

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CIVIL ACTION NO. 06-5929 (FSH)

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HENRY ROUWENDAL & KATHLEEN	:	
ROUWENDAL, husband and wife,	:	TRANSCRIPT
	:	OF
Plaintiffs,	:	PROCEEDINGS
-v-	:	
	:	
ANTHEM BLUE CROSS & BLUE SHIELD,	:	
	:	
Defendant.	:	
	:	

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February 8, 2007  
Newark, New Jersey

B E F O R E: HONORABLE FAITH S. HOCHBERG, U.S.D.J.

A P P E A R A N C E S:

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following transcript is certified to be an accurate record  
taken stenographically in the above entitled proceedings.

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JOHN KEVIN STONE,  
Official Court Reporter

1 THE COURT: Be seated, please.

2 Good afternoon, counsel.

3 May I have appearances.

4 MR. KATZ: Yes.

5 Good afternoon, Your Honor.

6 Eric Katz from the law firm of Mazie, Slater, Katz  
7 and Freeman on behalf of the plaintiffs.

8 THE COURT: Good afternoon, Mr. Katz.

9 MR. GOLDSTEIN: Hi. David Goldstein, from the law  
10 firm of Morrison Cohen for defendant.

11 THE COURT: Good afternoon, Mr. Goldstein.

12 Let me tell you why I have asked you to come in.

13 I have a serious and genuine question about subject  
14 matter jurisdiction in this case since it has been removed  
15 here on the ground of an allegation by the defendant that  
16 there is preemption by virtue of ERISA and therefore it must  
17 be in federal court.

18 We looked at the law on -- that both of you cited,  
19 and let me ask you, Mr. Goldstein, here's my question. As  
20 I -- and correct me if I'm wrong, and this is very broad  
21 brushed strokes. If I were to keep jurisdiction of this  
22 case and consider it in the format and the manner in which  
23 we in federal court handle traditional ERISA cases, as I  
24 understand it, I could only consider the record that your  
25 client put together pursuant to the terms of the plan that

1 they issued to this plaintiff, which is a plan that has a  
2 form of coverage that says that if you go out-of-network,  
3 you get the same reimbursement that -- the reimbursement is  
4 capped by the amount that you would pay to an in-network  
5 provider of the same service, roughly like that. Correct?

6 MR. GOLDSTEIN: That's correct, Your Honor.,

7 THE COURT: And so the plaintiffs, let me give you  
8 a hypothetical to illustrate what my issue is.

9 If the plaintiffs had bought a plan, had been told  
10 and purchased a plan which said to them, if you need a  
11 doctor, you have the right to go to Canada and hire the  
12 specialist at McGill Hospital. I'm just making this up.  
13 Okay? And that's their right and that's what they bought.

14 And then now they're here and they have this plan  
15 which is nothing like that.

16 If they were right, that that's what they were  
17 sold, is there any way that I could possibly give them that  
18 relief here in the federal court action which limits me to  
19 the terms of the plan and the record of the administrator  
20 for this plan?

21 MR. GOLDSTEIN: Your Honor, I believe that the  
22 court can consider the state law claim here, but I think  
23 that the facts will show --

24 THE COURT: That's not what I asked.

25 I can give them the state law relief.

1 MR. GOLDSTEIN: Well, they have a state law claim  
2 for a misrepresentation --

3 THE COURT: Correct.

4 MR. GOLDSTEIN: -- about pre-plan activities.

5 THE COURT: Correct.

6 MR. GOLDSTEIN: It's defendant's allegation that  
7 there were no misrepresentation, therefore --

8 THE COURT: That's not what I'm --

9 MR. GOLDSTEIN: -- therefore you're governed by  
10 the plan. So the answer is yes.

11 THE COURT: I'm not asking you that. I'm not  
12 looking at the merits of whether the plaintiffs prevail or  
13 not. They may or may not prevail. This is not a merits  
14 inquiry.

15 This inquiry is, if what they said were true, they  
16 can't raise it here in the traditional ERISA case which  
17 limits the court's review to the administrative record of  
18 the ERISA determination within the scope of the ERISA plan.  
19 Correct?

20 MR. GOLDSTEIN: Correct, Your Honor.

21 THE COURT: And getting the Cadillac at McGill  
22 Hospital in Toronto, not the Cadillac, getting a doctor at  
23 McGill Hospital in Toronto is not part of the ERISA plan.

24 MR. GOLDSTEIN: That's correct, Your Honor.

25 THE COURT: All right.

1           So there's no way, if, even if what they said were  
2 true, there's no way they could get that relief.

3           MR. GOLDSTEIN: Well, then their relief is limited  
4 to what they're entitled to under the plan. So under your  
5 hypothetical, yes.

6           THE COURT: You're not following me. I don't know  
7 if it's deliberate or not.

8           MR. GOLDSTEIN: No, it's definitely not deliberate,  
9 Your Honor.

10          THE COURT: All right.

11          Let's suppose that you went into a room and you  
12 saw -- you sold to Mr. Katz' clients an oral description of  
13 a plan, and you said Mr. and Mrs. plaintiff, here is your  
14 plan. If you get sick, you can go to McGill University in  
15 Canada for your treatment. And it will be fully covered.  
16 They think they bought that plan.

17          MR. GOLDSTEIN: Correct.

18          THE COURT: All right.

19          That's what I'm asking you. You then deliver to  
20 them a plan that has a paragraph in it that says what your  
21 plan says. And then your ERISA fiduciary denies their  
22 claim, saying you can't go to McGill University in Canada  
23 because it's not part of your plan, and they bring an action  
24 for fraud. You sold me a bill of goods they say. That's my  
25 problem.

1 Do you understand?

2 MR. GOLDSTEIN: No, I understand your problem.

3 THE COURT: So I can't --

4 MR. GOLDSTEIN: I still think that that relates to  
5 the plan though, as to what they were promised under the  
6 plan.

7 THE COURT: No, it's not under the plan. This is  
8 what were they promised before they got the plan.

9 If you go into a room and promise to sell somebody  
10 a Cadillac under the plan, and then you send them a plan and  
11 it's got a Ford, and the limit of coverage is the Ford,  
12 that's not an ERISA issue, that's a fraud issue, or a  
13 misrepresentation issue, or a consumer confidence issue, or  
14 a New Jersey regulatory issue, or whatever you want to call  
15 it. But we're not looking at within the plan, we're looking  
16 at what did they buy. That's what I'm looking at. And  
17 that's my concern about the ERISA preemption argument. I am  
18 concerned that this is a claim that in a very street  
19 parlance sense says, you didn't sell me what I bought from  
20 you. I bought a plan that says I can go to the best  
21 specialist in McGill. I just made that up by the way,  
22 obviously. I tried to pick a hypothetical as far away from  
23 the situation here --

24 MR. GOLDSTEIN: Sure.

25 THE COURT: -- so no one would think I was looking

1 at the merits. Because I'm not. I'm just trying to test  
2 the theory.

3 There's no way they can get relief. If I -- let me  
4 take it to cars, maybe that will be easier.

5 MR. GOLDSTEIN: No, I understand where you're  
6 going, Your Honor.

7 THE COURT: So how could I -- let's suppose that  
8 that happened.

9 MR. GOLDSTEIN: Well, I think that the facts are  
10 important here in one respect. Because we -- there was  
11 brokers involved here, so what we didn't sell them, anything  
12 we didn't tell them anything, I have no documents to say  
13 what kind of misrepresentation we can -- what we gave them.  
14 From our standpoint this is a purely benefits, denial of  
15 benefits claim so...

16 THE COURT: And I -- and from your briefing that's  
17 very clear to me. That's how you're viewing it.

18 I'm trying to get your head to the way I'm looking  
19 at it, so you understand. Because the briefing is like  
20 ships passing in the night.

21 MR. GOLDSTEIN: Correct, Your Honor.

22 THE COURT: So that's why you're here.

23 So what you're saying to me is if they're making  
24 this claim of misrepresentation, it belongs in state court,  
25 but with additional parties other than you, the brokers, who

1 allegedly said something different should be parties too.

2 MR. GOLDSTEIN: Under your hypothetical.

3 THE COURT: Under their claim.

4 MR. GOLDSTEIN: Under their claim, no, I don't  
5 think -- I think it belongs in this court. Because it is  
6 based on a health plan that was provided by Mr. Rouwendal's  
7 employer.

8 THE COURT: Okay. Let me ask you this. Maybe I  
9 can make it -- I can't get you out of where you are. Let me  
10 ask you this.

11 Let's suppose that there was a broker at a health  
12 fair run by his employer, and that broker is a broker for  
13 Anthem Blue Cross. And that broker says to them, if you  
14 subscribe to our Anthem Blue Cross policy, we will give you  
15 a Cadillac as a bonus. Okay? Anthem will.

16 MR. GOLDSTEIN: Yes.

17 THE COURT: And they say, fine. And then of course  
18 Anthem sends them a policy and no Cadillac.

19 MR. GOLDSTEIN: Sure.

20 THE COURT: State court or federal court?

21 MR. GOLDSTEIN: I believe it all should be here.  
22 It's all ERISA based claim, whether they are alleging common  
23 fraud law claims, it still belongs here, because it's  
24 trumped by the plan.

25 THE COURT: The plan doesn't say anything about a



1 Cadillac.

2 MR. GOLDSTEIN: But the allegations that  
3 plaintiff's raising, and the allegation in their complaint,  
4 are key to the language of the plan. It's plan based here.

5 THE COURT: What -- and I'm going to get to him in  
6 a minute.

7 This is what I read him -- read the plaintiffs'  
8 complaint, in sum and substance, as saying, and I obviously,  
9 as you will see, do not have -- I have all the pleadings in  
10 front of me, but I'm not reading from them.

11 What I construe the plaintiff's claim to be  
12 sounding in is as follows: The plaintiff's claim is that  
13 the plaintiff was represented that the Anthem plan that it  
14 was buying was a plan that included a provision that  
15 provided for out-of-network reimbursement based on UCR, but  
16 in fact what was delivered to them was a plan where  
17 out-of-network coverage was keyed -- was capped at what an  
18 in-network provider gets. In other words, a completely  
19 different standard in the plan for reimbursement, totally  
20 different plan language, not the contract they were told  
21 they were going to get. Is that how you read the  
22 plaintiffs' claim?

23 MR. GOLDSTEIN: I am unsure how I read the  
24 plaintiffs' claim.

25 THE COURT: All right.

1           Why don't you sit down and we're going to ask the  
2 plaintiffs lawyer to stand up.

3           Okay. Mr. Katz, you now know the hypothetical.

4           MR. KATZ: Okay. You want me to answer the  
5 McGill --

6           THE COURT: Well, you can answer them both.'

7           MR. KATZ: Okay.

8           THE COURT: If you don't understand them either,  
9 I'll change the hypothetical.

10          MR. KATZ: No, I think I understand it.

11          With respect to the McGill University issue, that's  
12 not something that this court could consider, because I  
13 believe Your Honor is limited to the welfare fund's file and  
14 this would be -- that's what you would be reviewing, and  
15 that would be outside of that. You wouldn't be able to  
16 consider that issue, that's beyond the court's ERISA review,  
17 if ERISA applied to that situation, which I don't think it  
18 does.

19          THE COURT: Okay.

20          Now let's go to the second one. The Cadillac one.  
21 How do you view that one, and then we'll go to the reality  
22 of this case in a minute.

23          MR. KATZ: Same issue.

24          I mean if the inducement was before I purchase this  
25 coverage, you're promising me something, I rely on that

1 promise, that's a pre-plan activity, and in this case if I'm  
2 expecting that Cadillac, and I don't get it, that's clearly  
3 outside of ERISA, that has nothing to do with ERISA.

4 THE COURT: All right.

5 Now, let's go -- that's how I've analyzed it as  
6 well. I've obviously picked an extreme hypothetical, now  
7 let's drag this discussion in to some zone of reality around  
8 this case. What in fact is it your complaint alleging?

9 MR. KATZ: I believe Your Honor aptly summarized  
10 what the claim is. Mr. Rouwendal and his wife were deciding  
11 which health insurance coverage they should pick. It was  
12 important in their considerations that they they be able to  
13 obtain out-of-network coverage. They had some options.  
14 They went with the Anthem policy based upon the  
15 representations made.

16 THE COURT: By whom.

17 MR. KATZ: By Anthem. As far as he knows it was  
18 Anthem people, as set forth in the document that Your Honor  
19 referred to in the standing order, that the out-of-network  
20 coverage would be determined based on UCR. And there are  
21 certain criteria set forth in there about what other  
22 providers in the geographic area submit, we look at  
23 expertise and the skill necessary.

24 THE COURT: What document now, just so I  
25 understand, what document of the many that I have you're

1 referring to?

2 MR. KATZ: We're referring to the written  
3 representations that were made in the Anthem -- in the  
4 coverage book that he received before --

5 THE COURT: Has that been given to the court?

6 MR. KATZ: It was attached in Mr. Goldstein's  
7 papers. Although he attaches a slightly newer version, but  
8 essentially it says the exact same thing.

9 THE COURT: All right.

10 So he -- and what exhibit number is that, just so I  
11 can pull it out here?

12 MR. KATZ: It's attached as Exhibit A to Mr.  
13 Goldstein's moving memorandum.

14 THE COURT: Okay. Make sure I have it.

15 All right. So you're saying that the  
16 representations on which you relied are in Exhibit A to the  
17 defendant's submissions, the attachments to the memorandum,  
18 the law in support of removal.

19 MR. KATZ: That's correct.

20 Except, Your Honor, as I pointed out, the book that  
21 we have is -- the date of that book is August 2002. I  
22 believe this book is effective February 2003. So the pages  
23 are off a little bit. But the language is exactly the same.

24 THE COURT: Is there a section that has a name  
25 that's the same in bold type?

1 MR. KATZ: Well, in Mr. Goldstein's book it's M-17,  
2 page M-17.

3 THE COURT: And in your book it's what?

4 MR. KATZ: In mine it's M-18. But the language is  
5 identical.

6 THE COURT: M-17 is a pharmacy book, using a family  
7 benefit.

8 MR. GOLDSTEIN: No, Your Honor, there's  
9 additional --

10 THE COURT: Are there two M-17s?

11 MR. GOLDSTEIN: Correct.

12 It's further along in the certificate that I think  
13 plaintiffs counsel was referring to.

14 THE COURT: All right.

15 You better make clear which M-17 you're referring  
16 to.

17 MR. KATZ: I'm sorry, Your Honor. It's in the  
18 certificate -- it's in the certificate.

19 MR. GOLDSTEIN: Correct, it's in the certificate.

20 MR. KATZ: It's in the document entitled "Your  
21 Health Certificate."

22 THE COURT: "Your Health Certificate."

23 MR. GOLDSTEIN: Your Honor, on the bottom of the  
24 page it says, "Health Certificate."

25 THE COURT: I see it. I have.

1 All right. It's M-17 of the health certificate  
2 portion of the attachment.

3 MR. KATZ: Yes, ma'am.

4 THE COURT: All right.

5 And you're saying that this is what he got or this  
6 is what he negotiated for?

7 MR. KATZ: This is what he was provided before he  
8 made his determination to subscribe to this coverage.

9 THE COURT: All right.

10 And what particular line of this are you saying  
11 that your complaint is premised upon?

12 MR. KATZ: Well, it's premised on two paragraphs,  
13 Your Honor. The first paragraph is in the second column of  
14 M-17 which talks about for a non-network provider --

15 THE COURT: Yes.

16 MR. KATZ: -- who is a physician or other  
17 non-facility provider.

18 Then it goes on to say the maximum allowable amount  
19 is the lesser of the actual charge or the standard rate  
20 under the participation agreement used with the network  
21 providers for this product.

22 THE COURT: All right.

23 MR. KATZ: Okay. He looks at maximum allowable  
24 amount, which is in the first column of this page, it's in  
25 bold.

1 THE COURT: Right.

2 MR. KATZ: And their maximum allowable amount is,  
3 according to Anthem, determined by considering various  
4 factors, including, significantly, the amounts charged by  
5 other providers for that, the same or similar service, and  
6 unusual medical circumstances requiring additional time,  
7 skill or experience.

8 Mr. Rouwendal will testify at trial, assuming we  
9 were back in state court, that he -- his understanding of  
10 that was that he would be covered by the typical charge that  
11 out-of-network providers in the same geographic area with  
12 the same skill would have provided. And he would say that  
13 his -- he relied upon that to his detriment. That's why he  
14 signed up and subscribed and paid premiums for this coverage  
15 and then when it came time, and all that is pre-plan -- and  
16 then when it came time, when he needed the coverage, in  
17 reality what he got paid was a network rate of a thousand  
18 bucks on a \$32,000 surgery.

19 THE COURT: So did he ask any -- would he testify  
20 that he asked any questions or that's just how he read this  
21 handbook?

22 MR. KATZ: No, he would testify, Your Honor, that  
23 he asked -- he asked questions when he got it, because he  
24 was comparing the coverage with other plans, that he could  
25 have gone on his wife's COBRA, and there was something else

1 that he looked at, and he asked questions. And he was made  
2 to understand, and I know he's not here under oath now, I'm  
3 making these representations --

4 THE COURT: I'm just trying to figure out what the  
5 gist of the claim is.

6 MR. KATZ: Right.

7 THE COURT: Is it that he misread the handbook, or  
8 asked for clarification and was told something that didn't  
9 turn out to be true?

10 MR. KATZ: He asked for clarification of what it  
11 means, and he was led to believe that if you go  
12 out-of-network, you'd be paid usual and customary, or the  
13 coverage would be equivalent to a usual and customary, UCR  
14 rate.

15 THE COURT: And who -- did somebody actually say  
16 UCR, usual and customary?

17 MR. KATZ: UCR is what I'm using.

18 What I think he would say, Your Honor, based on my  
19 conversations with him, is that he was told that he would be  
20 paid what doctors of similar experience and background who  
21 provide the same service ordinarily get paid for rendering  
22 these services. And that he understood to mean what I call  
23 usual and customary, UCR.

24 I don't know at this point, we obviously haven't  
25 taken any discovery, if somebody actually said UCR to him,



1 or usual and customary rates. So that's discovery we  
2 haven't taken yet.

3 THE COURT: Fine. All right.

4 MR. GOLDSTEIN: Your Honor, may I address some of  
5 the facts --

6 THE COURT: Yes, of course.

7 MR. GOLDSTEIN: Thank you.

8 Just by way of background and, obviously, the same  
9 of this plaintiff, as what you -- this is what I was told by  
10 my client.

11 THE COURT: Right.

12 MR. GOLDSTEIN: The way this process worked,  
13 plaintiff worked for a company called Sylon, who is a Ohio  
14 based company who has offices, as I understand, from  
15 throughout the country. Sylon was unhappy with their  
16 previous health care provided, they used, and gave to their  
17 employee, so they scrapped Aetna and decided to go with  
18 Anthem. Okay?

19 In November 2002 Sylon submits an application to  
20 Anthem to be enrolled. In December, I mean, I'm sorry.

21 In January of '03, Anthem approves Sylon's  
22 application and approves the individual like Mr. Rouwendal  
23 who applied for coverage under the -- under the plan.

24 From what I understand, Sylon offered no other  
25 options other than Anthem. It's not like they had -- you

1 could choose Anthem or Oxford or some other health plan.

2 THE COURT: He said --

3 MR. GOLDSTEIN: He made a choice.

4 THE COURT: Between Sylon or somebody else?

5 MR. GOLDSTEIN: He's saying through his wife's  
6 plan, that's right. I have no reason to believe that's not  
7 accurate.

8 THE COURT: Right.

9 MR. GOLDSTEIN: But I'm saying with respect to what  
10 was offered, from what we know from our, my client's  
11 standpoint --

12 THE COURT: Right.

13 MR. GOLDSTEIN: -- this was the only option for  
14 employees of Sylon.

15 THE COURT: Right.

16 MR. GOLDSTEIN: So the certificate, on January 9th,  
17 Anthem approves Sylon's application, and then the documents,  
18 including this certificate, goes out to people who were  
19 approved for coverage, including plaintiff.

20 So the timing, from what I understand, the timing  
21 is off. I don't think plaintiff received this prior to him  
22 being already enrolled in the plan.

23 Nevertheless --

24 THE COURT: Well, that would be --

25 MR. GOLDSTEIN: -- that's a fact we're going to

1 have determine at some point.

2 THE COURT: Exactly. Which ever tribunal which  
3 hears this case will decide whether he's telling the truth  
4 or not.

5 MR. GOLDSTEIN: Sure.

6 But getting to the merits of what this document  
7 says, I think the court should not just look at M-17 in a  
8 vacuum. There's a couple of provisions throughout this  
9 certificate that clearly delineate that what he's entitled  
10 to if he chooses a non-network provider is the lesser of the  
11 actual charge or the standard rate for a network provider.

12 The part where it's in bold, Maximum Allowable  
13 Amount, in M-17, if you look at the fourth bullet point, it  
14 specifically says that that's one of the factors that is  
15 considered in determining payments for non-network payments.  
16 It's the amount accepted by a network provider as payment in  
17 full under the partition agreement for this product.

18 THE COURT: It's one of the four.

19 MR. GOLDSTEIN: It's one of the four. So he knew  
20 that that was a factor.

21 THE COURT: Are you saying that the record will  
22 show that your response to his fraud claim will be that  
23 you're going to show, in whatever court we deem this goes  
24 to, that Anthem in fact looked at amounts charged by other  
25 providers for the same or similar service?

1 MR. GOLDSTEIN: Correct.

2 THE COURT: They did?

3 MR. GOLDSTEIN: Correct.

4 We have a payment schedule where the amount that  
5 was paid is in line with what's paid throughout the country,  
6 including what's paid by Medicare.

7 THE COURT: And that you looked at any unusual  
8 medical circumstances requiring any additional time, skill  
9 or experience?

10 MR. GOLDSTEIN: Well, that that is part of the  
11 process, from my understanding, is plaintiffs fault why we  
12 did not do that, they never appealed the decision of the  
13 denial of coverage, which is required under the plan. And  
14 if they did so, that's when those extraordinary  
15 circumstances would come up and would be reviewed. The  
16 way --

17 THE COURT: But that -- does it say that here?

18 MR. GOLDSTEIN: The appeal process, Your Honor, is  
19 on page M --

20 THE COURT: No, I'm not asking that, this doesn't  
21 say you have to appeal for us to consider any unusual  
22 medical circumstances.

23 MR. GOLDSTEIN: No, but it's in the booklet, it  
24 explains the procedure.

25 THE COURT: It says, we will not look at any

1 unusual medical circumstances unless you appeal?

2 MR. GOLDSTEIN: No, it does not, Your Honor. I'm  
3 just telling you how procedurally it works.

4 THE COURT: So Anthem does not look at any unusual  
5 medical, requiring any additional time, skill or experience  
6 unless there's an appeal?

7 MR. GOLDSTEIN: Well, the way that the system  
8 works, it's a little more complicated. The way the system  
9 works is, from what I understand, the claim's filed  
10 electronically, when it hits the system, it's billed  
11 according to the code rates, and it's paid, the payments are  
12 made according to the code rates. Whatever the rates are in  
13 the system, less the deductible, less the co-pay, and that's  
14 what was paid out.

15 THE COURT: But the rate in the system is solely  
16 the in-network provider rate.

17 MR. GOLDSTEIN: No, no, Your Honor.

18 THE COURT: What's the rate in the system?

19 MR. GOLDSTEIN: The rate in the system is the  
20 lesser of the actual charge that was charged by the doctor  
21 or what's in the system for the provider.

22 THE COURT: Wait a minute. That's not answering my  
23 question.

24 What's the rate that's in the system?

25 MR. GOLDSTEIN: The rate in the system varies,

1 depending upon where the coverage is and throughout the  
2 country. In different -- in different states it's in  
3 different amounts, all within the \$2,000 range that was  
4 paid.

5 THE COURT: But the rate in the system, does it  
6 differ from the network provider rate?

7 MR. GOLDSTEIN: The rate in the system is the  
8 network provider rate.

9 THE COURT: That's what I asked you about four  
10 questions ago.

11 MR. GOLDSTEIN: I apologize, Your Honor.

12 THE COURT: Okay.

13 That's okay. That's what I thought.

14 So basically, when a claim goes in, a computer  
15 automatically sends out a check for the in-network provider  
16 rate, regardless of the bill, unless the bill from the  
17 out-of-network provider happens to be less than the  
18 in-network rate?

19 MR. GOLDSTEIN: That is my understanding. Unless  
20 there is also additional data provided as to why it may meet  
21 extenuating circumstances. I don't know how, what was  
22 submitted in this case, so I don't know if that information  
23 was provided.

24 THE COURT: How often does the in-network rate end  
25 up being more than the actual rate charged by an

1 out-of-network provider?

2 MR. GOLDSTEIN: It would be very rare, Your Honor.  
3 It's incentive for a doctor to be in plan.

4 THE COURT: I'm not questioning -- I'm just saying.

5 MR. GOLDSTEIN: Absolutely.

6 THE COURT: They basically -- right. So it, almost  
7 never is the bill, it's the in-network rate.

8 So what he's saying is his claim is that someone  
9 told him, and I'm not evaluating the merits of the claim,  
10 his claim, as I understand it from Mr. Katz, is someone told  
11 him that when he submitted a claim, the four bullets in the  
12 column marked "Maximum Allowable Amount," would be used to  
13 determine his claim. And that it wouldn't be limited by the  
14 last sentence of the second paragraph in the next column on  
15 page M-17 of the health certificate, which limits it to  
16 network providers unless he appeals.

17 MR. GOLDSTEIN: That appears to be what he's  
18 saying. However, you know, if you're alleging  
19 misrepresentations, we need a little bit more to go on that.

20 THE COURT: I'm not saying -- I'm not alleging  
21 anything. I'm just trying to figure out whether the claim  
22 sounds in pre-plan misrepresentation or post plan arbitrary  
23 and capricious behavior. That's what -- and I'm not saying  
24 anything about the merits of the claim.

25 MR. GOLDSTEIN: From --

1 THE COURT: Just trying to figure out what the  
2 claim is.

3 MR. GOLDSTEIN: But from my --

4 THE COURT: All right?

5 And from my -- I mean it -- whatever court you're  
6 in, presumably, there's going to be a battle about who said  
7 what to whom when. You're going to say you couldn't  
8 possibly have asked the question because you didn't have the  
9 booklet until you picked our plan. But I'm not hear to hear  
10 all that. That may be true, that may not be true. I don't  
11 know, and that's not outcome determinative of what the claim  
12 is. The question is, what is the claim.

13 MR. GOLDSTEIN: Sure.

14 But, Your Honor, he, plaintiffs counsel is saying  
15 that plaintiff looked at this language and then questioned  
16 this language. So it's clearly related to the plan, the  
17 case is related to the plan, and the development court, and  
18 the Supreme Court said, where it relates to the plan at  
19 issue, it's trumped by ERISA.

20 THE COURT: But -- so the only, let's suppose that  
21 he is sitting in a room trying to decide which plan to buy.  
22 All right? Even though you say there was only one available  
23 as an employee. He's comparing his -- what's the name of  
24 the company --

25 MR. GOLDSTEIN: Sylon.



1 THE COURT: What does Sylon do, just so maybe I can  
2 remember the name better?

3 MR. GOLDSTEIN: I --

4 MR. KATZ: Your Honor, I'm sorry, I don't know.

5 THE COURT: You don't know either.

6 Well, sounds like a halfway between nylon and  
7 Xenon.

8 All right. So, he's sitting in the company  
9 cafeteria, or wherever, in his home, in his living room, and  
10 he's looking at his wife's COBRA plan, and he's looking at  
11 the Sylon plan, and he's saying, where should I spend my  
12 dollars to pay for coverage. And someone says to him, look,  
13 here it says, someone from Anthem or Sylon -- how come you  
14 only have Anthem in here, Mr. Katz? Why don't you actually  
15 have whoever made the misrepresentation?

16 MR. KATZ: My understanding is it is Anthem, so  
17 that's why we have not added any parties or ERISA --

18 THE COURT: He's going to say, he's going to  
19 testify that he actually spoke to some representative of  
20 Anthem?

21 MR. KATZ: It's my understanding, now if that  
22 person ends up being a broker, it's sometimes, you know, a  
23 lay person meets with people like --

24 THE COURT: But it's somebody purporting to be  
25 stating what the Anthem coverage is?

1 MR. KATZ: Well, that's right. That's right.

2 THE COURT: Okay. So --

3 MR. KATZ: It could have been could be an agent of  
4 the plan, we haven't gotten that far.

5 THE COURT: Exactly. I understand that.

6 Okay. He's saying he spoke to someone purportedly  
7 representing the interests of Anthem or giving him  
8 information as if it were from Anthem. These are all  
9 questions to be decided later, if we ever get there.

10 MR. GOLDSTEIN: Sure.

11 THE COURT: And that person says to him, oh, look  
12 at M-17. If you go out-of-network you will get an amount  
13 charged by other providers for that, the same or similar  
14 service, or -- and if there's any unusual medical  
15 circumstance, we'll consider that, we'll also consider a  
16 resource base relative value scale. What is that? What's  
17 bullet three?

18 MR. GOLDSTEIN: I have to check with that my  
19 client, Your Honor. I'm not sure.

20 I'm now not sure how that is part -- what that  
21 language means, what that term means, resource based  
22 relative values.

23 THE COURT: What do you think it means? You're a  
24 relatively educated lay person.

25 MR. GOLDSTEIN: The value -- the value of the

1 procedure, I assume. But it varies. I don't know. I mean  
2 I don't want to represent what it means, Your Honor, because  
3 I really don't know.

4 THE COURT: That's part of the problem here. This  
5 literature requires you to ask questions because it's  
6 inexplicable. I'm a modestly educated lay person, and I'm  
7 not sure I know what the phrase "other factors we determine  
8 are relevant, including, but not limited to, a resource  
9 based relative value scale."

10 MR. GOLDSTEIN: I think the issue though of what it  
11 means is -- goes back to the issue that that's related to  
12 the plan.

13 THE COURT: All right.

14 What I'm trying to say --

15 MR. GOLDSTEIN: And I don't --

16 THE COURT: -- to you, Mr. Goldstein, yes, it is.  
17 If you, unequivocally say, he bought this plan, I didn't  
18 look at a thing I said, whatever, it is, it's mine. But  
19 what he's saying is he actually looked at all these bullet  
20 points, had a conversation with someone, was misrepresented  
21 and never bought a plan other than the one he thought he was  
22 buying. That's because there's language in here that it's  
23 perfectly logical you might ask a question. And I'm saying  
24 it's right, I was wrong, or what the answer was or wouldn't  
25 be to that question. I'm just saying that's what his claim

1 is. His claim is I got the book, I compared the plans  
2 side-by-side, this one and the other one, and I bought this  
3 one because someone told me what this language meant in this  
4 one. Is basically what he's saying. And the question is  
5 what does the law do under those circumstances.

6 MR. GOLDSTEIN: Your Honor, I believe it's,  
7 preempted by ERISA, as the long line of plaintiffs who have  
8 tried to make these sorts of arguments before in cases --

9 THE COURT: Give me the best case for that.

10 MR. GOLDSTEIN: In the Lamonica case that this  
11 court decided --

12 THE COURT: Lamonica?

13 MR. GOLDSTEIN: Yes.

14 THE COURT: Do we have a copy of Lamonica for me?

15 MR. GOLDSTEIN: I'll get one, Your Honor.

16 May I approach?

17 THE COURT: Yes, yes.

18 Just give it to my law clerk. She'll give it to  
19 me.

20 MR. GOLDSTEIN: I apologize, it's marked up but --

21 THE COURT: Or my courtroom deputy.

22 That's okay.

23 MR. GOLDSTEIN: In the Lamonica case, if I may,  
24 Your Honor.

25 THE COURT: Yes.

1 MR. GOLDSTEIN: The plaintiff filed a complaint in  
2 a New York, in New Jersey Superior Court, alleging state  
3 tort law claims for bad faith, to seek negligent --  
4 intentional affliction of emotional distress. The court  
5 reasoned that the bad faith claims were based upon the  
6 allegedly and improper processing of their -- the claim for  
7 benefit. And that was accepted.

8 THE COURT: That's different, that's -- right.

9 MR. GOLDSTEIN: The court also dismissed their  
10 deceit and fraud cause of actions on the grounds that the  
11 state law claims for fraud and deceit are preempted by  
12 ERISA.

13 THE COURT: And what were the fraud and deceit  
14 premised on, factually?

15 MR. GOLDSTEIN: I believe, Your Honor, obviously,  
16 you have the decision, I believe it was with respect to  
17 representations made about the necessity of cosmetic breast  
18 reduction surgery.

19 THE COURT: Hang on, let me -- I've got your copy,  
20 let me look. It's not fair to ask you questions when you  
21 don't have the case. Let me take a quick look at it and  
22 then I'll hand it back to you.

23 So this was, plaintiff was claiming that she needed  
24 breast reduction surgery because she had neck and back  
25 problems caused by the the excessive weight of her breasts.

1 The defendants argued that the surgery was cosmetic and  
2 therefore excluded from coverage.

3 Where are the fraud and deceit claims in here?

4 MR. GOLDSTEIN: I believe they're at page 19, Your  
5 Honor.

6 THE COURT: All right.

7 THE COURT: At 19 in this case the -- it recites  
8 that the tort of deceit was allegedly allowing an  
9 unqualified person to serve as the independent consultant  
10 who reviewed the claims for coverage. Because that person  
11 was not a licensed physician.

12 The court finds again these claims are directly  
13 related to the alleged improper processing of Lamonica's  
14 benefits and are therefore preempted. And then it cites  
15 several other cases that have specifically held that state  
16 law claims for fraud and deceit are preempted by ERISA,  
17 citing Davidian, Reilly -- Davidian and Reilly.

18 What that doesn't address is the crux of what I've  
19 been -- you may have this case back. I've not read -- have  
20 I read Davidian and Reilly, was that in the package?

21 THE CLERK: I don't think so.

22 THE COURT: Okay. That was talking about the  
23 processing of the claim.

24 As I understand it, the plaintiff is not making a  
25 claim here because of the processing of the claim.

1 MR. KATZ: That's correct, Your Honor.

2 All those cases speak about post plan activity.

3 This is -- the misrepresentation we allege here is  
4 what induced him to purchase the coverage in the first  
5 place.

6 Using the case that Your Honor just reviewed, if  
7 the allegation -- if I may give one hypothetical, if the  
8 allegation there was, you told me before I purchased this  
9 plan that you would cover breast reduction surgery, and you  
10 didn't do it, and it turns out they didn't do it, that would  
11 be -- that claim would not have been preempted.

12 But here she purchased the coverage, she later goes  
13 for a breast reduction surgery, the carrier determines it's  
14 not medically necessary. That is clearly involved with the  
15 plan. That, you know, that's flat smack in the middle of  
16 the plan's function as a fiduciary.

17 THE COURT: I certainly agree with you about that  
18 case.

19 I don't know what the Reilly and -- I'm going to  
20 ask my law clerk to go pull them, so we take a look at the  
21 cases cited. There's a blanket sentence after that that  
22 says, courts routinely decide that cases of fraud and deceit  
23 are preempted. I'm going to go read the cases cited and the  
24 case cited by the defendant.

25 MR. KATZ: That's fine.

1 THE COURT: Unless anyone of you has them here.

2 MR. KATZ: Actually I don't, Your Honor, and I  
3 can't say I remember every single fact pattern in the case.

4 Well, in the Lamonica -- I may not be pronouncing  
5 -- the decision he handed me, it's not old, it's not new, so  
6 it's citing to 1988 cases, the chances are you haven't  
7 looked at it, that's why we're going to get them, and the  
8 cases may have had a great amount of law since then, but I  
9 thought we ought to at least read them. It's a blanket  
10 statement. It's a District Court case, it doesn't bind me,  
11 I'm trying to come out with the right answer here.

12 MR. KATZ: As I understand.

13 As Your Honor knows, I cited cases that deal with  
14 this issue of pre-plan misrepresentation.

15 THE COURT: So I understand it, it is not the  
16 plaintiff's desire ever to try to get leave to appeal and  
17 resubmit for unusual medical circumstances?

18 MR. KATZ: We shouldn't -- first of all, this is  
19 the first I ever heard, I never heard of a situation like  
20 this, where they say up front we're going to consider  
21 certain criteria and then they won't consider it until you  
22 appeal, but --

23 THE COURT: Neither have I? That's a new one for  
24 me, and I thought I heard it all.

25 MR. KATZ: I'm sorry, Your Honor.



1           But putting that aside, no, Your Honor. I mean I  
2 would even venture to say they probably processed the claim  
3 correctly because they're going to pay the network rate  
4 every single time. And if it turns out they actually pay a  
5 thousand dollars for doing metastatic brain surgery, so be  
6 it.

7           THE COURT: He said it was 2,000, your client  
8 said --

9           MR. KATZ: It was 1,000.

10          MR. GOLDSTEIN: Well, that's after the deductible  
11 and co-pays.

12          THE COURT: All right.

13          After the deductible and co-pays.

14          What is the full, the in-network rate for  
15 metastatic brain --

16          MR. KATZ: \$2,450.93.

17          THE COURT: All right. Who does it --

18          MR. GOLDSTEIN: A couple of hundred dollars cheaper  
19 than what Medicare provides, and other providers throughout  
20 the country pay for that surgery.

21          MR. KATZ: Well, that -- first of all, we're  
22 talking about a commercial plan, not Medicare, number one.  
23 And number two, I would seriously dispute that the usual  
24 customary --

25          THE COURT: What's the UCR for this procedure?

1 MR. KATZ: We --

2 MR. GOLDSTEIN: What they're claiming it is --

3 MR. KATZ: What was submitted by these

4 neurosurgeons who relied --

5 THE COURT: No, UCR, is there a UCR that you've  
6 looked at, any database?

7 MR. KATZ: If I may, Your Honor, these  
8 neurosurgeons rely on Ingenix, as Your Honor may know,  
9 Ingenix --

10 THE COURT: Oh, I know a lot about Ingenix.

11 MR. KATZ: I figured you would, Your Honor.

12 And Ingenix is considered by many of -- in the  
13 industry, one of the entities that gathers this kind of  
14 information to determine usual and customary rates.

15 This practice relied on what's called their  
16 customized Ingenix fee analyzer, which is based upon a  
17 neurosurgeon within the zip code of Hackensack, New Jersey,  
18 rendering these specific CPT codes, and that's how they  
19 bill. So that -- what's been represented to me by the  
20 practice is in fact UCR. That might be an expert issue  
21 ultimately, who knows.

22 THE COURT: Well -- that may actually show you  
23 Ingenix, yes, because I don't know, I haven't had the  
24 benefit of getting to a hearing on precisely how the Ingenix  
25 database goes.

1 MR. KATZ: Your Honor, I have fair amount of  
2 experience in this area, I do a lot of managed care  
3 litigation. Ingenix guards this thing like Fort Knox.

4 THE COURT: Well, it's certainly clear to me from  
5 my efforts to find out about it for the last five years, it  
6 certainly is guarded like Fort Knox.

7 MR. KATZ: I understand.

8 THE COURT: I've never been battling at the doors  
9 of Fort Knox so long just to find out information which  
10 might be perfect, just wonderful, but I'd like to know just  
11 what it is.

12 MR. KATZ: I'm fully familiar. I know what -- the  
13 cases Your Honor is referring to.

14 But the physicians I've represented in other  
15 matters that have showed me their Ingenix fee analyzers,  
16 it's a book, it says, CPT code, you know, 91213, 50th  
17 percentile; 70th percentile this amount, that amount, you  
18 know, it's a chart, how they --

19 THE COURT: The question is, what is the source of  
20 the data that's entered into that chart, and does it include  
21 non-physician services? I have a lot of questions about the  
22 data, because I just want to know, having had a case  
23 involving it for so long, and I'm not asking, it doesn't  
24 affect you right now --

25 MR. KATZ: Right.

1 THE COURT: -- because your claim is not whether  
2 the Ingenix database correctly or incorrectly comes up with  
3 a UCR figure, or is a premise for a UCR figure. Your claim  
4 is that your client was told by someone purportedly on  
5 behalf of Anthem. And obviously, this raises questions of  
6 agency that are not being ruled on. But that someone told  
7 your client that his claims would be reviewed using a UCR  
8 type database. And he was sold a plan that did not.

9 MR. KATZ: That's --

10 THE COURT: And the defendants would counter that  
11 while there are four bullet points in the brochure, the  
12 second paragraph of the second column tells you that you  
13 get -- that the maximum allowable amount is the lesser of  
14 the actual charge or the charge used by in-network  
15 providers, which actually makes those bullets sort of  
16 meaningless.

17 MR. KATZ: Exactly. I mean we're not here on a  
18 summary judgment --

19 THE COURT: Why --

20 MR. KATZ: -- but there's fundamentally --

21 THE COURT: -- Mr. Goldstein --

22 MR. GOLDSTEIN: Yes.

23 THE COURT: -- you're in the wrong courtroom for  
24 this kind of case, I think you probably know that by now.

25 MR. GOLDSTEIN: I am sensing -- I am sensing.

1 THE COURT: No, no, seriously, sir. I've been  
2 looking at gobbledygook for years now. And this -- and this  
3 kind of gobbledygook. And I'm not ruling, but I do -- it's  
4 sort of jumping off the page at me as I'm trying to orally  
5 work through it myself, that the bullets are meaningless  
6 once you get to the second paragraph of the second column.

7 MR. KATZ: That's right.

8 MR. GOLDSTEIN: Well, it might make a difference if  
9 you look at the paragraph preceding that, where it talks  
10 about network providers as opposed to non-network providers.  
11 There's a distinction made.

12 MR. KATZ: No, but the point is, you'll never get  
13 the maximum allowable.

14 THE COURT: Then you never get the maximum  
15 allowable based on the definition of maximum allowable  
16 amount.

17 MR. KATZ: That's it.

18 MR. GOLDSTEIN: Well, there could be instances --  
19 well, this particular case where he's claiming that UCR is  
20 \$30,000 and the payment was 22, there could be situations  
21 where the gap is much shorter, or that what's paid by what a  
22 physician charged for who is in plan is less.

23 THE COURT: You just told me about ten minutes ago  
24 that never happens.

25 MR. GOLDSTEIN: It's unlikely that it could happen.

1 The difference here --

2 THE COURT: You're -- here's the problem. Even --  
3 even -- we're here, three lawyers, we've all, I don't know,  
4 how many years have you been practicing law, Mr. Goldstein?

5 MR. GOLDSTEIN: Seven years.

6 THE COURT: You're a smart guy practicing law seven  
7 years; I'm a smart woman practicing law 31 years, and you,  
8 Mr. Katz?

9 MR. KATZ: 15.

10 THE COURT: 15. All right.

11 So I have some years on you, which means my  
12 education is more dated. So let's say we're all about  
13 equal, an ordinary lay person. Even you or I are struggling  
14 with what this means. So it's logical that someone's going  
15 to ask a question. You can't -- I mean if it were so  
16 inherently obvious from the written page, then you might  
17 have an argument that says, oh, that's so inherently  
18 preposterous, he clearly knew what he was getting, even -- I  
19 mean I don't care if he asked someone is the sky blue and  
20 the person said, the sky is orange. That's just ridiculous.  
21 Look, it's as clear as day in black and white on page M-17.  
22 The trouble is, it's as murky as mud on page M-17, which  
23 means that it's logical that someone asked a question.

24 MR. GOLDSTEIN: Well, I don't think the facts play  
25 out as it being logical, the surgery that was performed,

1 that was being disputed here was two and a half years after  
2 the plain was effectuated for this plaintiff.

3 THE COURT: But he wasn't asking specifically about  
4 surgery, he was saying, as I understand Mr. Katz, hey, look,  
5 I want to be sure I always get the doc I think is best for  
6 my health.

7 MR. GOLDSTEIN: Right.

8 THE COURT: Right?

9 I mean I'm trying to distill it down to its  
10 simplest, first grader type language. And I'm going to let  
11 Mr. Katz change, if what I said oversimplifies in any way  
12 his concern. He wasn't saying, oh, look in 2001, and I'm  
13 picking dates out of the air, he's not saying in 2001 I knew  
14 my wife was going to have brain cancer in 2003 so I picked  
15 this policy.

16 MR. GOLDSTEIN: Well, when he filled out his  
17 application she already new she had cancer, it was a  
18 pre-existing --

19 THE COURT: Well, then he may have.

20 MR. GOLDSTEIN: -- the -- my point is for two and  
21 a half years they never said they were defrauded or  
22 misrepresented any information.

23 THE COURT: Because they thought -- they thought  
24 they were going -- that they bought a policy that covered,  
25 they're saying they thought they bought a policy that gave

1           them a UCR based rate of reimbursement.

2                   MR. GOLDSTEIN:   Okay.

3                   But even if they're right, what they'e complaining  
4           about was the amount that was paid.

5                   THE COURT:   No, see, that's where I fundamentally  
6           disagree with you.

7                   You are just -- I do not agree with you on that,  
8           Mr. Goldstein.  I agree with you that it's an issue that can  
9           legitimately be claimed, and is all the time, I suppose, by  
10          carriers.  But he's not -- he's saying I'm not challenging  
11          your processing, because your computer kicked out the right  
12          check.  He's saying no one told me that I wouldn't have  
13          usual medical circumstances looked at until I appealed, if  
14          I'd known that, I might have filed a timely appeal.  But I  
15          didn't.

16                  But anyway, he's saying the true way the plan works  
17          was not told to him, that he was told the out of plan --  
18          this plan would give him a UCR basis for reimbursement, and  
19          the truth is that unless you're as deeply familiar with  
20          insurance litigation as I am becoming, to my great chagrin,  
21          you would not know a lot of the buzz words that you take for  
22          granted because you represent carriers, and that I take for  
23          granted because I've had so much this litigation, and Mr.  
24          Katz takes for granted because he's had a lot of this  
25          litigation, which is this whole concept of in-network



1 providers and caps and this and that, so that that this  
2 second paragraph isn't so inherently obvious. In fact, it's  
3 anything but inherently obvious. Especially when preceded  
4 by the four bullets, that you can't say that the claim that  
5 someone told him what was covered is so preposterous that it  
6 couldn't possibly be. That it has to be a claim about the  
7 amount rather than the type of plan he got. He's saying I  
8 got a Ford plan, I thought I was buying a Cadillac plan.

9 MR. GOLDSTEIN: Right.

10 And in his complaint and in his affirmation he's  
11 not saying who told him he got a Ford, there's no evidence  
12 whatsoever with respect to that.

13 THE COURT: All right.

14 Okay. Mr. Goldstein, you and I both know that goes  
15 to evidence. Which believe me, if it were here, we would  
16 start scrutinizing.

17 But the trouble is that claim can't be here. The  
18 only thing that can be here, if you stay here under ERISA,  
19 is what does this plan provide. And if you come back to me,  
20 if I send you off and you come back to me, then I ask  
21 questions like, what does this plan really provide. How  
22 does one figure out whether the computer that just spits out  
23 a check automatically giving you the in-network provider fee  
24 is in fact arbitrary and capricious, if in fact the booklet  
25 says we're going to look at these four bullets.

1 MR. GOLDSTEIN: If the plaintiff believed that he  
2 was sold the wrong car --

3 THE COURT: Yes.

4 MR. GOLDSTEIN: -- when he got the explanation of  
5 benefits and the check for a thousand dollars, with the  
6 details about how to appeal that process because you may  
7 feel something, if you feel it's calculated in error, he  
8 could have appealed it then.

9 THE COURT: He didn't think it was calculated in  
10 error. He thinks it was the wrong plan. He's saying, --

11 MR. GOLDSTEIN: Well --

12 THE COURT: -- and if he appealed it and they  
13 said, no, no, no, let's talk about that. Let's suppose he  
14 wrote in a letter that said, to Anthem, I appeal your  
15 decision to reimburse me at the rate of \$2,000 less  
16 deductible, because it is not a UCR based rate. That is the  
17 basis of my appeal.

18 MR. GOLDSTEIN: Correct.

19 THE COURT: Anthem would have said, too bad, so  
20 sad, that is not your plan. Correct?

21 MR. GOLDSTEIN: Anthem would have looked at the  
22 documents he provided showing what usual and customary rates  
23 are, what -- why this was a circumstance that warranted a  
24 deviation from this. We had no opportunity to do that.

25 THE COURT: You're saying he had to appeal to get

1 you to look at the bullets. Are you willing to look --

2 MR. GOLDSTEIN: We're -- no --

3 THE COURT: Let me ask you this. Maybe I can  
4 settle this case. Are you willing now --

5 MR. GOLDSTEIN: Of course, to look at the appeal,  
6 yes.

7 THE COURT: Wait a minute. You haven't heard the  
8 rest of the question.

9 Are you willing now, I mean we can have a wonderful  
10 esoteric discussion about the metes and bounds of  
11 preemption, which I'm happy to do, as well as the insurance  
12 language, which if you want to do something useful, you  
13 should go back to your client and suggest that you sit down  
14 and rewrite things with them. Not just your client, all  
15 these clients.

16 MR. GOLDSTEIN: Sure.

17 THE COURT: Because these books are not clear at  
18 all to highly educated readers, much less uneducated  
19 readers, not in the remotest. I'm not even sure the claims  
20 processors have a clue what these nice books mean. The  
21 computer is programmed to spit out a check, it spits out a  
22 check, and then basically that's -- what Rouwendal probably  
23 didn't know, that's just the beginning, that's an invitation  
24 to negotiate. Right?

25 Right. But he didn't know that because it doesn't

1 say that in the book either. You have to start calling and  
2 yammering and explaining and then you get to your four  
3 bullets and whatever.

4 Be that as it may, are you now interested in taking  
5 a look at UCR and willing to calculate for the purposes of  
6 settlement only, a reimbursement rate based on a mutually  
7 agreeable database, as a point of discussion, putting aside  
8 the limitation about in-network providers? Because that may  
9 save both of you an awful lot of time and litigation costs.

10 Here's my concern. I can see me saying to you,  
11 I've thought long and hard about this, I really have, as you  
12 possibly can tell, perhaps, or not. I have. But I think  
13 that while there's no case directly on point here, it's  
14 closer to the pre-plan activity than it is to a claim about  
15 how the plan was processed or whether something that was  
16 covered under the plan should have been paid but wasn't  
17 paid, which is the standard junk -- the standard things we  
18 get. That this claim is conceptually different enough to  
19 say you're going back to state court. And then one or the  
20 other, you'll probably appeal, if you can. I don't even  
21 know if you can appeal a remand.

22 MR. KATZ: You can't, Your Honor, my understanding.

23 THE COURT: Because that is, if you could, you have  
24 two years in the circuit and it's very expensive for both of  
25 you. And I'm trying to avoid that, to see if there's a way

1 both of you gentlemen can sit down and see if you can work  
2 out a way, or is it not just this surgery? Do you want out  
3 of the plan, what you do really want?

4 MR. KATZ: Your Honor, this --

5 THE COURT: And do you want to go off the record  
6 now that we're talking about settlement? ,

7 MR. KATZ: Your Honor --

8 THE COURT: Because I think I know enough from both  
9 of to you decide this. I'm perfectly happy now to talk to  
10 you about settling this thing, if you want to settle before  
11 I make a decision about my jurisdiction.

12 MR. KATZ: Your Honor, with all due respect, this  
13 is a very significant issue in this area of the law, and I  
14 would -- I will take my chances and roll the dice on Your  
15 Honor making a decision on the jurisdictional issue. If Mr.  
16 Goldstein wants to talk settlement after this matter is  
17 remanded, if that's what Your Honor's decision is, I'll be  
18 happy to talk to him. But we've come to this point because  
19 of the significance of this issue.

20 THE COURT: I agree with you. It's significant. I  
21 also don't want you to think that I'm going to write a 20  
22 page opinion on the topic.

23 MR. KATZ: I appreciate that, Your Honor.

24 THE COURT: I scrutinize all the papers, I look  
25 very deeply at them. I may just rule from the bench.

1 MR. KATZ: Your Honor, I appreciate that, and I  
2 understand that an opinion that Your Honor may issue from  
3 the bench or even a written opinion is, you know, it's  
4 juris -- its precedential value is limited, or extremely  
5 limited. But it would nevertheless be a significant issue  
6 where a District of New Jersey Judge has made a ruling on a  
7 matter that comes up quite often. And I would respectfully  
8 ask that Your Honor make the ruling. I have no idea what it  
9 is. But I think it's an important ruling to make. I mean  
10 we've come this far, Your Honor. I'll take my chances, my  
11 client will take the chances.

12 THE COURT: Okay. And I certainly would never  
13 force you to talk settlement, that's not my goal. I was  
14 just seeing if I could save both sides some serious  
15 difficulty here.

16 MR. KATZ: I mean --

17 THE COURT: And I'm not -- I think I've been very  
18 loud and clear, and you're both highly intelligent attorneys  
19 and understand, I'm not ruling at all or even inclined to  
20 rule at all on anything related to the merits of this claim.  
21 All I am considering is what is -- what does the claim sound  
22 in, and is it properly the subject of ERISA preemption.

23 MR. KATZ: I understand, Your Honor.

24 THE COURT: All right.

25 Is there anything else either one of you wants to

1 to say before we take this under advisement?

2 MR. KATZ: Not from the plaintiffs, Your Honor.

3 THE COURT: All right. Mr. Goldstein?

4 MR. GOLDSTEIN: No, Your Honor.

5 THE COURT: All right. I'm going to take a brief  
6 recess.

7 ( After a brief recess court resumed ).

8 THE COURT: You may be seated, counsel.

9 I have gone back and read the two cases cited in  
10 the opinion handed to me by the defendants in this case.  
11 Both relate clearly to the way a plan was administered. So  
12 they are not particularly apposite.

13 I find that this case is more apposite to the  
14 Woodworkers Supply versus Principal Mutual Life Insurance  
15 Company case, and to the series of cases cited on page 9,  
16 -- excuse me, I'm using page 9 of the copy I have, it's page  
17 991, it would be 170 F. 3d. at 991 of that case, because  
18 what is the gravamen of plaintiff's complaint here is that  
19 the plaintiff was not sold the plan that the plaintiff  
20 thought he was being sold to cover himself and his wife, and  
21 relied on a representation as to what that plan consisted of  
22 or was, in order to decline to enter into another plan.  
23 It's logical and non-frivolous, although I make no fact  
24 findings here, and indeed, plaintiff will have many hurdles  
25 to climb as an evidentiary matter. But it is not inherently

1 implausible that there were such oral representations prior  
2 to the decision being made to subscribe to the Anthem plan,  
3 the plaintiff's wife was already ill. That makes it logical  
4 that the plaintiff would be looking, particularly closely,  
5 at the type of coverage, the basis for coverage provided in  
6 a plan, and would ask close questions about it, knowing that  
7 his wife had a lethal brain tumor and would probably, or  
8 might require surgery in the future.

9           While I don't get to the merits, if the health  
10 certificate were so crystal clear that it could not possibly  
11 render believable a claim that someone was told something  
12 else about what this plan's basis for reimbursement was, I  
13 might look very close, even more closely at it. However, in  
14 this circumstance the provisions of the health certificate  
15 that have been drawn to my attention are anything but  
16 crystal clear. Indeed, counsel is unable to even understand  
17 certain of them, which renders it logical that someone would  
18 can ask before subscribing to ensure that an understanding  
19 of his terms of the bullet points on M-17 made sense.

20           I am not rendering an opinion about what is or is  
21 not covered by the plan. That would be preempted by ERISA.

22           What this plaintiff says is he was not given the  
23 plan he believed he subscribed to. He believed he was  
24 subscribing to a plan that provided for reimbursement on a  
25 UCR basis, and he was given a plan that provided for



1 reimbursement on an -- with a cap and an in-network provider  
2 rate. Therefore, the claim for misrepresentation under  
3 state law can proceed, and it is not preempted by ERISA.  
4 There is no way that an ERISA evaluation in this court would  
5 even reach the claim that the plaintiff is making. This  
6 court would be limited to the record of the plan and how it  
7 determined reimbursement. That is not the question being  
8 posed by the plaintiff in his lawsuit. The plaintiff is  
9 saying, "I did not get the plan I bought." For that reason,  
10 I am remanding this case.

11 Is there anything further, gentlemen?

12 MR. KATZ: Nothing, Your Honor.

13 MR. GOLDSTEIN: Nothing, Your Honor.

14 THE COURT: All right. Thank you.

15 MR. KATZ: Thank you.

16 THE CLERK: All rise.

17 ( Court adjourned ).  
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