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Class Certified in Dentists' Suit Over Horizon Blue Cross Claims Practices

By David Gialanella

Just months after wrapping up a marathon class-action suit by physicians alleging onerous billing and claim procedures, Horizon Blue Cross Blue Shield of New Jersey is being drilled by dentists with similar litigation.

On Sept. 16, an Essex County judge certified the class in *Kirsch v. Horizon*, Esx-L-109-08, which alleges the insurer used tactics known as "bundling" and "downcoding" to deprive dentists due payments for patient care, in breach of provider agreements that payments be made according to fee schedules.

According to the complaint, "bundling" means paying for only one umbrella procedure when mul-

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iple procedures were performed on a single date and "downcoding" means retroactively coding a procedure as a less complex procedure, subsequently paying less.

The suit seeks injunctive relief, compensatory damages plus interest for dental services rendered, punitive damages, costs and attorneys' fees.

Superior Court Judge Paul Vichness certified the class as including all dentists who provided services, for which Horizon had a payment obligation, from Jan. 7, 2002, to the present.

He also approved as the class representative Caldwell oral surgeon Michael Kirsch, D.D.S., represented by designated class counsel Eric Katz of Mazie Slater Katz & Freeman in Roseland.

Kirsch is also lead plaintiff, with Katz as class counsel, in *Kirsch v. Horizon I*, Esx-L-4216-05. That suit, seeking more than \$13 million in damages for 10 years' worth of alleged late payments in violation of Prompt Payment Regulations, N.J.A.C. 11:22-1.1, is to be tried by Vichness next year.

Kirsch will likely be the class representative in a third class action, *Kirsch v. Delta Dental of New Jersey Inc.*, 07-cv-186, filed in federal court in Newark in 2007, which alleges billing and claim practices similar to those in the case certified Sept. 16. It is assigned to District Judge Stanley Chesler and Magistrate Judge Michael Shipp. Katz says he has not yet requested class certification.

The suits follow the mold of the phy-

sicians' class action, *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, Esx-L-385-02, settlement of which was finalized on June 15.

The doctors alleged the insurer denied legitimate claims and, when it did pay, paid slowly, increasing providers' administrative costs. The settlement was originally approved by Judge Stephen Bernstein in 2007. Horizon agreed to ease the administrative burden on doctors; to allow doctors to turn away new Horizon patients; to publish a complete schedule of fees for typical services; and to seek timely reimbursement of any overpayments to doctors. The insurer also agreed to pay \$6.5 million in fees to class counsel at Katz's firm.

But nine medical groups appealed, objecting that the settlement was flawed because it provided only equitable relief — with no cash payments for doctors — and because the legal fee was excessive.

Last year, a state appeals court ordered Bernstein to reconsider the fairness of the overall settlement and make a thorough review of whether the fee award was reasonable.

On June 15, Bernstein again found the settlement fair and reasonable, though he cut \$1.8 million from the fee award, calculating a lower hourly rate while applying a multiplier to take into account the case's difficulty and risk. The result was a \$4.7 million fee.

Katz says money damages will be sought if the *Kirsch* cases go to trial, but says that, as with *Sutter*, injunctive relief is the main goal.



TRIFECTA: Eric Katz, of Mazie Slater Katz & Freeman in Roseland, is class counsel in two state court suits by dentists against Horizon and, most likely, in a federal one not yet certified.

"The change in business practices is worth a lot more than what the monetary award might be," he says. "It's worth more to stop them from what they're doing and change their practices going forward."

Katz says there has been no discussion of a possible settlement in *Kirsch II* — the case just certified — but says experts likely will value the case "much more" than the \$13 million sought in *Kirsch I*. Damage estimates generally are significantly higher for bundling and downcoding violations than they are for prompt payment violations, he says.

Horizon is represented by John Murdock of Benton Potter & Murdock of Falls Church, Va., and Maxine Neuhauser of Epstein Becker & Green in Newark. Both decline comment. ■