New Jersey Law Journal

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ERISA Class Action Settles for No Damages, $2.5 Mil Attorney Fee

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July 11, 2014

Under a class-action settlement approved by a federal judge in Newark, the state's largest health insurer, Horizon Blue Cross Blue Shield of New Jersey, has agreed to reform its practices and pay $2.5 million in fees to class counsel, though nothing to class members.

U.S. District Judge Stanley Chesler signed off on the deal July 9 in *McDonough v. Horizon*, a consolidated suit dating back to 2009 that was brought under the Employee Retirement Income Security Act on behalf of patients covered by Horizon health-care plans and psychologists who provided treatment to Horizon insureds but were not part of its network of health-care providers.

The plaintiffs alleged that Horizon systematically underpaid for out-of-network services, which the carrier was supposed to reimburse at the "usual and customary rate."

They claimed Horizon paid too little because it determined those rates based on two sources that consistently understated the correct figures: a widely used third-party database maintained by Ingenix Inc., and its own reimbursement schedule known as "Top of Range."

Under the settlement, Horizon has agreed to completely discontinue use of that schedule and stop using the Ingenix database for the bulk of its plans.

In addition, it has agreed to rework the language for new and renewed plans to clarify how it calculates out-of-network claims and address the subject in its marketing literature, member handbooks and websites.

The class consists of nearly 2.7 million insureds and over 181,000 out-of-network health-care providers who provided services and are not licensed medical doctors or osteopaths.

The agreement was first submitted to the court last November and won preliminary approval on Dec. 4.

In granting final approval, Chesler took into account the reaction of the class. Only 471

insureds, less than 0.02 percent, opted out and 245 providers, less than 0.14 percent, asked to be excluded.

There were only 29 objectors.

Eight of them without lawyers primarily complained about things unrelated to the suit, such as Horizon customer service or the managed care industry, Chesler said.

The other 21 were represented by the firm of Mazie Slater Katz & Freeman in Roseland, which was founded by David Mazie and other attorneys who once worked for the firm of class counsel, Nagel Rice.

The Mazie Slater clients, six class members and 15 nonmembers, argued there were problems with notice to the class and the settlement provided no real benefits because it paid class members nothing in return for relinquishing a multibillion dollar claim. Their expert had pegged class damages at $10 billion.

"Neither criticism detracts from the fairness and reasonableness of the settlement," Chesler said.

Supplemental notice had obviated any problems with the initial notice and the settlement's business reforms were a "real benefit," Chesler said.

In addition to ending use of the allegedly flawed databases, "it also achieves greater transparency and clarity for Horizon members on how out-of-network payments are calculated," he said. "By requiring Horizon to update and revise plan language, member handbooks and marketing materials, the settlement tangibly addresses a significant problem about which the class complained in this action."

As to the $10 billion figure, Chesler said a motion to preclude the expert's testimony was pending when the parties agreed to settle and Horizon had challenged the expert's methodology.

Further, the objectors had also argued the class was uncertifiable, which would preclude recovery of any damages, Chesler said. He referred several times to a similar suit against CIGNA where he denied class certification June 24.

The objectors opposed the $2.5 million fee request on the grounds that the class is getting no monetary benefits, a stance Chesler rejected as "at odds with the nature of the settlement and the law in this jurisdiction," where courts have approved fee awards for business reforms absent dollar damages.

The objectors had previously moved to disqualify Nagel Rice as class counsel for a purported conflict of interest based on Nagel Rice's representation of ambulatory surgical centers in a parallel action, *Edwards v. Horizon,* where money damages are still being sought.

But Chesler said their argument that Nagel Rice had divided loyalties and was selling out the *McDonough* class to pursue the interests of the ambulatory centers, which are carved out of the settlement, "borders on the frivolous" and is "based on nothing but speculative and

unfounded assertions."

The objectors' accusation that Nagel Rice structured the settlement so that it could "cash in on two significant multi-million fee awards" was "nothing but inflammatory," he wrote in denying the motion.

He also refused to allow the non-class members to intervene because he saw no risk of impairing their legal interests. Nor would he let them appear as amici curiae because the concerns they raised had little to do with the litigation and were of no help to the court.

"Far from assisting the court, the objections filed by the Mazie firm...have hampered the court in fulfilling its obligation to determine whether the class action settlement is fair and reasonable by consuming judicial resources and time with issues that fail to illuminate this assessment."

Bruce Nagel, lawyer for class plaintiff Cathleen McDonough, called the settlement "a fair resolution," noted that "the objectors were led by my former law partner," and called the objections "pure and complete nonsense."

Nagel added "it's no coincidence that my former partner did this in *Drazin* and got slapped royally and has now done it [here] and got slapped royally."

The *Drazin* case was a suit against Horizon over coverage of eating disorders. Mazie had filed an earlier suit, while still at Nagel Rice, and took it with him when he left.

When Nagel's later-filed *Drazin* case settled for $1.18 million, U.S. District Judge Faith Hochberg in Newark rebuffed Mazie's request for a share of the $2.3 million fee, awarding it all to Nagel, a ruling upheld on appeal.

Eric Katz of Mazie Slater reacted to Chesler's ruling, saying, "We believe the court erred on multiple grounds and are reviewing the opinion and considering what options we have next in the Third Circuit." He declined comment on Nagel's remarks.

Mazie was out of the office Friday and couldn't return a call for comment.

Horizon's attorney, David Jay of Greenberg Traurig in Florham Park, N.J., referred a request for comment to Horizon spokesman Thomas Vincz.

Vincz said in an email, "We commend the court for its understanding of the complex issues in this case. Horizon BCBSNJ is committed to extending the benefits of this settlement to our health-care providers and members."

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