

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: CIVIL PART  
ESSEX COUNTY  
DOCKET NO.: L-1474-17  
A.D. # \_\_\_\_\_

NORTH JERSEY BRAIN AND )  
SPINE CENTER, )  
 )  
Plaintiff, )  
 )  
vs. ) TRANSCRIPT  
 ) OF  
 ) MOTION  
HORIZON BLUE CROSS BLUE )  
SHIELD, ET AL., )  
 )  
Defendants. )

Place: Historic Courthouse  
470 MLK Jr. Blvd. 1st Fl.  
Newark, NJ 07102

Date: April 13, 2018

BEFORE:

HONORABLE STEPHANIE ANN MITTERHOFF, J.S.C.

TRANSCRIPT ORDERED BY:

ERIC D. KATZ, ESQ. (Mazie, Slater, Katz & Freeman,  
L.L.C.)

APPEARANCES:

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L.L.C.)  
Attorney for Plaintiff

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(Greenberg Traurig, L.L.P.)  
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Defendants

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**(Transcribers Note: Portions of transcript are indiscernible due to Ms. Neidl being soft-spoken and background noise on audio)**

1 (Proceeding commenced at 10:56 a.m.)

2 THE COURT: Good morning, everybody.

3 MR. JAY: Good morning.

4 MS. NEIDL: Good morning.

5 MR. GOOBY: Good morning, Your Honor.

6 THE COURT: Okay. We're here on the  
7 employer's, you know, and Masco's motion to dismiss  
8 North Jersey Brain and Spine Center's complaint.  
9 Docket number is 1474-17. If I could have your  
10 appearances, please?

11 MR. KATZ: Yes. Good morning, Your Honor.  
12 Eric Katz of the law firm of Mazie, Slater, Katz and  
13 Freeman on behalf of the plaintiff.

14 THE COURT: Good morning.

15 MR. JAY: Good morning, Judge. David Jay  
16 from Greenberg Traurig for Horizon and the employer  
17 defendants. And my colleague, Cindy Neidl, is here *pro*  
18 *hac vice*.

19 THE COURT: Okay.

20 MR. JAY: So she can make here appearance.  
21 But I wanted to just make sure that was okay with you.

22 THE COURT: Yes. I said yesterday that --

23 MR. JAY: Okay, great.

24 THE COURT: -- will be fine.

25 MR. JAY: Thank you.

1 THE COURT: Mm-hmm.

2 MS. NEIDL: Thank you. Good morning, Your  
3 Honor. Cynthia Neidl with Greenberg Traurig for the  
4 defendants.

5 THE COURT: Good morning. Welcome.

6 MR. GOOBY: Your Honor, Steven Gooby with the  
7 firm Ansa Assuncao for the defendant, Masco  
8 Corporation.

9 THE COURT: Okay. So I -- I assume Horizon  
10 is going to take a lead on this, right?

11 MS. NEIDL: Correct.

12 THE COURT: Okay. Everybody else can relax.

13 MS. NEIDL: Can I use the podium just because  
14 I can't --

15 THE COURT: Sure. No problem.

16 MS. NEIDL: -- thank you.

17 MR. JAY: The eyes are going.

18 THE COURT: I hear you.

19 MS. NEIDL: Great. Thank you, Your Honor.  
20 So defendants have moved to dismiss all the claims in  
21 the complaint based on preemption and also failure to  
22 state a claim. And those arguments are somewhat  
23 intertwined so I'm going to address them together for  
24 the most part. But I want to start with some sort of  
25 general principles of federal preemption under ERISA.

1 So the purpose of federal preemption is to provide a  
2 national uniform system of regulation --

3 THE COURT: Well, isn't the standard a little  
4 bit different in New Jersey then on a federal level?

5 MS. NEIDL: -- I'm sorry. Is the preemption  
6 different?

7 THE COURT: Right.

8 MS. NEIDL: No. It's federal preemption. So  
9 it's -- so it's -- the same rules would apply whether  
10 you were in federal court or state court. There's two  
11 different types of preemption. There's one that's  
12 called complete preemption and --

13 THE COURT: And you're -- that's conceded  
14 that that doesn't apply here.

15 MS. NEIDL: -- that doesn't --

16 THE COURT: Correct?

17 MS. NEIDL: -- apply. Correct. So we're  
18 really talking about express preemption and that, under  
19 the statute, it broadly says (indiscernible) to an  
20 ERISA plan or a preempted. It's not quite that  
21 expansive. But we think it's -- it's certainly broad  
22 enough to cover the claims here. Another purpose of  
23 preemption is to provide an exclusive remedy to recover  
24 benefits under the plan. And I think if you look at  
25 each of the claims here, the goal is to recover the

1 benefits under the claim. And the allegations are that  
2 payment wasn't proper under the plan and that's what --

3 THE COURT: But what about the plaintiff's  
4 argument that, you know, this relates to Horizon's  
5 corporate policies, the way they -- you know, the way  
6 they process these claims?

7 MS. NEIDL: -- yes.

8 THE COURT: Is this case on remand from the  
9 district court?

10 MS. NEIDL: It is.

11 THE COURT: And didn't the District Court  
12 comment, make some comment about, you know, some of  
13 these claims, you know, not necessarily being preempted  
14 by ERISA?

15 MS. NEIDL: It -- it remanded it based on  
16 procedural.

17 THE COURT: That I understand.

18 MS. NEIDL: Yes.

19 THE COURT: But I think their --

20 MS. NEIDL: But I think the court's  
21 impassive, I believe, on -- on the merits of any of  
22 these claims with a preemption argument. It's based on  
23 a preemptive level. And in that case, the Court did  
24 address it. It would have been on a complete  
25 preemption, not whether the claims related to the ERISA

1 plan.

2 And -- and to your point about whether it  
3 involves the administration of the claim, yes, it does.  
4 And such claims are preempted under ERISA. The whole  
5 goal is not to interfere with the plan's administration  
6 under ERISA.

7 THE COURT: I know. I'm just think that, you  
8 know, I -- I do give some, you know, credence to the  
9 plaintiff's argument that isn't it a little premature  
10 to decide this now because, you know, how can you  
11 determine the scope of the preemption, how they relate  
12 to -- if they relate to, you know, state laws.

13 MS. NEIDL: I -- I think that it's a motion  
14 to dismiss and so you would have to look at the  
15 complaint. And I think it's fairly easy to look at the  
16 complaint and see what the plaintiff is alleging here  
17 and to say that's preempted --

18 THE COURT: But that --

19 MS. NEIDL: -- because --

20 THE COURT: -- that's -- you know, it's  
21 disputed.

22 MS. NEIDL: -- well, the complaint speaks for  
23 itself. I mean, it's the same thing if you were to  
24 allege a breach of contract and the parties might  
25 dispute something about the contract. But if the

1 contract doesn't apply at all, it's a matter of law for  
2 the Court. And that's what we're saying here. If you  
3 -- I mean, superficially, if you just make  
4 generalizations, you could come to one conclusion. But  
5 what we're asking for is look at the allegations, look  
6 at each of the claims. And you have to make the  
7 determination of whether it relates to the plaintiff.  
8 Is it connected to it? Is it going to interfere with  
9 the administration of the claim?

10 THE COURT: How can I do that at this  
11 juncture? I don't know any of the facts about the  
12 case. You know, there -- there's no way I can make a  
13 determination on this record --

14 MS. NEIDL: You --

15 THE COURT: -- about --

16 MS. NEIDL: -- you -- you can make a  
17 determination, with all due respect, on the allegations  
18 in the complaint. And that's -- that's what our motion  
19 to dismiss is based on. So how about if I address each  
20 of the claims to -- to explain why it is that you can  
21 make that determination, Your Honor? And I wanted to  
22 start with the unjust enrichment clause of contract  
23 claims because those are the most clear. Those are  
24 routinely found to be preempted under -- under ERISA,  
25 complete preemption as well as related to -- related to



1 (indiscernible) --

2 THE COURT: And with the cases you're citing,  
3 is that summary judgment or that's on a motion to  
4 dismiss?

5 MS. NEIDL: -- motion to dismiss. These are  
6 decided all the time. And the reason is, if you look  
7 at the unjust enrichment claims, if you look at the  
8 allegations, the allegations are that we failed to  
9 properly pay under the terms of the plan. So what  
10 they're seeking is coverage under the plan but they  
11 want to get around --

12 THE COURT: Well, now you're getting to a --  
13 into a big stretch now, you know? I mean, that's --  
14 that's your theory of what they're seeking, you know?  
15 I think the claims are a little bit different. And,  
16 you know, let me ask you this. What -- what remedy do  
17 the plaintiffs have, you know, if -- what remedy do  
18 they have?

19 MS. NEIDL: They -- they -- we do not dispute  
20 that they have the ability to preempt a plan under  
21 ERISA, which is what they could have and should have  
22 done in the first instance. And I -- I think this  
23 plaintiff, and certainly its Counsel, has argued up to  
24 the Third Circuit that providers should have standing  
25 in ERISA. And the Third Circuit has decided that they

1 have. So in ERISA -- so an out-of-network provider,  
2 other providers can bring claims under ERISA in the  
3 Third Circuit in -- in New Jersey State Courts. The --  
4 the -- the allegation is simply that they have  
5 assignment of benefits, they stand in the shoes of the  
6 beneficiaries and they can assert they have an ERISA  
7 claim.

8 The problem is, and the reason that providers  
9 want to get around ERISA, is because an ERISA claim is  
10 based on review of the administrative record. There's  
11 generally not discovery. It's also based on an  
12 arbitrary (indiscernible) review of the administrator's  
13 decision so there's deference given to the plan. In  
14 state law claims like this, although clearly they're  
15 trying to obtain benefits under the plan, they want to  
16 do it under state law, which -- which would interfere  
17 with the administration of the plan. So that's the  
18 unjust enrichment claim.

19 And then -- and I'm not -- I'm not trying to  
20 characterize their claims one way. What I'm doing --

21 THE COURT: Listen, I -- I'm -- I'm not --

22 MS. NEIDL: -- is based on the claims.

23 THE COURT: -- saying you couldn't get --  
24 make a motion that it's preempted at some point. I'm  
25 just wondering if now is the time.

1 MS. NEIDL: I absolutely --

2 THE COURT: Because it's a motion to dismiss  
3 on the pleadings.

4 MS. NEIDL: -- right. And -- and -- and the  
5 courts do grant such motions on the pleadings based on  
6 what the defendant is saying. And if you think about  
7 it, the purpose of ERISA is to avoid interference with  
8 the administration of the plans. It's to avoid  
9 unnecessary financial consequences on the plan. And  
10 if, in every case, a provider can just come in and say,  
11 you know, I'm trying to get benefits under the plan but  
12 I think I'll give it a different label and they get all  
13 the way through to summary judgment, it's interfering  
14 with ERISA plans.

15 It's interfering -- it's imposing financial  
16 consequences on those plans, which spreads out to all  
17 of us. So that's why, in the first instance, the Court  
18 can just look at the pleadings -- that's all we're  
19 asking you to do and you can determine whether those  
20 plans -- whether the plaintiffs are really just seeking  
21 benefits under the plans or whether there's something  
22 --

23 THE COURT: I'm -- I'm just having difficulty  
24 on this record, you know, I -- you know, obviously I  
25 read the allegations in the complaint and -- but, you

1 know, I just don't know any facts about the case. So,  
2 you know, that has to be flushed out a little bit in my  
3 judgment in order to, you know, grant the motion to  
4 dismiss based on preemption. And I don't think that,  
5 you know, there's any point in going through all the  
6 state law claims at this juncture because obviously, if  
7 they are preempted, then they're all going to be  
8 dismissed. If it's not preempted, then we can discuss  
9 whether the state law claims are viable or not. But I  
10 just need a little bit more factual information. You  
11 know, there's no -- no discovery's been done, correct?

12 MS. NEIDL: Well, we -- we have asked that  
13 the --

14 MR. KATZ: No -- no answer has been filed,  
15 Judge.

16 MS. NEIDL: -- we -- we have asked for a more  
17 definite statement in order to get the sufficient  
18 facts. It's really unfair to allow a plaintiff to come  
19 into court and say nothing to get -- to get to summary  
20 judgment. I mean, shouldn't the plaintiff have to come  
21 in and give you facts in order to make that happen?

22 THE COURT: Well, I think it's pretty clear  
23 what happened. They were either -- you know, there's  
24 three circumstances. They were either underpaid, not  
25 paid or there was a third one -- oh, they were

1 preauthorized and then they didn't pay. They didn't  
2 pay for emergency treatment and -- and having, you  
3 know, received medical bills, they agreed to reimburse  
4 but then refused to pay it back. So I think that's  
5 pretty clear what happened.

6 MS. NEIDL: Well, okay. But -- but I think  
7 that there has to be some theory of liability. And  
8 that's you if we march through each of the claims, we  
9 say okay, well, this is -- this is what they allege and  
10 here's why it's preempted and here's also why it fails  
11 to state a claim. I mean, I -- I think what they  
12 allege is a little different when they argue in  
13 opposition. But I think you're right. There's these  
14 buckets of claims. There's these --

15 THE COURT: Right.

16 MS. NEIDL: -- preauthorizations. There's  
17 this course of conduct that's all occurring because we  
18 are an ERISA administrator. And this is what occurs on  
19 a daily basis in claims by the millions.

20 THE COURT: Yes. That's what I think they're  
21 saying, you know?

22 MS. NEIDL: Right. And then they cap it over  
23 the course of four years. So let's take their course  
24 of conduct claim, implied contract. That requires a  
25 meeting of the mind and understanding --

1 THE COURT: Now I'm just hearing facts  
2 outside the pleadings. You know, it's -- it's -- I  
3 would have to consider facts outside the pleadings to  
4 make any sort of determination about that.

5 MS. NEIDL: I think you can just look at the  
6 facts in the complaint. And the facts --

7 THE COURT: I don't know anything about, you  
8 know, what the interaction was between the plaintiff  
9 and the defendant. I'm not saying we might not be able  
10 to bring a successful motion later. But I just think  
11 at this juncture, there's not enough of a record to  
12 make that determination.

13 MS. NEIDL: All right. Well, let -- let me  
14 take then the promissory estoppel and negligent  
15 misrepresentation claim. That requires a higher  
16 standard of pleading. You don't have that here. You  
17 again just have -- there was a -- there were -- I mean,  
18 we're talking about 63 patients. We're talking about  
19 multiple self-insured defendants or fully insured  
20 defendants. And there's no particularity at all with  
21 respect to those claims. I think the Court can say  
22 those are insufficiently pled and they -- they should  
23 be dismissed. I think the same holds true --

24 THE COURT: Why? Because we don't know what  
25 happened. You know, they attached all the E-O-Bs or

1 whatever they were, you know, specifying now okay, this  
2 was preauthorized and wasn't paid or, you know, we were  
3 paid nothing for this claim, we were underpaid for this  
4 -- it's 63 --

5 MS. NEIDL: I --

6 THE COURT: -- it's 63 patients. It was  
7 attached to the complaint. So I don't think there's  
8 any mystery really about what happened. But I just  
9 don't know enough about the processes that, you know,  
10 Horizon utilizes, what they do, how they make these  
11 determinations at this juncture. You know, I'm not  
12 saying you could -- couldn't bring a motion later. And  
13 I think the case law is pretty clear that, you know,  
14 courts are loath to -- you know, and some have  
15 dismissed a motion to dismiss. But, you know --

16 MS. NEIDL: -- absolutely.

17 THE COURT: -- many other courts have not and  
18 have said, you know, it's premature at this juncture to  
19 make that determination without a full record.

20 MS. NEIDL: Okay. And again, I go back to  
21 the point that it -- it's -- it's -- it does -- just  
22 doesn't seem right that the plaintiff can come in and  
23 say very little, especially where federal preemption is  
24 at issue and they get by by saying the least amount.  
25 It really encourages plaintiffs to say as little as

1 possible and assert as many claims as possible and  
2 include as many defendants as possible to get to the  
3 point that they want where they can leverage a  
4 settlement.

5 THE COURT: That's New Jersey notice  
6 pleading.

7 MS. NEIDL: Okay. So if I can go to the  
8 self-insureds then --

9 THE COURT: Okay.

10 MS. NEIDL: -- the self-insureds, there's no  
11 allegations about -- other than that they insisted that  
12 they provide these -- the ERISA plans for their  
13 employees, there's no allegations to any wrongdoing by  
14 any of them. There's no, based on the -- the --

15 THE COURT: So you're talking about the  
16 employers.

17 MS. NEIDL: The employers. There's only at  
18 this point, I think, five or six of them who are left  
19 in the complaint. So --

20 THE COURT: Okay.

21 MS. NEIDL: -- there needs to be some theory  
22 of liability with respect to those employer defendants.  
23 The -- the -- the root pleading that was used in the  
24 complaint is all defendants did everything together.  
25 We know that that's not true, right? And many of these



1 claims (indiscernible) defendants have been dismissed  
2 at this juncture. That's unfair to the remaining  
3 defendants. What did they do? Like take Bed, Bath and  
4 Beyond. They've got one patient at issue. Certainly  
5 they cannot allege all these claims against Bed, Bath  
6 and Beyond. Certainly Bed, Bath and Beyond didn't  
7 participate in all this conduct that's alleged. That's  
8 why we asked for a more definite statement to allow  
9 these defendants to file an answer that responds to the  
10 allegations.

11 THE COURT: Well, I suppose just -- you know,  
12 I'm just surmising but Horizon Blue Cross administers  
13 the plan. Correct?

14 MS. NEIDL: Horizon --

15 THE COURT: But -- but the -- but the  
16 employers are ultimately required to pay because --

17 MS. NEIDL: -- under ERISA --

18 THE COURT: -- they're self-funded.

19 MS. NEIDL: -- under ERISA.

20 THE COURT: Right. So I -- I assume that's  
21 the theory of liability here as to the employers. I --  
22 I mean, I'll here more from that from the plaintiff.

23 MS. NEIDL: Yes. I -- and I think that goes  
24 back to the point these are really ERISA claims for us  
25 to -- as state law claims. But --

1 THE COURT: And you could be -- you could be  
2 right, down the road, but just right now it's just --  
3 there's not a full enough record to make --

4 MS. NEIDL: -- understood.

5 THE COURT: -- a determination.

6 MS. NEIDL: But -- but in -- in terms of the  
7 self-insureds, the reason why they're in it is,  
8 obviously, is because of ERISA. But is there -- is  
9 there a basis for finding liability against them, even  
10 at this stage, based on the pleadings? What are the  
11 allegations against them? There -- there is this --  
12 they're not specific. They're incredible because  
13 obviously all of these employers weren't doing all of  
14 these things. So either a more specific statement or -  
15 - or preferably, that they just be dismissed at this  
16 juncture since there's no reason to find them liable.  
17 If they want to assert ERISA claims, that's a different  
18 story.

19 THE COURT: Okay.

20 MS. NEIDL: Thank you, Your Honor.

21 THE COURT: I'll -- I'll hear from the  
22 plaintiff.

23 MR. KATZ: Good morning, Your Honor. First,  
24 I'd -- I'd like to congratulate Your Honor on her  
25 instant nomination to the Appellate Division.

1 THE COURT: Thank you.

2 MR. KATZ: I understand that Your Honor --  
3 it's -- it's "temporary" but I have a feeling that it's  
4 going to be longer than that and that's a loss to the  
5 trial bar.

6 THE COURT: Thank you. I appreciate that.

7 MR. KATZ: Your Honor, I -- I hear where the  
8 Court is going with this so I -- I've been practicing  
9 long enough to know when to sit down and shut up. But  
10 I --

11 MR. GOOBY: That's not true.

12 MR. KATZ: -- but saying that, Judge -- but I  
13 would like to comment on -- on -- on a few things so we  
14 have it on -- on the record. We've been doing business  
15 -- North Jersey Brain and Spine Center has been doing  
16 business with Horizon for over 20 years. And I've  
17 represented the practice throughout that period of  
18 time.

19 Over that course of time, we've submitted  
20 thousands, many thousands of claims. Many of those  
21 claims were processed correctly in accordance with the  
22 course of dealings between the parties, many weren't.  
23 Many of those, or most of those, have been resolved  
24 either between the parties, principles themselves or  
25 between counsel over the years. Every day I'm on the

1 phone with Horizon's general counsel's office about  
2 something or another.

3 But these 63 claims could not be resolved  
4 which is why we're in this lawsuit. The last time we  
5 couldn't resolve claims of this same nature, typically  
6 the emergency services type claims, the practice sued  
7 Horizon in 2007. And we discussed it at length in our  
8 brief.

9 I deposed Horizon's corporate designee. She  
10 made it crystal clear that the manner in which Horizon  
11 reviews emergency services claims is based on Horizon's  
12 policy, its corporate policy of, this is how we  
13 determine if something is an emergency service and this  
14 is what we do when we determine, if it is an emergency  
15 service, how much we're going to pay. And the  
16 corporate representative made it crystal clear, we hold  
17 the member harmless and we pay billed charges. That's  
18 the course of dealing between the parties.

19 Now Horizon doesn't dispute that. They  
20 argue, well, you know, we're -- we're -- we're throwing  
21 all these estoppel documents in there. And you know  
22 what? They're probably right. We don't need that  
23 right now because they're not disputing the substance  
24 of what we're saying. And I don't need to seek  
25 estoppel. That could be down the road. The testimony

1 is what it is and it's -- it's pretty clear.

2 The only kind of preemption involved in this  
3 case is 514 conflict preemption. Now I know it seems  
4 -- from what Your Honor is saying, Your Honor is not  
5 going to rule in Horizon's favor today but I would like  
6 to be on the record on this. What 514 conflict  
7 preemption is, is that our claims have to relate to "an  
8 ERISA plan." And what that means is that in order to  
9 determine liability, to establish liability, the review  
10 of the plan is critical.

11 Now for the reasons I just mentioned, it  
12 isn't critical because it's Horizon's corporate policy.  
13 They'll -- they'll never succeed on 514 conflict  
14 preemption. But even more fundamentally, there's no  
15 indication here at -- even at this stage, that any of  
16 these policies are ERISA policies. So they're going to  
17 need to get over that hurdle before we can get into the  
18 514 argument.

19 As Your Honor also correctly understands,  
20 there's essentially two buckets of claims here. One is  
21 emergency services types claims, which we allege is  
22 based on -- should be disposed of based on the course  
23 of conduct of the -- of the parties and Horizon's  
24 policies which are crystal clear, having nothing to do  
25 with the plans, assuming they are ERISA plans. And the

1 second bucket is the preauthorizations where we get on  
2 the phone with Horizon and prior to that -- rendering  
3 the services, we get Horizon to preauthorize the  
4 services. And in many of those instances, Horizon made  
5 specific promises that claims would be covered or  
6 covered in a certain way. And we contend they weren't.  
7 And we relied on that, to our detriment.

8 Now Horizon made it crystal clear -- and this  
9 was the subject of my sur-reply, which the Court  
10 graciously allowed me to file. Horizon made it crystal  
11 clear that what we call the so-called Memorial Hospital  
12 rule -- and I will say we have come up with that dub or  
13 dubbed it that because we've litigated this issue all  
14 over the place, in state courts, in federal courts. We  
15 prevailed in two recent cases in Bergen County on this  
16 that are attached to our submission. We win on this  
17 issue in the district court all the time.

18 And Horizon concedes that the Memorial  
19 Hospital rule, when it does apply, "ERISA does not  
20 preempt state law tort claims for misrepresentation,  
21 estoppel and similar claims." That's at their reply  
22 brief at page six. Their only challenge to our  
23 preauthorization Memorial Hospital case is it only  
24 applies when it's about the existence of coverage  
25 versus the extent of coverage. But as we address in

1 our sur-reply, that's a reach for that argument. The  
2 federal courts have disposed of that a long time ago as  
3 a distinction without a difference. So ultimately, I  
4 don't think they're going to prevail on that either.

5 A couple of other quick things, Your Honor,  
6 I'm not going to go through the whole rigmarole of our  
7 claim by claim. But to just address a couple things  
8 that Horizon's Counsel brought up, first with regard to  
9 the unjust enrichment claims, and that -- I believe  
10 Counsel said those are routinely denied.

11 We attached as exhibit U to my associate's,  
12 Mr. Estes's, certification, the Srinivasan (phonetic)  
13 decision from the Appellate Division. Granted, it's an  
14 unpublished decision. It's published on Westlaw. But  
15 that decision made crystal clear that providers in the  
16 State of New Jersey have implied contract claims and  
17 unjust enrichment claims that arise out of the  
18 emergency services regulations. Indeed, the Appellate  
19 Division, specifically on the unjust enrichment claim,  
20 commented about at the liability trial the jury  
21 determined unanimously that Aetna benefitted from the  
22 services provided by Dr. Srinivasan and that therefore  
23 Aetna was unjustly enriched. So there is Appellate  
24 Division precedent of --

25 THE COURT: And that involved a provider not

1 a patient?

2 MR. KATZ: Dr. Srinivasan was similar to  
3 North Jersey Brain and Spine Center, provided emergency  
4 services and then expected to get paid by Aetna one  
5 hundred percent of billed charges under the emergency  
6 services regulations --

7 THE COURT: Right.

8 MR. KATZ: -- the same ones we plead here.  
9 And the Appellate Division agreed with the -- did not  
10 overturn the jury finding both in regard to implied  
11 contract and unjust enrichment. So there's certainly  
12 precedent for these kinds of claims.

13 With regard to the employer defendants, the  
14 employer defendants -- look, and we -- as Your Honor  
15 recognizes, this is its earliest pleading state. With  
16 regard to incorporating the -- the so-called employer  
17 defendants, we very specifically pled in the complaint  
18 which patients apply to which employer. There's only  
19 like one or two to each of the remaining four or five  
20 employer defendants. So a comment was made about hey,  
21 we dismissed all the other employer defendants --

22 THE COURT: Well --

23 MR. KATZ: -- why not these?

24 THE COURT: -- what is the claim against the  
25 -- the employer defendants?



1 MR. KATZ: That the buck stops with them.

2 Horizon --

3 THE COURT: Well, I understand that. But  
4 what's the theory of liability against them? I mean --

5 MR. KATZ: -- well --

6 THE COURT: -- I know they're ultimately  
7 responsible to pay but does, you know -- they're not  
8 doing any of the administration with these claims, are  
9 they?

10 MR. KATZ: -- no. Well, we believe -- what  
11 we pled in the complaint is Horizon --

12 THE COURT: I guess you can have an unjust  
13 enrichment claim against them.

14 MR. KATZ: -- correct. Look, the way this  
15 could play out at the end is discovery determines that  
16 Horizon solely administrated these claims and Horizon  
17 solely made the misrepresentations or Horizon was  
18 solely responsible --

19 THE COURT: Right. I just think it's a  
20 little premature. But you know --

21 MR. KATZ: -- it's --

22 THE COURT: -- I would --

23 MR. KATZ: -- it's just --

24 THE COURT: -- entertain that motion at a  
25 later date.

1 MR. KATZ: -- you know -- and why did we  
2 dismiss some of the employer defendants? Because --  
3 and this is in our papers as well, in our -- in Mr.  
4 Estes's certification, certain plans, Horizon conceded,  
5 were fully funded plans. In other words, the buck  
6 stops completely with Horizon.

7 THE COURT: Right.

8 MR. KATZ: Okay? These few remaining  
9 self-funded plans, we don't know yet where -- where  
10 they go. It may end up Horizon's totally on the hook  
11 for them but we don't -- we don't know (indiscernible)  
12 --

13 THE COURT: Okay.

14 MR. KATZ: -- with that. So unless Your Honor  
15 had some other specific questions, I'm going to short  
16 circuit the rest of my --

17 THE COURT: Okay.

18 MR. KATZ: -- presentation.

19 THE COURT: Counsel, anything further?

20 MS. NEIDL: Yes. Thank you, Your Honor.  
21 I'll be quick. I'm going to start with the employer  
22 defendants since we were just talking about that. And  
23 I think Your Honor is indicating correctly that there's  
24 no theory of liability although unjust enrichment might  
25 come into play. And -- and it -- I have to go back to,

1 but that's based on ERISA. They are unjustly enriched  
2 only to the extent that ERISA -- the ERISA plan exists,  
3 that the coverage existed and the coverage is due under  
4 ERISA.

5 And if I could just point to one of the cases  
6 that was submitted on that sur-reply talking about  
7 unjust enrichment claims -- and then this is after  
8 discussing the Memorial Hospital rule which I can talk  
9 about but ERISA, these unjust enrichment claims, if not  
10 preempted, would allow any provider who has provided  
11 care for which the ERISA claim denied coverage to  
12 challenge the ERISA plan's interpretation of its  
13 policies in state court. The outcome would run afoul  
14 to Congress's intent if the causes of action created by  
15 ERISA be the exclusive means of enforcing an ERISA  
16 plan's terms. In pertinent --

17 THE COURT: But the whole problem I have with  
18 it though is, you know, you're talking about the ERISA  
19 plan's provisions, you know? So then the plaintiffs  
20 are talking about Horizon's corporate policies. So I  
21 think we're kind of --

22 MS. NEIDL: -- well, no -- no.

23 THE COURT: -- at the --

24 MS. NEIDL: And --

25 THE COURT: -- (indiscernible) with this --

1 MS. NEIDL: -- and I agree. But we're --  
2 what we're talking about here is the sup (phonetic)  
3 insurance of the employer defendants who have -- who  
4 have done nothing wrong. They've hired Horizon.  
5 Horizon, in theory, could be reliable for --

6 THE COURT: It -- it sounds like more of  
7 those cases -- the -- those claims may go away once  
8 they determine, you know, what their involvement is.  
9 Sounds like they don't have enough information yet.

10 MS. NEIDL: -- then those claims should be  
11 dismissed. If they don't have a basis for bringing  
12 claims, especially against the employer defendants --  
13 again, they're -- they're alleging promissory estoppel  
14 against -- against employers whom --

15 THE COURT: Well, they're --

16 MS. NEIDL: -- they haven't spoken to  
17 earlier.

18 THE COURT: -- they're saying they don't know  
19 if they had any involvement in the processing of the  
20 claims or, you know -- once they figure out that --  
21 that it's entirely Horizon, it sounds like they're  
22 going to be amenable to letting them go too.

23 MS. NEIDL: And if I could just follow up on  
24 the Memorial Hospital just to point out that the  
25 sur-reply was unnecessary. We agreed to the extent of

1 that rule. We didn't make any distinction between the  
2 existence of coverage and the extent of coverage. We  
3 -- we said, with respect to both. If you have a  
4 misrepresentation, if -- if you go to plan and say do  
5 they have coverage and you say yes, in theory, that's  
6 outside the plan. Same thing if you go to the plan,  
7 how much am I going to get reimbursed, you'll get  
8 reimbursed X amount. Okay. That's intended to be  
9 outside of the plan.

10 That's not what's alleged here. If -- again,  
11 if you look at the allegations, the allegations are  
12 that we promised to reimburse correctly under the terms  
13 of the plan. Those are --

14 THE COURT: I don't know if that's --

15 MS. NEIDL: -- these claims are so different  
16 from --

17 THE COURT: -- but --

18 MS. NEIDL: -- all of the other cases.

19 THE COURT: -- that's your theory about what  
20 they're alleging and, you know, I just don't enough --

21 MS. NEIDL: Well -- well, my --

22 THE COURT: -- about the case --

23 MS. NEIDL: -- Judge, our theory --

24 THE COURT: -- to know whether or not --

25 MS. NEIDL: -- is that --

1 THE COURT: -- it's really true.

2 MS. NEIDL: -- excuse me. Sorry. Their --  
3 their theory is set forth in their complaint. That's  
4 what we moved on and I appreciate --

5 THE COURT: I think the other reasons are  
6 that Horizon, you know, has a policy of underpaying or  
7 not paying so it's -- it's pretty simply in that way.  
8 But, you know, we just have to know more about the  
9 case. You know, I'd -- I'd be amenable to, you know,  
10 refiling once you have a little bit more discovery  
11 under your belts. Who knows? You may prevail. I  
12 don't know. I just --

13 MS. NEIDL: Well --

14 THE COURT: -- don't know.

15 MS. NEIDL: -- yes. We would actually  
16 appreciate that in terms of maybe a stay or discovery  
17 because if preemption applies to these claims, then all  
18 the claims -- so -- but there's a question -- I -- I  
19 believe the only factual issue is, well, how do we know  
20 these are ERISA (indiscernible) here? It's never been  
21 said that they're not. And I think we all know that  
22 they are ERISA plans and these are plans of Horizon  
23 with ERISA. But if there should be discovery, we can  
24 have discovery with respect to the plan. And I think  
25 that we do need more definitive allegations in terms of

1 the different buckets. So we heard about emergency  
2 claims --

3 THE COURT: Okay. Well, you guys can start  
4 exchanging discovery then and get back to me, not just  
5 on preemption but on the prongs.

6 MR. KATZ: And Your -- Your Honor,  
7 respectfully, I -- and we've been up and down to the  
8 district court. This case is over a year and it's time  
9 for the defendants to file their answers and we conduct  
10 discovery in the ordinary cause. They have their  
11 rights, as we do, preserving our rights to file  
12 dispositive motions at a later date.

13 THE COURT: Right.

14 MR. KATZ: But we do have to start the case.

15 THE COURT: Yes. I think it starts just  
16 exchanging discovery and then, you know, maybe we can  
17 get a clearer picture of, you know, who's in, who's  
18 out.

19 MR. KATZ: In -- in which case, I will ask  
20 Your Honor, then as part of your ruling and order today  
21 to provide -- set forth the dates certain by which all  
22 defendants must answer the complaint.

23 THE COURT: Oh, so there's no --

24 MR. GOOBY: I think it's --

25 THE COURT: -- no answer filed?

1 MR. KATZ: No answers have been filed.

2 MR. GOOBY: -- probably governed by a certain  
3 amount of time after the -- after the motion is --  
4 after the order is entered. But we can -- I don't  
5 think we're going to have a problem --

6 THE COURT: Right.

7 MR. GOOBY: -- working that out.

8 THE COURT: Well, you can just answer within  
9 35 days --

10 MR. JAY: 30 days.

11 THE COURT: -- right?

12 MR. JAY: I think that's --

13 MR. KATZ: That -- that's fine.

14 MR. JAY: -- yes.

15 MR. KATZ: That's not --

16 MR. JAY: We have no objection to that.

17 MR. KATZ: -- yes.

18 THE COURT: All right. Okay.

19 MR. JAY: Just curious if -- if Your Honor  
20 knows who's getting the commercial docket. We can go  
21 off the record.

22 THE COURT: The state business docket?

23 MR. JAY: Yes.

24 THE COURT: Judge Lynott.

25 MR. JAY: Oh, okay. Great. Good luck.



1           THE COURT: Thank you. Okay. So defendants  
2 Bed, Bath and Beyond, Sun Chemical -- Sun Chemical  
3 Corp., DSM Food -- Food Specialties Inc., PSE&G,  
4 Association Master Trust, collectively the employer  
5 defendants, and Horizon Blue Cross Blue Shield moved to  
6 dismiss with prejudice North Jersey Brain and Spine  
7 Center's complaint or alternatively for a more definite  
8 statement of the claims against them.

9           In support of arguing for dismissal,  
10 defendants argue that the employee benefits plans at  
11 issue and the claims regarding them are expressly  
12 preempted as being governed exclusively by ERISA. And  
13 to the extent that they say all things are not  
14 preempted, they must be dismissed for failure to state  
15 a viable claim. Defendants argue in the alternative  
16 that North Jersey Brain and Spine Center should provide  
17 a more definite statement of the claims. Defendant  
18 Masco Corporation joins in with the defendants' motion  
19 to dismiss.

20           NJBSC opposes, arguing the issue of ERISA  
21 preempts -- preemption is premature at this stage, the  
22 state law claims are not preempted by ERISA in the  
23 state law claims stated claim for which relief can be  
24 provided. Alternatively, NJBSC argues that the remedy  
25 to any vague allegation or claim is a more definite

1 statement not dismissal. But I -- I find that the --  
2 the complaint is adequately pled so there's no need for  
3 a more state -- you know, clearer statement. I think  
4 it's pretty clear what the case is about.

5 Defendants filed a reply and there was a  
6 sur-reply filed. And so the facts, as we know, NJBSC  
7 is an out-of-network nonparticipating medical practice  
8 with respect to Horizon. They're bringing this action  
9 to recover payment for services it rendered to 63  
10 patients for medical services covered under healthcare  
11 plans insured, operated or administered by Horizon and  
12 the other defendants. And, you know, to the extent,  
13 you know, discovery reveals maybe they had no  
14 involvement, maybe some of them get out, we don't know  
15 yet. But there's just no -- no -- not enough discovery  
16 under our belts to know that at this juncture.

17 These medical services rendered for some of  
18 the patients were preauthorized or precertified by  
19 Horizon. Nonetheless, Horizon and the other defendants  
20 refused to render payment to NJBSC upon submission of  
21 the plaintiff's medical bills. On other occasions,  
22 Horizon advised NJBSC to forgo preauthorization on  
23 particular patients for whom medical services were  
24 emergent or urgent. Nonetheless, Horizon and the other  
25 defendants refused to render payment to NJBSC upon

1 submission of the patients' medical bills. On other  
2 occasions, after receiving medical bills, Horizon  
3 agreed to reimburse NJBSC but ultimately refused  
4 payment.

5 So NJBSC asserts the -- the following eight  
6 counts in the complaint: breach of implied contract,  
7 breach of the covenant of good faith and fair dealing,  
8 unjust enrichment and *quantum meruit*, promissory  
9 estoppel, negligent misrepresentation, interference  
10 with economic advantage, violations of the New Jersey  
11 regulation of discovery and payment for emergency  
12 services rendered by an out-of-network provider, and  
13 violations of Healthcare Information Networks and  
14 Technology Act, and Health Claims Authorization  
15 Processing and Payment Act. NJBSC alleges it is not  
16 seeking payment under ERISA or any other federal  
17 regulatory scheme.

18 On a motion to dismiss, the Court is to  
19 determine whether a cause of action is suggested by the  
20 facts. Printing Mart-Morristown vs. Sharp Electric  
21 Corporation, 116 N.J. 739 at 746 (1989). The pleading  
22 must be liberally construed to ascertain whether the  
23 fundament of a cause of action may be gleaned from even  
24 an obscure statement of the claim. Plaintiffs are  
25 entitled to every reasonable inference of fact. The

1 Court must assume as true facts asserted by the  
2 plaintiff. See Banco Popular North America vs. Gandi,  
3 184 N.J. 161 at 166 (2005).

4 At the motion to dismiss stage, the Court is  
5 not concerned with the ability of plaintiff to prove  
6 the allegations contained in the pleading. Cornett vs.  
7 Johnson and Johnson, 414 N.J. Super. 365 at 384 (App.  
8 Div. 2010). Nonetheless, a pleading should be  
9 dismissed if it states no basis for relief and  
10 discovery would not provide one. Rezem Family  
11 Associates L.P. vs. Borough of Millstone, 423 N.J.  
12 Super. 103 at 113 (App. Div. 2011).

13 Now defendants argue that while the complaint  
14 does not explicitly allege the existence of ERISA  
15 plans, the patients' employer sponsored health benefits  
16 plans clearly are employer -- employee welfare benefit  
17 plans under 29 U.S. Code Section 1002 Section 1. As  
18 such, in light of ERISA's purpose to provide a uniform  
19 regulatory regime over employee benefit plans, that  
20 would be exclusively a federal concern.

21 Defendants argue that the NJBSC's claims that  
22 relate to the employee benefit plans are -- at issue  
23 are expressly preempted under ERISA section 514(a) 29  
24 U.S. Code Section 1144. Quoting various allegations in  
25 the complaint, defendants emphasize that it's

1 indisputable on the face of the complaint that NJBSC's  
2 claims relate to employee benefit plans, which  
3 defendants argue are ERISA plans which, you know, as  
4 the plaintiffs pointed out, we -- we don't even know  
5 what the plans say. So we don't know if they're ERISA  
6 plans but, you know, they -- they probably are but we  
7 really don't know that at this stage.

8 Defendants also cite numerous cases that --  
9 that hold various state law claims relating to ERISA  
10 plans are preempted by ERISA. Defendants note that  
11 NJBSC does not have an express contract with Horizon  
12 and thus it would not have a claim against either  
13 Horizon or any of the employer defendants about the  
14 employee benefit plans. But differently, defendants  
15 argue NJBSC's claim arises solely out of the ERISA  
16 plans.

17 Now the plaintiff opposes, arguing its claims  
18 against defendant are not preempted. Specifically,  
19 NJBSC argues that as per the Memorial Hospital rule,  
20 ERISA 514(a) does not preempt a healthcare provider's  
21 state law, misrepresentation and related claims arising  
22 from the health insurance preauthorization for a  
23 medical procedure or service. Citing Memorial Hospital  
24 Systems vs. Northbrook Life Insurance Company, 904  
25 F.2d. 236 (5th Cir. 1990).

1 NJBSC argues that since its claims are over  
2 the amount of reimbursement and involves application of  
3 Horizon's own internal corporate policy rather than the  
4 plan term, there is clearly no preemption. NJBSC  
5 argues defendants literal reading of ERISA's preemption  
6 statute is overwrought and has been rejected by the  
7 United States Supreme Court. Similarly, NJBSC argues  
8 that this Court must presume, at least initially, that  
9 NJBSC's state law claims are not preempted by federal  
10 law.

11 NJBSC emphasizes that presumption against  
12 preemption is important here because healthcare  
13 providers cannot bring direct claims under ERISA and so  
14 an overly broad interpretation of ERISA will often  
15 leave a provider with no forum or remedy. That's  
16 Connecticut State Dental Association vs. Anthem Health  
17 Plans Inc., 591 F.3rd. 1337 at 1346-47 (11th Cir.  
18 2009).

19 Now as a threshold matter, NJBSC argues a  
20 federal preemption of state law claims is a  
21 fact-intensive endeavor premature resolution prior to a  
22 motion for summary judgment. NJBSC asks that  
23 defendants must first prove that the subject plans are,  
24 in fact, ERISA plans. Then they can seek a resolution  
25 on the ERISA preemption issue.

1 NJBSC notes that defendants cannot prove that  
2 subject plans are ERISA plans until discovery of the  
3 actual plan documents occurs. It argues that  
4 determining if the subject plans are ERISA plans is a  
5 question of fact to be answered in light of all the  
6 surrounding circumstances and facts from the point of  
7 view of a reasonable person. Vindor Management Company  
8 vs. Spirit (phonetic), 355 N.J. Super. 170 at 185-86  
9 (App. Div. 2002).

10 In its reply, defendants argued that the only  
11 fact sensitive -- sensitive inquiry NJBSC can raise is  
12 whether the plans at issue are ERISA plans. Defendants  
13 insist the complaint adequately alleges the plans at  
14 issue are ERISA plans, which is kind of repetitious,  
15 you know, that was the same argument that was made  
16 before, and those parts clearly fall under ERISA.

17 Now the New Jersey Supreme Court has held  
18 that determining whether federal law preempts state  
19 law, is a fact-sensitive endeavor. R.F. vs. Abbott  
20 Labs, 162 N.J. 596 at 619 (2000). Well, we'll  
21 (indiscernible) -- preemption determinations are very  
22 fact-sensitive, very much based on the record and  
23 context of a particular case. Additionally, a Court  
24 must review fragments of statutory language, random  
25 statements in the legislative history and degree of

1 detail of the federal regulation.

2 A defendant relying on an affirmative defense  
3 has the burden of persuasion by a preponderance of the  
4 evidence. Village of Ridgefield Park vs. New York  
5 Susquehanna and Western Railway Corp., 318 N.J. Super.  
6 385, 395-96 (App. Div. 1999). ERISA preemption is an  
7 affirmative defense. Vindor Management Company, 355  
8 N.J. Super. at 185. The existence of an ERISA plan is  
9 a question of fact to be answered in light of all the  
10 surrounding circumstances and facts, again, from the  
11 point of view of a reasonable person.

12 So the precise issue here is whether a court  
13 can decide ERISA preemption at the motion to dismiss  
14 stage without the benefit of relevant discovery. It's  
15 not been explicitly addressed by New Jersey case law.  
16 However, where the issue has come on -- up, several  
17 courts across the country have cautioned against  
18 resolving the issue of ERISA preemption on a motion to  
19 dismiss or without relevant discovery.

20 For example, in Kindred Hospitals East,  
21 L.L.C. vs. Aetna Life Insurance Company, the court, on  
22 a motion to dismiss, ordered limited expedited  
23 discovery regarding the ERISA preemption issues raised  
24 on the defendant's motion, among other issues. So  
25 that's an unreported case, a 2015 U.S. District Lexis



1 80876 at 1-2. The court cautioned that resolving the  
2 parties' disputes on the current record would be unwise  
3 both for purposes of finality and potential of  
4 appellate review. And I agree with that. I think  
5 that's what we have here. It's -- it's premature.

6 The Court noted the case law in the  
7 preemption issues, arguably, has been inconsistent.  
8 And they're contrasting a couple of cases, Our Lady of  
9 Lourdes Health System vs. NHI Hotels Inc. Health and  
10 Welfare Fund (phonetic), with Aetna Life Insurance  
11 Company vs. Huntington Valley Surgical Center, both  
12 unreported cases, you know, and come -- coming up with  
13 inconsistent results.

14 So in Coleman vs. Standard Life Insurance  
15 Company (phonetic) where there had been no  
16 determination as to whether ERISA applies and defendant  
17 had not presented the -- any evidence of his own to  
18 that effect other than citations to allegations in the  
19 complaint, the court denied defendant's motion to  
20 dismiss and cautioned that given the uncertainties  
21 concerning whether the plan in question is an ERISA  
22 plan and the scope -- I think that's more the issue,  
23 the scope of the preemption that applies in this case,  
24 it would be foolish to put all of one -- one's eggs in  
25 either the ERISA or state law bucket.

1           Plaintiffs at this early stage are not bound,  
2           for purposes of their state law claims, by their  
3           alternative allegation that there was an ERISA plan.  
4           So here, although NJBSC does not explicitly allege the  
5           existent ERISA plans like the plaintiffs in Coleman  
6           did, to take away from that case as well as the other  
7           cases cited throughout the country is that this Court  
8           should not decide at such an early stage of litigation  
9           whether ERISA preempts state law claims. So, you know,  
10          here, you know, I think that, you know, there's a  
11          question as to, you know, whether there is preemption,  
12          what the scope of the preemption is. And so that  
13          cannot be determined on this record. Okay?

14                 So for that reason, I'll deny the motion for  
15          summary judgment and -- as well as for the employers  
16          because we don't really know, you know -- they're --  
17          they're alleging that they ultimately are responsible  
18          for payment. And they don't know the extent of their  
19          involvement in processing these claims. You might well  
20          get out, the employers out, after some limited  
21          discovery on that issue. But for now, I'm just denying  
22          it. Okay?

23                 MR. KATZ: Thank you, Judge.

24                 MS. NEIDL: Thank you, Your Honor.

25                 MR. GOOBY: Thank you, Your Honor.

1  
2  
3  
4

MR. JAY: Thank you.

THE COURT: Take care.

(Proceeding concluded at 11:39 a.m.)

CERTIFICATION

I, Suzanne Struble, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 10:56:53 to 11:39:32, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, as recorded.

/s/ Suzanne Struble

Suzanne Struble

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