

## Out-Of-Network Health Care Provider Isn't Seeking ERISA Benefits, Judge Says

(August 2, 2018, 1:19 PM EDT) -- TRENTON, N.J. — An out-of-network provider is not a beneficiary of an Employee Retirement Income Security Act plan, and because the plan includes an anti-assignment provision, it cannot sue to recover benefits under the law, a federal judge in New Jersey held July 31 in remanding the action (*Advanced Orthopedics and Sports Medicine Institute v. Blue Cross Blue Shield of New Jersey, et al.*, No. 17-11807, D. N.J.).

(Opinion available. Document #93-180822-008Z.)

Advanced Orthopedics and Sports Medicine Institute (AOSMI) provided spinal surgery for an individual insured by Blue Cross Blue Shield of New Jersey. AOSMI is an out-of-network provider but contacted Blue Cross before surgery and obtained approval to perform the procedure and obtained an assignment of rights from the patient.

### Unpaid Bills

AOSMI subsequently billed Blue Cross \$218,472.50. Blue Cross paid \$4,145. AOSMI sued Blue Cross in the Monmouth County Superior Court, seeking the difference. Blue Cross removed the case, arguing that it was an employee welfare benefit plan as defined by ERISA, 29 U.S.C. § 1001 et seq. AOSMI moved for remand. Blue Cross moved to dismiss the action.

Applying the two-prong test for complete preemption of ERISA actions under *Pascack Valley Hosp. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 399-400 (3d Cir. 2004), Judge Brian R. Martinotti noted that AOSMI is not the type of party that can bring an ERISA claim. ERISA Section 502(a), 29 U.S.C. § 1132(a)(1)(B), is limited to plan participants and beneficiaries, neither of which describes AOSMI, Judge Martinotti said.

### Assignment

Blue Cross argues that the assignment of benefits gives AOSMI derivative provider standing, the judge said. But a provider cannot have standing to sue if the insurance plan in question specifically excludes the assignment of benefits, as this one does, Judge Martinotti said.

AOSMI brings its own claims based on a quasi-contract it formed with Blue Cross, not an attempt at recovery of benefits under ERISA, Judge Martinotti said.

Judge Martinotti granted remand but denied the motion for attorney fees.

Michael E. Holzapfel of Becker in Livingston, N.J., represents Blue Cross. Aaron Aubrey Mitchell of Cohen & Howard in Shrewsbury, N.J., represents AOSMI.

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