

IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI

MISSOURI AMBULATORY SURGERY )  
CENTER ASSOCIATION, )  
 )  
Petitioner, )

vs. )

MISSOURI DEPARTMENT OF SOCIAL )  
SERVICES, )  
Serve: )  
Ronald J. Levy, Director )  
Department of Social Services )  
221 West High Street )  
Jefferson City, MO 65102-1527 )

and )

MO HEALTHNET DIVISION )  
Serve: )  
Ian McCaslin, Director )  
MO HealthNet Division )  
Department of Social Services )  
615 Howerton Court )  
Jefferson City, MO 65109 )

Respondents. )

Case No.

FILED

JUN 18 2010

BRENDA A. UMSTATTD  
CLERK CIRCUIT COURT  
COLE COUNTY, MISSOURI

**PETITION FOR DECLARATORY JUDGMENT**

COMES NOW Petitioner, by and through counsel, and for its Petition states:

**ALLEGATIONS COMMON TO ALL COUNTS**

1. Respondent, the Missouri Department of Social Services ("the Department"), is established by Section 660.010, RSMo 2000 with its primary location in Cole County, Missouri.

2. Section 660.017, RSMo states as follows:

The department of social services may adopt, appeal and amend rules necessary to carry out the duties assigned to it. All rules shall be

promulgated pursuant to the provisions of this section and chapter 536, RSMo. No rule or portion of a rule promulgated under the authority of this section shall become effective unless it has been promulgated pursuant to the provisions of section 536.024, RSMo.

3. Section 660.017, RSMo, gives the Department the authority to adopt, appeal and amend rules necessary to carry out duties assigned to it, but subjects the promulgation of such rules to Chapter 536, RSMo, the Missouri Administrative Procedure Act.

4. Respondent, "MO HealthNet Division," is established within the Department by Section 208.201.6(2), RSMo, with its primary location in Cole County, Missouri.

5. Section 208.201.6(2) provides that the MO HealthNet Division has the power to "adopt, amend and rescind such rules and regulations necessary or desirable to perform its duties under state law and not inconsistent with the constitution or laws of this state."

6. Petitioner, Missouri Ambulatory Surgery Center Association (MASCA), is a Missouri not-for-profit corporation in good standing. MASCA has forty-seven (47) members, all of which are small businesses. MASCA brings this action on behalf of its members and in protection of their interests and purposes. A copy of its Articles of Incorporation and most recent annual registration report are attached as Exhibit 1.

7. MASCA has standing to bring this action on behalf of its members to promote and protect those purposes and interests.

8. MASCA can sue as a representative of its members because (1) its members have standing to bring suit in their own right; (2) the interests it seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief sought requires the participation of all the individual members.

9. MASCA's members have standing to bring suit in their own right under Section 536.328, RSMo, as they are small businesses adversely affected and aggrieved by a final agency action.

10. MASCA's members have standing to bring suit in their own right under Section 536.053, RSMo, as they are persons who are or may be aggrieved by a rule promulgated by the Department and MO HealthNet.

11. The interests MASCA seeks to protect, including the interest in the welfare of ambulatory surgery centers, are germane to MASCA's purpose, which is as follows:

MASCA is organized for the purpose of fostering and promoting the public welfare, the welfare of ambulatory surgery centers, dissemination useful information in the best interest of ambulatory surgery centers, and for doing any and all things necessary, suitable and proper for the social, educational, and literary and scientific advancement of its membership.

*See Exhibit 1.*

12. Neither the claim asserted nor the relief sought (invalidation of the Rule) requires the participation of all the individual members. No request for money damages or individual-specific relief is made.

13. On November 17, 2008, MO HealthNet Division certified a proposed rule, 13 CSR 70-14.200 (hereinafter "Rule"), to the Secretary of State. *See Exhibit 2.*

14. The November 17, 2008, Certification was transmitted to the Secretary of State, Administrative Rules Division and to the Joint Committee on Administrative Rules (hereinafter "JCAR") on November 17, 2008. *See Exhibit 2.*

15. On December 15, 2008, a notice of proposed rulemaking containing the text of a proposed rule, 13 CSR 70-15.200, was published in the *Missouri Register*. *See Exhibit 3.*

16. The proposed rule contained five subsections. *See Exhibits 2 and 3.*

17. The December 15, 2008 *Missouri Register* required comments to be submitted by January 14, 2009. *See Exhibit 3.*

18. On April 13, 2009, MO HealthNet Division issued a "Certification of Administrative Rule" for the Rule to the Secretary of State. *See Exhibit 4.*

19. The MO HealthNet Certification was transmitted to the Joint Committee on March 12, 2009, and to the Secretary of State, Administrative Rules on April 13, 2009. *See Exhibit 4.*

20. On May 15, 2009, a Notice of Order of Rulemaking containing comments, responses and explanation of changes was published in the *Missouri Register*. *See Exhibit 5.*

21. In the May 15, 2009, Notice of Order of Rulemaking, published in the *Missouri Register*, the Department added an additional subsection (number 6) to the Rule. *See Exhibit 5.*

22. In the May 15, 2009, *Missouri Register*, the Department reported the following comment, response and explanation of change:

Comment #20: The Missouri Center for Patient Safety and the Missouri Hospital Association encouraged the department to work with federally-listed Patient Safety Organizations (PSO) and require MO HealthNet enrolled hospitals and ambulatory surgical centers to participate with a federally-designated PSO.

Response and Explanation of Change: The division agrees with this recommendation. Section (6) has been added.

*See Exhibit 5.*

23. Section 6, which was not included in the initial Proposed Rule, was published in the May 15, 2009, *Missouri Register* and reads:

On or before January 1, 2010, all hospitals or ambulatory surgical centers enrolled as MO HealthNet providers shall have a contract to participate with a federally-designated Patient Safety Organization (PSO) as defined in the federal Patient Safety and Quality Improvement Act of 2005. The hospital or ambulatory surgical center shall report the occurrence of a serious reportable event and the root cause of the event to the PSO and

participate in PSO-related improvement strategies as set forth in the contract.

24. On June 30, 2009, the rule became final and effective.

25. Venue is appropriate in the Circuit Court of Cole County, Missouri.

26. This Court has jurisdiction to grant a declaratory judgment in this case pursuant to Section 527.010, RSMo, and Rule 87.02(c).

### COUNT I

27. Paragraphs 1 through 26 are adopted and restated as though fully set out herein.

28. Section 536.010(8) defines a "small business" as a "for profit enterprise consisting of fewer than one hundred full- or part-time employees."

29. Petitioner MASCA is a not-for-profit enterprise with approximately forty-seven (47) members, all of which are for-profit enterprises and consist of fewer than one hundred full- or part-time employees.

30. Section 536.300.1, RSMo (emphasis added), states in pertinent part:

Prior to submitting proposed rules for adoption...the state agency shall determine whether the proposed rulemaking affects small businesses, and if so, the availability of less-restrictive alternatives that could be implemented to achieve the same results of the proposed rulemaking.

31. Section 536.010(1), RSMo defines the term "affects small business" as:

any potential or actual requirement imposed upon a small business...through a state agency's proposed or adopted rule that will cause direct and significant economic burden upon a small business or minority small business, or that is directly related to the formation, operation or expansion of a small business.

32. The Department did not determine whether (or not) the proposed rule affects small businesses as required by Section 536.300.1, RSMo.

33. Subsection 6 of the Rule will cause a direct and significant economic burden upon small businesses.

34. Subsection 6 of the Rule will cause a direct and significant economic burden upon the small business members of MASCA.

35. MASCA contacted the Missouri Center for Patient Safety in regard to contracting with MASCA members and was originally informed that the cost would be \$3,500.00 per surgery center per year (\$1000 base fee plus \$.50 per patient case). *See Exhibit 6.* Later, MASCA was informed that the cost would be \$2,500.00 per surgery center per year. *See Exhibit 7.*

36. MASCA members are unable to comply with Subsection 6 of the Rule without expending more than \$500.00.

37. Subsection 6 is directly related to the operation of small businesses.

38. Section 536.300.2, RSMo, provides:

If the proposed rules affect small businesses, the state agency shall consider creative, innovative, or flexible methods of compliance for small businesses and prepare a small business impact statement to be submitted to the secretary of state and the joint committee on administrative rules with the proposed rules.

39. The Department never considered creative, innovative, or flexible methods of compliance for small businesses pursuant to 536.300.2, RSMo.

40. The Department never prepared a small business impact statement to be submitted to the Secretary of State and the JCAR with the proposed Rule pursuant to Section 536.300.2, RSMo.

41. The proposed Rule was not promulgated on an emergency basis.

42. The proposed Rule was not federally mandated.

43. The proposed Rule does not substantially codify existing federal or state law.

44. Any proposed rule that is required to have a small business impact statement but does not include such a statement shall be invalid and the Secretary of State should not publish the rule until such time as the statement is provided. Section 536.300.2, RSMo.

45. Section 536.300.2, RSMo, requires that a copy of the proposed rule and the small business impact statement be filed with the Small Business Regulatory Fairness Board (hereinafter "the Board") on the same date as they are filed with the Secretary of State.

46. A copy of the proposed Rule and small business impact statement were never filed with the Board pursuant to Section 536.300.2. *See* Exhibit 2.

47. The Order of Rulemaking certified in the April 13, 2009, MO HealthNet Certification was never transmitted to the Board. *See* Exhibit 4.

48. The Board is charged with "[s]olicit[ing] input and conducting hearings from small business owners and state agencies regarding any rules proposed by a state agency[.]" Section 536.310.1(2), RSMo.

49. The Board never solicited input or conducted a hearing in regard to the Rule.

50. Section 536.300, RSMo, requires the business impact statement and proposed rules to be submitted to the Board prior to providing notice for a public hearing.

51. Section 536.303, RSMo, requires an agency to submit a small business statement to the Board after a public hearing is held.

52. No public hearing was ever held regarding the proposed Rule.

53. The small business statement required by Section 536.303, RSMo, must include a description of how the opinions or comments from affected businesses were solicited; a summary of the public and small business comments; a summary of the agency's response to

those comments; and the number of persons who attended the public hearing, testified at the hearing and submitted written comments.

54. No small business statement was submitted to the Board.

55. If the Department determines that the proposed Rule does affect small businesses, it shall certify this finding in the transmittal letter to the secretary of state, "stating that it has determined that such proposed rule will not have an economic impact on small businesses[.]"

Section 536.300.3, RSMo.

56. The Department never certified that it determined the proposed Rule would not have an economic impact on small businesses.

57. Petitioner brings this action pursuant to Section 536.328, RSMo.

58. Section 536.328, RSMo reads:

For any regulation subject to sections 536.300 to 536.328, a small business that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 536.300 to 536.328. Judicial review shall be commenced in the circuit court of the county in which the small business has its primary place of business, or in Cole County. If the small business does not have a primary place of business in the state, proper venue shall be in Cole County. Notwithstanding any provisions of this chapter to the contrary, an affected small business may seek such judicial review during the period beginning on the date the proposed rule becomes final and ending one year later.

59. Section 536.050.1, RSMo, states as follows:

The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of rules, or of threatened applications thereof, and such suits may be maintained against agencies whether or not the plaintiff has first requested the agency to pass upon the question presented. The venue of such suits against agencies shall, at the option of the plaintiff, be in the circuit court of Cole County, or in the county of the plaintiff's residence, or if the plaintiff is a corporation, domestic or foreign, having a registered office or business office in this state, in the county of such registered office or business office. Nothing herein contained shall be construed as a limitation on the



declaratory or other relief which the courts might grant in the absence of this section.

60. Section 536.050.2, RSMo, states, in part, as follows:

Any person bringing an action under subsection 1 of this section shall not be required to exhaust any administrative remedy if the court determines that:

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(2) The only issue presented for adjudication is a constitutional issue or other question of law; or

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(4) The party bringing the action is a small business claiming a material violation of section 536.300 or 536.303 by the state agency requiring the small business impact statement for the amendment or rule.

61. Petitioner is bringing this declaratory judgment action raising only a question of law and/or a material violation of sections 536.300 and 536.303 by the Department and MO HealthNet.

62. Section 536.053, RSMo, states:

Any person who is or may be aggrieved by any rule promulgated by a state agency shall have standing to challenge any rule promulgated by a state agency and may bring such an action pursuant to the provisions of section 536.050. Such person shall not be required to exhaust any administrative remedy and shall be considered a nonstate party.

63. MASCA itself as well as the individual members of MASCA are and may be aggrieved by the Rule promulgated by the Department and MO HealthNet.

64. Section 536.050.3, RSMo, provides that a prevailing non-state party shall be awarded reasonable fees and costs.

**WHEREFORE**, Petitioner prays the Court enter judgment in their favor as follows:

- a. Declaring that the Rule is void and of no effect for failure to comply with the requirements of Section 536.300 to 536.238, RSMo;
  - b. Taxing the costs against Respondents pursuant to Section 536.050;
  - c. Awarding Petitioner its reasonable attorney's fees pursuant to Section 536.050;
- and
- d. Awarding such other and further relief as the Court deems just and proper.

### COUNT II

65. Paragraphs 1 through 64 are adopted and restated as though fully set out herein.
66. Section 536.205.1, RSMo, provides:

Any state agency filing a notice of proposed rulemaking as required by section 536.021, wherein the adoption, amendment, or rescission of the rule would require an expenditure of money by or a reduction in income for any person, firm, corporation...or any business entity of any kind or character which is estimated to cost more than five hundred dollars in the aggregate, shall at the time of filing the notice with the secretary of state file a fiscal note[.]”

67. No fiscal note for the Rule was ever filed pursuant to Section 536.205.1, RSMo.
68. Section 536.205.2, RSMo, requires that the fiscal note shall be published in the *Missouri Register* adjacent to the Notice of Proposed Rulemaking and “failure to do so shall render any rule promulgated thereunder void and of no force and effect.”
69. No fiscal note was published in the *Missouri Register* adjacent to the Notice of Proposed Rulemaking. *See* Exhibit 3.

70. Section 536.215, RSMo, provides:

If before the effective date, such rule, amendment or rescission is altered to the extent that the cost...is changed by more than ten percent, then a new fiscal note and affidavit shall be filed with the order of rulemaking and the new estimated cost shall be published in the *Missouri Register*.

71. The addition of subsection 6 to the Rule increased the cost of the Rule by more than ten percent (fifty dollars).

72. Subsection 6 requires ambulatory surgical centers enrolled in MO HealthNet to contract with a federally-designated Patient Safety Organization (PSO).

73. Members of MASCA have attempted to secure such contracts in Missouri and learned that this would require an expenditure of money in the amount of \$2,500.00 to \$3,500.00 per surgery center per year. *See* Exhibits 6 and 7. In addition, members of MASCA have contacted other federally-designated Patient Safety Organizations and were informed that this would normally require an expenditure of \$2,500.00 per surgery center per year. *See, e.g.,* Exhibit 8.

74. No new fiscal notes or affidavits were filed with the Order of Rule making. *See* Exhibit 5.

75. The new estimated cost of the Rule with the addition of subsection 6 was never published in the *Missouri Register*. *See* Exhibit 5.

**WHEREFORE**, Petitioner prays the Court enter judgment in their favor as follows:

a. Declaring that the Rule is void and of no effect for failure to comply with the requirements of Section 536.200 to 536.215, RSMo;

b. Taxing the costs against Respondents pursuant to Section 536.050;

c. Awarding Petitioner its reasonable attorney's fees pursuant to Section 536.050;

and

d. Awarding such other and further relief as the Court deems just and proper.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By:



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