

Horizon Agrees To Settle Class Action By Shorted Out-of-Network Providers

By Mary Pat Gallagher

Horizon Blue Cross Blue Shield, New Jersey's largest health insurer, has agreed to settle a federal class action by ambulatory surgical centers who claim they were shortchanged on reimbursements for out-of-network care.

The deal requires cash payments totaling \$22 million, but class counsel Bruce Nagel says it is worth more than \$200 million due to other provisions, the value of which remains to be quantified.

The deal allows Nagel, of Nagel Rice in Roseland and co-counsel Neil Prupis, of Lampl, Lipkind, Prupis & Pettigrew in West Orange, to ask the court for up to \$10 million in legal fees plus costs, to be paid out of the class recovery. They are to receive at least \$7.3 million, one-third of the \$22 million.

The settlement won preliminary approval Monday from Magistrate Judge Madeline Cox Arleo in Newark. She also conditionally certified the class in *Gregory Surgical Services LLC v. Horizon Blue Cross Blue Shield of New Jersey Inc.*, 06-cv-462.

The class consists of about 130 licensed ambulatory surgical centers and unlicensed single surgical suites in New Jersey that have billed Newark-based Horizon for services since Oct. 1, 2004.

The plaintiffs do not have a contract with Horizon, making them out-of-network providers. They are supposed to be reimbursed based on a percentage of the reasonable and customary charges for the services they provide, and they

typically bill directly after obtaining an assignment of benefits from the patient.

Starting in 2004, they allege, they saw an abrupt decrease in the amount of benefits paid, which fell well below the reasonable and customary charges.

They have sued for violation of section 502(a) of ERISA, of the fiduciary duty of loyalty and due care and the duty of good faith.

Most of the fixed \$22 million settlement amount — \$16 million — covers underpayment claims through the end of 2008. Horizon must pay at least another \$6 million through retroactive adjustments to payments for 2009 services made under large employer benefit plans, those with 50 or more employees.

Going forward, from 2011 to 2013, the insurer will have to increase the reimbursement rate to at least 225 percent of what Medicare paid as of July 2010, with 3 percent cost-of-living adjustments in 2012 and 2013.

Nagel estimates this will garner about \$50 million per year or about \$150 million over the three-year stretch.

He says business reforms, including Horizon's waiver of a \$2,000 cap on out-of-network benefits under large employer plans, will add value. Class members have already gained millions from a correction to a computer program for calculating payments under small employer plans, which Horizon made in 2008 in response to the suit, says Nagel.

The settlement allows Horizon to recover any overpaid benefits and provides that class representative Glen

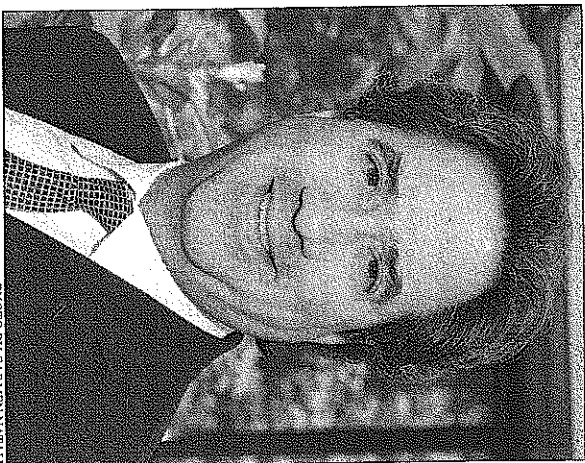


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VALUE ADDED: Besides \$22 million in cash, Bruce Nagel says, increased reimbursement rates will garner \$150 million over the next three years and mandated business reforms will further enhance the settlement.

Ridge Surgicenter will receive \$10,000.

Notice to class members must go out by Oct. 20 and members can opt out until Nov. 29. The due date for objections is Dec. 6, with responses by Dec. 13.

Arleo set the final approval hearing for Dec. 17. The parties consented to let her decide the issue, rather than Chief Judge Garrett Brown Jr., who is assigned to the case.

In a joint statement, the parties said they agreed to settle "to avoid the risk and expense of lengthy protracted litigation." Horizon spokesman Thomas Vincz declines comment beyond that.

Horizon's lawyers are B. John Pendleton Jr., of McCarter & English in Newark, who was out of the country

and could not be reached, and Edward Wardell, of Kelley, Wardell, Craig, Amin & Baxter in Haddonfield, who declines comment.

Nagel says this is the first class-action settlement in New Jersey in a suit by providers alleging under-reimbursement for out-of-network care. A similar action on behalf of insureds, *McCoy v. Health Net Inc.*, 03-cv-1801, settled in 2008 for \$25 million — which included reforms valued at \$40 million and legal fees of \$68 million.

In December 2007, the Horizon case survived a motion to dismiss when District Judge Joseph Greenaway Jr. now on the Third U.S. Circuit Court of Appeals, refused to dismiss for lack of standing to sue under ERISA.

Horizon had argued that the insureds could not have validly assigned their benefits to the plaintiffs because the policies had anti-assignment clauses, but Greenaway held that Horizon might have waived the provision by dealing directly with the providers.

The Newark-based Horizon provides or administers health benefits for about 3.6 million people in the state, says Ed Rogan, a spokesman for the Department of Banking and Insurance. That number encompasses those insured under Horizon policies and under self-funded employer plans for whom Horizon processes claims, including the State Health Benefits Program for state employees.

The plaintiffs' complaint included a count that Horizon had a fiduciary duty to state employees, and thus to the plaintiffs as their assignees, but had breached that duty by underpaying benefits. On March 19, 2009, Greenaway dismissed that count for failure to exhaust administrative remedies through an appeal to the State Health Benefits Commission. ■