

# Business & Law

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## Health Clinic May Sue Insurer When Shortchanged on Reimbursement

By Charles Toutant

Health care providers that are habitually reimbursed directly by an insurer for covered costs may have standing to sue under ERISA for claimed deficiencies, a federal judge says.

U.S. District Judge Joseph Greenaway Jr. last Wednesday denied a carrier's motion to dismiss a clinic's claim on the ground that there was no valid assignment of benefits by the insured.

The suit in *Gregory Surgical Services, LLC v. Horizon Blue Cross Blue Shield of New Jersey, Inc.*, 06-0462, was lodged by an ambulatory surgical center in Jersey City that provides services to people insured by Horizon Blue Cross Blue Shield of New Jersey Inc.

Although Gregory Surgical Services is not part of Horizon's provider network, some of the carrier's plans allow for reimbursement of a portion of the insured's out-of-network costs. The plans also provide that Horizon can pay the out-of-network providers directly.

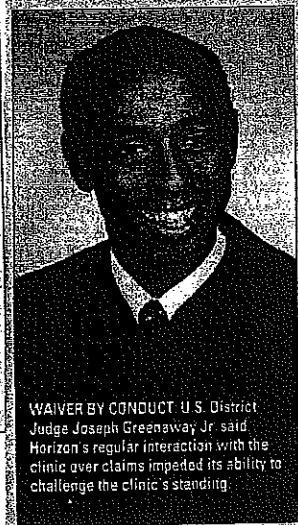
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But Horizon's plans also include an anti-assignment provision prohibiting insureds from assigning their rights to benefits to out-of-network health care providers, and Horizon argued that such providers thus can't sue under a section of the Employee Retirement Income Security Act to recover benefits due or to enforce rights under the terms of a plan.

But Greenaway found that a case could be made that Horizon waived the prohibition by its conduct, including "discussions of patient coverage under health care policies, direct submission of claim forms, direct reimbursement of medical costs, and engagement in appeals processes."



WAIVER BY CONDUCT U.S. District Judge Joseph Greenaway Jr. said Horizon's regular interaction with the clinic over claims impeded its ability to challenge the clinic's standing.

According to his opinion, GSS requires patients to sign a form stating that they assign to GSS all insurance benefits governed by Horizon. After the services are provided, GSS submits the claim to Horizon, which usually makes the payment directly to the clinic. If the carrier denies the claim, it gives GSS its reasons and GSS responds by opening a discussion or formally appealing. If the carrier finds that a previous payment exceeded the amount due GSS, it adjusts the next reimbursement accordingly.

The GSS clinic alleges a course of conduct beyond direct reimbursement for medical services. Greenaway continued, "Indeed, the [complaint] describes regular interaction between Horizon and GSS prior to and after claim forms are submitted, without mention of Horizon's invocation of the anti-assignment clause. Such actions impede Horizon's ability to rely on the anti-assignment provision to challenge GSS's standing."

GSS originally sued Horizon in state court, alleging that as of a certain date, reimbursement payments were substantially curtailed. Horizon removed the case to federal court, and two motions to dismiss were granted before GSS finally established standing to sue under ERISA.

Upon finding standing, Greenaway refused to dismiss the count of the complaint based on ERISA §502(a)(1)(B). He found sufficient the clinic's statement of claims that certain Horizon plans

require the carrier to pay a portion of the insured's costs of services rendered by out-of-network providers; that insureds assigned to the clinic their rights to receive such reimbursement, and that reimbursements abruptly decreased as of a certain date. GSS also claimed that as a beneficiary, it is entitled to enforce its rights, and clarify rights to future benefits under ERISA.

Greenaway dismissed with prejudice a separate ERISA-based claim and state law claims he found pre-empted by ERISA. But he dismissed without prejudice a claim that Horizon breached fiduciary duties by failing to disclose material information to GSS, namely about changes in its reimbursement policy.

GSS, which is independent from any hospitals, performs minor procedures such as colonoscopies. It does not participate in any health insurance networks but receives reimbursement only on an out-of-network basis, which can be a handicap in dealing with insurers, says its lawyer.

Thomas Gentile of Lampf, Lipkind, Prupis & Petigrow in West Orange.

Gentile says insurance companies consider interactions with medical office staff more efficient than fielding inquiries

from individual patients about their insurance benefits, and he says the benefit derived by Horizon from its long-running relationships with clinics such as GSS is evidence — to be adduced at trial — of the waiver or estoppel of anti-assignment provisions.

Horizon's lawyer, Edward Wardell of Kelley, Wardell, Craig, Annin & Baxter in Haddonfield, declined to comment.

Gentile's co-counsel in the case are Neil Prupis of his firm and Bruce Nagel and Robert Solomon of Nagel Rice in Roseland. ■

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Charles Toutant

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