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Blue Cross Blue Shield of Michigan Continues to Fight "Hidden Fees" Suits Despite Major Loss in Court of Appeals

3.23.2015

Under the Sixth Circuit's Hi-Lex decision, hundreds of current and former self-insured customers of BCBSM may be entitled to reimbursement of unlawful hidden fees.

BCBSM is relying on ERISA's statute of limitations to stem the tide of lawsuits.

Current and former self-insured customers of BCBSM should immediately determine if they were charged hidden fees and, if so, how much time they have left under ERISA's statute of limitations to recover those fees.

In a far-reaching decision, last year the Sixth Circuit Court of Appeals affirmed a ruling by Judge Victoria Roberts of the U.S. District Court in Detroit that awarded over \$6 million to a self-insured customer of Blue Cross Blue Shield of Michigan ("BCBSM"). The Court of Appeals agreed with Judge Roberts that BCBSM had unlawfully charged its customer, Hi-Lex Controls, "hidden fees" for over a decade. In October 2014, the U.S. Supreme Court declined to further review of the case, allowing the Court of Appeals' decision to stand.

The hidden fees were allegedly charged by BCBSM in its role as third-party administrator of Hi-Lex's self-insured health care plan. Under its administrative service contract (ASC) with Hi-Lex, BCBSM charged administrative fees for such services as managing claims, paying health care providers from funds provided by Hi-Lex, and giving Hi-Lex employees, as enrollees in the plan, access to BCBSM's network of lower-cost health care providers.

According to Judge Roberts opinion, under the hidden-fees arrangement, BCBSM would mark up a hospital bill submitted for payment by an enrollee in the plan, then pay the hospital the originally billed amount and keep the mark-up. Hi-Lex argued

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that it was unaware that it was paying more than the hospital actually charged. The court agreed.

Judge Roberts concluded that BCBSM functioned as an ERISA fiduciary and that the hidden-fees scheme was fraudulent under ERISA. Judge Roberts also ruled that BCBSM had violated its fiduciary duty under ERISA and that Hi-Lex's claims were not barred by ERISA's statute of limitations.

Numerous similar federal suits against BCBSM, which had been on hold pending the appeal of Judge Roberts' decision, have now been reactivated. A survey of recent filings and decisions in those suits shows that despite the rulings in Hi-Lex, BCBSM continues to vigorously resist the plaintiffs' hidden-fees claims.

BCBSM's main line of defense in many of the pending cases appears to be ERISA's statute of limitations: the argument that its self-insured customers waited too long to demand reimbursement after learning they had been charged hidden fees. In many of the "reactivated" lawsuits, BCBSM is arguing that its self-insured customers knew or should have known of the hidden-fees arrangement well before the statute of limitations expired.

Normally, a plaintiff has three years to bring suit alleging violation of ERISA. However, Judge Roberts held that because BCBSM's hidden-fees scheme was fraudulent, ERISA's six-year limitations period applied. This prevented Hi-Lex's lawsuit from being time barred. The Sixth Circuit agreed that the six-year "fraud" limitation period applied.

In one "hidden fees" case, brought by Lumbermen's Inc, BCBSM recently argued that ERISA's six-year "fraud" statute of limitations does not apply because—unlike in Hi-Lex—BCBSM did not fraudulently conceal the allegedly hidden fees from Lumbermens. According to BCBSM, it disclosed those fees in an attachment to the administrative service agreement known as Schedule A, and in periodic "Value of Blue" reports sent to Lumbermens.

Briefing of BCBSM's motion to dismiss Lumbermen's claims ended on February 27, 2015, and the district court has yet to rule on the statute of limitations issue. However, another district court recently rejected a similar argument by BCBSM in a suit brought by Pridgeon & Clay, Inc. ("P&C"). In an opinion issued on January 30, 2015, the district court rejected BCBSM's "Schedule A" argument, emphasizing that in reports sent to P&C subsequent to the Schedule A disclosures, Blue Cross once again failed to reveal the hidden fees.

In a third case, brought by Kent Companies, Inc. ("Kent"), the district court recently concluded that it was too early to rule on the statute of limitations issue, and held that BCBSM was entitled to conduct discovery into exactly when Kent knew—or should have known—about the hidden-fees arrangement.

In a decision that should be encouraging to those BCBSM customers who failed to assert a claim for reimbursement within ERISA's six-year "fraud" statute of limitations, another federal district court held that the entire period between September 1, 2004 and August 12, 2011 should not be counted as part of the statute of limitations analysis. Ruling on January 16, 2015, in a suit brought by Dykema Excavators, the district court held that ERISA's statute of limitations was "tolled" for that seven-year period with

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respect to all Blue Cross customers who had been charged hidden fees like those at issue in Hi-Lex. If that ruling is not successfully appealed by BCBSM, it would have the effect of greatly extending ERISA's statute of limitations for most of BCBSM's current and former self-insured customers. For example the ruling would give a BCBSM customer who discovered the hidden-fees scheme in 2005 until August 12, 2017 to file suit.

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