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Horizon settlement benefits to New Jersey physicians

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PND: Why was a lawsuit filed against Horizon Blue Cross Blue Shield of New Jersey?

EDK: Back in 1998, one thing I had always heard from physicians was how difficult it was on the business side of medicine dealing with managed care with respect to reimbursement and claims processing issues. I began in 2000 to look at potential class actions for dealing with these things because they seemed, at least anecdotally, to be affecting physicians in the same way across the board. I started to perform due diligence to hone in which issues that made the most sense, from a strategic and litigation standpoint, to pursue, and also to find the right person or persons who would be willing to step forward and represent a potential class. That is not an easy undertaking. It takes a special person to stand out in the forefront to be the standard-bearer for this sort of thing. I was very fortunate to find such a person in John Sutter, who is a pediatrician from Clifton and was willing to take on these issues. We began our due diligence together, looking at his contracts, bills and explanations of benefits – between him and various health insurance companies.

By April 2002 we filed suit in Superior Court of New Jersey as one consolidated action against Horizon Blue Cross Blue Shield of New Jersey, Health Net,

Oxford Health Plans, United Healthcare and Cigna. The cases got broken up: three of them got removed to federal court and transferred to the multidistrict litigation pending in the southern district of Florida, where there are other similar class actions that have been ongoing over the years, some of which have settled. Two of the three cases down there – John Sutter's case against Cigna and Health Net – ended up getting subsumed by the larger national class actions against those companies, and they ultimately were settled. The third case down there – United Healthcare – is now pending in class arbitration. All five of these cases, by the way, are substantially similar in scope and in what they are looking for.

The two other cases are against Oxford and Horizon. The Oxford case was dismissed and compelled to go to arbitration because there was an arbitration agreement in Dr. Sutter's provider agreement and the court upheld the validity of that clause. That case is pending now as a class action in arbitration before the American Arbitration Association. The United States Court of Appeals for the Third Circuit recently upheld the class certification ruling. Dr. Sutter represents some 16,000 to 20,000 physicians who are providers of Oxford in that class arbitration.

The Horizon case remained in the New Jersey Superior Court and was a very lengthy, contentious, hard-fought litigation from April 2002 until a settlement in principal was achieved in August 2006, just a few days before trial. The claims in that case dealt with issues involving failure to make payments on a timely basis under the prompt pay statutes and failure to process claims correctly, resulting not only in money being lost by physicians, but also a significant hassle factor: doctors were confused and were trying to track down payments, whether the claims were ever received by the carrier, and what the carrier did with them after they got the claims. We found that medical practices were expending significant amounts of money hiring people specifically to deal with claims follow-up, which tremendously increased their overhead and took resources away from what doctors should be doing – the practice of medicine.

PND: How significant and widespread were these alleged practices?

EDK: When the court certified the Horizon case as a class action, it made a vigorous finding that everyone, in essence, is impacted the same way: the same thing Horizon does to Dr. Sutter, it does to every other one of the approximately 60,000 class members that were in the Horizon case. The number of currently practicing physicians in the state is probably somewhere around 25,000 to 30,000, but the class period covered about ten years, so some physicians who were class members may have since retired, or were from out of state and had submitted a claim to Horizon. That is why the class totals around 60,000.

One of the allegations was that Horizon processed claims inappropriately – certain claims were bundled, certain modifiers weren't recognized, there was downcoding of higher procedure codes to lower procedure codes. But the key thing that we had uncovered in the course of litigation was that doctors really didn't know what it was that Horizon was doing with the claims that were being submitted – in essence, that they were being processed in a "black box" and physicians didn't know what was going on with these claims and why they were being edited by Horizon's computer system in a particular manner.

There are also certain prompt pay statutes in New Jersey that govern the timeliness of responses from carriers: carriers have to respond – in other words pay, deny or request more information to process the submitted claim – no later than 30 days of receipt for clean claims submitted electronically and 40 days for paper claims. One important result that came from this litigation that is not directly part of the settlement agreement – and this was a litigation of "first impression" in many respects – is that up until our involvement, the prompt pay statues had never been the subject of extensive litigation, and therefore there was not much in the way of opinions interpreting the statutes, what they mean and how they are applied. During the course of our litigation, there were a number of significant court rulings that will affect doctors in a positive way going forward. First and foremost, carriers have always disputed that there was no private right of action for physicians to pursue money damages under the prompt pay laws. The insurance industry has argued that the only entity who had a right to enforce the prompt pay statutes was the Department of Banking and Insurance, who could slap a carrier on the wrist with a $10,000 fine.

Carriers are floating millions of dollars when they don't pay on time, and they're getting the benefit of this money that doctors aren't getting. Their view was that doctors couldn't enforce the laws themselves and they would absorb the fines, which is a small price to pay, considering the amount of money they're floating by not paying on time.

On a going forward basis, however, an individual physician who believes that Horizon, or another carrier, has not timely processed their claims can take on the carrier because they have the right to recover their individual damages. Under the interpretation of the laws that we obtained as a result of this litigation, if a carrier does not timely respond within that 30- or 40-day window, they then waive the right to contest the claim for *any* reason, other than fraud. In addition, if the carrier disputes the "cleanliness" of a claim and requires additional information or missing information to make that claim whole, they must expeditiously communicate with the physician to get that information in order to process the claim timely. Failure to do that within the prompt pay time window also constitutes a waiver and forfeits the carrier's right to contest that the claim was not clean for prompt pay purposes.

PND: What benefits do New Jersey physicians now enjoy as a direct result of the Horizon settlement?

EDK: The main thrust of the settlement is a change in several business practices that Horizon has agreed to implement. Horizon is required to publicize to physicians, through newsletters and on their website, what physicians' rights are under this agreement. Horizon is now making available complete fee schedules in electronic format so that practices can easily put them into their practice management software, making it much more easy to reconcile payments for services rendered. These are *complete* fee schedules, not partial fee schedules or just disclosing a handful of codes. They also are going to disclose all of the significant automated edits that Horizon uses to process claims. The black box is being removed, so doctors will know what it is that Horizon is doing with their claims and, if physicians disagree with that, they can challenge Horizon.

Primary care doctors had complained to us for years that capitation was not being handled properly, and

carve-outs for capitation weren't being paid. Now there is a dedicated Horizon capitation liaison who under a very strict timeframe has to respond to questions completely and expedite any capitation payments that are due.

Horizon is going to be limited to 18 months in their ability to seek overpayments. That's a provision that actually exists under New Jersey law, but as part of this settlement there is now a specific policy in place requiring Horizon to provide a very specific explanation to doctors before they can initiate overpayment recovery – eliminating problems physicians have reported about carriers requesting recovery from unrelated claims going back a lengthy period of time and not giving an explanation as to why they thought they were entitled to the overpayment.

There are changes regarding medical necessity, that once a medical necessity determination is made it cannot be revoked. That was an issue that we'd heard had troubled some surgeons to whom medical necessity was offered, a procedure was performed and payment was denied after medical necessity was revoked. Well, they can't do that anymore absent some clear evidence of fraud, error or change in a patient's condition prior to the service being rendered.

Regarding other reimbursement provisions of the settlement, physician fees will not be reduced, at most, more than once a year. Also, there will be a standard physician fee schedule for Northern New Jersey and one for Southern New Jersey. Until now, you had doctors from one town to the next in the same part of the state that had different fee schedules. There should not be disparity of treatment from one physician to the next. The regional fee schedules would not prevent physicians or physician groups from independently negotiating contracts. Horizon also must now give 90 days notice before making changes to policies or procedures in a physician's provider agreement.

Another significant change is that primary care doctors can control their patient volume by closing their practices to new Horizon patients with 90 days notice. There are also other changes that Horizon is implementing and I encourage doctors to obtain a copy of the settlement agreement.

PND: Was removing an "all-products" clause from physician contracts part of this settlement?

EDK: That provision was not included in this agreement. But the other substantial component to this settlement is that New Jersey physicians who do business with Horizon will also enjoy all of the settlement benefits of the national class action – *Love v. Blue Cross Blue Shield Association* – which we understand is close to achieving a settlement in principal. Although the specifics are not yet known, doctors will receive numerous other business reforms, which will likely include monetary compensation. Thus, New Jersey doctors are in a unique situation to obtain benefits of a significant type from two distinct litigations, as Horizon was negotiating in two separate forums and will be paying money to New Jersey physicians from the settlement in the Love case. I think it is important to recognize, however, that the amount of compensation doctors generally receive from such class actions has been relatively nominal, perhaps a few thousand dollars, and that's not what this is about. It is about changing business practices going forward and getting carriers to understand that they have to sit down in partnership with doctors, who are now going to be looking out for their business interests. In fact, only a few of our settlement's many business reforms were valued by an expert health economist to be not less than $39 million, just based on the administrative savings to class members over the life of the agreement, which expires in five years. Horizon has expressly represented that it doesn't have any intention of undoing these settlement reforms after the agreement expires. If it did, we could go right back and sue them again.

PND: Are there any other important implications of this settlement for New Jersey physicians?

EDK: Independent of the settlement benefits of these litigations, these class actions are important for doctors because they stake out their turf and open their eyes – and the eyes of the carriers – to what is going on in the business side of their practices. What comes out of these litigations that is most beneficial is to get carriers to start sitting down and dealing with physicians in a more even-handed matter. I know, for example, that the American Academy of Pediatrics has a group that meets with Horizon and other carriers regularly to discuss business and practice issues. From

what I understand, they actually make progress and carriers are willing to listen and talk about issues that carriers might not otherwise have wanted to sit down and discuss in the past. I think the power of the litigation behind it, helps. It's always out there as a reminder that, if the carrier doesn't deal with physicians in a fair manner, physicians can take them to court.

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