

## Judge halts Ga. law on 'prompt pay' for some health plans

A federal judge has halted enforcement of a Georgia law requiring employer-funded health benefit plans to pay employee claims in as little as 15 days.

U.S. District Judge William Duffey Jr. of the Northern District of Georgia issued a preliminary injunction Dec. 31 enjoining amendments to the state's 14-year-old "prompt pay" statute. The changes, slated to take effect Jan. 1, also would fine insurance companies and other health benefits providers that delay processing claims, reimbursing physicians or insured patients for health benefit plans funded by employers.

Duffey's order granted the request of attorneys for America's Health Insurance Plans, a national trade association for the health insurance industry. AHIP sought the injunction in August, arguing that the federal Employee Retirement Income Security Act (ERISA) exempts employer-funded health benefit plans from state regulation.

The case before Duffey challenged amendments to a 1999 Georgia law that set stringent timetables for insurance companies to pay health benefits claims. The 1999 law applied to benefit plans in which employers bought health insurance policies to cover employees. But it did not include self-funded plans in which employers paid employees' claims but traditionally relied on third-party administrators (usually insurance companies) to run them.

In 2011, Georgia expanded the "prompt pay" law to include the growing number of companies funding their own plans.

In his 50-page order, Duffey agreed with the insurance trade association that the state's attempt to extend its prompt payment requirements to employer-funded programs is expressly prohibited by ERISA.

Duffey acknowledged that there exists "the curious—and even unfair—disparate treatment of self-funded and insured ERISA plans, the latter being capable of some state regulation and the former being free of nearly all state oversight."

But, he wrote, "The Supreme Court has recognized this disparity on multiple occasions reasoning that Congress intended to allow it. ... Any disparity created in the treatment of self-funded and insured ERISA plans is a matter that Congress is required to address."

Duffey said in his order that he enjoined the 2011 Georgia law after determining that AHIP is likely to succeed in the litigation.

AHIP's local counsel, solo practitioner Bruce Brown and James Washburn of McKenna Long & Aldridge,

could not be reached for comment. An AHIP lawyer in Washington, Geoffrey Sigler of Gibson Dunn & Crutcher, referred questions about the injunction to his the trade association.

AHIP spokesman Robert Zirkelbach said Thursday, "We're pleased with the ruling."

"If you start allowing state laws to apply to employer funded plans, it would set a very troubling precedent particularly if more and more states start to do this," Zirkelbach explained.

Regulations that vary from state to state, he said, "would create a tremendous amount of complexity" and cause the cost of administering health benefit plans "to go up considerably" for large employers with operations and employees in multiple states. "It would make it harder for employers to continue offering uniform health care benefits for their employees."

Georgia Insurance Commissioner Ralph Hudgens, the defendant in the AHIP suit, said Thursday he supported the amended law and was disappointed by the preliminary injunction. "The law was intended to protect doctors from delayed payments and to prevent them from having to chase down insurance companies or administrators to receive timely compensation," he said.

"However," the commissioner added, "I remain hopeful that the law will ultimately be upheld and that doctors will receive protection against unnecessary delays in payment. Additionally, I was not enjoined from enforcing prompt pay laws in the fully-insured market and intend to continue enforcing those provisions."

A spokeswoman for Attorney General Sam Olens, who is defending Hudgens, said Olens had no comment on Duffey's ruling and has not decided what the state's next step in the litigation will be.

### **'The float'**

At the heart of the dispute and the legislation that led to it, according to Duffey's order, are tactics that insurers have been accused of employing in order to boost their earnings at the expense of medical providers and their patients. Those tactics include delaying, denying or simply ignoring medical claims, or paying less than the submitted amounts in order to "gain money on the float."

"The longer an insurer withholds paying a claim, the longer the insurer can invest and make use of the amounts it owes on the claim," Duffey wrote. "This practice takes a toll on providers, sometimes to the extent of forcing doctors to take out loans to keep their offices open or requiring them to seek bankruptcy protection."

State legislatures, including the Georgia General Assembly, have responded to the medical lobby's complaints about the late payment tactics with "prompt pay" legislation that has set time limits for payments of claims and has assessed penalties for insurance companies and other health care providers that did not comply. But Georgia law, until recently, had focused on insured health plans rather than employer-funded plans, according to the order.

That changed in 2010, according to an affidavit in the case from the Medical Association of Georgia, a physicians' trade association that lobbied successfully for passage of the state's 1999 prompt pay law and has petitioned to intervene in the AHIP case.

MAG's executive director, Donald Palmisano Jr., who authored the affidavit, said the association recognized that a majority of the state's employers were shifting from traditional insurance plans to self-funded plans.

With MAG's support, Insurance Commissioner Hudgens, then a state senator, sponsored the bill in 2009 that would become the basis for the enjoined law. It passed both houses of the Georgia General Assembly in 2010, but Governor Sonny Perdue vetoed the bill, saying he believed that it ran afoul of ERISA.

Virtually identical legislation was introduced again in 2011 and again passed by overwhelming majorities in the General Assembly. Governor Nathan Deal signed it into law in May 2011.

### **Payment on a timetable**

In court briefs, state attorneys have said the law was intended "to address the growing problem of [third-party administrators] of health benefits plans not paying medical claims in a timely manner" by compelling payment on a timetable under threat of financial penalties.

AHIP—which had joined with the Georgia Chamber of Commerce to fight the law—claimed that the expansion of Georgia's prompt payment law to include employer-funded benefits plans was invalid because it usurped ERISA's exclusive regulatory authority and "if it were not pre-empted, would increase the cost and complexity of administering these plans... ."

AHIP spokesman Zirkelbach said that AHIP's suit "specifically focused on upholding ERISA as the regulator of self-funded plans. ... It is not about prompt pay."

He deflected questions about allegations that insurers want to be able to delay payments so they can continue to use the funds for their financial benefit. "This is not a question of whether doctors should be paid on time. We strongly agree they should," he said. "The question is about which entity governs and how these plans are regulated."

AHIP, he added, sued on behalf of its membership's customers, many of whom are employers who fund their own benefit plans, in order to keep their costs down "and not make it any harder" for them to offer uniform benefits to employees across the country. "If people want to impose pay laws on self-funded employer plans," he added, "they need to do it at the federal level, not at the state level."

The Georgia Chamber of Commerce, in a friend of the court brief supporting AHIP, echoed Zirkelbach's concerns: "The Prompt Pay law will doubtlessly and needlessly increase the cost of health insurance benefits in the State of Georgia by adding an additional layer of state government oversight to a federally regulated matter and imposing exactly the type of burdens on the administration of health benefit plans that ERISA sought to alleviate." The Chamber's brief was filed by Atlanta attorneys **Richard Robbins** and **Josh Belinfante**, Perdue's former executive counsel.

### **'An understatement'**

In his order, Duffey observed that "to say that the imposition of state prompt pay legislation on ERISA plans would 'interfere' with uniformity may, in fact, be an understatement" given what he described as a "patchwork of prompt pay legislation." He also noted that, "The ability to withhold payments for long periods of time certainly benefits plans by allowing them to earn income on the unpaid funds."

But, the judge added, "Whether plans should be able to take advantage of funds owed to providers is not for

the Court to remedy in this action."

MAG has argued that, in Georgia, insurers had been adhering to the state's prompt payment requirements for both insured and employer-funded health benefit plans after some of the nation's largest insurance companies settled suits filed by MAG and the AMA over chronic claim payment delays.

"Although most of the settlement agreements have now expired, several of AHIP's [third-party administrator] members have agreed to voluntarily continue to abide by various terms of those settlement agreements," Palmisano's affidavit stated. But others, according to the affidavit, "have now stated that they will no longer do so."

A MAG survey also revealed that while Georgia law requires insurers for insured plans to meet prompt payment timetables, when those same companies acted as third-party administrators for employer-funded plans, "the discrepancy between the insurer/third party administrators' statutorily required payment behavior when acting as an insurer versus their actual payment behavior, when acting either as [third party administrators] or insurers was striking."

Palmisano told the *Daily Report* on Thursday, "Right now, we know they are not paying in a timely manner on these self-funded benefits claims. ... If you don't timely pay, the money made on the float is at the expense of physicians and health care providers."

The case is *America's Health Insurance Plans v. Hudgens*, No. 1:09-cv-955 (N.D. Ga.).