

Insurer Settles Class Action Seeking Health Coverage for Eating Disorders

By Henry Gottlieb



AETNA. THEY'RE GLAD THEY MET YA: The plaintiffs' legal team in the class-action suit are, from left, Elliott Pell, Robert Solomon, Bruce Nagel and Rande Matloff.

In a step toward better insurance coverage for eating disorders, Aetna Inc. has agreed to pay \$250,000 in reimbursements to up to 100 New Jersey policyholders whose claims were denied and to liberalize its largesse for many future claimants.

The agreement, if approved, would settle a class-action suit in federal court in Newark brought by insureds seeking the same benefits for anorexia and bulimia that are available in cases of biologically based mental illnesses (BBMI) such as schizophrenia.

Coverage for years of treatment is available for BBMI cases. But carriers typically classify eating disorders as non-

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BBMIs. At Aetna, that means coverage is limited to 20 outpatient visits per calendar year and 30 days for inpatient benefits, according to the suit.

Advocates for eating disorder patients, who say cures can take years of therapy, have been rooting for the plaintiffs in the Aetna case and class actions against Blue Cross companies in New Jersey and Michigan.

For people enrolled in fully insured policies, "Aetna shall cover claims submitted by Aetna Insureds for the diagnosis, care and treatment of eating disorders in the same manner as biologically based mental illnesses," the May 22 settlement in *DeVito v. Aetna Inc.*, civ-07-418 says.

Aetna also would establish panels of doctors approved by the class action plaintiffs' lawyers to review denials of coverage, and the findings would be binding on all parties.

In the meantime, 85 to 100 eating disorder claimants turned down by Aetna in the past seven years would receive reimbursements worth an estimated total of \$250,000, the settlement says. The company also would pay up to \$350,000 in legal fees to the firm that brought the suit, Nagel Rice in Roseland, and pay \$10,000 to the two lead plaintiffs.

The parties will seek U.S. District Judge Faith Hochberg's approval of the pact on June 16.

Plaintiffs' counsel Bruce Nagel said in a brief vetted by Aetna lawyers that the settlement is "believed to be the first in which a health insurer in New Jersey has agreed to cover eating disorders such as anorexia nervosa and bulimia under the same terms and conditions as biologically based mental illnesses."

It said the deal requires Aetna to "implement a significant business practice change which establishes an enhanced appeals procedure for the denial of benefits based on adverse medical necessity determination."

Under the procedure, anyone whom Aetna determines to have no medical necessity for enhanced eating disorder treatment during the next four years would have the right to elect binding review by an independent eating disorder specialist. The plaintiff lawyers would select the specialists, subject to approval by the company.

Robert Roether of Dearborn, Mich., who is co-counsel in a similar case against Blue Cross Blue Shield of Michigan, says he needs more time to study the proposed Aetna settlement but that a cursory reading suggests "it sounds like substantial progress."

But there will be opposition from the plaintiff's lawyer in a similar case in

Newark federal court, *Beye v. Horizon Blue Cross of New Jersey*, 06-6219.

The lawyer, Eric Katz of Mazie Slater Katz & Freeman in Roseland, says he has been retained by a member of the Aetna class to ask Hochberg to reject the pact. Katz is critical of the settlement's restriction of future BBMI benefits to claimants in "fully insured" plans. Those are plans funded by employers.

As a result, there will be no relief for hundreds of thousands of enrollees in self-funded plans, such as employee welfare and state worker health benefit programs, Katz says. The settlement does not say how many Aetna customers in New Jersey are in fully insured plans.

The limit on retroactive payments to 100 or so people whose claims were denied does not help insureds who did not bother to make claims because they knew they would be turned down, Katz says. And he says the settlement is premature because there has not been enough discovery.

"The paramount purpose of these eating disorder coverage class actions is to ensure that the carriers affirmatively declare that they will cover eating disorder claims now and in the future — forever — on full parity with other illnesses and that the carriers will do so for any and all persons that have been, currently are and will be in the future,

diagnosed with any type of eating disorder," Katz says.

Katz and Nagel are estranged former partners from a firm that underwent a bitter breakup in 2007, Nagel Rice & Mazie, but Katz says his criticism is based on a career in health law and is "completely objective."

An Aetna spokeswoman declines to comment in advance of the June 16 hearing, and Nagel says lawyers in the case agreed not to discuss the settlement pending approval of a joint statement by Aetna.

Nagel's brief said a fee of up to \$350,000 would closely approximate the so-called lodestar calculation: the reasonable billable hours for such a case multiplied by a reasonable hourly rate, plus a possible multiplier for risk and complexity.

In some class action settlements, plaintiffs' firms get a fee equivalent to a percentage of the recovery, which can be difficult to determine in deals that include nonmonetary terms, like this one. The brief said the value of the nonmonetary terms has not been determined.

Hochberg eased the path toward a settlement in March when she denied Aetna's motion for dismissal. The company argued that the dispute should be decided by its own internal review process on a case-by-case basis or by state regulators.

But Hochberg ruled that the suit was permitted under ERISA, the federal benefits act. That allowed the plaintiffs to pursue the suit, but the defense also benefited because there are no punitive damages or right to a jury trial in an ERISA claim. ■