PROVIDERS, IF THEY SUFFER PROVIDER  
4 TURNOVER, GAPS IN SERVICE WHILE THEY ARE LOOKING FOR PROVIDERS,  
5 IF THEY ARE FORCED TO HAVE FEWER IHSS HOURS THAN THEY ARE  
6 AUTHORIZED FOR BECAUSE THEY CAN'T FIND ENOUGH PROVIDERS TO WORK  
7 THOSE HOURS, AND FOR SOME PEOPLE IF THEY WILL BE DEPRIVED OF  
8 IHSS SERVICES ALTOGETHER BECAUSE OF THE RATE CHANGE.

9           **THE COURT:** DO YOU HAVE ANY COMMENT ON COUNSEL'S  
10 PROBLEM WITH CALIFORNIA PHARMACISTS?

11           **MS. LEYTON:** I WOULD POINT OUT THAT IT IS ACTUALLY  
12 NOT ONLY THE NINTH CIRCUIT THAT HAS READ SECTION 30(A) IN THIS  
13 MATTER. THE EIGHTH CIRCUIT HAS AND A NUMBER OF FEDERAL  
14 DISTRICT COURTS HAVE AS WELL, BUT AS YOUR HONOR POINTED OUT,  
15 THIS COURT IS BOUND BY CALIFORNIA PHARMACISTS.

16           I CERTAINLY DON'T THINK IT'S AN UNREASONABLE  
17 READING. IF IT TURNS OUT THAT THE STATE HAS CHANGED RATES IN A  
18 WAY -- THE STATE HAS CHANGED RATES WITHOUT CONSIDERING THE  
19 EFFECT THAT THAT RATE CHANGE WILL HAVE ON ACCESS AND QUALITY, I  
20 THINK THAT SHOWS THAT THE PROVISIONS IN THE STATE PLAN ARE NOT  
21 ADEQUATE TO ENSURE ACCESS AND QUALITY AND TO ENSURE  
22 CONSIDERATION OF THOSE FACTORS.

23           SO I CERTAINLY DO NOT THINK IT'S AN UNREASONABLE  
24 READING OF SECTION 30(A), BUT THE MORE IMPORTANT POINT BEING  
25 THAT THAT IS THE GOVERNING AUTHORITY IN THIS CIRCUIT.

1           **THE COURT:** DID YOU WANT TO REPLY BRIEFLY?

2           **MS. CARSON:** WELL, I THINK I EXPLAINED THE  
3 DIFFERENCES IN CAL PHARMACISTS. I THINK --

4           **THE COURT:** NO, I DIDN'T MEAN JUST TO THAT. SHE --

5           **MS. CARSON:** I THINK --

6           **THE COURT:** COUNSEL IS FINISHED WITH HER ARGUMENT,  
7 ARE YOU NOT?

8           **MS. LEYTON:** YES, YOUR HONOR.

9           **THE COURT:** SO, TO ANYTHING, IF YOU WANTED TO REPLY  
10 BRIEFLY TO ANYTHING THAT COUNSEL SAID, YOU MAY DO SO.

11           **MS. CARSON:** WELL, I THINK THAT WE WELL-ESTABLISHED  
12 THAT THE EVIDENCE THAT THEY SUBMITTED FROM THEIR DR. HOWES AS  
13 WELL AS FROM THE PROVIDERS AND BENEFICIARIES AND FROM OTHERS  
14 WAS HIGHLY SPECULATIVE AND NOT AT ALL DETERMINATIVE, ESPECIALLY  
15 THE EXPERT, DR. HOWES' DECLARATION, AND FOUND IT QUITE  
16 INTERESTING THAT IN A REPLY OR SUPPLEMENTAL DECLARATION JUST  
17 SAID, WELL, THIS IS THE BEST I CAN DO GIVEN THE SHORT TIME  
18 FRAME.

19           WELL, I HAD TWO DAYS TO GET AN EXPERT, AND DR. BROWN  
20 WAS ABLE TO LOOK AT HER ANALYSIS AND FOUND VERY SERIOUS FLAWS  
21 IN THAT ANALYSIS. SO I DON'T BELIEVE THAT THAT IS ANY EVIDENCE  
22 THAT YOU SHOULD GIVE ANY CREDENCE TO.

23           AS FAR AS PROVIDERS COMING FORWARD AND SAYING THEY  
24 MAY HAVE DIFFICULTY PAYING THE RENT OR WHATEVER THAT IS, WHILE  
25 I AM NOT UNSYMPATHETIC, THOSE ARE NOT THE KIND OF COSTS AT

1 ISSUE IN ORTHOPAEDIC OR EVEN IN CAL PHARMACISTS. THOSE ARE  
2 COSTS THAT ARE INCURRED IN PROVIDING THE CERTAIN SERVICE TO THE  
3 BENEFICIARIES. THERE ARE NO COSTS ASSOCIATED HERE WITH  
4 PROVIDING BENEFICIARIES WITH THE SERVICE. IT'S TRUE IT IS JUST  
5 A WAGE, EMPLOYMENT WAGE AND BENEFIT.

6 AGAIN, I REMIND THE COURT THAT FOR 36 COUNTIES OUT  
7 OF THE 58, THIS HAS ABSOLUTELY NO IMPACT; THAT THOSE COUNTIES  
8 INCLUDING, LOS ANGELES, SAN DIEGO, AND SOME OTHER BIG COUNTIES  
9 PAY LESS THAN WHAT THE STATE IS GOING TO CONTRIBUTE TO THOSE  
10 WAGES.

11 AGAIN, TWO COUNTIES SOUGHT THAT TO INCREASE THEIR  
12 WAGES GIVEN THE STATE SHARE REDUCTION; OTHERS HAVE INDICATED  
13 THEY WILL REDUCE THEM MINIMALLY, AND ONLY SIX HAVE EVEN SAID  
14 THEY WILL REDUCE THEM TO THE STATE LEVEL. SO THERE IS NO  
15 EVIDENCE IN THE RECORD, ESPECIALLY GIVEN THE REPORTS THAT WE  
16 HAVE SUBMITTED TO YOU, THAT GOES TO THE LEGISLATURE EVERY YEAR  
17 THAT THERE WILL BE AN ACCESS PROBLEM.

18 THERE'S JUST -- COMPARED TO THE EVIDENCE OR THE  
19 DECLARATIONS THAT THE PLAINTIFFS PUT IN, ANECDOTAL AT BEST,  
20 FROM A VERY SELECT FEW COUNTIES, PRIMARILY FROM ALAMEDA COUNTY,  
21 THAT THERE WILL BE A STATEWIDE PROBLEM WITH ACCESS.

22 AGAIN, I TAKE ISSUE WITH THE FACT WITH THE NOTION  
23 THEY HAVE SUBSTANTIVE GUARANTEES OF ECONOMY -- EXCUSE ME, OF  
24 QUALITY CARE AND ACCESS. THE STATUTE SAYS EFFICIENCY, ECONOMY  
25 AND QUALITY OF CARE. ALL THOSE THINGS MUST BE BALANCED AS THE

1 NINTH CIRCUIT FOUND IN SANCHEZ.

2 AND LET'S SEE WHAT ELSE. YOU ARE ABSOLUTELY CORRECT  
3 WHEN YOU SAY THE STATE DOESN'T FORCE THE COUNTIES TO DETERMINE  
4 WHAT WAGES AND BENEFITS THEY WILL PAY THESE WORKERS. IN FACT,  
5 THAT IS THROUGH COLLECTIVE BARGAINING. IN EVERY COUNTY THERE  
6 IS COLLECTIVE BARGAINING GOING ON BETWEEN THE UNIONS, SOME OF  
7 THE PLAINTIFFS HERE, AND THE PUBLIC AUTHORITY IN THAT COUNTY.

8 SO THE STATE MAKES ITS CONTRIBUTION. THAT HAS BEEN  
9 SANCTIONED, THAT METHODOLOGY HAS BEEN SANCTIONED BY THE FEDERAL  
10 GOVERNMENT. IT HAS GONE UP VARIOUS YEARS. THIS YEAR, IN THESE  
11 EXTREME BUDGETARY TIMES, THE STATE MADE A MODEST REDUCTION TO  
12 ITS SHARE, AND IT'S NOT AS THOUGH THE LEGISLATURE DIDN'T HAVE  
13 INFORMATION OF HOW THIS PROGRAM WORKS AND WHAT THE IMPACTS ARE  
14 BY THE COUNTY IN FRONT OF IT.

15 THANK YOU, YOUR HONOR.

16 **THE COURT:** WITH RESPECT TO THE COUNTY, IF I WERE TO  
17 ENJOIN THE STATE FROM REDUCING ITS CONTRIBUTION OR THE  
18 PROCEDURAL, ALLEGED PROCEDURAL VIOLATIONS AS IS REQUESTED, THEN  
19 THE COUNTY WOULD HAVE NO DOG IN THAT FIGHT, I TAKE IT?

20 **MR. WOODS:** I DON'T THINK THE COUNTY HAS A DOG IN  
21 THIS FIGHT AS IT IS PROPOSED. AND I THINK THEY WERE IMPROPERLY  
22 ADDED AS A PARTY FOR IMPROPER PURPOSES. WE ARE ONE OF 12  
23 COUNTIES.

24 **THE COURT:** RIGHT. BUT SETTING THAT ASIDE IN TERMS  
25 OF THE INJUNCTION, WHICH IS ALL THAT'S REALLY BEFORE ME TODAY.

1           **MR. WOODS:** I AM NOT SURE HOW THE INJUNCTION READS.  
2 THE REQUEST WAS TO ENJOIN --

3           **THE COURT:** THE STATE FROM REDUCING THE RATES.

4           **MR. WOODS:** BY APPROVING OR IMPLEMENTING ANY COUNTY  
5 IN-HOME SUPPORTIVE SERVICES RATE DECREASES ADOPTED PURSUANT TO  
6 SECTION 12306.1(D) 6.

7           SO, IF THAT IS THE INJUNCTION THAT IS BEFORE THE  
8 COURT, AND I BELIEVE THAT'S THE ONLY ONE THAT IS, AND YOU  
9 ISSUED IT, THEN IT WOULD BE UP TO THE STATE TO TAKE STEPS. I  
10 DON'T THINK THE STATE APPROVES RATE DECREASES.

11           IF YOU LOOK AT THE STATUTE, THE STATE ONLY -- IT  
12 SPEAKS OF INCREASES. AND AS THE STATUS INDICATED IN THE PAPERS  
13 IT SUBMITTED, IT REVIEWS THOSE INCREASES TO DETERMINE  
14 PROCEDURAL REQUIREMENTS AND TO MAKE SURE THAT THE STATE IS  
15 GOING TO SHARE IN IT IF IT COMPLIES WITH THE RULES.

16           BUT IF YOU LOOK AT WELFARE AND INSTITUTIONS CODE  
17 SECTION 12306.1(A), THE PLAINTIFFS ARGUE --

18           **THE COURT:** I AM SORT OF LOSING YOU HERE. I WAS  
19 LOOKING FOR SOMETHING SPECIFIC THAT THIS WOULD EFFECT FRESNO.

20           ARE YOU NOW JUST SUPPORTING THE STATE'S ARGUMENTS OR  
21 ARE YOU TELLING ME SOMETHING SPECIFIC TO YOUR COUNTY'S ISSUES?

22           **MR. WOODS:** I THINK AN INJUNCTION AS TO THE STATE  
23 DOESN'T DIRECTLY IMPACT FRESNO.

24           **THE COURT:** OKAY.

25           **MS. CARSON:** I DON'T THINK IT DIRECTLY IMPACTS ANY

1 COUNTY BECAUSE, AGAIN, YOUR HONOR, THE WAGES AND BENEFITS ARE  
2 SET THROUGH COLLECTIVE BARGAINING. SO IT COULD BE THAT A  
3 STATE -- THAT A COUNTY WILL CHOOSE TO REDUCE ITS WAGES AND  
4 BENEFITS --

5 **THE COURT:** NONE OF THIS IS WHAT I AM GETTING AT. I  
6 JUST WANT TO MAKE SURE THAT FRESNO DOESN'T HAVE SOME PARTICULAR  
7 OBJECTION TO THE INJUNCTION THAT'S REQUESTED THAT THE STATE  
8 HASN'T ADDRESSED.

9 **MR. WOODS:** IF THE INJUNCTION IS LIMITED TO THE  
10 DECREASES UNDER 12306.1(D)(6), IT DOES NOT.

11 **THE COURT:** OKAY.

12 NOW, HAVE YOU SUBMITTED A PROPOSED INJUNCTION?

13 **MS. LEYTON:** WE HAVE SUBMITTED A PROPOSED ORDER,  
14 YOUR HONOR.

15 AND I WOULD MENTION ONE THING. THERE ARE TWO --

16 **THE COURT:** DID YOU E-FILE THAT OR E-MAIL IT, OR  
17 BOTH?

18 **MS. LEYTON:** IT WAS E-FILED IN CONNECTION WITH OUR  
19 ORIGINAL MOTION.

20 I WOULD POINT OUT ONE THING IN RESPECT TO THIS  
21 DISCUSSION THAT WE ARE JUST HAVING NOW, YOUR HONOR, IS THAT  
22 THERE ARE REALLY TWO RELEVANT ACTS BY THE STATE THAT ARE AT  
23 ISSUE HERE. ONE IS THE ENACTMENT OF 12306.1(D)6 AND THE OTHER  
24 IS THE STATE'S APPROVAL OF THE COUNTY RATE CHANGE REQUEST. AND  
25 IT HAS BECOME CLEAR THROUGH THE STATE'S RESPONSE TO OUR MOTION

1 THAT THE STATE HAS NO MECHANISM IN PLACE TO REVIEW ACCESS AND  
2 QUALITY WHEN IT IS REVIEWING COUNTY RATE CHANGE REQUESTS.

3 AND SO WE BELIEVE THAT IF THIS COURT WERE TO ENJOIN  
4 THE STATE'S IMPLEMENTATION OF 12306.1(D)6, THAT WILL INCLUDE  
5 ENJOINING THE STATE FROM APPROVING ANY RATE CHANGE REQUESTS  
6 THAT HAVE BEEN SUBMITTED TO BE IN EFFECT ON JULY 1ST. THAT  
7 INCLUDES FRESNO COUNTY'S RATE CHANGE REQUEST. EVEN IF THERE IS  
8 SOME SEPARATE JUSTIFICATION FOR THAT REQUEST THAT RELATES TO  
9 THE COUNTY'S OWN SHORT-FALLING FUNDS RATHER THAN TO THE STATE'S  
10 ENACTMENT --

11 **THE COURT:** EVEN IF IT IS NOT -- EVEN IF THE STATE'S  
12 REDUCTION DOES NOT GO INTO EFFECT?

13 **MS. LEYTON:** YES, YOUR HONOR. EVEN IF THE STATE'S  
14 REDUCTION DOES NOT GO INTO EFFECT, WE BELIEVE THAT THE --  
15 BECAUSE IT HAS BEEN MADE CLEAR BY THE STATE IN THIS CASE THAT  
16 THE STATE DOES NOT REVIEW RATE CHANGE REQUESTS FOR THE EFFECT  
17 UPON ACCESS AND QUALITY, AND SO THE STATE CANNOT, IN COMPLIANCE  
18 WITH THE MEDICAID STATUTE, APPROVE FRESNO'S RATE REDUCTION  
19 WITHOUT CONDUCTING THAT ANALYSIS.

20 **THE COURT:** CAN'T WE JUST WAIT AND SEE WHAT HAPPENS?  
21 I MEAN, IF WE WERE TO ENJOIN THE STATE FROM DOING ITS OWN  
22 REDUCTION OF CONTRIBUTIONS, THEN WHO KNOWS WHAT THE COUNTIES  
23 MIGHT DO AT THAT POINT.

24 **MS. CARSON:** THAT IS EXACTLY CORRECT, YOUR HONOR.

25 **MS. LEYTON:** WELL, YOUR HONOR, FRESNO COUNTY, AS FAR

1 AS WE ARE AWARE IS THE ONLY COUNTY THAT CLAIMS THAT IT STILL  
2 MAY BE ABLE TO IMPLEMENT A RATE REDUCTION AS OF JULY 1ST EVEN  
3 IF THE STATE'S ENACTMENT IS ENJOINED.

4 **THE COURT:** BUT WE DON'T KNOW IF IT WILL PERSIST IN  
5 TRYING TO DO SO IF THE STATE'S CONTRIBUTION IS NOT REDUCED.

6 **MS. LEYTON:** UNLESS COUNSEL CAN REPRESENT WHAT  
7 FRESNO COUNTY WOULD DO, WE WOULD NOT KNOW FOR SURE. BUT FRESNO  
8 COUNTY HAS ARGUED IN THIS CASE THAT EVEN IF THIS COURT ENJOINS  
9 THE STATE ENACTMENT, IT CAN STILL IMPLEMENT ITS RATE CHANGE.

10 AND SO THE BEST WAY FOR THE COURT TO ENSURE THAT ITS  
11 INJUNCTION WILL ENSURE COMPLIANCE WITH THE FEDERAL MEDICAID  
12 STATUTE IS TO MAKE CLEAR THAT PART OF ENJOINING THE  
13 IMPLEMENTATION OF THE STATE'S ENACTMENT IS ENJOINING THE STATE  
14 FROM APPROVING THE RATE REQUESTS THAT HAVE BEEN SUBMITTED TO GO  
15 INTO EFFECT ON JULY 1ST, AND THAT INCLUDES FRESNO COUNTY'S  
16 RATE.

17 **THE COURT:** NUMBER ONE, WE DON'T KNOW IF FRESNO WILL  
18 STILL TRY TO DO IT AND NUMBER TWO WE DON'T KNOW IF THE STATE  
19 WILL APPROVE IT IF THE STATE IS UNABLE TO REDUCE ITS  
20 CONTRIBUTION. THAT WOULD BE SORT OF TWO HYPOTHETICALS OR  
21 ADVISORY --

22 **MS. LEYTON:** MY UNDERSTANDING, YOUR HONOR, IS THAT  
23 FRESNO COUNTY HAS STATED THAT IT -- THAT ITS RATE REQUEST DOES  
24 NOT DEPEND ON THE STATE'S REDUCTION IN FUNDS.

25 SO WHAT WE WOULD ASK IS THAT THIS COURT ISSUE AN



1 INJUNCTION THAT PRESERVES THE STATUS QUO AT THIS TIME. AND THE  
2 STATUS QUO IS THAT IN THE COUNTIES THAT ARE ABOVE -- THE STATUS  
3 QUO IN THE COUNTIES THAT ARE ABOVE 9.50 PER HOUR DESPITE THE  
4 SUBMISSION BY FRESNO COUNTY AND OTHER COUNTIES FOR RATE CHANGE  
5 REQUESTS THAT WOULD OTHERWISE GO INTO EFFECT ON JULY 1ST.

6 **THE COURT:** LET ME ASK THE FRESNO COUNSEL IF YOU  
7 WANT TO TAKE A POSITION AS TO WHETHER YOU WILL PERSIST IN YOUR  
8 REQUEST FOR A RATE REDUCTION EVEN IF THE STATE IS NOT ALLOWED  
9 TO REDUCE ITS CONTRIBUTION?

10 **MR. WOODS:** THE COUNTY'S POSITION, FIRST OF ALL, IS  
11 THAT ISN'T BEFORE THE COURT IN THE PRELIMINARY INJUNCTION.

12 **MS. CARSON:** THAT'S RIGHT.

13 **MR. WOODS:** NOT AT ALL. NOT IN THE PAPERS. AS YOU  
14 KNOW, WE GOT A VERY ABBREVIATED PERIOD OF TIME TO RESPOND.  
15 THAT'S NOT BEFORE THE PAPERS.

16 **THE COURT:** THAT'S BECAUSE I THOUGHT THE EXTENSION  
17 THAT WAS REQUESTED BY THE STATE COVERED ALL OF THE DEFENDANTS.  
18 AND ONLY WHEN I GOT YOURS DID I REALIZE IT DIDN'T, AND BY THAT  
19 TIME YOU HAD ALREADY FILED IT, SO ALTHOUGH I GRANTED IT, IT WAS  
20 TOO LATE, BUT THAT WAS UNINTENTIONAL.

21 **MR. WOODS:** THANK YOU. I APPRECIATE IT.

22 **THE COURT:** I WASN'T TRYING TO DISCRIMINATE AGAINST  
23 YOU.

24 **MR. WOODS:** I FIGURED THAT'S WHAT HAPPENED.

25 **THE COURT:** GOOD.

1           **MR. WOODS:** THE REASON I BROUGHT THE SECOND GROUNDS  
2 OF THE COUNTY'S POSITION, THERE ARE A NUMBER OF COUNTIES THAT  
3 IN THE MOU THEY NEGOTIATED SET FORTH VARIOUS CONTINGENCIES  
4 WHICH ALLOW FOR REDUCTION OF WAGES. IN FACT, ONE OF THE  
5 PLAINTIFFS IN THIS CASE IS THE PARTY TO THAT MOU.

6           THE SEIU NEGOTIATED WITH THE COUNTY OF FRESNO TO  
7 AGREE THAT THE COUNTY COULD LOWER ITS RATES UNDER ONE OF TWO  
8 CONTINGENCIES -- UNDER EITHER CONTINGENCIES. ONE, IS IF THE  
9 STATE LOWERED ITS REIMBURSEMENT AND, TWO, IF THERE WAS A LOSS  
10 OF REALIGNMENT FUNDING.

11           AND FRESNO HAS EXPERIENCED A LOSS OF REALIGNMENT  
12 FUNDING IN EXCESS OF 6.43 -- 6 MILLION -- 6.435 MILLION. IT  
13 WENT THROUGH THE MEET AND CONFER PROCESS. THE FACT FINDER IN  
14 THAT CASE, AGAIN, ADVISORY OPINION FOUND THAT THERE HAD BEEN A  
15 LOSS OF REALIGNMENT FUNDING JUSTIFYING A RATE REDUCTION.

16           THE COUNTY'S POSITION IS THAT'S NOT BEFORE THIS  
17 COURT. I BROUGHT IT TO THE ATTENTION OF THE COURT BECAUSE IF  
18 YOU FOUND OUT LATER THAT THE COUNTY WAS CONTEMPLATING THIS, I  
19 THOUGHT THE COURT SHOULD HAVE THAT INFORMATION NOW RATHER THAN  
20 LATER.

21           AND, YES, THE COUNTY OF FRESNO FEELS THAT IT CAN  
22 ACCORDING TO THE TERMS OF THE CONTRACT. AND FOR THE COURT TO  
23 INTERJECT ITSELF THERE, UNDER THE GUISE OF A 30(A) ANALYSIS,  
24 THAT DOESN'T APPLY TO A RATE REDUCTION DUE TO THE LOSS OF  
25 REALIGNMENT FUNDS AT ALL. THAT DOESN'T -- IT'S NOT TIED TO

1 MEDICAID FUNDING OR ANALYSIS. THAT'S A COMPLETELY SEPARATE  
2 ANALYSIS.

3 SO, YES, THE COUNTY OF FRESNO, AND THERE ARE SEVERAL  
4 COUNTIES INCIDENTALY THAT HAVE SIMILAR CLAUSES IN THEIR MOU  
5 WHICH ALLOW FOR REDUCTION OF RATES DEPENDING ON CERTAIN  
6 CONTINGENCIES. FRESNO ISN'T THE ONLY ONE, BUT FRESNO DOES  
7 INTEND, BECAUSE IT MUST FOR THE REASONS SET FORTH IN OUR  
8 PAPERS, DUE TO THE CONDITIONS EXISTING THERE, INTEND TO GO  
9 FORWARD WITH IT.

10 PLAINTIFFS' PRELIMINARY INJUNCTION INSOFAR AS FRESNO  
11 IS CONCERNED, FRESNO, EVEN AFTER THIS REDUCTION, WILL PAY  
12 MORE -- PROPOSED REDUCTION -- WILL PAY MORE THAN 32 COUNTIES.  
13 EVEN AFTER THE PROPOSED REDUCTION, IT PAYS MORE THAN EVERY  
14 SINGLE COUNTY IN THE CENTRAL VALLEY.

15 SO TO SUGGEST THAT THIS MODEST REDUCTION, WHICH IS  
16 THE 35 CENTS LESS THAN WHAT THEY WERE MAKING IN SEPTEMBER OF  
17 '08, IS DISINGENUOUS. THERE HAS BEEN NO FACTUAL SHOWING.  
18 THERE HAS BEEN NO PROOF OF LIKELIHOOD OF SUCCESS INSOFAR AS  
19 FRESNO IS CONCERNED.

20 THE SO-CALLED EXPERTS USED BY PLAINTIFFS PROVIDE  
21 GENERAL SWEEPING STATEMENTS WITHOUT ANY PARTICULAR COMMENTS  
22 RELEVANT TO FRESNO, WHICH HAS A 15 AND A HALF PERCENT  
23 UNEMPLOYMENT RATE NOW. AND WHEN IT NEGOTIATED THIS CONTRACT  
24 WHICH ALLOWS FOR A REDUCTION DUE TO LOSS TO REALIGNMENT FUNDS,  
25 THERE WAS ONLY 8.2 PERCENT UNEMPLOYMENT. IT HAS 450

1 PREQUALIFIED WORKERS FOR THE REGISTRY. SO WE HAVE AN AMPLE  
2 LABOR SUPPLY, A DESPERATE EMPLOYMENT SITUATION, PEOPLE DYING TO  
3 FIND WORK, THERE SIMPLY IS NO ADMISSIBLE EVIDENCE TO  
4 DEMONSTRATE THAT PLAINTIFFS COULD LIKELY SHOW THAT THERE WOULD  
5 BE ANY DEPRIVATION OR DENIAL OF SERVICES.

6 **THE COURT:** WELL, I AM INCLINED TO ENJOIN THE STATE  
7 FOR THE PROCEDURAL REASONS FROM REDUCING ITS CONTRIBUTION. I  
8 AM NOT INCLINED TO GO ANY FURTHER THAN THAT AT THIS POINT, BOTH  
9 BECAUSE I DON'T THINK FURTHER POINTS WERE ADEQUATELY BRIEFED  
10 AND BECAUSE OTHER THINGS HAVE NOT YET COME TO PASS.

11 SO, UNLESS YOU HAVE SOMETHING YOU REALLY WOULD LIKE  
12 TO SAY ABOUT THAT.

13 **MS. LEYTON:** I WOULD LIKE TO SPEAK TO JUST A COUPLE  
14 OF POINTS, YOUR HONOR.

15 FIRST, I BELIEVE THAT PLAINTIFFS HAVE --

16 **THE COURT:** IF THE OTHER SIDE STILL HAS MORE TO SAY,  
17 THEN LET'S HAVE IT ALL SO WE CAN BE FINISHED.

18 **MS. CARSON:** WELL, I THINK THE PLAINTIFFS -- I AGREE  
19 WITH YOUR HONOR, THEY HAVE GONE TOO FAR HERE TO SAY THE STATE  
20 SHOULD BE ENJOINED FROM ANY EVALUATION OR APPROVAL.

21 WE HAVE A STATE PLAN AMENDMENT THAT OUTLINES EXACTLY  
22 WHAT CMS HAS APPROVED IN TERMS OF WHAT THE STATE IS SUPPOSED TO  
23 LOOK AT IN THIS APPROVAL PROCESS. SO, TO THEN SUPERIMPOSE UPON  
24 THAT THEIR INTERPRETATION OF 30(A) IS NOT PROPER, I DO NOT  
25 BELIEVE.

1           SECONDLY, AS MR. WOODS ELOQUENTLY STATED, THERE ARE  
2 OTHER COUNTIES. THIS WAS NOT BRIEFED. SO TO SAY TO THE STATE  
3 YOU CAN'T APPROVE A RATE REDUCTION AT ALL, I MEAN WE DON'T KNOW  
4 WHAT ALL THE BASES ARE. THEY WERE TOLD THAT THEY WERE GOING TO  
5 DO THIS. WE STILL HAVE SOME COUNTIES OUT THERE THAT HAVE TAKEN  
6 NO POSITION IF THIS -- IF THIS RATE REDUCTION -- EXCUSE ME,  
7 CONTRIBUTION WOULD BE REDUCED.

8           **THE COURT:** THE IDEA WOULD BE --

9           **MS. CARSON:** THEY HAVE TAKEN --

10           **THE COURT:** -- TO REDUCE IT WITHOUT UNDERTAKING THE  
11 30 (A) INQUIRY THAT'S REQUIRED BY THE NINTH CIRCUIT WOULDN'T BE  
12 TO SAY YOU CAN'T REDUCE IT NO MATTER WHAT AS YOU POSIT.

13           **MS. CARSON:** I UNDERSTAND, BUT I AM SAYING THAT WE  
14 DON'T KNOW WHAT THE COUNTIES WILL DO. SO TO SAY TO THE STATE  
15 YOU CAN'T APPROVE A RATE REDUCTION SUBMITTED BY THE COUNTY, NOT  
16 NECESSARILY KNOWING WHAT THE BASIS FOR THAT IS, OR IF THEY  
17 THEMSELVES HAVE DONE THE ANALYSIS.

18           AGAIN, I DON'T KNOW HOW THE STATE IS GOING TO DO  
19 THIS ANALYSIS GIVEN THAT THEY HAVEN'T EVEN -- ALL THE COUNTIES  
20 HAVEN'T EVEN WEIGHED IN ON THIS YET. SO I WOULD JUST POINT  
21 THAT OUT AGAIN TO THE COURT.

22           **MR. WOODS:** MAY I FINISH --

23           **THE COURT:** WE HAVE TO STOP AT SOME POINT.

24           **MR. WOODS:** I UNDERSTAND. BUT I HAVE NO OBJECTION  
25 TO WHAT WAS REQUESTED IN THE INJUNCTION, BUT TO EXPAND THAT TO

1 SAY THE STATE CAN'T APPROVE ANY RATE REDUCTION, TO BEGIN WITH  
2 THE LAW DOESN'T --

3 **THE COURT:** AS I SAID, I WOULD NOT DO THAT.

4 **MR. WOODS:** I AM SORRY, I MISUNDERSTOOD THAT.

5 **THE COURT:** I WOULD SAY MAY NOT APPROVE A RATE  
6 REDUCTION WITHOUT UNDERTAKING THE EFFICIENCY, ET CETERA,  
7 ANALYSIS REQUIRED BY THE NINTH CIRCUIT. BUT MY INCLINATION IS  
8 NOT TO DO THAT EITHER, AND I WAS JUST TRYING TO GET PLAINTIFFS'  
9 COUNSEL'S FINAL WORD ON THAT POINT, BUT IF YOU FEEL YOU HAVE  
10 SOMETHING ELSE YOU NEED TO SAY.

11 **MR. WOODS:** THE ONLY THING, IF IT WERE EVER TIED TO  
12 THE 30(A) ANALYSIS, THAT WOULD PREVENT HOME RULE COUNTIES,  
13 CHARTER COUNTIES FROM NEGOTIATING MOU'S WITH UNIONS, WHICH THE  
14 LEGISLATURE --

15 **THE COURT:** NO, IT WOULDN'T. IT WOULD ENJOIN THE  
16 STATE FROM NOT -- FROM APPROVING RATE REDUCTIONS WITHOUT  
17 UNDERTAKING THE PROPER ANALYSIS.

18 **MS. CARSON:** SO, YOUR HONOR, LET ME JUST BE CLEAR  
19 HERE. SO THEN FOR EVERY YEAR THAT THE STATE INCREASED ITS  
20 SHARE, IT WAS REQUIRED TO DO SUCH AN ANALYSIS?

21 **THE COURT:** I DON'T KNOW.

22 **MS. CARSON:** YOU DON'T KNOW?

23 **THE COURT:** I DON'T KNOW. IS THAT BEFORE ME?

24 **MS. CARSON:** YOU'RE INTERPRETING CAL PHARMACIST AND  
25 ORTHOPAEDIC TO SAY THAT BEFORE WE MAKE A CHANGE, WE HAVE TO DO

1 AN ANALYSIS. SO I AM JUST TRYING TO GET CLARIFICATION FROM YOU  
2 THAT EVERY YEAR THAT WE RAISED IT OVER THE LAST EIGHT YEARS,  
3 WERE WE REQUIRED TO DO AN ANALYSIS BEFORE WE DID THAT?

4 **THE COURT:** I CAN'T ISSUE AN ADVISORY OPINION ON  
5 SOMETHING THAT IS NOT --

6 **MS. CARSON:** OKAY. WELL, I AM TRYING TO UNDERSTAND.

7 **THE COURT:** IF YOU -- IF THERE WAS AN OBJECTION TO  
8 IT, I SUPPOSE I WOULD HAVE TO LOOK AT THAT, BUT THAT ISN'T --

9 **MS. CARSON:** OH, SO IT DEPENDS ON WHETHER SOMEONE  
10 OBJECTS.

11 **THE COURT:** THE CASES COME --

12 **MS. CARSON:** SOMEONE FILES A LAWSUIT.

13 **THE COURT:** -- BEFORE ME. UNLESS SOMEONE FILES A  
14 LAWSUIT, I CAN'T REACH OUT AND --

15 **MS. CARSON:** I UNDERSTAND.

16 **THE COURT:** -- FIX THINGS THAT I DON'T THINK ARE  
17 RIGHT.

18 **MS. CARSON:** I UNDERSTAND.

19 **THE COURT:** I CAN ONLY RESPOND TO LAWSUITS THAT ARE  
20 BROUGHT BEFORE ME.

21 **MS. CARSON:** I UNDERSTAND.

22 **MR. WOODS:** ONE LAST CONCERN SO PLAINTIFFS CAN  
23 ADDRESS ALL OF THEM. IF THE STATE HAS TO APPROVE A REDUCTION,  
24 TO BEGIN WITH, THAT ISN'T PROVIDED FOR UNDER STATE LAW. THEY  
25 HAVE TO APPROVE INCREASES IN RATES, NOT REDUCTIONS. SO THAT

1 WOULD IMPOSE NEW LAW.

2 SECONDLY, IF THE COURT ISSUED A BROAD-SWEEPING  
3 FINDING LIKE THAT, THAT WOULD EFFECTIVELY INTERFERE WITH ANY  
4 LABOR NEGOTIATIONS BECAUSE NO MATTER WHAT THE COUNTY AND THE  
5 UNION AGREED TO, IT WOULD NOT BE BINDING UNLESS THE STATE  
6 LOOKED AT IT AND THEN DID SOME FURTHER ANALYSIS, AND THE STATE  
7 WOULD THEN HAVE TO DO AN ANALYSIS FOR EVERY COUNTY BECAUSE THE  
8 SITUATIONS IN EVERY COUNTY WILL BE DIFFERENT DEPENDING ON, YOU  
9 KNOW, COST OF LIVING, UNEMPLOYMENT RATE, COST OF HEALTH CARE,  
10 ET CETERA, ET CETERA.

11 SO, I REALLY RESPECTFULLY SUGGEST THAT ISN'T WHERE  
12 THE COURT SHOULD BE HEADED BECAUSE IT WILL BE IMPOSSIBLE TO  
13 APPLY IN A PRACTICAL SENSE.

14 **MS. LEYTON:** YOUR HONOR, WE DO NOT BELIEVE IT WOULD  
15 BE ENTERING AN ADVISORY OPINION TO DECIDE THAT THE RATE CHANGES  
16 CAN'T TAKE EFFECT WITHOUT A SECTION 30 (A) ANALYSIS.

17 THE EVIDENCE IN THE RECORD SHOWS THAT FRESNO COUNTY  
18 HAS SUBMITTED A RATE CHANGE REQUEST BASED ON THE STATE'S  
19 REDUCTION IN FUNDING. FRESNO COUNTY THEN SUBMITTED EVIDENCE  
20 THAT IT SUBMITTED A SEPARATE JUSTIFICATION FOR THAT RATE  
21 CHANGE, WHICH IS THE SHORTFALL AND THE ALIGNMENT FUND.

22 AND I DON'T UNDERSTAND FRESNO'S COUNSEL TO BE  
23 REPRESENTING THAT IT WILL WITHDRAW THAT PART OF THE RATE CHANGE  
24 REQUEST OR THE STATE TO BE REPRESENTING THAT THE STATE WOULD  
25 CONDUCT A SECTION 30 (A) ANALYSIS BEFORE PERMITTING FRESNO'S



1 RATE CHANGE TO GO INTO EFFECT.

2 IF FRESNO REDUCES RATES ON JULY 1ST, IT WOULD MEAN  
3 THAT THE RATES ARE BEING DECREASED WITHOUT ANY SECTION 30 (A)  
4 ANALYSIS. SO REGARDLESS OF THE REASON FOR THE REDUCTION, AT  
5 SOME POINT THAT ANALYSIS NEEDS TO TAKE PLACE AND THE STATE  
6 CAN'T HAVE A SYSTEM THAT ABDICATES AUTHORITY.

7 IF YOUR HONOR IS NOT INCLINED TO RULE ON THIS ISSUE,  
8 THEN I WOULD ASK THAT THERE BE SOME PROCEDURE BY WHICH IF  
9 FRESNO DOES GO FORWARD WITH THE JULY 1ST RATE REDUCTION AND THE  
10 STATE DOES NOT PREVENT IT FROM DOING SO, THAT WE WILL NEED SOME  
11 KIND OF 24-HOUR BRIEFING SCHEDULE TO BE ABLE TO COME IN FOR A  
12 TEMPORARY RESTRAINING ORDER UNLESS COUNSEL IS REPRESENTING THAT  
13 THEY DO NOT INTEND TO MOVE FORWARD WITH THAT RATE CHANGE  
14 REQUEST.

15 I WOULD ALSO MENTION THAT WE DO HAVE SEPARATE CLAIMS  
16 AGAINST FRESNO COUNTY THAT ARE BASED ON THE AMERICANS WITH  
17 DISABILITIES ACT. WE SUBMITTED NUMEROUS DECLARATIONS BY  
18 CONSUMERS IN FRESNO, AND OUR EXPERT DECLARATION BY DR. HOWES  
19 DOES ADDRESS THE NUMBERS SPECIFICALLY IN FRESNO COUNTY. BUT WE  
20 DO NOT BELIEVE THAT THIS COURT WOULD HAVE TO REACH THAT ADA  
21 CLAIM IF THIS COURT WERE TO RULE THAT THE RATE CHANGE REQUESTS  
22 THAT HAVE ASKED FOR A RATE DECREASE TO GO INTO EFFECT ON  
23 JULY 1ST CANNOT TAKE PLACE WITHOUT SOME KIND OF SECTION 30 (A)  
24 ANALYSIS.

25 **THE COURT:** ALL RIGHT. WELL, I AM GOING TO ENJOIN

1 THE RATE REDUCTION TO THE 9.50 PLUS 60 CENTS THAT HAS BEEN  
2 ALREADY APPROVED BY THE STATE WITHOUT THE 30(A) ANALYSIS, WHICH  
3 I FIND IS REQUIRED AND NOT DONE. AND THAT'S THE ONLY THING I  
4 AM GOING TO ENJOIN AT THIS POINT.

5 I WILL ISSUE A WRITTEN ORDER. IF SOMETHING ELSE  
6 HAPPENS THAT NEEDS TO BE ENJOINED, THEN YOU CAN FILE ANOTHER  
7 REQUEST FOR AN INJUNCTION AGAINST SOMETHING ELSE THAT HAPPENS.

8 AND I AM NOT INCLINED TO BASE THE INJUNCTION ON  
9 ANYTHING OTHER THAN THE PROCEDURAL VIOLATION, BUT AT THE VERY  
10 LEAST I WILL BE ENJOINING THAT OR AM ENJOINING THAT, AND I WILL  
11 ISSUE AN ORDER.

12 **MS. CARSON:** THANK YOU, YOUR HONOR.

13 **THE COURT:** YOU ALSO HAVE A MOTION TO DISMISS THAT'S  
14 SCHEDULED FOR AUGUST 6TH, WHICH WE WILL HEAR.

15 **MR. WOODS:** THAT IS MY MOTION, YOUR HONOR.

16 **THE COURT:** THAT'S ONLY YOURS?

17 **MR. WOODS:** MY MOTION AND ALSO THERE'S A MOTION TO  
18 SEVER SCHEDULED FOR THE SAME DAY.

19 **THE COURT:** AND YOU HAVE A CMC ON SEPTEMBER 1ST?  
20 WHAT ARE YOU -- ARE YOU GOING TO ANSWER OR FILE A MOTION TO  
21 DISMISS?

22 **MS. CARSON:** I DON'T KNOW, YOUR HONOR.

23 **THE COURT:** WHEN IS IT DUE?

24 WHEN IS YOUR ANSWER OR MOTION DUE?

25 **MS. CARSON:** I BELIEVE IT'S PROBABLY DUE LIKE

1 MOMENTARILY. I DON'T KNOW YET.

2 **THE COURT:** I ASK ONLY BECAUSE I WOULD LIKE TO HAVE  
3 IT ON THE SAME DATE AND IT'S PROBABLY TOO LATE FOR YOU TO  
4 NOTICE YOURS FOR AUGUST THE 6TH, SO I WOULD LIKE ALL OF YOU TO  
5 CONSULT WITH EACH OTHER AND AGREE UPON A DATE ON WHICH I WOULD  
6 HEAR ALL MOTIONS TO DISMISS, IF YOU ARE THINKING OF FILING ONE.

7 **MS. CARSON:** ACTUALLY, YOUR HONOR, I AM GOING TO  
8 REQUEST A STAY OF THIS INJUNCTION. I NEED TIME, AND I MAY BE  
9 GOING TO THE NINTH CIRCUIT, BUT --

10 **THE COURT:** YOU CAN DO THAT BUT WE WILL GO FORWARD  
11 WITH THE CASE IN ANY EVENT. AN APPEAL OF THE INJUNCTION  
12 DOESN'T STAY --

13 **MS. CARSON:** I UNDERSTAND --

14 **THE COURT:** -- THE WHOLE CASE.

15 (SIMULTANEOUS COLLOQUY.)

16 **THE COURT:** YOU NEED TO WAIT UNTIL I FINISH TALKING  
17 BECAUSE IT'S HARD FOR THE REPORTER TO GET BOTH OF US AT ONCE.

18 **MS. CARSON:** SURE.

19 **THE COURT:** IRRESPECTIVE OF WHETHER YOU SEEK A STAY  
20 OF THE INJUNCTION AND/OR GO TO THE NINTH CIRCUIT, WE WILL STILL  
21 PROCEED WITH THE REMAINDER OF THE CASE AND YOU WILL STILL NEED  
22 TO FILE EITHER AN ANSWER OR A MOTION TO DISMISS IN A TIMELY  
23 FASHION. AND I WOULD LIKE TO COORDINATE ANY MOTION TO DISMISS  
24 THAT YOU MIGHT FILE WITH THE MOTION TO DISMISS THAT'S ALREADY  
25 BEEN FILED SO I CAN HEAR THEM BOTH ON THE SAME DATE.

1 IF YOU CAN MAKE YOUR DECISION AS TO WHAT YOU ARE  
2 GOING TO DO AND THEN CONSULT WITH YOUR CO-COUNSEL AS WELL AS  
3 OPPOSING COUNSEL TO SEE IF YOU CAN'T AGREE UPON A THURSDAY AT  
4 2:00 O'CLOCK THAT I AM AVAILABLE ON SO THAT I CAN HEAR ANY AND  
5 ALL MOTIONS TO DISMISS ON THE SAME DAY.

6 AND IF YOU WANT TO CHANGE THE CMC DATE BY  
7 STIPULATION, YOU CAN DO THAT AS WELL, BUT AT THE MOMENT IT  
8 SEEMS TO BE ON FOR SEPTEMBER 1ST.

9 **MS. CARSON:** THANK YOU, YOUR HONOR.

10 **MS. LEYTON:** THANK YOU, YOUR HONOR.

11 **THE COURT:** THANK YOU.

12 (PROCEEDINGS CONCLUDED AT 4:00 P.M.)

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**CERTIFICATE OF REPORTER**

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C-09-2306 CW, MARTINEZ, ET AL. V. SCHWARZENEGGER, PAGES NUMBERED 1 THROUGH 45, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

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DIANE E. SKILLMAN, CSR 4909, RPR, FCRR