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Va. Tribe's Medicaid Suspension Fight Faces State Pushback

By **Crystal Owens**

Law360 (May 28, 2025, 6:17 PM EDT) -- Virginia is fighting a bid by the Nansemond Indian Tribe to strike a state declaration supporting a notice that its Medicaid payments are suspended, telling the court nothing is improper about the document, and the tribe's accusations of fraud are unfounded.

Disagreeing with a declarant's statements does not mean they lack a basis in personal knowledge, the commonwealth argues, nor does it warrant striking those statements at the preliminary injunction stage of the litigation.

"Moreover, defendants here have no obligation to prove fraud — in this action or outside of it," the state tells the court in a Friday **response**.

Last month, the Nansemond Tribe asked the court **to strike a declaration** by state Deputy Director of Medical Assistance Services Jeffrey Lunardi in the tribe's bid for a preliminary injunction that would force the state to continue to process its Medicaid claims, saying Lunardi's declaration cites no contemporaneous records and relies on a redacted, unauthenticated and selectively altered version of a federal communication.

In addition, the tribe claims, an April 29 notice received by the tribe that stated payments of its Medicaid claims had been suspended by the state due to a credible allegation of fraud was based on a single-page June 2024 email from Virginia's Centers for Medicare & Medicaid Services that characterized the tribe's activity as a billing surge.

That version of the notice was "selectively edited," according to the motion, and omits any reference to Virginia's Upper Mattaponi Indian Tribe and a response made by the Nansemond Indian Tribe.

According to the tribe, the unaltered version, which was obtained from the state Attorney General's Office through a November 2024 Freedom of Information Act request, makes clear that the Centers for Medicare and Medicaid Services only asked the Department of Medical Assistance Services to vet billing from two providers, not to investigate suspected fraud.

The state countered those assertions, arguing that the tribe's motion to strike is an improper and unsupported effort to litigate the payment suspension in a case that does not challenge that suspension.

The attachment to Lunardi's declaration was the true and correct copy of what the tribe received April 29, Virginia tells the court, and there is also nothing deceptive about the notice itself or its attachment of the June 2024 email from the Centers for Medicaid and Medicare Services.

The notice, the commonwealth says, is a straightforward representation that the Department of Medical Assistance Services conducted a further review after receiving an email from the Centers for Medicaid and Medicare Services about a billing surge.

That review uncovered potential categories of billing that support a credible allegation of fraud, Virginia adds.

"Based on that post-June 2024 inquiry, there is now (as of May 2025) an investigation by MFCU of a credible allegation of fraud, and DMAS thus followed the federal mandate to suspend payments

during an ongoing investigation," Virginia argues.

The tribe and its healthcare entity, Fishing Point Healthcare LLC, **sued** the commonwealth, Gov. Glenn Youngkin, its Department of Medical Assistance Services, its Office of the Secretary of Health and Human Services, and various state officials April 1, saying the state made changes to the tribe's Medicaid program without lawful authority in a "systematic" campaign to undermine its sovereign rights.

Under federal law, Medicaid policy changes that affect tribal health programs must go through formal tribal consultation and also win approval from the federal Centers for Medicare & Medicaid Services, the tribe argues.

In 2024 and 2025, Virginia made sweeping Medicaid policy changes that materially harmed Fishing Point's operations by illegally interfering in its business, the tribe contends.

The commonwealth, in an April 29 response, **accuses the tribe** of Medicaid billing fraud while telling the court that it had suspended payments while it investigates the tribal healthcare entity.

In two years, Fishing Point billed taxpayers hundreds of millions to serve roughly 2,000 Medicaid patients. The costs appear to stem from the use of subcontracted providers to perform personal care and home health services such as bathing, dressing and toileting, as well as physical or speech therapy at the federal all-inclusive rate of \$801, Virginia says.

Bills for the group of roughly 2,000 members surpass those of Virginia hospitals serving 10 times more people, it tells the court.

The commonwealth is also asking the court to dismiss the lawsuit, arguing that the Nansemond Tribe is trying to usurp Virginia's authority to administer its Medicaid program and to step in as the arbiter of what Medicaid claims should be paid when and at what rates.

The tribe's arguments on sovereignty fail, Virginia tells the court, because a tribal clinic's existence does not preempt all state regulation when that clinic chooses to participate in a state Medicaid program.

In its Friday response, the state says the tribe's arguments that the payment suspension notice and the Department of Medical Assistance Services' email do not prove fraud miss the point.

The Department of Medical Assistance Services has never purported to conclusively prove fraud, nor is it required to do so, Virginia argues.

The payment suspension notice concerns a credible allegation of fraud that, under federal law, requires suspension of all payments while the state investigates, the state says.

"In issuing this notice, DMAS had to set out the relevant 'general allegations.' It was not required to provide 'patient-specific documentation' or evidence supporting the allegations, much less prove fraud. Now, following DMAS's referral, it is MFCU — not DMAS or this court — that is tasked to determine whether fraud occurred," it says.

Jessie Barrington of Cultural Heritage Partners, who represents the tribe, told Law360 in a Wednesday statement that federal Medicaid regulations only authorize payment suspensions under narrow, well-defined conditions.

A state can suspend Medicaid payments only if two independent requirements are met: a credible allegation of fraud against a Medicaid provider and an investigation of that allegation of fraud, she said.

The state does not allege a credible allegation of fraud, only a conclusory assertion of potential fraud, unsupported by any evidence, Barrington argued.

"Further, DMAS fails to show that an investigation was pending on the alleged allegation of fraud. Federal law is explicit: there must be a pending investigation, not merely an agency referral. DMAS

must show that the Medicaid Fraud Control Unit has accepted a referral, opened a case against Fishing Point, or otherwise initiated any investigative steps, all of which it did not and has not shown," she told Law360.

Counsel for the commonwealth could not immediately be reached for comment Wednesday.

The Nansemond Indian Nation is represented by Jessie Barrington, Gregory A. Werkheiser and Lydia Dexter of Cultural Heritage Partners PLLC.

Virginia is represented by Brian E. Pumphrey, Benjamin L. Hatch, Kathryn M. Barber and John J. Woolard of McGuireWoods LLP.

The case is Nansemond Indian Nation et al. v. Commonwealth of Virginia et al., case number 2:25-cv-00195, in the U.S. District Court for the Eastern District of Virginia.

--Editing by Kristen Becker.

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