

# Aetna Can't Duck Orthopedic Surgeon's \$209K Treatment Suit

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Law360 (September 25, 2018, 7:34 PM EDT) -- A New Jersey federal judge on Monday refused to toss an orthopedic surgeon's lawsuit over [Aetna Inc.](#)'s failure to reimburse him for a patient's \$209,000 procedure, ruling that the state law claims in the suit aren't preempted by the federal Employee Retirement Income Security Act.

In her decision in favor of Dr. Cary Glastein, U.S. District Judge Anne E. Thompson rejected the insurer's argument that ERISA's Section 514(a), which preempts "any and all" state law claims as they relate to any ERISA plan. The judge reasoned that Glastein's claims didn't require an inquiry into his patient's ERISA plan, nor did they affect the plan in any way.

"The state laws at issue here — breach of contract, promissory estoppel, account stated and fraudulent inducement — neither 'refer to' nor have an 'impermissible connection with' an ERISA plan," Judge Thompson said, quoting Section 514(a).

Addressing whether or not the claims "refer to" an ERISA plan, Judge Thompson noted that Glastein isn't alleging that he is a contracting party to any ERISA plan, nor does he contend that he is owed payment under the terms of an ERISA plan. Also, Glastein wasn't claiming that any relevant ERISA plan provides reimbursement rates for the out-of-network services provided, she said.

Turning to whether or not Glastein's claims have an "impermissible connection" with an ERISA plan, Judge Thompson noted that several federal appeals courts have held that claims brought by a provider against an insurance company don't implicate ERISA's goals of protecting participants and beneficiaries. Therefore there was no "impermissible connection" between Glastein's claims and an ERISA plan, so they are not preempted, the judge said.

The surgical procedure at the heart of Glastein's suit was "medically necessary" and performed in October 2016, according to the decision. Glastein was an out-of-network provider for the patient, who received benefits through Aetna, the decision said.

Nonetheless, Glastein contacted Aetna prior to the surgery and Aetna sent him a written authorization for the procedure, according to the decision. Glastein then billed the insurer for \$209,000, "representing normal and reasonable charges given the complexity of the procedure and plaintiff's qualifications," but received no payment, the decision said.

Glastein's lawsuit, which was originally filed in state court but removed to federal court at the insurer's request, named Aetna and a subsidiary, along with unnamed individuals and corporations.

Judge Thompson noted that her decision was "at odds" with several other New Jersey federal court cases involving suits against insurers by out-of-network providers who had obtained prior authorization, each resulting in a judge's ruling that the claims were indeed preempted by ERISA.

One example Judge Thompson cited was a previous case Glastein launched against Horizon Blue Cross Blue Shield of America. That suit was different than the instant matter because Glastein had suggested payment was based on the patient's ERISA plan rather than the authorization obtained, the judge said.

The other two examples, which involved surgeons' suits against Blue Cross entities, were distinguishable from the instant case because in each one the "provider's claims could not be adjudicated without referencing an ERISA plan," Judge Thompson said.

Aaron Aubrey Mitchell of Cohen and Howard LLP, an attorney for Glastein, said the decision was what he expected.

"The court correctly held that ERISA was created to allow for uniform, nationwide regulation of insurance and not to allow insurers to avoid paying for pre-authorized, medically necessary services provided to its members. As Judge Thompson astutely notes, the court does not need to look to an ERISA plan's terms to determine what is owed to an out-of-network provider who doesn't participate in that plan," Mitchell told Law360 on Tuesday.

An attorney for Aetna didn't immediately respond to a request for comment on Tuesday.

Glastein is represented by Aaron Aubrey Mitchell of Cohen & Howard LLP.

Aetna is represented by Matthew A. Baker of Connell Foley LLP.

The case is Glastein v. Aetna Inc. et. al., case number 18-9262, in U.S. District Court for the District of New Jersey.

--Editing by Stephen Berg.