

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

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4 XIUFANG SITU, et al.)
5 Plaintiffs,) CIVIL ACTION NO.: C06-02841 TEH
6 v.)
7 MICHAEL O. LEAVITT,) **NOTICE OF PROPOSED SETTLEMENT**
8 Secretary of Health and Human Services,) **OF CLASS ACTION AND OF FAIRNESS**
9 Defendant.) **HEARING**
10 _____)
11

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13 Notice is hereby given to certain individuals who are eligible for both Medicare and
14 Medicaid (“full benefit dual eligibles” or “FBDEs”) that a class action settlement has been
15 proposed in the above-referenced case filed in the United States District Court for the Northern
16 District of California. This notice contains information about:

- 17 A. The Nature and History of the Lawsuit
18 B. The Proposed Settlement of the Lawsuit
19 C. The Reasons for the Settlement
20 D. The Fairness Hearing and the Process for Filing Objections to the Settlement
21 E. Additional Information
22

23 **PLEASE READ THIS NOTICE CAREFULLY.**
24 **YOUR RIGHTS MAY BE AFFECTED BY THESE PROCEEDINGS.**

25 **A. Nature and History of Lawsuit**

26 Plaintiffs filed this lawsuit on April 26, 2006, against Defendant Michael O. Leavitt,
27 Secretary of Health and Human Services, alleging that the U.S. Department of Health and
28 Human Services (HHS) has violated its obligations under the law by failing to properly provide

1 full benefit dual eligibles with benefits under “Part D,” the Medicare prescription drug program.
2 Specifically, Plaintiffs alleged that HHS has failed to implement properly Part D with respect to
3 (a) auto-enrolling FBDEs into Part D plans; (b) notifying Part D plans of FBDEs’ entitlement to
4 the Low Income Subsidy (LIS); and (c) processing requests by full benefit dual eligibles to
5 change plans. Plaintiffs sought an injunction ordering HHS, among other things, to auto-enroll
6 promptly FBDEs who have not chosen Part D plans, inform plans of the assignment, and take
7 any and all steps to ensure that FBDEs receive the full benefit of the Part D program and the LIS.

8 Plaintiffs filed a motion for class certification at the same time as their original
9 Complaint. The Court granted that motion on January 12, 2007. The Court defined the class to
10 include all FBDEs who have not received full Part D or LIS benefits

11 because of one or more of the following: (1) the Secretary did not follow all auto-
12 enrollment requirements after the beneficiary failed to enroll in a plan of his or
13 her choice; (2) at the time benefits were sought, the beneficiary’s Part D plan had
14 not been informed by the Secretary of the beneficiary’s enrollment in the plan or
15 his or her entitlement to the Low Income Subsidy; or (3) the beneficiary was
16 listed by the Secretary as a member of more than one Part D plan or as a member
17 of the incorrect Part D plan after the beneficiary elected to change plans.

18 The Court also limited membership in the class to individuals who have complained about
19 experiencing one of these problems to the Centers for Medicare and Medicaid Services (CMS),
20 to a Part D plan, or to a state Medicaid agency.

21 **B. The Proposed Settlement of the Lawsuit**

22 Following an exchange of information regarding the claims at issue and extensive
23 settlement negotiations supervised by Magistrate Judge Edward Chen, the parties have reached a
24 settlement of this matter, subject to Court approval. In exchange for class members dismissing
25 their claims, Defendant has agreed that HHS will do the following:

- 26 • Modify the current system for auto-enrolling FBDEs and for deeming them
27 eligible for the Low Income Subsidy (LIS) so that eligibility files received from
28 the states or the District of Columbia will be processed within one business day of
receipt. This modification will also allow states and the District of Columbia to
submit eligibility files more frequently than once per month.
- Encourage states to submit eligibility files more frequently than once per month.

- 1 • Conduct outreach, with input from Plaintiffs' counsel, to pharmacists and
2 pharmacy organizations explaining a revision to the Point of Service (POS)
3 contract which relieves pharmacists of liability for claims in which a prescription
4 is filled based on reasonable evidence of LIS status, but the individual is
5 subsequently determined ineligible for the LIS.
- 6 • Issue a memorandum clarifying the existing Best Available Evidence (BAE)
7 policy and instructing plans of a new process that plans are required to utilize to
8 assist individuals in proving their LIS status.
- 9 • Implement internal procedures under which CMS regional offices will contact
10 State Medicaid agencies to confirm Medicaid eligibility of beneficiaries who
11 claim to be Medicaid eligible but are not able to provide evidence of eligibility.
- 12 • Issue partner tip sheets, with input from Plaintiffs' counsel, instructing
13 beneficiaries, pharmacists and advocates about beneficiary rights and plan
14 requirements related to the BAE policy.
- 15 • Continue to implement a system for manually updating an individual's LIS status
16 in response to requests made directly to CMS by beneficiaries or pharmacists.
- 17 • Continue to include a subcategory for tracking complaints related to the BAE
18 policy in the agency's Complaints Tracking Module (CTM).
- 19 • Pay reasonable attorney's fees, costs and expenses in the amount of \$700,000 and
20 to pay reasonable attorney fees, expenses and costs for monitoring
21 implementation of the settlement agreement, not to exceed \$110,000.

22 Under the settlement agreement, individual class members retain the right to pursue an
23 appeal under 42 U.S.C. § 1395w-104(h) or otherwise seek individual relief of an individual
24 claim against the Secretary for Medicare Part D prescription drug or Low Income Subsidy
25 benefits that is not based on the allegations made in this lawsuit.

26 **C. The Reasons for the Settlement**

27 Plaintiffs argue in this lawsuit that HHS has failed to fulfill its legal obligations in
28 implementing Part D, leaving FBDEs exposed to significant gaps in coverage. The Secretary
vigorously disputes that allegation and contends that HHS has administered Part D in a lawful
manner. It is uncertain which side would prevail at trial, and if Plaintiffs prevailed, it is
uncertain what type of relief would be ordered by the Court. Any order of the court would be
subject to appeal. If litigation continued, relief to the class would be uncertain and, if ultimately

1 provided, delayed. Continued litigation would be time consuming and expensive for both
2 parties. Plaintiffs and Defendant believe that the proposed settlement is fair, adequate and
3 reasonable and will result in immediate and substantial improvement in the administration of
4 Part D as it pertains to FBDEs.

5 **D. Settlement Fairness Hearing**

6 The Court has preliminarily approved the settlement, but will hold a hearing (“Fairness
7 Hearing”) to determine whether to permanently approve the proposed settlement as fair,
8 adequate and reasonable. The Fairness Hearing will take place at 10:00 AM on October 6, 2008
9 in Courtroom 12, 19th Floor, United States District Court for the Northern District of California,
10 450 Golden Gate Avenue, San Francisco, CA 94102. The Fairness Hearing may, from time to
11 time and without further notice to the Class, be continued or adjourned by order of the Court. If
12 you wish to attend the Fairness Hearing, you should confirm the date and time with Class
13 Counsel at the National Senior Citizens Law Center (contact information below). Class
14 Members do not need to appear at the Fairness Hearing or take any other action to indicate their
15 approval of the settlement or to obtain the benefits of the settlement.

16 If you wish to object to the settlement, you must do so in writing. Written objections
17 must be sent to Class Counsel at the National Senior Citizens Law Center (address below), on or
18 before September 8, 2008. Class Counsel will forward all objections to Defense Counsel and
19 will file all objections with the Court on or before September 15, 2008. The parties will file a
20 joint response to any comments received by September 22, 2008.

21 **E. Additional Information**

22 The pleadings and other records in this litigation may be examined and copied during
23 regular office hours at the office of the Clerk of the Court, United States District Court for the
24 Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102. You may
25 also view the entire Settlement Agreement at the website of the National Senior Citizens Law
26 Center ([www.nsclc.org/areas/medicare-part-d/medicare-part-d-settlement-
27 agreement/at_download/attachment](http://www.nsclc.org/areas/medicare-part-d/medicare-part-d-settlement-agreement/at_download/attachment)).

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1 Date: July 24, 2008

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