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COURT OF APPEALS

STATE OF NEW YORK

AETNA HEALTH PLANS,

Appellant,

-against-

No. 15

HANOVER INSURANCE COMPANY,

Respondent.

20 Eagle Street
Albany, New York 12207
January 13, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

JONATHAN A. DACHS, ESQ.
SHAYNE, DACHS, SAUER & DACHS, LLP
Attorneys for Appellant
114 Old Country Road
Suite 410
Mineola, NY 11501

BARRY I. LEVY, ESQ.
RIVKIN RADLER LLP
Attorneys for Respondent
926 RXR Plaza
Uniondale, NY 11556

Sharona Shapiro
Official Court Transcriber

1 JUDGE PIGOTT: Our first case is number 15,
2 Aetna Health Plans v. Hanover Insurance.

3 Mr. Dachs?

4 MR. DACHS: For the - - -

5 JUDGE PIGOTT: Welcome.

6 MR. DACHS: - - - appellant, Jonathan
7 Dachs. I request seven minutes and three for
8 rebuttal.

9 JUDGE PIGOTT: Three? Okay. Please
10 proceed.

11 Mr. Dachs, go ahead.

12 MR. DACHS: Good morning, Your Honors, and
13 bright and early. I appreciate it.

14 I'd like to begin by briefly summarizing
15 some of the main issues upon which the parties seem
16 to agree. In fact, in one case, at least, they agree
17 in writing, including the amicus, and that is the
18 simple issue that we all agree upon, which is that
19 this case includes and involves some very significant
20 and important issues to the insurance industry as a
21 whole, to no-fault insurers, to health insurers, to
22 medical providers, as well as millions of automobile
23 consumers.

24 JUDGE RIVERA: Why should you escape paying
25 for this or why should - - -

1 MR. DACHS: I'm sorry, why - - -

2 JUDGE RIVERA: - - - why should Hanover
3 escape paying for these bills just because of a - - -
4 an error by the hospital - - -

5 MR. DACHS: Well, they shouldn't - - -

6 JUDGE RIVERA: - - - and Aetna.

7 MR. DACHS: They shouldn't escape paying
8 for these bills, and that really is the essence of
9 our position.

10 JUDGE RIVERA: Um-hum.

11 MR. DACHS: What - - - what's happening
12 here is an unjust enrichment which the law abhors.
13 And Aetna acted in good faith for its insured; it did
14 what it's supposed to do.

15 JUDGE ABDUS-SALAAM: Don't you have to - -
16 - counsel, don't you have to at least adhere to the
17 law in order to get paid for this, and wouldn't that
18 require that you be either a proper subrogee or an
19 assignee or actually have a bill to collect, because,
20 as - - - as I understand it, your subrogee or assign
21 - - - your subrogor or assignor doesn't owe anything
22 now to Hanover.

23 MR. DACHS: Well, okay.

24 JUDGE ABDUS-SALAAM: Isn't that - - -

25 MR. DACHS: So I agreed with - - -

1 JUDGE ABDUS-SALAAM: - - - correct?

2 MR. DACHS: - - - everything Your Honor
3 said until the last words. Absolutely, there is a
4 requirement to comply with the law to recover on a
5 claim. But there's also a requirement by a no-fault
6 insurer, as this court is well aware, to deny - - -
7 to pay or deny a claim within thirty days or be
8 subject to significant consequences - - -

9 JUDGE STEIN: Well, can I ask you about
10 that?

11 MR. DACHS: - - - which include preclusion.

12 JUDGE STEIN: You're talking about a claim?

13 MR. DACHS: Yes.

14 JUDGE STEIN: Okay? The arbitrator said
15 that there was no claim. Neither of the courts below
16 address that issue. Is that a finding that we can
17 make as to whether or not it was a valid claim?

18 MR. DACHS: Well, the arbitrator ruled on
19 the issue of standing, and as a result of the
20 arbitrator's ruling, we accepted that for purposes of
21 - - - of going forward, and said, okay, well, if
22 Herrera, the injured party, doesn't have standing,
23 the arbitrator said the only party with standing is
24 Aetna.

25 JUDGE STEIN: Well, I guess - - -

1 MR. DACHS: We then proceeded as Aetna.

2 JUDGE STEIN: - - - my question is, is that
3 a fact - - - a factual question as to whether it was
4 or was not a claim, and if so is - - - how - - - how
5 do - - - how do we get to make that determination
6 when none of the other courts did?

7 MR. DACHS: Well, respectfully, I don't
8 think there has ever been an issue as to whether it
9 was a claim. The - - -

10 JUDGE STEIN: Well, I thought Hanover said
11 we didn't deny it because it wasn't a claim: it
12 wasn't on the proper forms, it wasn't coming from a
13 proper party - - -

14 MR. DACHS: Hanover - - - Hanover did take
15 the position below, in the trial level, actually in
16 the arbitration level, that the proper bills were not
17 submitted. The fact of the matter is that a
18 submission was made, it was made as a submission of
19 bills, and they were required to deny the claim.

20 JUDGE RIVERA: But didn't the arbitrator -
21 - -

22 MR. DACHS: And they didn't.

23 JUDGE RIVERA: - - - make a finding
24 regarding the quality of the submission of that
25 documentation?

1 MR. DACHS: Yes, the arbitrator did, and -
2 - -

3 JUDGE RIVERA: And what was that finding?

4 MR. DACHS: That finding by the arbitrator
5 was that they - - - these were not bills.

6 JUDGE ABDUS-SALAAM: The finding that you
7 mentioned before, that Aetna had standing, did the
8 arbitrator actually say that Aetna had standing?
9 Wasn't the arbitrator's decision that Ms. Herrera had
10 no standing?

11 MR. DACHS: No, the arbitrator - - -

12 JUDGE ABDUS-SALAAM: Not that - - -

13 MR. DACHS: The arbitrator said, on two
14 separate occasions, in two separate sentences, that
15 the proper party is - - - unfortunately he used the
16 wrong words; he said the health care provider, but as
17 I've demonstrated in my brief, it's very clear from
18 the context and the meaning of those - - - of those
19 words that what he meant was the health care
20 insurance company, which is Aetna.

21 JUDGE PIGOTT: The larger - - - the larger
22 question here - - -

23 MR. DACHS: That's what led us to commence
24 the action in the way we did.

25 JUDGE PIGOTT: The larger question here is,

1 it seems to me - - - I signal to Mr. Levy about this
2 too - - - is I picture someone who's in an accident,
3 who, let's say, is comatose or is otherwise unable to
4 comply with all of the rules that no-fault sets out -
5 - -

6 MR. DACHS: Right.

7 JUDGE PIGOTT: - - - and submits all of
8 this to their - - - to their personal carrier, the
9 personal carrier should re - - - may or may not know
10 the reason why the - - - you know, may or may not
11 know that there's no-fault involved - - -

12 MR. DACHS: Correct.

13 JUDGE PIGOTT: - - - pays it, and - - - and
14 the way the law reads now, it sounds like once it's
15 paid, once Aetna, in this case, paid it, they're off
16 the hook, even though they're the no-fault carrier,
17 and in the normal course, if - - - if Ms. Herrera had
18 submitted it to her no-fault carrier, they would have
19 paid it.

20 MR. DACHS: Well, they either would have
21 paid it or would - - - or would have denied it.

22 JUDGE PIGOTT: Right.

23 MR. DACHS: And then we would have known if
24 they were going to pay it or not. But there was no
25 denial here. So based on this decision, that appears

1 to be the law, and that's the problem, because that
2 creates significant real-world problems here for
3 claimants in that situation or other situations.

4 JUDGE PIGOTT: And what are the - - - what
5 are the real-world problems that you see?

6 MR. DACHS: Well, as a result of this
7 decision, a - - - where a health care insurer, not a
8 no-fault insurer, for whatever reason receives the
9 claim - - - here the claim was submitted by the
10 doctors directly, because I guess they didn't know it
11 was a no-fault claim.

12 JUDGE FAHEY: Well, they made an error.

13 MR. DACHS: But - - -

14 JUDGE FAHEY: I think you have - - - let's
15 assume that it was an error, and let's assume that
16 this form, reasonable people may call it a bill, but
17 for purposes of - - - of the regs and the finding of
18 the arbitrator, it wasn't a bill, even if - - - even
19 if they're right, don't the principles of equitable
20 subrogation help you and - - - and get you to where
21 you need to be? This seems - - -

22 MR. DACHS: Of - - - of course they do.

23 JUDGE FAHEY: - - - relatively
24 straightforward under that principle.

25 MR. DACHS: Of course they do, and I think

1 the courts below were focused on whether the no-fault
2 reg helps us. And I can argue for ten minutes about
3 whether we fit into the no-fault reg or not because -
4 - - and this is the statement by Judge Abdus-Salaam
5 that I needed to disagree with. The - - - it's not
6 correct that - - - that the injured party doesn't owe
7 any money here because a lien has been asserted by
8 Aetna on - - - by - - - by Rawlings Company on behalf
9 of Aetna. And that's the crux here; she will have to
10 pay that money back, whereas if she was able to
11 recover under the no-fault law, she wouldn't have
12 that problem. So she is injured, in fact - - -

13 JUDGE ABDUS-SALAAM: Is she foreclosed from
14 recovering on the no-fault law now?

15 MR. DACHS: Well, they won't pay it.
16 They've taken the position that they don't owe it.

17 JUDGE STEIN: But she can recover from - -
18 - the lien is against her recovery from the third
19 party tort fees, isn't it? So - - -

20 MR. DACHS: Correct, so the minute she
21 recovers something, she has to pay it back to Aetna.

22 JUDGE STEIN: Well, I know, but when she -
23 - - well, certainly if she settles, that would be - -
24 - the lien would be taken into account in terms of
25 how much she settles with the - - -

1 MR. DACHS: Well, even if she recovers by a
2 judgment, she's going to have to pay that back. It's
3 only - - -

4 JUDGE PIGOTT: Could you make that clear
5 for me? Let's assume that she - - - I forget what
6 the total bill here is. Let's assume it's fifty - -
7 -

8 MR. DACHS: 43,000 dollars.

9 JUDGE PIGOTT: All right. Let's make it
10 fifty, just so I can - - -

11 MR. DACHS: Okay.

12 JUDGE PIGOTT: - - - round it off. So you
13 - - - you settle the case for 150-.

14 MR. DACHS: Right.

15 JUDGE PIGOTT: Let's - - - let's take the
16 lawyer out of it for a second, but - - - so fifty
17 grand of that in - - - would be - - - go - - - would
18 go to the no-fault carrier in the normal course, or -
19 - - or - - -

20 MR. DACHS: She is obligated to pay back
21 from - - - the health care provider; because of the
22 type of policy this was - - - it's an ERISA-qualified
23 plan, it's not protected by the statute - - -

24 JUDGE PIGOTT: Okay.

25 MR. DACHS: - - - that excludes other types

1 of insurance, she owes that money back. That's the
2 crux here because whether - - - whether she submitted
3 the claim or Aetna submitted the claim, it really
4 makes no difference. She has to pay that money back.
5 Aetna is now trying to recover that money from - - -

6 JUDGE PIGOTT: Well, if Hanover paid the
7 claim, would they - - - would they be entitled to get
8 it back?

9 MR. DACHS: No, there's no lien by the no-
10 fault carrier. That's why this is significant. And
11 - - -

12 JUDGE STEIN: Can I ask one more question?

13 MR. DACHS: Sure.

14 JUDGE STEIN: Were you under a legal
15 obligation to pay Herrera?

16 MR. DACHS: To pay Her - - - is Aetna under
17 a legal obligation - - -

18 JUDGE STEIN: Was Aetna under any legal
19 obligation to make - - - I mean, at a certain point
20 you knew that it was supposed to be no-fault, and you
21 continued paying anyway. But either before then or
22 after then, was Aetna under any legal obligation to
23 pay out to Herrera - - -

24 MR. DACHS: I can't - - -

25 JUDGE STEIN: - - - or on behalf of

1 Herrera?

2 MR. DACHS: I can't go that far as to say
3 it was a legal obligation.

4 JUDGE STEIN: Okay.

5 MR. DACHS: But I do want to emphasize that
6 what Aetna did here was the right thing for its
7 policy holder, something that should never be
8 discouraged. And what will happen as a result of
9 this decision, if - - - if health care providers that
10 do take that affirmative action to protect their
11 insureds who have a problem with the no-fault
12 coverage and need to be reimbursed, need to have
13 their doctors paid so that they can get treated,
14 they're going to know that they're never going to get
15 their money back if they do that because of this
16 decision - - -

17 JUDGE STEIN: Why can't you go - - -

18 MR. DACHS: - - - they're never going to
19 treat anybody.

20 JUDGE STEIN: Why can't you go after the
21 doctors for their error?

22 MR. DACHS: Well, in - - - in very abstract
23 theory, that could happen, but in, again, real world,
24 that's not going to happen. They're not - - - they
25 have no reason to give you the money back. If they

1 do, they have to now make a claim for no-fault
2 benefits - - -

3 JUDGE FAHEY: So they - - - they'd have to
4 - - -

5 MR. DACHS: - - - which Hanover will deny
6 as untimely.

7 JUDGE FAHEY: They'd have to go back then -
8 - - if you went after the doctors, then the doctors
9 would have to go after the no-fault carrier?

10 MR. DACHS: Correct, that would be - - -

11 JUDGE FAHEY: Is that the theory?

12 MR. DACHS: - - - the only way they get
13 money, and we know what's going to happen if they try
14 that.

15 JUDGE FAHEY: I always think about - - -

16 MR. DACHS: So they're not going to want to
17 treat no-fault patients anymore.

18 JUDGE FAHEY: I always think about the
19 principle if the bank puts a million dollars in my
20 account; just because the bank makes an error doesn't
21 mean I get to keep the money. And - - - and this
22 strikes me very much as that kind of case. So - - -

23 MR. DACHS: Okay. I have to think about
24 that a little bit more when I have the time.

25 JUDGE FAHEY: Thank you.

1 MR. DACHS: So simply put, Your Honor
2 mentioned equitable subrogation. Implied indemnity
3 applies as well. It's - - - it's a situation where
4 somebody - - -

5 JUDGE ABDUS-SALAAM: Did you argue that
6 below?

7 MR. DACHS: - - - paid something - - -

8 JUDGE ABDUS-SALAAM: Counsel, did you argue
9 the implied indemnity - - - are you - - - did you
10 make that argument in the Supreme Court, or did you
11 make that after the Supreme Court made its decision?

12 MR. DACHS: Did we make that in the Supreme
13 Court? I don't - - - I honestly don't know. I know
14 I made that in the Appellate Division, and I've made
15 that here.

16 JUDGE FAHEY: But if we decided it under
17 equitable subrogation, we wouldn't need to address -
18 - -

19 MR. DACHS: You don't need to - - - right.
20 But I'm saying I have both. And I'm also saying - -
21 - and this may be controversial, and whereas the
22 others are not - - - even under the no-fault
23 regulation - - - the no-fault regulation says
24 payments can be made directly to the claimant or to
25 the health care provider. And everybody's making a

1 big fuss about whether Aetna is a health care
2 provider or not.

3 Aetna is not a health care provider. I
4 have no problem conceding that. It is a health care
5 insurer, but it is standing in the shoes of the
6 claimant, Ms. Herrera. It is attempting to recover
7 the money that she has to pay directly to them. So
8 whether Hanover pays - - - Hanover pays Herrera and
9 Herrera has to give it to Aetna, or Hanover pays
10 Aetna directly, makes no difference. The concept is
11 the same. And that regulation should not be read so
12 narrowly as to exclude this particular situation.
13 And the criti - - -

14 JUDGE PIGOTT: We may have questions for
15 you going forward - - -

16 MR. DACHS: Sure.

17 JUDGE PIGOTT: - - - on your rebuttal about
18 what this means, going out the other way, but let's
19 hear from Mr. Levy.

20 MR. DACHS: Okay. Thank you.

21 JUDGE PIGOTT: Thank you, Mr. Dachs.

22 MR. LEVY: Good morning, Your Honors.

23 JUDGE PIGOTT: Good morning.

24 MR. LEVY: Let's start by talking about
25 what this case really is, which is not a case about

1 equitable subrogation or implied indemnity; it's a
2 case about an assignment.

3 JUDGE PIGOTT: Well, it looks like a
4 gotcha, because if - - - if somebody asked me am I
5 health care provider, the answer is no. Do I take
6 care of the health care insurance for my children?
7 Yes. And if somebody said, well, that's great, and -
8 - - and you shouldn't have paid this bill because
9 you're not a health care provider, so we're not going
10 to provide the insurance that you think you - - - you
11 paid for, for that reason. It just - - - I think you
12 would agree that if Ms. - - - Ms. Herrera had
13 submitted the no-fault documents, that you would have
14 paid it.

15 MR. LEVY: I - - -

16 JUDGE PIGOTT: Assuming for a minute that
17 this was an auto accident.

18 MR. LEVY: Assuming it was an auto
19 accident, and assuming that the bills came to - - -
20 to Hanover, in due course, in requirement with the
21 regulation in that - - - the definition of a claim,
22 we would have adjusted the claims according to the
23 regulations in the policy.

24 JUDGE PIGOTT: Right. This was an auto
25 accident case. You say we insure you for auto

1 accidents; we, the insurance carriers, fought very
2 hard for no-fault, because we didn't want these - - -
3 these claims to be in - - - in the trial courts. And
4 so we got what we wanted, and we will pay these
5 things regardless of fault.

6 MR. LEVY: But part of - - -

7 JUDGE PIGOTT: Wait a minute; I'm almost
8 done.

9 MR. LEVY: Sure, Your Honor.

10 JUDGE PIGOTT: So - - - so that's what
11 we're - - - I know you know what I'm going to say.

12 MR. LEVY: I do.

13 JUDGE PIGOTT: So now, all of a sudden, my
14 comatose patient or someone, in this case the
15 doctors, make a mistake and say, well, we should have
16 sent it to Hanover, we've sent it to Aetna; Aetna, in
17 good faith, paid it, because it's their insured as
18 well. And now you guys are saying, gotcha; we're not
19 paying it, even though we otherwise would have.
20 What's the error in my reasoning there?

21 MR. LEVY: A couple of things. Number one,
22 in terms of what we got in 1974, when no-fault was
23 enacted, okay, and in the thirty or more years that
24 it's been there - - -

25 JUDGE PIGOTT: That was an editorial

1 comment I probably - - -

2 MR. LEVY: - - - long - - -

3 JUDGE PIGOTT: - - - shouldn't have made.

4 MR. LEVY: - - - long time, Your Honor,

5 what we got is we got a very highly regulatory

6 scheme, okay, in which we operate on a day-to-day

7 basis. And part of that regulatory scheme talks

8 about who are participants, appropriately, and who

9 are not participants, appropriately, in that scheme.

10 And when you look at - - -

11 JUDGE ABDUS-SALAAM: Well, counsel, why

12 shouldn't we include another insurer rather than just

13 limiting it to a health care provider or a co-insurer

14 under a no-fault?

15 MR. LEVY: Well, I don't think that the

16 court is the - - - the proper body to do that because

17 the consequences of the court doing that, and

18 ultimately what flows from that, is really or should

19 be within the purview of either the legislature or

20 the Department of Financial Service - - -

21 JUDGE PIGOTT: But can't you define it that

22 way? In other words, using my - - - you know, I'm a

23 health care provider for my children and my family.

24 MR. LEVY: But you - - -

25 JUDGE PIGOTT: I'm a lawyer, but I'm - - -

1 but I'm the one that - - - that does it. Aetna is
2 the health care provider for all of its insureds, but
3 - - - and - - - and - - - you may be right; we might
4 be expanding definitions too far. But if somebody
5 asks, you know, who's your health care provider, I'd
6 - - - I'd say Empire or Blue Cross or Blue Shield.

7 MR. LEVY: It's - - -

8 JUDGE PIGOTT: And I'd be wrong under the -
9 - - under the definition that exists now in this
10 case.

11 MR. LEVY: Right, but under the definition
12 under the no-fault statute, Your Honor, "health care
13 provider" is identified as the pover - - - the
14 person who is licensed to deliver professional
15 services.

16 JUDGE RIVERA: Does the statute prohibit
17 subrogation?

18 MR. LEVY: The statute absolutely prohibits
19 subrogation except in the instances in which it
20 allows it. If you look at 5105 - - - and this goes
21 to the question of what - - - what - - -

22 JUDGE RIVERA: Or it allows it unless it
23 prohibits it.

24 MR. LEVY: Right.

25 JUDGE RIVERA: So go ahead.

1 MR. LEVY: And then the question of what
2 the circumstances are. Equitable subrogation,
3 relative to the subrogation provision in the no-fault
4 law, doesn't have any application. One, we have a
5 statutory and a regulatory scheme that's been in
6 place for umpteen years. Secondly, in terms of
7 equitable subrogation, when we talk about concepts of
8 unjust enrichment or to employed inequitable results,
9 two things. Number one, Aetna does not deny that it
10 had a contractual obligation to pay the claims in
11 this case. This is not a claim of mistake. This is
12 not a claim where - - -

13 JUDGE RIVERA: So you're saying you both
14 equally had a duty to pay?

15 MR. LEVY: I believe that they - - -

16 JUDGE RIVERA: And so they got to it first
17 and so you don't have to pay anything?

18 MR. LEVY: I believe that in this
19 particular situation, Judge Rivera, that both
20 carriers had an equal obligation to pay. Why the
21 health care providers, the hospital and the doctors,
22 elected to submit the claims to Aetna, rather than to
23 Hanover, is beyond - - -

24 JUDGE PIGOTT: Wait a minute. Wait a
25 minute.

1 MR. LEVY: - - - anyone's understanding
2 here.

3 JUDGE PIGOTT: Wait a minute. If you take
4 - - - wouldn't that reasoning also follow that you -
5 - - you guys have, as - - - as does Aetna, people who
6 - - - who decide what your premiums are going to be
7 based upon what your loss history is? And I would
8 think that the no-fault carriers would determine
9 their loss history in terms of automobile liability -
10 - - not liability, but - - - but the number of
11 injuries and claims made in - - - in automobile
12 accidents. And Aetna would be doing it with
13 everything but liabil - - - automobile accidents.

14 MR. LEVY: Not necessarily.

15 JUDGE PIGOTT: And then - - - and then, you
16 know, this happens, and - - - and somebody's out of
17 their pool. I mean - - -

18 MR. LEVY: But not necessarily. I think
19 Your Honor's reasoning would be correct if the policy
20 of insurance, or the plan under which the coverage
21 was provided by Aetna, had an exclusion - - - which
22 it can have, under ERISA - - - for accidents or
23 injuries resulting from motor vehicle accidents.

24 JUDGE PIGOTT: But you wouldn't feel bound
25 by that. You would - - - you'd be making the same

1 argument you - - -

2 MR. LEVY: Our argument would not be any
3 different, because ultimately, at the end of the day,
4 they're in no different of a position. But in this
5 position, it - - - on this record, we feel that
6 there's no question that each insurer was equally
7 responsible.

8 But go - - - go back to the question we
9 were talking about in terms of the - - -

10 JUDGE RIVERA: Did you argue to the
11 arbitrator that it had standing?

12 MR. LEVY: I don't believe that the
13 arbitrator's decision - - -

14 JUDGE RIVERA: No, no, no, I - - - did you
15 argue that to the arbitrator?

16 MR. LEVY: No, we argued that Ms. Herrera
17 did not have standing. And what's reflected - - -

18 JUDGE RIVERA: And you never said that the
19 appropriate party for standing is Aetna - - -

20 MR. LEVY: No.

21 JUDGE RIVERA: - - - before the arbitrator?

22 MR. LEVY: No, that was - - - that was an
23 interpretation that I believe Mr. Dachs has drawn
24 from that, if you read the arbitrator's decision.
25 Now, the master arbitrator draws some different

1 conclusion, but not based on anything we argued, just
2 based on something that they concluded. But
3 inevitably, our position is that the only way that we
4 have a direct obligation to pay benefits, other than
5 to Ms. Herrera, is based on an assignment.

6 When Ms. Herrera gave the assignment to
7 Aetna, whenever that was, okay, at the end of the
8 day, she didn't have any rights to give. She had
9 already given an assignment of her benefits to the
10 hospital and the doctors for the purposes of
11 submitting the claim to the insurer.

12 JUDGE PIGOTT: I get that, but isn't it
13 true now that when Ms. Herrera, assuming she has a
14 claim and assuming she settles it, is going to have
15 to pay out of her recovery for the hospital care that
16 she received, that but for this little kerfuffle, you
17 would have paid?

18 MR. LEVY: Maybe; maybe not. We don't know
19 that from the record. But it's conceivable that
20 there would be some compromise of the lien. But the
21 law doesn't contemplate that in the context of the
22 no-fault - - -

23 JUDGE PIGOTT: The law does, if Mr. Dachs
24 is right. I mean, when - - - when she settles - - -
25 if you had paid it and she settled, this would not be

1 a factor. It'd only be a factor in terms of - - - of
2 the value of the case. But if we settled for 150-
3 and - - - and the hospital bill was 50-, that you had
4 paid, it - - - it would not be a factor in the
5 settlement.

6 MR. LEVY: We wouldn't be having these
7 discussions - - -

8 JUDGE PIGOTT: Right.

9 MR. LEVY: - - - because those bills would
10 not exist.

11 JUDGE PIGOTT: Right.

12 MR. LEVY: But that doesn't necessarily
13 confer upon Aetna as the - - - as the commercial
14 insurer, as the health plan, the right to come
15 against us.

16 JUDGE PIGOTT: Right, but - - -

17 MR. LEVY: No - - -

18 JUDGE PIGOTT: But my - - - my point is
19 this, that she paid - - - she paid you a premium for
20 coverage, and she paid Aetna for coverage. The way
21 this thing is going to come down is your - - - the
22 coverage she paid you for, even though it's a
23 no-fault for an auto accident, does not - - - is not
24 going to figure in this. Aetna's is. And she's
25 going to have to repay, essentially, Aetna the fifty

1 grand that she thought you were going to pay because
2 she paid you a premium.

3 MR. LEVY: But one of the things that was
4 alluded to during Mr. Dachs' argument, which is
5 important, is the question of unwinding the payments.
6 And - - - and I think Judge Fahey alluded to this.
7 Contractually, and as a matter of law under ERISA,
8 Aetna health plan can go back to the health care
9 providers, if it's not contractually obligated to pay
10 the claims or for their - - - or there's a priority
11 of payment issue here.

12 JUDGE PIGOTT: But isn't that - - - isn't
13 that the reason why we have no-fault was we - - - and
14 not - - - not this particular one, but there is no
15 way on God's green earth that a carrier is going to
16 go back to the hospital and say, give us the money
17 back we paid you.

18 MR. LEVY: Do it every week. They do it
19 every single day of the week, Your Honor.

20 JUDGE PIGOTT: Really?

21 MR. LEVY: Because they have capitation
22 agreements with the doctors that obligate them - - -
23 and this is not in the record, but this is the way
24 the industry works. Commercial insurers, ERISA-based
25 plans, have clawback provisions in every agreement

1 they have with major hospitals and providers in order
2 to participate in their networks, because they don't
3 want to be in a situation where, if they have a
4 mistaken payment, they can't get the money back.

5 JUDGE PIGOTT: Oh, I get that.

6 MR. LEVY: That's the premise.

7 JUDGE PIGOTT: I get that, but what I
8 thought you were going to talk about is you got a
9 lady who needed health care and they provided it.
10 You know, you call them not a health care provider,
11 but they - - - they provide it by paying the doctors.
12 It turns out it was a no-fault case. They call you
13 and say, hey, guess what, it's a no-fault, not ours.
14 You would have said, fine, we'll pay it and - - - and
15 you go your merry way. And if it was the reverse, if
16 it turned out that it wasn't a no-fault case, and you
17 had paid it, you'd have caught - - - you know, you'd
18 have - - -

19 MR. LEVY: We're equally stuck, Your Honor.

20 JUDGE PIGOTT: - - - you'd have undone it -
21 - - wait a minute - - - you would have undone it, and
22 - - - and Ms. Herrera would have gone after Aetna.

23 MR. LEVY: I don't have that right. I
24 don't have the - - - the breadth of rights that Aetna
25 has under its own contractual arrangements with the

1 health care providers because no-fault is an
2 indemnity system. I don't have contractual
3 arrangements, nor can I, with health care providers
4 such as hospitals and doctors. I don't have any
5 clawback rights against doctors who provide services
6 in good faith and - - - and - - -

7 JUDGE FAHEY: This is a - - - just to take
8 a step back; you had said that equitable subrogation
9 doesn't apply and then the conversation went in
10 another direction. Address that, will you?

11 MR. LEVY: Sure. A couple of reasons why
12 equitable subrogation shouldn't really be judicially
13 implied in this particular instance. Number one, we
14 have a statutory scheme of subrogation that I think
15 is comprehensive enough so that we don't really need
16 to fill a gap here. And the legislature, in 5105 and
17 5106, has specifically defined the circumstances
18 under which subrogation can occur in the no-fault
19 arena. And that relates to parties who are
20 participants in that arena, such as ourselves and
21 other carriers.

22 But more importantly, it deals with the
23 question of fault. Equitable subrogation really
24 deals with not only questions of unjust enrichment
25 but questions of fault. And the way that subrogation

1 in the no-fault regime works is, hypothetically,
2 Judge Fahey, if my insured - - - I covered my insured
3 and I paid claims on their behalf, but I thought the
4 driver of the other vehicle was at fault, and it met
5 the threshold requirements of the subrogation
6 statute, I would have the ability to pursue
7 reimbursement based on fault of the insurer's insured
8 in causing the accident.

9 JUDGE PIGOTT: Right. And that happens all
10 the time.

11 MR. LEVY: It happens every day of the week
12 - - -

13 JUDGE PIGOTT: That's routine.

14 MR. LEVY: - - - Your Honor.

15 JUDGE PIGOTT: Right. But that doesn't
16 happen between no-fault and non-no-fault.

17 MR. LEVY: It doesn't happen for one very
18 simple reason: commercial insurers are not part of
19 the rubric that the legislature has created. And if
20 Aetna doesn't like the result in this case, it has a
21 place to go. You know, one of the things that
22 no-fault was designed to do is to reduce litigation.
23 If this court opens this door, we - - - we might just
24 as well open up a whole new series of civil courts in
25 New York City and throughout the state to start

1 litigating allocation claims between commercial
2 insurers and no-fault insurers.

3 JUDGE PIGOTT: Well, how'd you end up in
4 arbitration before? I mean, there was an arbitration
5 hearing?

6 MR. LEVY: Well, there's intercompany
7 arbitration that exists.

8 JUDGE PIGOTT: You're not going to end up
9 in the Supreme Court; you're going to end up in
10 arbitration.

11 MR. LEVY: But that would assume that - - -

12 JUDGE FAHEY: This never went to any form
13 of intercompany arbitration - - -

14 MR. LEVY: Never.

15 JUDGE FAHEY: - - - because - - -

16 MR. LEVY: Because - - -

17 JUDGE FAHEY: - - - it was covered under
18 no-fault?

19 MR. LEVY: It would - - - it wouldn't go to
20 intercompany arbitration because, under the
21 subrogation statute and the regulations, Aetna, as a
22 commercial health plan, doesn't meet the definition
23 to participate in that system.

24 JUDGE FAHEY: I thought they signed
25 agreements between themselves on intercompany

1 arbitrations?

2 MR. LEVY: They - - - they do, but the - -
3 -

4 JUDGE FAHEY: So in theory, you could - - -
5 this could be the kind of thing that the companies
6 could resolve between themselves?

7 MR. LEVY: If they wanted to, voluntarily -
8 - -

9 JUDGE FAHEY: Um-hum.

10 MR. LEVY: - - - no-fault automobile
11 insurers could sign agreements with commercial
12 insurers, but would be outside of the voluntary
13 scheme. But if we're talking about judicially
14 implied obligations, we have to - - - we have to look
15 at what the bigger picture here is, what the public
16 policy is, and what the implications are - - -

17 JUDGE FAHEY: The policy implications, they
18 cut both ways here, though. The policy implications
19 for Ms. Herrera are pretty severe too.

20 MR. LEVY: But in terms of allowing Aetna
21 into the rubric, those policy considerations should
22 be taken up by either the legislature or the DFS in
23 restructuring.

24 JUDGE FAHEY: But isn't that what equitable
25 subrogation is for?

1 MR. LEVY: But - - -

2 JUDGE FAHEY: To kind of fill this hole in?

3 MR. LEVY: Not in environments that are as
4 heavily regulated as this one, Judge Fahey. When you
5 talk about a regulation environment - - -

6 JUDGE FAHEY: That's true. I think - - - I
7 think that's a good point. The problem is is this is
8 a very unusual lawsuit. This much litigation over a
9 40,000-dollar claim, I would consider it relatively
10 unusual. So - - - so the principle or the policy
11 becomes much more important then. And sometimes
12 that's where the courts have to step in.

13 MR. LEVY: I agree with you, and I think
14 the question that the court has to ask itself is, is
15 what is the rule of law here and what are the
16 consequences of the rule of law. And you're right;
17 this is not a case about an insignificant amount of
18 money. It's forty-five. From the court's
19 perspective it may be insignificant, but no-fault
20 litigation in the court system is about 100 dollars,
21 1,000 dollars, 500 dollars. There are cases that are
22 pending right now in the New York City civil courts
23 over two dollars where, if you want to talk about
24 creating - - -

25 JUDGE FAHEY: So this is why people hate

1 lawyers.

2 MR. LEVY: I - - - listen, we used to - - -

3 JUDGE FAHEY: We all suffer from those
4 pieces of litigation.

5 MR. LEVY: We used to call the no-fault law
6 the Full-Employment Lawyer Act of New York State.
7 But it is, unfortunately - - - has taken on a life of
8 its own over the last ten years. I mean - - -

9 JUDGE PIGOTT: Let me - - - before you go,
10 I think Judge Rivera had a question.

11 JUDGE RIVERA: No, that's okay.

12 JUDGE PIGOTT: You all right? I'm - - -

13 MR. LEVY: And let me make one point. In
14 addition to the - - - to the - - - the regulatory
15 environment, at the end of the day, Aetna is not
16 without remedy, okay, if - - - if it wants to
17 exercise - - -

18 JUDGE PIGOTT: What about Ms. Herrera? I'm
19 still worried about her settlement.

20 MR. LEVY: Let - - - let's take her
21 settlement out of the picture, Your Honor.

22 JUDGE PIGOTT: I don't want to because if
23 she has to pay what you should have paid, or - - -
24 under the no-fault, it - - - it's - - - talk about
25 equitable; I mean, it just seems to me that that's -

1 - - that's a serious issue.

2 MR. LEVY: And at that point in time, Your
3 Honor, it may very well be that Ms. Herrera may come
4 back to us and say we think that you should pay that
5 claim. Now, it - - -

6 JUDGE PIGOTT: Could that have happened
7 about six years ago?

8 MR. LEVY: Well, but here's - - - here's
9 the problem; Ms. Herrera did - - - she already, as -
10 - - as Judge Stein and Judge Rivera had pointed out,
11 Ms. Herrera already, before this case was filed,
12 tried to arbitrate her right to reimbursement. What
13 the consequence of that are, if she has to pay out at
14 - - - at a later point in time as a result of
15 whatever the compromise of the lien is - - -

16 JUDGE STEIN: You're not going to fight her
17 tooth and nail and say it's untimely?

18 MR. LEVY: I - - - I don't know; at this
19 point in time, I'm not in a position to know what
20 that is. But I don't think that for purposes of - -
21 -

22 JUDGE RIVERA: Well, your past conduct
23 suggests otherwise. I mean, the point is you've
24 spent a lot more money now than you would if you had
25 paid it before.

1 MR. LEVY: Well, but - - - but Your Honor,
2 we weren't the ones driving this litigation. Okay?
3 And one of the things that you had - - -

4 JUDGE RIVERA: No, you're just in the back
5 seat enjoying the view because you're not - - - at
6 this - - - you're taking the position that you don't
7 have to pay anything, although you started out, in
8 response to one of my questions, saying you're both -
9 - - you're both equally obligated to pay.

10 MR. LEVY: Right. But the answer is, at
11 the end of the day, where the claim goes is where the
12 claim stays, based on the way that the statute and
13 the regulation is written as it presently
14 constituted. And if there are other remedies that
15 need to exist to cover commercial insurers such as
16 Aetna, all right, they can be drafted into the
17 regulation or the statute to - - - to enlarge what
18 the scope of the players are.

19 JUDGE PIGOTT: Okay, thank you, Mr. Levy.

20 MR. LEVY: Thank you, Your Honor. I
21 appreciate it.

22 JUDGE PIGOTT: Appreciate your time.

23 Mr. Dachs?

24 MR. DACHS: Several things. First of all,
25 the idea that they had an equal obligation to pay,

1 Hanover and Aetna, and that at - - - at any time they
2 could have made the claim to one or the other and
3 that they are equal and not primary is just not
4 correct. As the no-fault carrier, they were primary.

5 JUDGE PIGOTT: Well, I don't think that's
6 the point. I think the point is you paid it because
7 you thought you owed it because your - - - your
8 insured was injured.

9 MR. DACHS: On some level, we did owe it,
10 but not - - - but not because they are not primary.
11 And that - - -

12 JUDGE PIGOTT: Well, there - - - and
13 they're conceding it, to some extent, saying, and we
14 would have owed it, you know, if it - - - A, if it
15 was no-fault and if we'd gotten the forms. The
16 doctor is here in the middle. And if I'm
17 understanding Mr. Levy correctly, this is not an
18 unusual case, although it is because it got here, but
19 what happens day to day? I mean - - - I mean - - -

20 MR. DACHS: Well - - -

21 JUDGE PIGOTT: - - - we've got people in
22 hospitals in all - - -

23 MR. DACHS: - - - I'm glad you asked that.
24 What happens day to day is there are usually, as - -
25 - as counsel said, there are small amounts of money

1 involved, and if - - - if we're talking about a
2 140-dollar claim, and we say to the no-fault carrier
3 you should have paid this, we paid it and we
4 shouldn't have, you should, they'll write him a check
5 for 140 dollars. But now we're talking about 43,000
6 dollars, and that's why we're in this posture,
7 because - - -

8 JUDGE STEIN: Well, some of that - - -

9 MR. DACHS: - - - 43,000 dollars, they
10 don't want to pay.

11 JUDGE STEIN: - - - 43,000 dollars you
12 knew, when you were making those payments, that they
13 - - - that it was no-fault, right?

14 MR. DACHS: Not - - - certainly not in the
15 beginning.

16 JUDGE STEIN: No, not in the beginning.

17 MR. DACHS: Right.

18 JUDGE STEIN: But at - - - a point in time
19 came and then you notified them, hey, we shouldn't be
20 making these payments, but you kept paying them. So
21 - - -

22 MR. DACHS: To take care of our customer in
23 a proper way so that she can get medical treatment.
24 Again, it's something that - - -

25 JUDGE RIVERA: Why not alert the hospital

1 that they're sending the bill to the wrong address?

2 MR. DACHS: No, at that point, they stopped
3 doing that, but - - - but we submitted the claims
4 directly to Hanover with the request for payment, and
5 at that time, if they were concerned, they could have
6 paid it. And if they felt even that there was a
7 fifty-fifty - - -

8 JUDGE ABDUS-SALAAM: But why - - -

9 MR. DACHS: - - - responsibility, they
10 should have paid half.

11 JUDGE ABDUS-SALAAM: Well, counsel, why
12 don't you have arrangements with no-fault carriers
13 for your type of insured to get reimbursed if there's
14 a mistake and you - - - or not a mistake, but you
15 pay, if you think that they're primary and you're
16 secondary?

17 MR. DACHS: Well, I mean, I - - - I don't
18 think it actually happens as often as counsel
19 suggests, and it shouldn't happen, but it does
20 happen, and - - - and I don't know what arrangements
21 are made in those cases. All I know is what's on the
22 record here. And I - - - I will say that I'm sure
23 when Aetna paid it and found out that it shouldn't
24 have, it never, in a million years, thought it
25 couldn't get the money back. The carr - - - the

1 carrier with the responsibility to pay should pay.
2 And - - - and there shouldn't really be any question
3 about that.

4 With regard to the assignment, it's kind of
5 circular to say that she couldn't assign her rights
6 because she already assigned them to the doctor.
7 That's how the whole system works. She had a right -
8 - - what we're talking about here is the right to get
9 back the money that Hanover should have paid.

10 JUDGE ABDUS-SALAAM: But - - -

11 MR. DACHS: And that's not - - -

12 JUDGE ABDUS-SALAAM: - - - isn't your
13 adversary correct that this is a highly regulated
14 industry, this no-fault insurance carrier industry,
15 and that the legislature set it up so that it could
16 be a quick payment kind of operation. And if you're
17 going to now bring in all the commercial other - - -
18 other health insurers, shouldn't that be something
19 that the legislature or the Department of Financial
20 Services looks at, rather than having the court do
21 that?

22 MR. DACHS: Well, the doctrine of equitable
23 subrogation is a court doctrine, and it's a doctrine
24 that's been used for years to handle exactly this
25 situation - - - the right of one carrier, which has

1 paid insurance benefits to an insured that were more
2 properly the obligation of another insurance company,
3 to subrogate and recover against that insurance
4 company, has long been recognized by the law and the
5 courts. And I've cited cases in my briefs that say
6 that. It's a principle of - - - of equity and
7 natural justice. And that's Allstate v. Stein by
8 this court. And it was formulated to present - - -
9 to prevent unjust enrichment. That's what - - -

10 JUDGE PIGOTT: When did we say that?

11 MR. DACHS: - - - we're trying to do here.

12 JUDGE PIGOTT: What year in that case?

13 MR. DACHS: Stein? I don't know; I'm
14 sorry.

15 JUDGE PIGOTT: That's okay.

16 MR. DACHS: I think it was - - - I'm
17 guessing 1980-something, but I honestly don't know.

18 JUDGE STEIN: No relation.

19 MR. DACHS: Correct.

20 JUDGE PIGOTT: No relation?

21 MR. DACHS: I assumed that as well.

22 The primary function and purpose of the
23 no-fault law, we've all - - - this is another one of
24 those things we agree upon, it's to insure prompt
25 compensation for losses incurred by accident victims

1 without regard to fault or negligence.

2 JUDGE PIGOTT: I guess the flip side of
3 what I was picking on Mr. Levy for is, you know, if -
4 - - if the personal carriers, if Aetna and Empire and
5 all of those get lazy, I mean, they have - - - they
6 have a business to run too.

7 MR. DACHS: Right.

8 JUDGE PIGOTT: And they don't need to hear,
9 a year-and-a-half after an accident, that you guys
10 paid something to the tune of 120,000 dollars on a
11 case that should have been a no-fault case, and
12 they're saying we're supposed to get these things
13 within thirty days, and they get - - - they get
14 whacked pretty good if they don't pay the - - -

15 MR. DACHS: That's why they have the - - -
16 they have all the defenses available whenever they
17 get the claim. And if the defense is we should have
18 gotten this claim earlier and you shouldn't have
19 submitted to Aetna, then they should have denied.
20 And that gets back to my first point, which I think
21 counsel is not focused on; they don't even mention it
22 in their brief. By failing to deny the claim when it
23 was presented, whenever it was presented, they have
24 bound themselves to pay the claim. That's - - - that
25 is Court of Appeals law over and over and over again.

1 And most recently - - -

2 JUDGE ABDUS-SALAAM: That's if they
3 actually got a claim.

4 MR. DACHS: Whatever they got; if what they
5 got wasn't satisfactory to them, then they had to
6 deny on that basis.

7 JUDGE RIVERA: You mean they should have
8 acted, even - - -

9 MR. DACHS: A hundred percent.

10 JUDGE RIVERA: - - - even if what they say
11 is this - - - this does not fall within the
12 regulatory framework - - -

13 MR. DACHS: That's a ground to deny.

14 JUDGE RIVERA: - - - of appropriate notice
15 and documentation to us.

16 MR. DACHS: Another ground to deny.

17 JUDGE RIVERA: But we should let them know
18 there's a problem with this because on its - - -
19 well, let me go one step further. Is that argument
20 because, on its face, it's a technical problem and
21 they can see that someone is requesting payment of a
22 medical bill?

23 MR. DACHS: They have the - - -

24 JUDGE RIVERA: You really can't figure that
25 out - - -

1 MR. DACHS: Correct - - -

2 JUDGE RIVERA: - - - but here they could.

3 MR. DACHS: - - - whether it's a bill or
4 not, the claim has been presented to them. Here are
5 bills; that's what the letter said.

6 JUDGE RIVERA: Um-hum.

7 MR. DACHS: And somebody in the company - -

8 -

9 JUDGE RIVERA: And they're not bills.

10 MR. DACHS: - - - says, but they're not
11 bills, so you have to deny - - -

12 JUDGE RIVERA: Yeah, but - - -

13 MR. DACHS: - - - based on the fact that
14 they're not bills.

15 JUDGE RIVERA: - - - what I'm saying is
16 your - - - your point is driven by the fact that when
17 they received that documentation - - -

18 MR. DACHS: Yes.

19 JUDGE RIVERA: - - - it was the kind of
20 documentation that although technically not a bill -
21 - - let's go with that for one moment - - - they
22 could look at it and see, this is a claim for
23 reimbursement for medical services, and that would
24 otherwise fall within what we have promised to pay.

25 MR. DACHS: Correct.

1 JUDGE RIVERA: But this doesn't look like
2 the paperwork, so I should let them know that this
3 doesn't look like the paperwork.

4 MR. DACHS: Well - - -

5 JUDGE RIVERA: Is that your position - - -

6 MR. DACHS: - - - not I should let them - -

7 -

8 JUDGE RIVERA: - - - that they should be
9 doing that?

10 MR. DACHS: It's not I should let them
11 know, to be a nice guy, to tell them what to do.
12 It's this submission does not - - -

13 JUDGE RIVERA: Or I should deny it.

14 MR. DACHS: - - - meet the requirement of -
15 - -

16 JUDGE RIVERA: I should deny it.

17 MR. DACHS: I should - - -

18 JUDGE RIVERA: I should not - - -

19 MR. DACHS: I have to deny.

20 JUDGE RIVERA: Right.

21 MR. DACHS: And if my positi - - -

22 JUDGE RIVERA: And other than not mailing
23 you anything, I should mail you a letter saying I
24 deny it.

25 MR. DACHS: You can't not respond; that's

1 the whole purpose of the regulation and the no-fault
2 law. And - - - and if the ground is you don't have
3 standing, you have to deny on that ground.

4 JUDGE STEIN: They certainly have to
5 respond to - - - to their - - - to the medical
6 provider or to their insured, but do they have to
7 respond to anybody that sends them anything and say,
8 yeah, we can't tell what this is but we don't think
9 it's a bill.

10 MR. DACHS: Well, very - - - it's very
11 simple to say they have to respond to Aetna if Aetna
12 is an assignee of Luz Herrera, but even without that,
13 they have to - - -

14 JUDGE STEIN: Well - - -

15 MR. DACHS: - - - yes, they do have to
16 respond to whoever is making the claim. That is a
17 key ingredient of the no-fault law and the no-fault
18 system. And this court has held on numerous
19 occasions, most recently last year in the Viviane
20 Etienne case, that the failure to deny a claim - - -
21 pay a claim or deny a claim within thirty days
22 results in preclusion of defenses to the claim and
23 they have to pay it. It's a strictly construed
24 thirty-day requirement.

25 We're not talking about thirty days here;

1 we're talking about ever. They've never denied the
2 claim except within the context of this litigation.

3 JUDGE PIGOTT: Thank you, Mr. Dachs and Mr.
4 Levy.

5 MR. DACHS: Thank you very much, Your
6 Honors.

7 JUDGE PIGOTT: Thank you both for your
8 time.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Aetna Health Plans v. Hanover Insurance Company, No. 15, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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