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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

IV SOLUTIONS, INC., Plaintiff and Appellant, v. UHC OF CALIFORNIA, Defendant and Respondent.	B268196 (Los Angeles County Super. Ct. No. BC515041)

APPEAL from a judgment of the Superior Court of Los Angeles County. Victor E. Chavez, Judge. Affirmed.

Esner, Chang & Boyer and Stuart B. Esner for Plaintiff and Appellant.

Crowell & Moring, Steven D. Allison, Daniel M. Glassman, and Samrah R. Mahmoud for Defendant and Respondent.

Plaintiff and appellant IV Solutions, Inc. (IVS), is a closed-door, compounding pharmacy that provides home infusion services to its patients. After it provided over $1 million in medicine to a sick infant, I.C., it sought reimbursement from I.C.'s insurance provider, defendant and respondent UHC of California, formerly known as PacifiCare (PacifiCare). PacifiCare denied IVS's claim for reimbursement, prompting IVS to bring suit against PacifiCare. Following a two-week trial, the jury returned a verdict for PacifiCare. IVS appeals, asserting that the trial court made three errors that compel reversal of the judgment.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

A. *I.C. is admitted to the hospital and then discharged with instructions for home treatment*

In September 2008, I.C., a baby, was admitted to Cedars-Sinai Medical Center (Cedars) with a wound infection related to a prior procedure. While there, I.C. was given Lovenox (anticoagulant) and Invanz (antibiotic). On September 23, 2008, I.C. was discharged and his physicians determined that he would continue to receive Lovenox and Invanz at home.

B. *I.C.'s insurance policy*

I.C.'s insurance policy was a PacifiCare Signature Value HMO. Pursuant to the policy, medical providers are required to obtain authorization from I.C.'s primary medical group, Facey Medical Group (Facey), prior to providing any nonemergent services. The purpose of the preauthorization requirement is to ensure that the services are necessary, are the best treatment for

the member, and to direct the member to one of PacifiCare's contracted (i.e., "in-network") providers.

In September 2008, PacifiCare had contracts with at least 10 home infusion pharmacies. These pharmacies are contractually obligated to provide the drugs anywhere in California and could have provided the drugs to I.C.

I.C.'s insurance policy also required noncontracted (or out-of-network) providers to submit claims within 180 days from the date of service or they would not be paid. It is common knowledge in the healthcare industry that health plans have these deadlines and that untimely payment claims will be denied.

C. *Cedars's discharge protocol*

Before sending a referral to a pharmacy, Cedars confirms with the pharmacy that it is contracted/in-network with the member's health plan. If the pharmacy is noncontracted, Cedars finds a contracted pharmacy. Cedars relies on the pharmacy's representation and typically does not contact the health plan to confirm the veracity of what it is told by the pharmacy. There is no evidence here that Cedars contacted PacifiCare about the referral to IVS.

D. *IVS obtains the referral for I.C.'s medication and provides the drugs without the required authorization*

IVS was not contracted with PacifiCare or any health plans. Despite this fact, IVS tells hospitals and physicians that it accepts all insurance. Its Web site touts "'Our motto is Any Patient, Any Time, Anywhere, Any Insurance,'" and "'ALL Insurance Accepted.'" IVS markets its services directly to hospitals, its primary referral source. IVS's owner, Alireza Varastehpour (Alex Vara), regularly meets with hospital physicians, case managers, and discharge planners. In 2008

alone, Mr. Vara visited Cedars over 50 times to market IVS's services. During IVS's marketing visits, Mr. Vara claims that IVS accepts all insurance. But IVS never discloses that it is a noncontracted/out-of-network provider. Nor does it reveal to the health plan's member that it is a noncontracted/out-of-network provider. And, IVS never informs the referring hospital or the member that it charges 50 times the average wholesale price (AWP) as its standard charge for drugs. By comparison, in 2008, PacifiCare's contracted/in-network pharmacies charged between 10 and 15 percent below AWP for Lovenox and Invanz.

Despite being noncontracted, IVS received the referral to provide Lovenox and Invanz to I.C. According to IVS, it always asks the referring hospital for the member's insurance information. It always, before it provides any services, contacts the health plan to verify the member's specific insurance coverage and benefits under the insurance policy. And it always asks the health plan if prior authorization is needed before it can deliver drugs to the member. IVS did all that here.

Accordingly, as of September 15, 2008, IVS knew that I.C.'s insurance policy was a PacifiCare Signature Value HMO, knew that Facey was his primary medical group, and knew that the insurance policy required IVS to obtain prior authorization from Facey before providing any services to I.C. But, IVS never obtained authorization from Facey. Despite not receiving authorization, IVS delivered Invanz to I.C. from September 23, 2008, to October 7, 2008, and Lovenox from September 23, 2008, to February 25, 2009.[1]

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[1] IVS claims that it attempted to obtain the authorization from Facey but was unsuccessful. According to IVS's opening

E. *I.C.'s second prescription from home-delivered drugs*

In April 2009, I.C. suffered a stroke after a fall and was admitted to Children's Hospital Los Angeles (CHLA). While there, he was placed back on Lovenox. He was discharged on May 15, 2009, and prescribed Lovenox. CHLA, like Cedars, confirms with the pharmacy that it accepts the member's insurance before sending the referral.

On May 15, 2009, despite still being an uncontracted/out-of-network provider, IVS received a new Lovenox prescription from CHLA for I.C. Again, IVS did not obtain authorization from Facey for the new prescription. Nonetheless, IVS shipped Lovenox to I.C.'s home from May 15, 2009, to July 7, 2010.

F. *IVS submits claims forms to PacifiCare for the drugs provided to I.C. under the first prescription; claims are denied*

On June 15, 2009, IVS submitted 66 separate claim forms to PacifiCare seeking payment for the Lovenox provided to I.C. during his first course of treatment between September 23, 2008, and February 25, 2009. Each claim form contained box 23, "Prior Authorization Number," the purpose of which was for IVS to provide the preauthorization number obtained from Facey prior to shipping any drugs to I.C. Because IVS never requested or received a single authorization, none of the claim forms had an authorization number in box 23. Instead, IVS wrote

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brief, "Despite not obtaining explicit authorization from Facey, IVS continued supplying I.C. with the medications he needed" because it was an emergency. Mr. Vara and IVS's chief operating officer apparently "believed that because I.C.'s life might be in jeopardy without his medication, Facey was required to respond to their request for authorization within 72 hours—otherwise, no authorization was needed."

"EMERGENCY BASIS" in box 23 on each claim form. IVS also typed on each claim form: "NO INTWRK PROV. WAS AVAILABLE. PT WAS REFERRED ON EMERGENCY BASIS." Emergency services[2] are an exception to the prior authorization requirement in I.C.'s policy.

But, the drugs were not provided to I.C. on an "emergency basis." As confirmed by doctors' testimony, I.C. was discharged from Cedars in a stable, nonemergent condition. Cedars would not have discharged I.C. in an emergent condition. Nothing on the documents prepared by Cedars or IVS at the time of referral indicated that I.C. was referred on an "emergency basis." The drugs were delivered to I.C.'s home by UPS, not an ambulance.

PacifiCare denied the claims for dates of services September 23, 2008, through December 15, 2008, as untimely, due to IVS's failure to submit them within 180 days of service as required by I.C.'s policy.

G. *Pricing agreements; PacifiCare pays IVS for drugs delivered between December 16, 2008, and February 25, 2009*

PacifiCare sent the claims for dates of Service December 16, 2008, through February 25, 2009, to Viant, Inc. (Viant), an entity used by PacifiCare to negotiate pricing of certain claims. On July 10, 2009, after negotiations, Viant and IVS entered into

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[2] "Emergency services" is defined as: "Medically Necessary ambulance or ambulance transport services provided through the 911 emergency response system. It is also the medical screening, examination[,] and evaluation by a physician or other personnel—to the extent provided by law—to determine if an Emergency Medical Condition or psychiatric Emergency Medical Condition exists."

a series of identical one-page pricing agreements. Each agreement contains the following language: "Payment of benefits, if any, is subject to all terms and conditions of the policy. Therefore, this letter of agreement does not constitute, nor should it be construed as, a guarantee of benefit payment by the Payor, and will be null and void if no benefit payment is determined to be payable by the Payor."

IVS did not find this language ambiguous. Angela Furman, the sole IVS employee who negotiated the pricing agreements, admitted that she understood this incorporation provision, was not confused by it, and did not ask Viant any questions about it. IVS was "very familiar" with these agreements, did not have any controversy with the language, and knew what the incorporation language meant.

According to PacifiCare, the pricing agreement, by its express terms, was merely an agreement on price, not a promise by PacifiCare to pay the claim. It was still necessary for the PacifiCare claims examiner to determine whether a claim was payable. The claims examiner confirms that the member was covered by an eligible insurance policy, the claims were authorized, and the claims were timely submitted. If the claim is payable, then the claims examiner authorizes payment at the price set forth in the pricing agreement.

Based upon IVS's representation on the first batch of claims forms, PacifiCare paid IVS in full for the Lovenox delivered December 16, 2008, through February 25, 2009.

H. *IVS submits claims for drugs delivered under the second prescription; PacifiCare denies them*

PacifiCare received claims forms from IVS for I.C.'s second course of treatment (dates of service May 15, 2009, through

July 7, 2010). None had a prior authorization number in box 23. Instead, IVS again typed "EMERGENCY BASIS" on most of the forms and left the box blank on the rest. IVS also again typed 'NO INTWRK PROV WAS AVAILABLE PT WAS REFERRED ON EMERGENCY BASIS" on many of the forms. But nothing in the May 2009 prescription indicated that I.C. was being referred on an emergency basis. I.C. was discharged from CHLA in a stable, nonemergent condition, and CHLA would not have discharged him in an emergent condition.

PacifiCare denied many claims based on IVS's failure to obtain preauthorization as required by I.C.'s insurance policy, a fact acknowledged by IVS when, on June 23, 2010, two weeks before the last date of service, IVS requested a retroactive authorization from Facey for all dates of service between January 1, 2009, and June 23, 2010. On June 30, 2010, Facey denied the request. PacifiCare denied some claims as untimely based on IVS's failure to submit claims within 180 days of service. The remainder of the denials were based on IVS's failure to provide requested medical records.

On or about April 1, 2011, PacifiCare received correspondence from IVS requesting reconsideration of the denials for dates of service May 15, 2009, through July 5, 2010. Three PacifiCare departments reexamined each claim. PacifiCare confirmed that IVS never obtained preauthorization from Facey or PacifiCare. PacifiCare then confirmed that the claims that were denied as untimely were untimely. All three departments agreed that the claims were properly denied. On May 9, 2011, PacifiCare notified IVS that the denials were appropriate, with a spreadsheet detailing its findings on a claim-by-claim basis.

II. Procedural Background

On July 12, 2013, IVS brought an action against PacifiCare for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, intentional misrepresentation, open book account, goods and services rendered, and unfair competition. Significantly, IVS alleged that PacifiCare made false representations "with the intention of inducing [it] to provide expensive and difficult-to-obtain pharmaceutical products and related services to its member I.C."

Prior to trial, the trial court heard argument on the issues of whether I.C.'s health insurance policy was incorporated into the terms of the pricing agreements and whether the pricing agreements contained a condition precedent that the claim had to be payable before any payment was required. After extensive briefing and oral argument, the trial court found that the terms of I.C.'s PacifiCare policy were incorporated into the pricing agreements, noting that it was not "a close question."

Thus, on April 20, 2015, the trial court entered an order finding that the terms and conditions of I.C.'s health plan were incorporated into the pricing agreements, and finding payment under the pricing agreements was subject to those terms and conditions. The trial court specifically found that the incorporation language in the pricing agreements was not ambiguous, IVS failed to offer any reasonable alternative interpretation of the incorporation language, and IVS failed to offer any extrinsic evidence to support a reasonable alternative interpretation of the incorporation language. The jury was instructed accordingly.

Meanwhile, on February 20, 2015, IVS filed a motion in limine to exclude as irrelevant all evidence and testimony

concerning the cost of the medication provided to I.C., and the AWP for those drugs. The trial court denied that motion.

Trial commenced on July 24, 2015. During cross-examination of Mr. Vara, IVS objected to evidence of IVS's financial condition on the grounds of relevance. The trial court overruled the objection.

On August 5, 2015, the jury returned a verdict for PacifiCare on all three causes of action that went to trial (breach of contract, breach of the implied covenant, and fraud).

IVS's motion for a new trial was denied; judgment was entered; and IVS's timely appeal ensued.

DISCUSSION

I. *The trial court did not err in finding that the PacifiCare Evidence of Coverage was incorporated into the contracts between IVS and PacifiCare's agent, Viant*

IVS argues that the trial court prejudicially erred in ruling that each and every term of PacifiCare's Evidence of Coverage was incorporated into the IVS-Viant pricing contracts.

"'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the "mutual intention" of the parties. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644), controls judicial interpretation. (*Id.*,

§ 1638.)" [Citations.]'" (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 647–648.)

"When parties dispute the meaning of contractual language, the trial court must provisionally receive extrinsic evidence offered by the parties and determine whether it reveals an ambiguity, i.e., the language is reasonably susceptible to more than one possible meaning. If there is an ambiguity, the extrinsic evidence is admitted to aid the interpretative process. 'When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citations.] . . . If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the [factfinder]. [Citations.]' [Citation.]" (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 376–377; see also *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 72–73.)

"'A contract may validly include the provisions of a document not physically a part of the basic contract. . . . "It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document. [Citations.] But each case must turn on its facts. [Citation.] For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties."' [Citations.]" (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54.)

All three elements are supported by ample evidence here. First, the reference to I.C.'s policy is clear and unequivocal, a fact

conceded by IVS in its interrogatory responses and by Ms. Furman at her deposition. And how could it not be? This case begins and ends with I.C.'s insurance policy—without it, IVS would have no basis for seeking any payment from PacifiCare and the pricing agreements would make no sense. IVS is a noncontracted/out-of-network provider, so it must look to the member's insurance policy to determine its ability to seek reimbursement.

Chan v. Drexel Burnham (1986) 178 Cal.App.3d 632 does not compel a different conclusion. In that case, plaintiff-employee was asked by the defendant-employer to execute a uniform application for securities and commodities industry and/or agent (the U-4). (*Id.* at pp. 635–636.) The U-4 provided in part that the plaintiff agreed "'to abide by the Statute(s), Constitution(s), Rule(s) and By-Laws'" of the New York Stock Exchange (NYSE). (*Id.* at p. 636.) NYSE Rule 347 sets forth an arbitration provision. (*Ibid.*) When the plaintiff's employment was terminated, she sued her former employer, who petitioned to compel arbitration pursuant to NYSE Rule 347. The trial court denied the petition, and the Court of Appeal affirmed the trial court's order, partly on the grounds that the arbitration provision had not been properly incorporated into the U-4; not only was arbitration not mentioned, but NYSE Rule 347 was not even identified. (*Id.* at pp. 642–643.) Moreover, the plaintiff provided evidence that she lacked knowledge of NYSE Rule 347, and the defendant offered no evidence of her knowledge of that rule. (*Id.* at p. 644, fn. 5.)

In contrast, the pricing agreements here explicitly refer to I.C.'s insurance policy; there is no hidden rule. And, as set forth

above, IVS admitted that the language of the pricing agreements was not ambiguous.

For the same reasons, we are not convinced by IVS's reliance upon *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1331–1332, *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1608, and *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403, 1420. The vague and/or complicating factors that precluded incorporation in those cases are not present here.

Second, IVS consented to the incorporation provision by signing more than 35 pricing agreements, all of which contained this language. The language was not hidden; each pricing agreement is one page and contains less than 250 words.

IVS asserts that the trial court "refused to consider any evidence or testimony on" the issue of what was discussed during the negotiations between IVS and Viant. But, as pointed out by PacifiCare, IVS failed to provide the trial court with the alternative extrinsic evidence. All it did was identify a "category of evidence," which the trial court rightly found insufficient.

Third, the terms of I.C.'s policy were known and easily available to IVS. As of September 15, 2008, before the pricing agreements were signed, IVS knew that I.C. was covered under the PacifiCare Signature Value HMO. In fact, to ensure that I.C. had insurance coverage, IVS verified the terms and conditions of the policy before agreeing to deliver the drugs. And, IVS understood that it needed authorization from Facey before providing services to I.C.

In urging reversal, IVS asserts that "[t]he first time [it] saw a copy of [the insurance policy] was when PacifiCare produced it in this case." But, IVS offers no evidence that it requested a copy

of I.C.'s insurance policy. Had it so asked, it is undisputed that the document would have been provided to IVS.

Next IVS argues that at a minimum, it is disputed whether the parties intended to incorporate the two terms at issue here—prior authorization and timing of claims. Applying the well-established rules of contract interpretation, summarized above, this argument fails. The plain and explicit words of the pricing agreements demonstrate that the parties intended those agreements to incorporate "all terms and conditions of" I.C.'s insurance policy. And, as set forth above, IVS conceded that it read, understood and had no questions about the language of the pricing agreements. Nothing in the evidence cited by IVS supports IVS's assertion that this language is ambiguous.

The fact that PacifiCare paid some of the early claims without enforcing the preauthorization and timing requirements did not amount to a waiver of these provisions. After all, the evidence establishes that IVS misrepresented on its claims forms that the services were provided to I.C. on an emergency basis, which is an exception to the prior authorization requirement in I.C.'s policy.

Finally, IVS challenges the trial court's supposed ruling that the prior authorization and timeliness conditions were conditions precedent to payment. But, as pointed out by PacifiCare, the trial court did not make any ruling that hinged on these conditions being "conditions precedent" as a matter of law. Rather, the trial court merely tracked the language from the pricing agreements that payment was subject to the terms and conditions of I.C.'s insurance policy.

II. *The trial court did not err by allowing PacifiCare to introduce evidence of IVS's financial condition*

IVS argues that the trial court prejudicially erred by allowing PacifiCare to introduce evidence of IVS's wealth—evidence that IVS claims was irrelevant and highly inflammatory.

A. Factual Background

In its opening brief, IVS asserts: "Prior to trial, the court ruled PacifiCare could introduce evidence of IVS's profits. [Citation.] This was error."

IVS's representation in its opening brief is misleading. IVS never sought to exclude evidence of its financial condition in limine. Rather, when IVS's counsel raised this issue while its other motions in limine were being heard, the trial court correctly noted that IVS never moved to exclude this evidence, saying: "[Counsel for IVS] seems to be worried you [counsel for PacifiCare] are going to try to introduce profits. I guess that's a different issue and not the subject of this motion."

IVS did not then make a motion to exclude this evidence. Rather, it appears that IVS waited to object during trial. When PacifiCare asked Mr. Vara about IVS's financial statements, IVS objected. Counsel then discussed the issue at side bar. IVS asserted that its profits were irrelevant. PacifiCare responded that IVS put its financial condition at issue by raising it in its complaint. The trial court overruled IVS's objection.

B. Analysis

As the parties agree, we review the trial court's determination on the relevancy of evidence for abuse of discretion.

The trial court did not abuse its discretion by overruling IVS's objection. As PacifiCare pointed out to the trial court, IVS put its financial condition at issue by alleging in its complaint that PacifiCare induced IVS to purchase expensive pharmaceutical products knowing that IVS was a small business without the resources to carry PacifiCare's debts with the intent to drive IVS out of business. (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.) These allegations put IVS's alleged financial hardship at issue and PacifiCare was entitled to present contrary evidence.

The legal authority cited by IVS is readily distinguishable. Civil Code section 3295, subdivision (d), and *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1241, address *when* evidence of a *defendant's* financial condition may be introduced for purposes of punitive damages. In *Farmy v. College Housing, Inc.* (1975) 48 Cal.App.3d 166, 183, the court held that because nothing in that nuisance case supported an award of punitive damages, evidence of the defendant's wealth was irrelevant. Moreover, because the evidence relating to the defendant's wealth tainted the award for compensatory damages, a retrial was required. Contrariwise, as set forth above, IVS's financial condition was at issue—based upon allegations set forth in IVS's own complaint.

In *Weaver v. Shell Oil Co.* (1933) 129 Cal.App. 232, 234, the Court of Appeal found it improper for plaintiffs' counsel to state in closing argument: "'Someone must take care of this widow and those four children, and the Shell Company is a great big, rich corporation, has millions, and it can afford to take care of them.'" Likewise, in *Hoffman v. Brandt* (1966) 65 Cal.2d 549, 553, our Supreme Court was troubled by counsel's comment that "a

judgment for plaintiffs would mean that defendant would have to go to the Laguna Honda Home." No such improper inflammatory remarks were made here.

III. *The trial court did not err by allowing PacifiCare to introduce evidence of IVS's internal costs and an industry AWP for prescription drugs*

IVS argues that the trial court erred in allowing PacifiCare to introduce evidence of IVS's internal costs and the AWP of the drugs it dispensed to I.C. The trial court did not abuse its discretion.

For the reasons set forth above, IVS put the cost of the drugs at issue by alleging in its complaint that PacifiCare defrauded IVS into purchasing expensive drugs and then providing an unconscionably low reimbursement rate.

Moreover, this evidence was relevant to PacifiCare's defense. As part of its defense of IVS's claims, PacifiCare alleged that IVS engaged in a fraudulent scheme to deceive PacifiCare into paying $1.4 million for drugs that cost IVS less than $20,000. In fact, Mr. Vara testified that it is IVS's "policy to charge 50 times the [AWP] for its drugs," even though IVS pays less than AWP for those drugs. It follows that this evidence was relevant and properly admitted.

IVS's reliance upon *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260 is misplaced. That case did not involve either a fraud claim or defense. Nor did the plaintiff in that case place its costs at issue by claiming that the drugs were particularly expensive.

DISPOSITION

The judgment is affirmed. PacifiCare is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J. *
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.