

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SURGICAL SPECIALISTS OF GREATER
NEW YORK as authorized representative of
CYNTHIA RYAN,

Civil Action No.

Plaintiffs,

- against -

VERIFIED COMPLAINT

EMPIRE BLUE CROSS BLUE SHIELD,

Defendant.

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Plaintiff, SURGICAL SPECIALISTS OF GREATER NEW YORK (“Plaintiff” or “SSGNY”) as authorized representative of CYNTHIA RYAN (“Patient”), by and through their attorneys, Stein Adler Dabah & Zelkowitz LLP and Drachman Katz LLP as and for their Complaint against defendant, EMPIRE BLUE CROSS BLUE SHIELD (“Defendant,” “BCBS”), state as follows:

NATURE OF ACTION

1. This is an action arising under the laws of the United States, specifically the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001, et seq., for Defendant’s wrongful denial/underpayment of Patient’s health insurance benefits.

PARTIES

2. At all material times, SSGNY is a multi-specialty medical surgical practice of highly trained and experienced academic surgeons, and other related healthcare practitioners, in the County of New York in the State of New York, located at 1060 Fifth Avenue New York, New York 10128. Plaintiff’s doctors perform complex, critical, often lifesaving, surgeries in emergency situations, and often referred by other surgeons.

3. Upon information and belief, BCBS is primarily engaged in the business of providing and/or administering health care plans or policies in the state of New York.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e). The insurance policy at issue was provided to the employer of Patient and is governed by ERISA, 29 U.S.C § 1001 et seq.

5. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) provides for nationwide service of process. Upon information and belief, Defendant is a resident of the United States and subject to service in the United States, and this Court therefore has personal jurisdiction over it.

6. All conditions precedent to the institution of this action, i.e., administrative appeals have occurred, been performed, and have been exhausted.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) in that this is the district in which a substantial amount of the events complained of herein occurred. Moreover, Defendant is authorized to do business in the State of New York, advertises and promotes its services in the State of New York, were present and engaged in significant activities in the State of New York to sustain this Court's exercise of *in personam* jurisdiction.

FACTUAL ALLEGATIONS

8. At all material times, Patient received health insurance coverage by way of an ERISA governed employee welfare benefit plan (the "Plan").

9. On November 7, 2019, Patient was undergoing surgery at Lenox Hill Hospital for advanced, deeply infiltrative stage four endometriosis, after failed attempts for treatment in Florida. During the surgery, it became clear to the gynecology surgeon that in order to properly treat her life-threatening condition, a colorectal intraoperative consultation was required.

10. Dr. Peter Hon and Dr. Panagiotis Manolas of SSGNY, who are colorectal surgeons on call at Lenox Hill Hospital, were called in on emergency basis. SSGNY assisted with Patient's complex endometriosis surgery, and determined that the best approach would be to perform a laparoscopy to properly visualize the rectum.

11. This call for help occurred during surgery, while Patient was under anesthesia, and therefore she had no ability to exercise any choice in which physicians would treat her.

12. Patient had no prior knowledge SSGNY's services would be necessary, and she was in no position to choose a provider at such time and to determine whether such provider participates in her insurance. Since the medical necessity of this procedure is not in question, this procedure must be viewed as an emergency, and processed under the hold applicable harmless clause in the Plan.

13. While performing the laparoscopy, they were able to identify defects and residual endometriosis in the rectum, therefore, they proceed to treat the defects and to repair the rectum, irrigating abundantly the area and suctioning dry. The on-call surgeons from SSGNY were able to successfully assist in Patient's complex surgery.

14. The surgery was successful and Plaintiff provided reasonable, medically necessary and life-saving services to Patient.

15. Subsequently, a Health Insurance Claim Form was submitted to Defendant or its agent for an amount totaling \$229,084.24 for the treatment/services/supplies discussed above.

16. The charges for the services performed by Plaintiff and its medical staff are in line with other medical providers and specialists in their geographic area.

17. Defendant, however, remitted \$6,399.80, for the above-referenced treatment.

18. Critically, Defendant drastically underpaid the medical providers at SSGNY by either (a) not remitting any payment for certain CPT codes; (b) remitting payment drastically under the 80th percentile of Fair Health for other CPT Codes, and (c) inexplicably basing its denial of appeals based upon the scheduled complex endometriosis surgery, entirely overlooking that unexpected complications arose whilst the scheduled surgery was underway, that Patient was under extremely precarious conditions, was unconscious and under anesthesia, and was in no position to choose a provider at such time and to determine whether such provider participates in her insurance.

19. Despite numerous and thorough appeals, Defendant has failed to remit the correct amount due, largely without reasonable explanation or justification as to the basis for denial.

20. Defendant underpaid its reimbursement of all services and accordingly, Plaintiff brings this action for the recovery of the balance of benefits due to Patient under the Plan, in the amount no less than \$226,684.44 for the treatment rendered to him by Plaintiff.

21. As the surgery involved urgent care, pursuant to 29 CFR § 2560.503-1(b)(4), Plaintiff is permitted to act as the authorized representative of Patient, and possesses the legal authority to recover the benefits from UHC due to Patient.

AS AND FOR A FIRST CAUSE OF ACTION
(Recovery of Benefits Under 29 U.S.C. § 1132(a)(1)(B))

22. Plaintiff repeats and realleges the allegations in the foregoing paragraphs, as if fully set forth herein.

23. ERISA § 502(a)(1), codified at 29 U.S.C. § 1132(a)(1)(B), provides a cause of action for a beneficiary or participant seeking benefits due payment under the terms of an ERISA governed plan.

24. Defendant improperly denied benefits due to Patient under the terms of the Plan.

25. Critically, Defendant drastically underpaid the medical providers of Surgical Specialist by either (a) not remitting any payment for certain CPT codes; (b) remitting payment drastically under the 80th percentile of Fair Health for other CPT Codes, and (c) inexplicably basing its denial of appeals based upon the scheduled complex endometriosis surgery, entirely overlooking that unexpected complications requiring emergency surgery arose whilst the scheduled surgery was underway.

26. As a result of Defendant's breach, Plaintiff is entitled to damages, including but not limited to, costs, expenses, and attorneys' fees.

AS AND FOR A FIRST CAUSE OF ACTION

(Breach of Fiduciary Duty and Co-Fiduciary Duty Under 29 U.S.C. § 1132(a)(3), Under 29 U.S.C. § 1104(a)(1) and 29 U.S.C. § 1105(a))

27. Plaintiff repeats and realleges the allegations in the foregoing paragraphs, as if fully set forth herein.

28. 29 U.S.C. § 1132(a)(3)(B) provides a cause of action by a participant, beneficiary, or fiduciary to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29. Plaintiff seeks redress for Defendant's breach of fiduciary duty and/or Defendant's breach of co-fiduciary duty under 29 U.S.C. § 1132(a)(3), 29 U.S.C. § 1104(a)(1) and 29 U.S.C. § 1105 (a).

30. 29 U.S.C. § 1104(a)(1) imposes a "prudent man standard of care" on fiduciaries.

31. Specifically, a fiduciary shall discharge its duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would

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