

NOT FOR PUBLICATION

NO. 25310

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

KATHERINE E. H. KIM, individually and on behalf of
KARA J. KIM, and KARA J. KIM, Appellants-Appellants,
v. J. P. SCHMIDT,¹ Insurance Commissioner, Department
of Commerce and Consumer Affairs, State of Hawai'i,
and HAWAII MEDICAL SERVICE ASSOCIATION,
Appellees-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 01-1-3266-11)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe, and Lim, JJ.)

This appeal stems from a request filed by
Appellant-Appellant Katherine E. H. Kim (Katherine) with
Appellee-Appellee Insurance Commissioner for the State of Hawai'i
(the Insurance Commissioner), seeking external review under the
Patients' Bill of Rights and Responsibilities Act, Hawaii Revised
Statutes (HRS) chapter 432E (Supp. 2003), of the final internal
determination of Appellee-Appellee Hawaii Medical Service
Association (HMSA) to deny health care coverage for nutritional
services provided to Katherine's daughter, Appellant-Appellant
Kara J. Kim (Kara), as part of a treatment program for anorexia

¹ The request for external review was initially filed with Wayne C. Metcalf, III (Metcalf) the former Insurance Commissioner for the State of Hawai'i. J. P. Schmidt succeeded Metcalf as the Insurance Commissioner effective February 3, 2003 and is automatically substituted as Appellee-Appellee Insurance Commissioner (the Insurance Commissioner), pursuant to Hawai'i Rules of Appellate Procedure Rule 43(c)(1).

nervosa. (Katherine and Kara hereinafter will be collectively referred to as "the Kims.")

Pursuant to HRS § 432E-6(a)(4) (Supp. 2003), the Insurance Commissioner, "[u]pon receipt of the request for external review and upon a showing of good cause, . . . shall appoint the members of the panel and shall conduct a review hearing pursuant to [HRS] chapter 91[,]" the Hawaii Administrative Procedure Act. HRS § 432E-6(a)(4). However, pursuant to HRS § 432E-6(a)(6), the Insurance Commissioner, "[a]fter considering the enrollee's complaint, the managed care plan's response, and any affidavits filed by the parties, . . . may dismiss the request for external review if it is determined that the request is frivolous or without merit[.]" HRS § 432E-6(a)(6).

In this case, the Insurance Commissioner, after considering Katherine's request, HMSA's response, and other documents submitted by Katherine and HMSA, concluded that "the nutritional services in dispute are not covered by [Katherine's] Plan.^[2] Thus, [Katherine's] request for external review is without merit and the petition should be dismissed pursuant to HRS § 432E-6(a)(6)."

² The Insurance Commissioner specifically determined that the nutritional services were not covered by Katherine's health insurance plan with HMSA because "[t]he nutritional services were not rendered by an 'approved physician or other practitioner' as required by Chapter 1, page 1 of the Plan and the nutritional services are not listed as covered services in Chapter 4 of the Plan, 'Description of Benefits.'"

On November 9, 2001, the Kims appealed to the Circuit Court of the First Circuit (the circuit court) pursuant to HRS § 91-14 (1993). The thrust of the Kims' argument was that the Insurance Commissioner wrongfully dismissed their request for external review without affording them a contested case hearing. Therefore, "[t]he Insurance Commissioner's Order of Dismissal was made upon unlawful procedure and violate[d] [their] due process rights under . . . [HRS] Chapter 91, Article I, Section 5 of the Hawaii State Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution."

On August 12, 2002, the circuit court, Judge Eden Elizabeth Hifo presiding, entered (1) an Order Affirming Insurance Commissioner's Order of Dismissal, and (2) a Final Judgment in favor of the Insurance Commissioner and HMSA and against the Kims. This appeal followed.

On December 16, 2004, the Hawai'i Supreme Court issued an amended opinion in Hawaii Mgmt. Alliance Ass'n v. Insurance Comm'r, 106 Hawai'i 21, 100 P.3d 952 (2004) (HMAA), holding that HRS § 432E-6, Hawai'i's external review statute, conflicted with the civil enforcement remedy set forth in Section 1132(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., and was therefore preempted and unenforceable. HMAA, 106 Hawai'i at 34-35, 100 P.3d at 965-66. The supreme court further concluded that because HRS § 432E-6 was preempted, the Insurance Commissioner did not have subject matter jurisdiction to consider a claimant's request for attorneys' fees

NOT FOR PUBLICATION

and costs, id. at 35, 100 P.3d at 966, and, accordingly, vacated the Insurance Commissioner's orders that had been appealed and the circuit court's judgment affirming the Insurance Commissioner's orders.

The HMAA decision is dispositive of this appeal because Katherine's health plan is governed by ERISA. Accordingly, we similarly conclude that the Insurance Commissioner lacked subject matter jurisdiction to review the Kims' claim, and, consequently, the circuit court lacked subject matter jurisdiction to review the merits of the Kims' appeal. We therefore vacate: (1) the circuit court's Order Affirming Insurance Commissioner's Order of Dismissal, (2) the circuit court's Final Judgment, and (3) the Insurance Commissioner's Order of Dismissal.

DATED: Honolulu, Hawai'i, January 5, 2005.

Ronald Albu (Albu & Albu) for
appellants-appellants.

Ellen Godbey Carson and Dianne
Winter Brookins (Alston Hunt
Floyd & Ing, of counsel) for
appellee-appellee Hawaii
Medical Service Association.

Deborah Day Emerson and
David A. Webber, deputy
attorneys general, State of
Hawai'i, for appellee-appellee
Insurance Commissioner,
Department of Commerce and
Consumer Affairs, State of
Hawai'i.