Pennsylvania Chiropractic Association v. Blue Cross Blue Shield Association

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The recent case of *Pennsylvania Chiropractic Association v. Blue Cross Blue Shield Association* was brought on behalf of a nationwide class of health care providers and several chiropractic associations. This action challenged the abusive practices of Blue Cross Blue Shield (BCBS) in using post-payment audits and false allegations of fraud to pressure providers to repay substantial sums that were previously paid for provision of health care services to BCBS subscribers. This practice is called “recoupment” and is becoming increasingly prevalent among a number of insurers in addition to BCBS. The plaintiffs brought claims under several regulations, including the Employee Retirement Income Security Act (ERISA). The court initially upheld the plaintiffs’ ERISA claims in denying the defendants’ motion to dismiss but granted summary judgment to BCBS on the grounds that the plaintiffs lacked standing to bring suit.

The plaintiffs alleged that the defendants would pay for services and then at a later date would make false or fraudulent determinations that the individual plaintiffs had been overpaid for those services. The defendants would demand that the individual plaintiffs repay the supposedly overpaid amounts immediately but would refuse to provide information about the specific claims, services, or patients that were allegedly the subject of overpayment.

The plaintiffs claim that the defendants made no offer of an appeals process when making these demands, a required practice under the ERISA. This federal law sets minimum standards for most voluntarily established pension and health plans in private industry to protect individuals in these plans. Under ERISA, patients have the right to adequate notice and opportunity for a full and fair review of adverse benefit determinations. The plaintiffs asserted that the defendants did not comply with these procedures and violated ERISA when they made adverse benefit determinations after the fact and without an adequate appeals process violated ERISA, 29 U.S.C. § 1132(a)(1)(B) and 29 U.S.C. § 1132(a)(3).

In a May 17, 2010 decision, the district court determined that the nationwide class of health care providers and chiropractic associations did not have individual standing in the lawsuit. The court stated that, although these plaintiffs claimed they were injured when they were forced to expend time and money assisting their members in dealing with the defendants’ improper practices, by their own admission this was a part of their ordinary work and thus could not be considered injurious. However, the same court concluded that the associations had representational standing to bring suit on behalf of their members based on the allegation that the defendants violated ERISA by failing to provide a full and fair review of adverse benefit determinations. Because this allegation stated a pure question of law, the court ruled that it could be brought by the associations even if their members did not have standing to sue in their own right.

In December of 2011, the remaining plaintiffs moved to certify the case as a class action, requesting certification of a provider class consisting of all health care providers and subscribers who were affected by the recoupments. A court may certify a case as a class action if the party seeking certification demonstrates that there is typicality among the claims and commonality among the members of the proposed class. The court held that because the claims were made against numerous BCBS entities, which utilized various different notice and review procedures when executing the challenged recoupments, the plaintiffs failed to show that common issues predominated over individualized issues and thus could not bring

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the suit as a class action. The court stated that although “there are certainly similarities ... in how different BCBS entities dealt with the possibility of provider challenges to recoupment determinations, they did not all deal with this in a way that can fairly be described as ‘uniform.’”

The plaintiffs also moved for certification of a subscriber class represented by individual plan member Katherine Hopkins against Anthem Ohio of Blue Cross Blue Shield. The court deferred consideration of this motion pending resolution of Hopkins’ case, which was reviewed in January 2012. Hopkins claimed that she received medical services at a local hospital for which BCBS paid in full. Two years later, however, Hopkins received a bill from the hospital informing her that Anthem Ohio had recouped funds it had paid to the hospital, making her liable for the balance. Hopkins was not given an opportunity to appeal the recoupment. She therefore filed suit, contending in her complaint that she was deprived of her right to a “full and fair review” of all claims denied. The court ruled that Hopkins lacked standing to bring suit because the contested payments were for co-pays that she owed to BCBS and, thus, she had no claim for benefits and no right to relief. Given that the plaintiffs lacked standing, judgment was subsequently granted for BCBS.

While the court’s conclusion that the plaintiffs lacked standing in these suits are in accordance with the provisions of ERISA, the legal result is problematic for several reasons. The issue of fraudulent “recoupment” extends far beyond the $600 payment of one BCBS plan member and the “ordinary work” of health care providers. BCBS is clearly in violation of the ERISA provisions that guarantee the subscriber’s right to appeal a recoupment, but the courts have thus far provided the plaintiffs no means of challenging these violations. Recoupments have the potential to cause severe financial difficulties for subscribers and major inconvenience for health care providers and associations. Moreover, those recoupments committed fraudulently increase the overall cost of health care, since providers need to charge patients more to cover added costs. The inability of the plaintiffs to bring suit against BCBS allows insurance companies to take advantage, if not profit off, of subscribers and health care providers.

Because BCBS’s health care plans are each run by completely separate entities, it will likely be impossible, given the decision of the Illinois court, for those who suffer injuries from recoupments to bring class action lawsuits. Thus, any injunctive relief to which the plaintiffs might be entitled would differ on a plan-by-plan basis. However, a class action lawsuit would be preferable for the plaintiffs and BCBS subscribers because it would force the company to amend its policies on a company-wide basis, thereby increasing the chances of compliance with ERISA.

Our legal system also makes it difficult for individual plan members to bring suit on allegations of recoupment. Hopkins’ choice to bring suit was based not on her need to recover the recouped sum of money but to force BCBS to modify its procedures in compliance with ERISA. Her argument focuses not on her own personal loss but on “what an insurer must apply when seeking to recover an overpayment of benefits issued under ERISA health care plans.”

To obtain a legal result that will force BCBS to amend its procedures to comply more fully with ERISA, it will be necessary for the plaintiffs to come forward with claims that meet the court’s requirements for standing. Health care providers may be able to bring suit against BCBS entities on an individual basis, but these suits will likely not have the impact of a large class action lawsuit. Individual subscribers are often unwilling to become entangled in potentially expensive and time-consuming litigation—particularly when the amount of money at stake is relatively small. Therefore, it may be necessary for the Department of Labor to step in and increase enforcement of ERISA, which is clearly lacking at this point in time. Until that occurs, or until a favorable legal result is reached, BCBS is free to continue its practice of recouping money from plan members, causing inconvenience and financial hardship to these members as well as to the health care providers on which they rely.

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4. Pennsylvania Chiropractic Ass’n, No. 09 C 5619 at 25.
5. Id. at 3.
6. Id at 3.
8. Id.
10. Id. at 20.
11. Id. at 20.
12. Id. at 21.
13. Id. at 21.
16. Pennsylvania Chiropractic Ass’n, No. 09 C 5619 at 10.
18. Id. at 1.
19. Id. at 2.
20. Id. at 7.
21. Id. at 3.