FILED
SEP 15 2017
RACHELLE L. HARZ
J.S.C.

Edward S. Wardell, Esq. (017181976)
Matthew A. Baker, Esq. (029202010)
Robert J. Norcia, Esq. (165172015)
CONNELL FOLEY LLP
Liberty View Building
457 Haddonfield Road, Suite 230
Cherry Hill, NJ 08002
Phone: (856) 317 - 7100
Fax: (856) 317 - 7117
Attorneys for Defendants Aetna Health Insurance Company and KPMG LLP

NORTH JERSEY BRAIN & SPINE CENTER, Plaintiff, v. AETNA LIFE INSURANCE COMPANY AND KPMG LLP, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION/BERGEN COUNTY Docket No.: BER-L-2477-17 CIVIL ACTION **ORDER**

THIS MATTER having been opened to the court by Connell Foley, LLP, counsel for Defendants Aetna Life Insurance Company and KPMG LLP (collectively Defendants), for an Order dismissing Plaintiff's Complaint, and the Court having considered the papers submitted in support of thereto, and for good cause shown;

IT IS ON THIS 15th day of Sept, 2017, **ORDERED** that Defendants Motion to Dismiss Plaintiff's Complaint is ~~**GRANTED**~~; Denied

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties and/or their attorneys, if any, within 7 days of the date listed above.

Rachelle L. Harz, J.S.C.

[X] Opposed
[ ] Unopposed

RACHELLE L. HARZ, J.S.C.

ORAL ARGUMENT HELD
For reasons set forth on the record.

4023619-1

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. BER-L-2477-17
APP. DIV. NO.________________

NORTH JERSEY BRAIN AND SPINE CENTER,

Plaintiff,

vs.

AETNA LIFE INSURANCE COMPANY, ET AL,

Defendant.

TRANSCRIPT of MOTION

Place: Bergen Co. Courthouse
10 Main Street
Hackensack, NJ 07601

Date: September 15, 2017

BEFORE:

HONORABLE RACHELLE L. HARZ, J.S.C.

TRANSCRIPT ORDERED BY:

ERIC D. KATZ, ESQ., (Mazie, Slater, Katz & Freeman, LLC, 103 Eisenhower Parkway, Suite 207, Roseland, New Jersey 07068)

APPEARANCES:

DAVID M. ESTES, ESQ., (Mazie, Slater, Katz & Freeman, LLC)
Attorney for the Plaintiff

MATTHEW A. BAKER, ESQ., (Connell Foley, LLP)
Attorney for the Defendants

Transcriber Gale Repasy
ELITE TRANSCRIPTS, INC.
14 Boonton Avenue
Butler, New Jersey 07405
(973) 283-0196
Audio Recorded
Operator, ____________________

I N D E X

	Page
MOTION TO DISMISS	
ARGUMENT	
By Mr. Baker	3, 19
By Mr. Estes	9
THE COURT	
Decision	20

Argument - Baker

1 THE COURT: Okay. Thank you. This is a
2 motion to dismiss, BER-L-2477-17. Counsel, your
3 appearances, please.
4 MR. BAKER: Good morning, Your Honor.
5 Matthew Baker from the law firm of Connell Foley on
6 behalf of the defendants, Aetna Life Insurance Company,
7 and KPMG.
8 MR. ESTES: Good morning, Your Honor. David
9 Estes from the law firm Mazie, Slater, Katz and Freeman
10 on behalf of the plaintiff, North Jersey Brain and
11 Spine Center.
12 THE COURT: All right. Thank you.
13 Plaintiffs have filed a complaint, counts of promissary
14 estoppel, misrepresentation, unjust enrichment. We
15 basically have opposition saying these matters are
16 pre-- this complaint is preempted by ERISA. And I have
17 moving papers, opposition, reply, and a sur-reply.
18 This is your argument, so why don't we hear
19 from counsel.
20 MR. BAKER: Thank you, Your Honor.
21 Defendant's position is that this is a relatively
22 straightforward matter, if not, though the legal
23 analysis is a little in depth. The plaintiff brings
24 state law claims for an alleged misrepresentation made
25 when they called in to pre-certify the benefits. They

Sheet 3

4

Argument - Baker

1 asked what was the applicable benefit level under the
2 plan, did the member have coverage, and they were told
3 that the claims would be reimbursed at a certain
4 percentage of what's called UCR.
5 The claims that they bring are the claims, as
6 you mentioned, promissory estoppel, negligent
7 misrepresentation, and unjust enrichment. And from the
8 defendant's point of view, it's really a two-step
9 analysis. Whether the claims at issue are preempted by
10 Section 514(a) of ERISA, and if they are, and we
11 obviously contend that they are, then the claim should
12 be dismissed with prejudice because the state claims
13 cannot survive and plaintiffs have not plead that they
14 have a valid assignment of benefits to bring a claim
15 under ERISA.
16 THE COURT: This isn't about assignment of
17 benefits.
18 MR. BAKER: Correct.
19 THE COURT: I don't -- I mean, I don't know
20 why you're arguing assignment of benefits. Isn't that
21 trying -- look, first of all, there's a question of
22 fact if there was or wasn't. But what they're saying
23 is that there was a representation made to the
24 plaintiff and their action is between the plaintiff and
25 your client, and that there is no need for an

5

Argument - Baker

1 assignment of benefits because the misrepresentation is
2 directly to them.
3 MR. BAKER: Correct.
4 THE COURT: So I don't really see why we're
5 arguing --
6 MR. BAKER: Okay. And I wasn't going to get
7 into the argument about assignment of benefits.
8 THE COURT: Oh, okay.
9 MR. BAKER: Our position is just that the
10 claims are preempted by Section 514(a) of ERISA, so the
11 state law claims we preempted, they could pursue a
12 ERISA claim if they elected to, but they didn't allege
13 that they were pursuing that or had an assignment of
14 benefits. But the main case we cite, the only binding
15 case in this jurisdiction, was the ST. PETER'S case
16 that talks about plain claims are preempted by Section
17 514(a) of ERISA.
18 THE COURT: There's a contract in that case.
19 I just -- I read the case. And I know you rely -- I
20 mean, there's an actual contract in that case.
21 MR. BAKER: Right. There was a third-party
22 contract that would control the level of reimbursement.
23 THE COURT: Right. And then there was a
24 third-party action because the party that was supposed
25 to pay on time didn't pay on time. It's not the exact

1 same set of circumstances as we have in this case.
2 MR. BAKER: Oh, it's not on the four corners
3 at all, Your Honor. But the Appellate Division did
4 find that these types, that a negligent
5 misrepresentation claim was preempted by Section 514(a)
6 of ERISA. And the reason they found that is because
7 the claims would not exist but for the existence of the
8 plan, and the claims relate to the plan.
9 As the Appellate Division noted, the claims
10 in there -- one of the reasons they weren't preempted
11 is because they did not address any type of unique
12 local problem and the case deals with what the payment
13 of benefits would be.
14 In this case, if the negligent
15 misrepresentation claims were to survive, and plaintiff
16 would be able to bring them, they would have to look to
17 the plan for what the claims would pay.
18 THE COURT: Well, isn't it 70 -- wasn't the
19 agreement -- wasn't the representation 70 percent?
20 MR. BAKER: I believe it was at 70 or 65.
21 THE COURT: I'm sorry, 65 percent.
22 MR. BAKER: Well, that would be the
23 representation, and then if they were to pay out, UCR
24 would be defined under the terms of the plan. What
25 would the plan pay. So there --

1 THE COURT: No. UCR is not under the plan.
2 Usual and customary? I don't think --
3 MR. BAKER: Right.
4 THE COURT: No. ERISA doesn't determine
5 what's usual and customary.
6 MR. BAKER: Well, the plan would define the
7 out-of-network benefit level, and that's usually
8 defined as the usual and customary, and sometimes it's
9 tied to a certain database.
10 THE COURT: Well, we're getting into factual
11 questions now. But the plan doesn't have, you know, an
12 appendix saying what their schedule is for usual and
13 customary.
14 MR. BAKER: Some plans do.
15 THE COURT: Well, that's not before me.
16 MR. BAKER: Understood. Understood.
17 THE COURT: Okay.
18 MR. BAKER: Okay. But -- but so our claims
19 would be that the negligent misrepresentation claims
20 would not exist but for the plan. No representation we
21 have made about the applicable coverage level if it
22 wasn't for the existence of the ERISA claim, the member
23 had benefits and they called to pre-certify under. If
24 the plan didn't exist and they called, there would be
25 no representation made because there wouldn't be a plan

1 to refer to.
2 THE COURT: Okay.
3 MR. BAKER: So when they called up, they had
4 to say, I'm going to see this member. I'm about to
5 render benefits to them. Do they have coverage? And
6 if they do, what is their coverage. If it wasn't for
7 the existence of that plan, no representation would be
8 made, therefore, the claims relate to the plan. And as
9 the courts in ST. PETER'S, would not exist but for the
10 plan.
11 And as far as I know, that plaintiffs rely on
12 the MC CULLOUGH decision, which was a Second Circuit
13 decision, that involved --
14 THE COURT: Which involved you.
15 MR. BAKER: And -- well, it didn't involve
16 me, it involved my law firm. But that was preemption
17 under Section 502(a) of ERISA, which is a different
18 statutory substance than 514(a.
19 THE COURT: I saw that.
20 MR. BAKER: What 502(a) is is --
21 THE COURT: So -- I have it.
22 MR. BAKER: -- that will confer federal
23 court jurisdiction. Are they the type of individual
24 that could -- could they bring the claim under ERISA
25 and if they could, is there any other independent legal

1 duty.
2 THE COURT: Okay. This is my question. If
3 it's such a distinction, then why did the MC CULLOUGH
4 case cite cases involving 514.
5 MR. BAKER: They might have cited cases
6 involving 514, the ruling wasn't related to 514. It
7 was all about whether the court had federal questioned
8 jurisdiction because the case was removed. So in that
9 instance, they found we don't actually have federal
10 question jurisdiction because it's under 502(a) they
11 wouldn't be able to bring this claim under ERISA
12 because they don't have an assignment of benefits. So
13 there's a distinction whether they're finding it -- so
14 they're finding they don't even properly have federal
15 --
16 THE COURT: Well, it said more than that.
17 I'll leave that to Mr. Estes to argue about MC
18 CULLOUGH. Okay. Any other points you wish to make?
19 MR. BAKER: That's it for now, Your Honor.
20 THE COURT: Okay. Why don't I hear from Mr.
21 Estes.
22 MR. ESTES: Good morning, Your Honor. May
23 it please the court, defendant's motion should be
24 denied for three reasons. First, there's no legal
25 basis to dismiss this as a matter of law under federal

1 preemption. Second, collateral estoppel clearly
2 applies here under the MC CULLOUGH decision. And,
3 third, in any event, this is a fact sensitive
4 affirmative defense that cannot be granted on the face
5 of the pleadings.
6 The Court question presented in defendant's
7 motion, from our perspective, is whether or not
8 plaintiff's state law claims are preempted by federal
9 law, specifically Section 514(a) of ERISA. The answer
10 is straightforward, like defense counsel said. And I'd
11 like to just read it directly from ST. PETER'S which
12 is a published Appellate Division case, one of the
13 leading cases in this state with respect to ERISA
14 preemption.
15 THE COURT: Could I just -- I have the case
16 here. Could you just give me the page though.
17 MR. ESTES: You have the Westlaw? You have
18 the Westlaw version or the NJ Courts version?
19 THE COURT: Is it in the brief? Are you
20 reading it from your brief or are you reading it from
21 the case?
22 MR. ESTES: I can do both. I could do
23 either one. I have -- but I have the one from New
24 Jersey Courts website, I don't have the Westlaw one,
25 but I know the Westlaw cite. The Westlaw cite is 458

1 -- I'm sorry, 457 -- and then going into 58.
2 THE COURT: Wait. I'll give it to my law
3 clerk --
4 MR. ESTES: No problem.
5 THE COURT: -- to find that.
6 MR. ESTES: I sometimes go a little too
7 fast, I've been told.
8 THE COURT: Did you cite the same provision
9 in your --
10 MR. ESTES: Yes. It's in our opposition
11 brief, Page 11 of the brief.
12 THE COURT: Okay. That's what I thought. I
13 have it right here.
14 MR. ESTES: Yes. Right after the bullet
15 points, or the asterisks there, it's the paragraph that
16 begins, additionally.
17 So at this point in the ST. PETER'S decision,
18 the courts kind of giving a general presentation of
19 ERISA preemption which it readily is a broad
20 preemption. But it acknowledges, more generally
21 speaking, that there's limits to the preemption, it's
22 not limitless. There are instances where the ERISA
23 plan only has a peripheral or tenuous connection with
24 the claims. And then the court goes on to give
25 examples. It's the paragraph beginning, additionally.

1 And it states, "Additionally, the Eleventh, Tenth, and
2 Fifth Circuits have found certain state causes of
3 action by healthcare providers against insurance
4 companies were not preemptive". Then the court cites
5 as examples, LORDMAN (phonetic), Eleventh Circuit.
6 HOSPICE out of the Tenth Circuit, and very importantly,
7 MEMORIAL HOSPITAL out of the Fifth Circuit.
8 At this point, what ST. PETER'S is
9 acknowledging is what's known in ERISA practice as
10 MEMORIAL HOSPITAL rule. And under the MEMORIAL
11 HOSPITAL rule when an out-of-network provider, such as
12 plaintiff here, North Jersey Brain and Spine, receives
13 pre-authorization, there's not ERISA preemption of such
14 claims. And there's a variety of policy and legal
15 reasons for this rule. This rule has been adopted and
16 applied in courts across the country consistently. And
17 under -- moving to the facts of this case, what
18 happened was my client's a neurosurgical practice based
19 here in Bergen County, a patient showed up, we'll call
20 her Jane Doe. Jane Doe needs a certain procedure. Our
21 -- my client has to decide whether or not to take on
22 and do that procedure without knowing the status of the
23 patient's healthcare plan. So what they do is they
24 contact Aetna, a New Jersey providers contacts a large,
25 national managed care insurance company. Aetna says,

1 is this service covered? And to what extent is it
2 covered? And Aetna --
3 THE COURT: Is the service covered and --
4 MR. ESTES: And to what extent is it
5 covered, in what way, what manner. And what happened
6 is, someone by the name of Lynn at Aetna, which this is
7 all plead in the complaint, told plaintiff it's covered
8 and it's covered at 65 percent of the usual, customary,
9 and reasonable rate, which we refer to in a healthcare
10 practice as UCR, by the acronym. It's basically the
11 market rate is essentially what it is. It's 65 percent
12 of the market rate.
13 So what that representation did is it induced
14 my doctors to render important surgical services to
15 Jane Doe. And they rendered them and they only
16 rendered them because of that representation and the
17 completeness of that representation. And they were
18 induced by Aetna to do so. And after they submitted
19 the claim, Aetna did not stand by its representation.
20 And that's the entirety of the proofs.
21 If you look at the Ninth Circuit decision in
22 CATHOLIC VS. -- I'm sorry. CATHOLIC HEATLHCARE, and
23 that's cited in our surreply at Page 5, and I'm just
24 going to read from the parenthetical in the surreply.
25 THE COURT: Let me get there.

1 MR. ESTES: I'm sorry.
2 THE COURT: Okay.
3 MR. ESTES: It's Page -- yes, Page 5, the
4 bottom paragraph, right in the middle, in bold. And
5 I'll read the sentence. "Unlike the factual
6 circumstances in ST. PETER'S, in all MEMORIAL HOSPITAL
7 cases, the ultimate fact finder will not have to
8 interpret an ERISA plan to determine the terms of the
9 implied contract or the nature of the insured's
10 misrepresentations".
11 This is not a type of fact pattern that's
12 preempted by ERISA. And you can look at case law
13 across the country and it's acknowledged and
14 incorporated in the ST. PETER'S decision. And
15 particularly I would also note that the -- that the
16 Appellate Division cited to LORDMAN. In the reply
17 brief, and I anticipate that defense counsel will argue
18 this in his response to my argument. They try to draw
19 a distinction between the extent of coverage and the
20 existence of coverage. I just want to point out, the
21 Appellate Division cited to LORDMAN. In that case, the
22 issue was not the existence of coverage, but the extent
23 or scope of coverage. And in that case, which the
24 Appellate Division adopted and cited affirmatively for
25 the proposition there's no preemption, the issue was

1 the amount of coverage, like this case. The facts are
2 analogous. And then there's a series of cases flowing
3 out of LORDMAN including the ACCESS MEDIKIP (phonetic),
4 case which is a recent Fifth Circuit case, which
5 rejects the position that is taken on this motion which
6 is they're trying to carve out an exception to this
7 well established MEMORIAL HOSPITAL rule and say, you
8 know, we can promise that we're going to pay you, but
9 -- and that's not preempted, but we promise to pay you
10 for $100,000 surgery and they send you a check for a
11 penny, we're off the hook. We could hide behind
12 federal preemption. Well, I mean it kind of doesn't
13 even pass the laugh test from my point of view.
14 The promise of coverage has implied in a
15 reasonable reimbursement rate, otherwise the promise is
16 meaningless. And if you look at the preemption
17 analysis under ERISA Section 514, there's no meaningful
18 way to distinguish between a promise as to the
19 existence of coverage and as to the amount of coverage.
20 And if you look at the Fifth Circuit in ACCESS MEDIKIP
21 and you look at a recent case out of the District of
22 Tennessee, SLF, which are both cited in our surreply,
23 those courts are the most recent decisions that address
24 and as position on this motion, and they just reject
25 it. It's a distinction without a difference. It's

Argument - Estes

1 meaningless. And the way the court claims it is, to
2 the extent a portion or the claim wasn't paid, it
3 wasn't covered. There's not really any meaningful
4 difference.
5 Moving on, before I move on from MEMORIAL
6 HOSPITAL, I just want to point, what undergirds this
7 MEMORIAL HOSPITAL rule is really the Legislative
8 intent. So we're talking about a federal statute, the
9 analysis -- the touchstone of the analysis under the
10 case law, is what was Congress's intent in enacting
11 ERISA. And if you look at all the published Federal
12 Court of Appeal decisions addressing this issue, they
13 all point to the fact that preempting my client's
14 claims actually frustrates the purposes of ERISA. The
15 purposes of ERISA are to protect the patient, Jane Doe,
16 not Aetna.
17 And what Aetna is trying to do here is
18 they're trying to provide -- create no legal remedies
19 or forums for healthcare providers in New Jersey. The
20 vast majority, I do a lot of healthcare litigation for
21 Mr. Katz, and the vast majority of Aetna cases that
22 I've seen, obviously this is beyond the four corners,
23 but I can represent based on my experience have what's
24 called an anti-assignment clause. Now plaintiff isn't
25 conceding that that's enforceable, but Aetna

Argument - Estes

1 consistently takes the position, particularly in
2 federal court in Newark, that providers don't have a
3 right to sue them in federal court. They have no
4 relief under the ERISA statute because they have no
5 standing. They don't have any claims. They're not
6 recognized a statutory plaintiff under ERISA and they
7 can't be assigned the rights of patient Jane Doe.
8 And so what they're -- they closed the door
9 in federal court and now they're trying to close the
10 door here. And what's going to happen is what the
11 federal courts are concerned about in the Fifth, Tenth,
12 and Eleventh, and other circuits, which is if that's
13 allowed to happen, what is a doctor going to do the
14 next time Jane Doe shows up. They have two options.
15 Either they don't provide healthcare and the patient
16 can't get the treatment that they need. Or,
17 alternatively, they have to bill the patient. Both of
18 those options are unacceptable and contrary to the
19 purposes of ERISA.
20 So even if we were to step away from the well
21 established case law and dive deeper into, you know,
22 what was Congress thinking when they created the
23 statute, this motion is inconsistent with that. And I
24 think it's just fundamentally unfair.
25 I just briefly want to address the collateral

1 estoppel issue. As Your Honor knows, there's five or
2 six elements, depending on how you look at the
3 collateral estoppel standard under New Jersey law, from
4 my reading of Aetna's brief, they're only disputing the
5 first, which is that the law and the facts of the
6 previous proceeding have to be substantially identical.
7 And, really, to be more precise, the issue is whether
8 preemption under ERISA 501 and ERISA 514 are a
9 difference. Our position is that there's no meaningful
10 difference. And what I would say is if Your Honor
11 looks at the, I believe it's a First Circuit case,
12 CONNECTICUT STATE DENTAL, in that case the court
13 recognizes that, in a footnote and in the text of the
14 decision which is cited in our surreply, that the
15 MEMORIAL HOSPITAL rule applies equally under both
16 facets of ERISA preemption. So there is no difference.
17 So I think collateral estoppel does apply because
18 that's really the only issue in dispute.
19 And then, finally, I just would like to
20 respond to a couple of comments. With respect to the
21 assignment of benefits and the scope of that, that's a
22 question of fact. It can't be decided on a 462 motion.
23 With respect to whether or not the plan, as
24 Your Honor noted, whether or not the plan defines UCR,
25 contains that term, that's a question of fact, that's

1 not an issue within the four corners of the complaint.
2 It's premature at a minimum.
3 And then, lastly, I'd like to address some
4 argument that was made regarding what the
5 representative did. Something to the effect that the
6 representative looked at the plan to determine -- to
7 respond to my client's response. That's not on the
8 four corners of the complaint. And, frankly, that's
9 speculative. That's also premature.
10 Unless Your Honor has any questions, I think
11 we're done -- I'm done.
12 THE COURT: Thank you.
13 MR. ESTES: Yes.
14 MR. BAKER: Your Honor, I would just note
15 that in the ST PETER'S case where counsel claims that
16 they're adopting LORDMAN and HOSPICE and MEMORIAL
17 HOSPITAL, the last sentence of that paragraph notes
18 that the claims in these cases were based on assurances
19 that certain treatment would be covered under the plans
20 when ultimately the insurance companies denied
21 coverage. So they're not adopting them at all.
22 They're just pointing out what other groups have found
23 and if they wanted to adopt them, they could. They
24 chose not to, so they did differentiate them from the
25 facts of that case and this case at issue here.

1 And then just briefly, as far as the
2 collateral estoppel argument, 514, there was no final
3 judgment in that prior matter, that wasn't litigated.
4 As we note in Footnote 1 of the reply brief, in MC
5 CULLOUGH, the courts rely on some cases relating to 514
6 refers findings that the claims -- they were for the
7 conclusion that some medical providers may decide not
8 to treat or otherwise screen patients in certain plans.
9 There was certainly no ruling on it. The court found
10 that under 502(a) the plaintiffs didn't have standing
11 to pursue an ERISA claim and that their claim was,
12 therefore, not a colorful claim for benefits under
13 ERISA. So it was different because they didn't have to
14 get to 514 because they found that there was no federal
15 question of jurisdiction and no preemption under 502(a)
16 which was in front of the court at that time on a
17 motion to remand. And I have nothing further, Your
18 Honor.
19 THE COURT: I am denying the motion to
20 dismiss. I'm not going to really address the
21 collateral estoppel argument, it's not necessary at
22 this juncture. I have, you know, questions about that,
23 but this Court is confident that it's not appropriate
24 to dismiss this matter. There's something
25 intrinsically wrong with the underlying facts and

1 presentation of this case, as I understand it. And as
2 other courts have recognized in same and similar
3 situations such as MEMORIAL HOSPITAL.
4 I don't think it's necessary to go into the
5 parties -- what the dispute is. The procedural
6 history. Upon receiving the underpayment by
7 defendants, plaintiff filed an appeal -- oh, we're not
8 going into the appeal issue. I think we should put
9 that on the record, even though it was in the papers,
10 you withdrew that.
11 MR. BAKER: That was withdrawn, Your Honor.
12 THE COURT: Apparently, you were arguing
13 that the plaintiffs didn't follow the appeal process,
14 but when an appeal was made, it was totally ignored by
15 the defendant, so there was nothing to pursue and yet
16 you were arguing that they didn't pursue the appeal
17 process. And I understand you've withdrawn that
18 frivolous litigation letter, a lengthy frivolous
19 litigation letter, has been served on you and your --
20 and I'm assuming your client, and as a result, you
21 withdrew that cause of action.
22 MR. BAKER: Correct, Your Honor.
23 THE COURT: Not that cause of action,
24 that --
25 MR. BAKER: Or that -- the -- portion of the

1 motion dismissed.
2 THE COURT: Correct. We should note that
3 ERISA is an affirmative defense.
4 MR. BAKER: Right.
5 THE COURT: Right. These claims before the
6 Court in the complaint involve promissory estoppel,
7 misrepresentation, and unjust enrichment centering
8 around the defendant's confirmation payment of 65
9 percent of UCR charges and a really, a very nominal
10 amount had been paid to them. I think that's important
11 to place on the record. The -- it was something like
12 $4,000 for complex neurosurgery. Am I correct,
13 Counsel?
14 MR. ESTES: I believe that's right. I'm not
15 exactly --
16 THE COURT: Here is it. I think it's
17 important to put on the record, based -- the UCR
18 charges total $48,000 for the surgical services for the
19 patient. Now based upon the representation made by the
20 defendant via the telephone call, plaintiff was
21 expecting to be paid $31,200, which was 65 percent of
22 the UCR. UCRs are not difficult to determine. In the
23 business of medicine, it's an everyday factor and the
24 charts are readily available on line and everywhere.
25 When the defendants issued payment, it was

1 for $4,461.73, which was 9 percent of the UCR. This
2 Court finds that plaintiff has standing to bring the
3 tort and quasi-contract claims in the complaint.
4 Defendant's lead argument is built on a factual
5 dispute, that is whether or not NJBSC obtained an
6 assignment of benefits from the patient. Defendants
7 ignore that the claims are predicated on defendant's
8 misrepresentation that there was coverage at 65 percent
9 of the usual customary and reasonable rate for the
10 services rendered, not "the terms of the plan".
11 Whether plaintiff obtained an assignment from
12 the patient and the scope relevancy and enforcibility
13 thereof are factual matters that must be decided at
14 summary judgment and after discovery.
15 Second, the existence and scope of an
16 assignment is legally irrelevant to whether plaintiff
17 has standing to assert the claims plead. Defendants
18 admit an assignment is relevant to standing to bring
19 common law, breach of contract, or statutory ERISA
20 claims. Plaintiff has asserted none of those claims
21 here. Plaintiff has sued defendants for a tort claim,
22 quasi-contract claims arising from their
23 misrepresentations and the parties direct course of
24 dealings and defendants obtaining an inequitable
25 benefit at the plaintiff's expense. Those claims -- it

1 is our due -- do not require an assignment to have
2 standing and certainly is something that could not be
3 determined at a motion to dismiss standard in any
4 event.
5 A quasi-contract, this Court notes, is not a
6 contract, but a legal concept rationalizing a sanction
7 to prevent unjust enrichment based upon the equitable
8 principle that would be before the Court. That is what
9 the law supposes should have been done based upon a
10 promise. A contract, on the other hand, whether
11 express or implied, has its distinguishing
12 characteristic agreement at promise by words of express
13 or implied acts.
14 The defendants in their papers argue express
15 contract and they tried to utilize those cases and
16 terminology into implied contract claims. Here,
17 plaintiff is only asserting a quasi-contract claim and
18 this Court does believe, based upon a preliminary
19 review of the case law and the facts at hand, that an
20 assignment is not required to have standing to assert
21 such a claim.
22 The Court will not get involved into -- with
23 the administrative appeals process as we have already
24 -- has been voluntarily withdrawn at this juncture.
25 Plaintiff's common law claims at this point

1 are not subject to federal preemption. This Court
2 agrees that defendant's preemption defense must await
3 summary judgment. Federal preemption of our common law
4 is a fact sensitive endeavor and so it cannot be
5 decided at this stage of a motion to dismiss. R.F. VS.
6 ABBOTT LABS, 162 NJ 596, 2000.
7 In considering defendant's preemption
8 defense, the Supreme Court requires the motion court to
9 start with the presumption that plaintiff's claims are
10 not preempted, citing IN RE: REGLAND LITIGATION
11 (phonetic), 226 NJ 315.
12 The presumption against preemption is
13 heightened in this case because the entire case
14 involves healthcare, an area that is traditionally
15 occupied and regulated by the State of New Jersey.
16 FREEDMAN VS. REDSTONE (phonetic), it's a Third Circuit
17 case, 753 F.3rd, 416. Regulating matters of health is
18 among the historic police powers of a state. Because
19 such regulation is primarily a matter of local concern,
20 states traditionally have had great latitude to
21 legislate as to the protection of the health of all
22 persons.
23 There's also great question here as to
24 whether or not ERISA 514(a) preemption when an insurer
25 misrepresents coverage and payment -- and payment terms

1 to a provider. The crux of Aetna's argument before
2 this Court is that ERISA 514(a) preempts state law
3 claims and that an insurer misrepresented the amount or
4 availability of benefits under an employee benefits
5 plan. It cannot be disputed that ERISA preemption is
6 expansive, but this Court has determined that there is
7 significant case law from -- throughout the United
8 States, including the New Jersey Appellate Division,
9 holding that there is no ERISA preemption under the
10 factual circumstances of the case at bar.
11 This Court does not want to go into a
12 argument in terms of what ST. PETER'S holds or doesn't
13 hold. However, this Court does recognize the language
14 as set forth by Mr. Estes in the ST. PETER'S case
15 quoting, "additionally, the Eleventh, Tenth, and Fifth
16 Circuits have found against state causes of action by
17 healthcare providers against insurance companies were
18 not preempted". Citing LORDMAN, 32 F.3rd, 1529,
19 wherein that case there was a finding that a claim for
20 negligent misrepresentation was not preempted because
21 the claim was not only indirectly related to the plan
22 and healthcare provider's need to freely rely on the
23 insurer's representations as to coverage. HOSPICE OF
24 METRO DENVER VS. GROUP HEALTH, Tenth Circuit case, 944
25 F.2nd, 752, holding a claim for promissory estoppel was

1 not preempted because it was a state law claim which
2 does not effect the relations among the principle of
3 its entities. And MEMORIAL HOSPITAL SYSTEMS VS.
4 NORTHFOLK (phonetic), 904 F.2nd, a Fifth Circuit case,
5 finding a claim for deceptive and unfair trade
6 practices was not preempted because the relation to the
7 ERISA plan was incidental and the claim was independent
8 of the plan's actual obligations under the terms of the
9 insurance policy.
10 This Court is also familiar with MC CALL VS.
11 METRO LIFE INSURANCE COMPANY, which was cited in the
12 papers of plaintiff, 956 F. Sup., 1172, District Court
13 of New Jersey, 1996; stating, in this case, the Court
14 concludes the provider's negligent misrepresentation
15 claims against the defendant insurers are sufficiently
16 removed from the plan to avoid the scope of ERISA
17 preemption. Unlike a patient's contract based claim
18 for plan benefits, a provider's negligent
19 misrepresentation of claim is a tort action that is
20 brought in the provider's own name, is independent of
21 the plan, and could have been brought even if the plan
22 did not exist. This case also citing MEMORIAL
23 HOSPITAL, 904 F. 2nd at 239.
24 Thus, federal courts in New Jersey agreed
25 with plaintiff's position before this Court that the

Sheet 15

28

Court Decision

1 claims which are the subject of this litigation are not
2 preempted. This Court could go on, but I believe what
3 I've placed on the record suffices. I will not get
4 into any discussion as to estoppel, vis-a-vis MC
5 CULLOUGH, I'm not entirely convinced as to that
6 argument, but it's of no moment because what is before
7 is a motion to dismiss. And, clearly, the motion to
8 dismiss is denied on multiple levels for the reasons
9 set forth on the record. Thank you. And I will give
10 you your order.
11 (Proceedings Concluded)
12
13

29

1 CERTIFICATION
2 I, Gale Repasy, the assigned transcriber, do hereby
3 certify the foregoing transcript of proceedings in the
4 Bergen County Superior Court on September 15, 2017,
5 Time Index from 9:50 to 10:22, is prepared in full
6 compliance with the current Transcript Format for
7 Judicial Proceedings and is a true and accurate
8 compressed transcript of the proceedings as recorded to
9 the best of my knowledge and ability.
10
11
12 /s/ Gale Repasy
13 ______________________________
14 Gale Repasy AD/T#281
15 Elite Transcripts, Inc. October 25, 2017
16 Butler, New Jersey 07405