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COURT OF APPEALS

STATE OF NEW YORK

AETNA HEALTH PLANS,

Appellant,

-against-

No. 97

HANOVER INSURANCE COMPANY (REARGUMENT),

Respondent.

20 Eagle Street
Albany, New York 12207
March 04, 2016

Before:

CHIEF JUDGE JANET DIFIORE
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
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

JONATHAN A. DACHS, ESQ.
SHAYNE, DACHS, SAUER & DACHS, LLP
Attorneys for Appellant
114 Old Country Road
Suite 401
Mineola, NY 11501

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

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 97, Aetna Health Plans v. Hanover Insurance
3 Company.

4 Counsel.

5 MR. DACHS: Good afternoon, Your Honors.
6 Jonathan Dachs representing the Appellant Aetna.

7 Well, here we are again.

8 JUDGE PIGOTT: Welcome back.

9 MR. DACHS: Thank you very much, good to be
10 here.

11 CHIEF JUDGE DIFIORE: Sir, would you like
12 to reserve any rebuttal time?

13 MR. DACHS: Yes, thank you. I would like
14 to reserve three minutes, please.

15 CHIEF JUDGE DIFIORE: Three?

16 MR. DACHS: Yes.

17 CHIEF JUDGE DIFIORE: You have it.

18 MR. DACHS: Thank you very much.

19 CHIEF JUDGE DIFIORE: You're welcome.

20 MR. DACHS: Thank you for the opportunity
21 to clarify, and any questions or issues the court
22 might have in this very interesting and important
23 insurance law case. And I also, on a personal level

24 - - -

25 JUDGE RIVERA: We'll see if you feel the

1 same way in a few minutes.

2 MR. DACHS: That's right.

3 But I also wish to thank the court for
4 accommodating my request for a schedule change.

5 The - - - in the interim period between January
6 13th, when we were here last, and today, I had an
7 opportunity, it's kind of a rare opportunity, to review
8 the videotape of the argument and to read the transcript
9 of the argument, maybe the court has the same thing, I
10 don't know, but it has allowed me to focus on what I think
11 are the important issues, and the things that might have
12 been troubling the court, and I would like to address
13 those, of course, answer any questions the court might
14 have.

15 Having done that, it's even clearer to me that -
16 - - then it was before, that the following five
17 uncontroverted, undeniable truths and rules of law gover -
18 - - which govern this case, should result in the reversal
19 and decision in favor of my client.

20 The first is that the law abhors unjust
21 enrichment. I don't think I will hear a response from
22 counsel that denies that.

23 JUDGE GARCIA: Counsel, on that point, I
24 don't mean to interrupt you.

25 MR. DACHS: Sure.

1 JUDGE GARCIA: I'm new to this, but - - -

2 MR. DACHS: Welcome.

3 JUDGE GARCIA: On that claim - - - on that
4 point, if these bills have been submitted to Hanover
5 - - -

6 MR. DACHS: Yes.

7 JUDGE GARCIA: - - - would they have been
8 paid, or do - - - would they have had some defenses
9 or reasons not to pay them?

10 MR. DACHS: That exact question was asked
11 the last time, and counsel - - - it was asked to
12 counsel for Hanover - - -

13 JUDGE GARCIA: Perhaps (indiscernible).

14 MR. DACHS: - - - and I believe the
15 response was, I can't say yes or no, but if they were
16 properly submitted, we would have addressed them in
17 the appropriate fashion, and sure, they might have
18 been paid.

19 The most important point with regard to whether
20 they would have been paid or not is another issue which I
21 was hoping to get to a little bit later, but I'll mention
22 right now, and maybe I'll even get back to, which is that
23 if they did pay those claims, we would not have the
24 situation that we are in now, where the injured party, Ms.
25 Herrera, is faced with the obligation to repay Aetna.

1 Because it would not have had to repay Hanover; Hanover
2 was the no-fault carrier, there would be no obligation.
3 They would pay it; she'd be in the clear.

4 Because Aetna paid it, Aetna has a lien against
5 that payment, and that's what caused the initial attempt
6 to recover by Herrera in arbitration, and led to this
7 Supreme Court case in which the plaintiff was Aetna.

8 JUDGE STEIN: But as I think we discussed
9 last time, I mean, there was the issue about the fact
10 that at some point Aetna knew that Hanover was not
11 paying these claims - - -

12 MR. DACHS: Right. And I would like to
13 clarify that.

14 JUDGE STEIN: - - - and paid them anyways.

15 MR. DACHS: That's one of the issues I
16 wanted to clarify. I don't think my answers were as
17 sharp as they could have been last time.

18 The facts which are set forth in the record, are
19 that the first claims were submitted to Aetna either by
20 mistake on the part of the doctors, or even maybe on the
21 part of Ms. Herrera, or for some other reason that is not
22 clear in the record. But those - - - that was nineteen
23 thousand dollars worth of bills, and they were paid by
24 Aetna.

25 I've said before and I'll say it again, faced

1 with those bills submitted to them, they did what they
2 thought they should do to protect their insured, to allow
3 her to continue to get medical treatment, all good
4 motives.

5 But what happened after that was, in 2009 - - -
6 and Hanover, actually, had bills submitted to it, which we
7 didn't make clear last time, and paid those bills up to a
8 certain point. And that was in 2009, at which point
9 Hanover issued a prospective denial and said, we're not
10 paying any of these bills anymore. But a perspective
11 denial in a no-fault context is not something that a
12 claimant can challenge and go to arbitration on.

13 There has to then be a bill following the
14 perspective denial that's submitted, and denied, and then
15 there could be a challenge. So at that moment - - -

16 JUDGE STEIN: Why did you - - - why did you
17 pay them rather than have - - -

18 MR. DACHS: Because at that point, Hanover
19 had denied the claims, said they weren't going to pay
20 them, any claim submitted subsequent to that were
21 properly sent to the next in-line carrier, which was
22 Aetna.

23 JUDGE ABDUS-SALAAM: Well, I thought you
24 said it was a prospective denial; it wasn't an
25 outright - - -

1 MR. DACHS: It was an announcement that we
2 are not paying any of your claims. I'm - - - what
3 I'm saying is that at that point, they had no right -
4 - - Ms. Herrera had no right to go to arbitration on
5 a particular bill because there were no particular
6 bills that had yet been denied. They said, we're
7 going to deny your bills in the future. And at that
8 that point, there was no purpose in her submitting
9 bills to them, she did the next best thing, went to
10 her health carrier. So it was an intentional - - -

11 JUDGE STEIN: No, but did you have an
12 obligation to pay - - - to pay the bills at that
13 point?

14 MR. DACHS: At that point, we - - - we did
15 have an obligation.

16 JUDGE STEIN: Under - - - under what, a
17 contractual obligation, a legal obligation, what was
18 - - - what was the basis for your obligation?

19 MR. DACHS: I - - - I would say all of the
20 above, including moral and ethical. But yes, because
21 they are the next carrier. If she couldn't get it
22 through no-fault, then it turns to us, and then it
23 sets in motion the whole proceeding that we are now
24 involved with, which is because they should have paid
25 it, we should now have the right to go after them.

1 JUDGE STEIN: I understand that - - - that
2 the providers would then turn to you next - - -

3 MR. DACHS: Right.

4 JUDGE STEIN: - - - but that doesn't
5 necessarily mean that you're under an obligation to
6 pay. I understand ethical, and moral, and do the
7 right thing, and all that.

8 MR. DACHS: Right.

9 JUDGE STEIN: I understand that, but that's
10 not the nature of my inquiry, and I am not sure you
11 answered it yet.

12 MR. DACHS: I understand. It is - - - it
13 is my understanding that at that point, it would be
14 the health carrier's obligation to pay.

15 JUDGE STEIN: What's that based on, a
16 statutory, legal, regulatory - - -

17 MR. DACHS: I don't think any of this is
18 statutory from the standpoint of the healthcare
19 provider - - - insurer - - -

20 JUDGE STEIN: When you point to - - - I'm
21 sorry, go ahead.

22 JUDGE FAHEY: Go ahead, Judge.

23 JUDGE STEIN: No, go ahead. You, go.

24 MR. DACHS: - - - but I assume it's
25 contractual.

1 JUDGE FAHEY: And what about equitable
2 subrogation?

3 MR. DACHS: Yes, thank you. That is - - -
4 to me, that's the crux here, and, Your Honor,
5 actually - - - well, let me say this.

6 Judge Rivera started the ball rolling on
7 equitable subrogation last time by asking the first
8 question of the day which was, "Why should Hanover
9 escape paying for those bills just because an error
10 by the hospital or and Aetna?" And Your Honor, Judge
11 Fahey, you questioned, "Don't the principles of
12 equitable subrogation help your case - - - help you -
13 - -

14 JUDGE FAHEY: Yeah, everybody hates me for
15 asking that one.

16 MR. DACHS: - - - and get you to where you
17 need to be," and then you said, "this seemed - - -
18 this seems relatively straightforward under that
19 principle."

20 And - - - and obviously, that's our position
21 here. This is an equitable subrogation situation, par
22 excellence. It is the classic equitable subrogation case.
23 Counsel - - -

24 JUDGE ABDUS-SALAAM: But how are you here?
25 Aren't you here as an assignee, not as an - - - a

1 subrogee?

2 MR. DACHS: I'm here as both.

3 JUDGE ABDUS-SALAAM: When did - - - when
4 did you decide that you were a subrogee as opposed to
5 an assignee?

6 MR. DACHS: Well, that's always been the
7 position. I know what you're going to ask me,
8 because you asked me last time, the complaint does
9 not use the words equitable subrogation.

10 JUDGE ABDUS-SALAAM: We're - - - we're
11 consistent.

12 MR. DACHS: Nor I - - - I fully understand
13 that. Nor does it use the words implied indemnity.
14 But the complaint doesn't have to spell causes of
15 action out in specific terms, the factual allegations
16 in the complaint including, we paid it, they were
17 supposed to pay it, we get it back; that is both of
18 those doctrines, that's implied - - -

19 JUDGE PIGOTT: Is that common? I mean, is
20 this a unique case and - - -

21 MR. DACHS: Counsel last time said this
22 happens every day, but he was talking about something
23 else. It does happen commonly, including, and this
24 is very important to consider on the public policy
25 under this, Medicare makes payments that it probably

1 shouldn't have, and insists that the (indiscernible)
2 gets rid of them.

3 JUDGE PIGOTT: Do you then just fix them?

4 MR. DACHS: And - - - and they go back and
5 they fix them. And they get - - - say, you have to
6 submit it to no-fault, and when no-fault pays it, you
7 have to pay us back; this happens all the time.

8 JUDGE PIGOTT: Now, Aetna Health Plans is
9 not Aetna Insurance, right?

10 MR. DACHS: Aetna Health Plans is a
11 division of Aetna Insurance Company - - -

12 JUDGE PIGOTT: Right.

13 MR. DACHS: - - - that provided - - -

14 JUDGE PIGOTT: And what does that division
15 do?

16 MR. DACHS: Well, I could tell you this
17 coverage was medical insurance.

18 JUDGE PIGOTT: Because I - - - the reason I
19 bring it up is in personal injury cases, when no-
20 fault carriers fight, in other words, they pay the -
21 - - their insured, but then depending on fault and
22 liability, they go to - - -

23 MR. DACHS: Right. That's a statutory
24 subrogation, that would be different from what I am -
25 - -

1 JUDGE PIGOTT: - - - arbitration and they -
2 - - and they whack it up among themselves - - -

3 MR. DACHS: Right.

4 JUDGE PIGOTT: - - - and decide who gets
5 what. Is the similar thing - - - I figured Aetna
6 must have an arm that handles this kind of stuff. In
7 other words, they're paying their normal insurance
8 obligations to hospitals, doctors, and things like
9 that, but over somewhere in the office is this
10 organization that says, we're the ones that deal with
11 the no-fault carries, with Medicare, getting these
12 things squared away when they are improperly
13 corrected.

14 MR. DACHS: I don't know, and it's
15 certainly not in the record.

16 JUDGE PIGOTT: Okay.

17 MR. DACHS: I don't want to hazard a guess.

18 But the subrogation you're describing is what
19 counsel says we are trying to rely on, but we're really
20 not. We don't have to rely on the no-fault law - - - no-
21 fault regulations, except we do to the extent that we
22 argue that they were when they were presented with the
23 claims, the bills, in this case, had an obligation to pay
24 or deny within thirty days, and that is a very significant
25 feature of our case here - - -

1 JUDGE FAHEY: Okay. But one - - -

2 MR. DACHS: - - - because they failed to do
3 that.

4 JUDGE FAHEY: One thing. Just back on
5 equitable subrogation for one second.

6 MR. DACHS: Right, yeah.

7 JUDGE FAHEY: Is the principle of equitable
8 subrogation abrogated by the statutory scheme of no-
9 fault? Does it - - - the existence of the statutory
10 scheme say, all right, under this scheme, equitable
11 subrogation applies. It's a common law principle, it
12 may apply to other arrangements, but it doesn't apply
13 here.

14 MR. DACHS: No, I don't believe it excludes
15 it, in fact, I think the argument that - - - that
16 Hanover makes, which is that we are not part of the
17 no-fault scheme, we're outside of it, actually
18 enhances the argument that equitable subrogate - - -

19 JUDGE FAHEY: Of your illegibility for
20 equitable subrogation.

21 MR. DACHS: If we can't do that, there's no
22 reason why we can't do it this way.

23 JUDGE FAHEY: I see.

24 MR. DACHS: There is nothing in the no-
25 fault law that prohibits what we are asserting. And

1 really, if you stand back and think about who is
2 saying what here and what's happening, we are the
3 ones that are not playing gotcha, we are the ones
4 that are trying to set the matter straight, we are
5 the ones that have tried to protect the insured, who
6 is - - - the no-fault law and other laws are supposed
7 to protect, and to provide prompt payment, and we are
8 the ones that are saying, you were supposed to pay
9 it, we paid it, and we helped out our insured, you're
10 supposed to pay us back.

11 And it does happen often, and it's supposed
12 to happen, and usually there is less money involved,
13 which could be why it happens - - -

14 JUDGE PIGOTT: But then how come there's
15 not a lot of equitable subrogation cases?

16 MR. DACHS: Well, maybe the lawyers
17 handling those claims didn't think about it, but more
18 likely, it's because the claims that they see on a
19 more regular bases involve \$140.00, as we talked
20 about last time, and here we are talking about forty-
21 three thousand.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. DACHS: Thank you.

24 CHIEF JUDGE DIFIORE: Counsel.

25 JUDGE PIGOTT: Do you have little index

1 cards with our questions already on them?

2 MR. LEVY: No.

3 JUDGE PIGOTT: Because - - -

4 MR. LEVY: No, I actually have it all up
5 here, Your Honor. So - - -

6 JUDGE ABDUS-SALAAM: Were you supposed to
7 pay, counsel?

8 MR. LEVY: Your Honor, the principle of
9 whether we're supposed to pay is irrelevant in the
10 context of this particular situation because the
11 bills never came to us, as we discussed last time.

12 Let me address the issue of the preservation
13 here, because I think that's - - -

14 JUDGE PIGOTT: But had - - - had they come
15 to you, you would have paid them.

16 MR. LEVY: Had they come to us, we would,
17 as we said before, we would have adjudicated them.
18 We may have paid some, we may have paid none, we
19 could have - - - we could have decided - - -

20 JUDGE PIGOTT: There was an auto accident,
21 she got hurt in an auto accident, you had the no-
22 fault, you pay it.

23 MR. LEVY: But there - - - but there are
24 conditions associated with it.

25 JUDGE PIGOTT: Correct, correct. But then

1 - - -

2 MR. LEVY: Medical necessity.

3 JUDGE FAHEY: Before you go - - - before
4 you go into the conditions of the bills. The bills -
5 - - I understand your argument on the bills, we went
6 through it last time, and you can get to that. But
7 when an insured comes to you, don't you have an
8 obligation under NYCRR 65 something, 3.2 something,
9 to - - - to assist the - - - your client in the
10 processing of those claims or bills?

11 MR. LEVY: We - - - we have - - -

12 JUDGE FAHEY: Is it - - - isn't that a
13 public policy obligation that you have?

14 MR. LEVY: There is fair claim settlement
15 practices - - -

16 JUDGE FAHEY: Um-hum.

17 MR. LEVY: - - - that exist between the no-
18 fault insurer, and between the eligible injured
19 person.

20 JUDGE FAHEY: I'm sorry, just so you know,
21 65.3 - - - I'm just looking at my notes, 3 - - -
22 3.2(b) is what I'm referring to.

23 MR. LEVY: And I believe that that section
24 talks about the fact that you don't treat your
25 insured as an adversary.

1 JUDGE FAHEY: Um-hum.

2 MR. LEVY: And that you are supposed to act
3 in a fair and equitable manner.

4 In this particular case, what we had was a
5 situation where for a number of years, for whatever
6 reason, these bills were submitted by the healthcare
7 providers to Aetna, based on assignments that Ms.
8 Herrera had given them. And then two years later,
9 because the services that are in dispute here are
10 from the 2008, 2009 period. And we first get notice
11 of this sometime down the road in 2010, and then
12 later on, down the road in 2012. So we have no
13 knowledge that this is going on, because all of this
14 is happening behind the scenes.

15 JUDGE PIGOTT: But the fact of the matter
16 is, to go back to my first question, if it's a no-
17 fault auto accident, and she is your insured, under
18 normal circumstances, forgetting all the - - - the
19 buts and - - - and ifs, that would be your
20 obligation. You weren't - - -

21 MR. LEVY: We're going to adjust the
22 claims, Judge Pigott - - -

23 JUDGE PIGOTT: Okay.

24 MR. LEVY: - - - and if we - - - if the - -
25 - if the claims are reimbursable, we pay what we owe

1 according to the fee schedule - - -

2 JUDGE PIGOTT: Right.

3 MR. LEVY: - - - okay. Based on
4 determinations of medical necessity and causation - -
5 -

6 JUDGE PIGOTT: Right.

7 MR. LEVY: - - - which are standards, by
8 the way, that Aetna doesn't apply - - -

9 JUDGE PIGOTT: Wait, wait, I know, I know,
10 I wanted to get away from all that.

11 MR. LEVY: Sure.

12 JUDGE PIGOTT: But what I'm saying is that
13 in a normal no-fault case - - -

14 MR. LEVY: Sure.

15 JUDGE PIGOTT: - - - you pay - - - you pay
16 your insureds' bills.

17 MR. LEVY: We pay what we owe in a normal
18 case.

19 JUDGE PIGOTT: Right. And you get that
20 because the hospital, doctors, or whoever, find out
21 that - - - that you are the carrier, and they send
22 you the bills.

23 MR. LEVY: They - - - they do it every day
24 of the week - - -

25 JUDGE PIGOTT: The mistake here - - -

1 MR. LEVY: - - - they get an assignment of
2 benefits.

3 JUDGE PIGOTT: The mistake here was the
4 hospital didn't tell you; they told Aetna. And Aetna
5 got the assignments that you would have otherwise
6 have gotten.

7 MR. LEVY: No, Aetna never got the
8 assignment. Who got the assignment was the doctor or
9 the hospital who then used the assignment to submit
10 to Aetna to get paid.

11 JUDGE PIGOTT: And they should have
12 submitted it to you.

13 MR. LEVY: They should have submitted it to
14 us.

15 JUDGE PIGOTT: But they didn't.

16 MR. LEVY: They did not. And that's one of
17 the points we talked about before, which is that, you
18 know, Aetna wants to talk about this lien that they
19 have, and this goes to the question of, who is really
20 here.

21 JUDGE PIGOTT: No, but before you get
22 there, before you get there, so, what I'm talking
23 about is that - - - that if they gone to you, you
24 would have paid them; they went to Aetna, they paid
25 them, and this - - - this fight is up here, it's the

1 dollar fight - - - I know what you are going to - - -
2 wait, it's the dollar fight.

3 He is making the argument that if you pay,
4 if she has a personal injury case, you're out of it,
5 your collateral source doesn't come in. If he is
6 there, he is saying he is going to get reimbursed for
7 money that she would otherwise - - - I'm almost done
8 - - -

9 MR. LEVY: I know.

10 JUDGE PIGOTT: - - - would otherwise
11 receive herself, and therefore she is hurt by this.

12 MR. LEVY: Let me tell you three reasons
13 why that's not necessarily true, and why the rule in
14 this case can't apply specifically to that.

15 First of all, under the no-fault law, if a
16 - - - if someone takes a lien from an eligible
17 injured person, that person cannot subrogate against
18 that eligible injured person down the road. If you
19 look at 65.3.11 - - -

20 JUDGE PIGOTT: Including - - - including
21 Aetna in this case.

22 MR. LEVY: Including Aetna, because they're
23 claiming that they took a lien, which they are
24 entitled to enforce under the no-fault law, to come
25 after us for first party benefits.

1 That's what's pled in the complaint, as Judge
2 Abdus-Salaam indicated. But they know, Aetna knows, that
3 the law in New York is and always has been that a person
4 that takes an assignment of benefits cannot go back after
5 the insured if the claims are not ultimately paid.

6 And the reason for that is because the DFS, in
7 enacting the regulation, has absolved the insured of the
8 responsibility to reimburse, and left that responsibility
9 between the person who's entitled to accept the assignment
10 and the payer. So for example, the doctors - - -

11 JUDGE RIVERA: I'm sorry, so how do you
12 correct the error here?

13 MR. LEVY: Three reas - - - three ways you
14 correct the error. First of all, the lien, from our
15 perspective, to the extent there is a lien, and I
16 would say that the evidence of this lien on this
17 record, I don't really see very much of it other than
18 a throwaway - - -

19 JUDGE RIVERA: Okay. But you're supposed
20 to pay. How do you correct the error here?

21 MR. LEVY: They go back to the doctors who
22 made the mistake, they get the money back from the
23 doctors, and the doctor is responsible to reimburse.
24 Because it's the responsibility of the physicians to
25 submit the claim.

1 JUDGE RIVERA: Okay. But where are you
2 paying?

3 MR. LEVY: Where am I paying?

4 JUDGE RIVERA: Where are you paying in that
5 scenario?

6 MR. LEVY: I may never pay in that
7 scenario, Your Honor.

8 JUDGE RIVERA: Is that the statutory
9 scheme, that you don't pay?

10 MR. LEVY: The statutory scheme is that I
11 am the payer, and that the healthcare provider, or
12 the doctors and physicians, are part of the scheme.

13 Aetna is not part of the scheme - - -

14 JUDGE RIVERA: I understand - - -

15 MR. LEVY: - - - has never been part of
16 the scheme.

17 JUDGE RIVERA: - - - the doctors made a
18 mistake, you were supposed to pay, how do you cure
19 the error, since under the scheme, you were supposed
20 to pay?

21 MR. LEVY: There is - - - essentially, the
22 party who made the mistake, which in this particular
23 case would be the hospitals or the doctors, have to
24 address that in the context - - -

25 JUDGE PIGOTT: Oh.

1 JUDGE STEIN: Is that because the scheme
2 has to do with timeframes and notice - - - timely
3 notice and (indiscernible) that they didn't happen
4 here?

5 MR. LEVY: It has to do with dozens of
6 things, and that's the question that Judge Fahey
7 asked about this question of how broad is the
8 statutory scheme. When you look at 5105(a), and you
9 look at it in conjunction with the regulation, which
10 is under 65.4.11, and then you apply three other
11 sections of the Insurance Law, which is 5103, 5221,
12 you apply those sections of the Insurance Law, it is
13 comprehensive. It never contemplates that Aetna is
14 part of the scheme.

15 JUDGE PIGOTT: Right, but - - -

16 MR. LEVY: And specifically defines, Your
17 Honor - - -

18 JUDGE PIGOTT: I'm coming.

19 MR. LEVY: - - - and I know where your
20 question is, because we talked about this last time,
21 never defines anyone entitled to play in that system,
22 other than an insurer who pays - - - automobile
23 insurers who pay first party benefits, and mandates
24 inner company arbitrations - - -

25 JUDGE PIGOTT: But healthcare providers,

1 you know, are in it. In fact, they were told - - -
2 they were told they couldn't arbitrate with you
3 because they were not a healthcare provider, right?

4 MR. LEVY: No. They were not told that.
5 What - - - who was told that, by the way, was Ms.
6 Herrera because before - - -

7 JUDGE PIGOTT: All right, all right, all
8 right.

9 MR. LEVY: - - - Aetna was ripe. And
10 that's an important point, because - - -

11 JUDGE PIGOTT: But if - - - if what - - -
12 if the assignments that you're talking about, that
13 went to Aetna, right, let me get the assignments
14 right.

15 MR. LEVY: Okay.

16 JUDGE PIGOTT: Did they go to the doctors,
17 or did they go to Aetna?

18 MR. LEVY: They could only go to one, and
19 they can only go to the doctors.

20 JUDGE PIGOTT: All right. So they go to
21 the doctors. If - - - if - - - why wouldn't the
22 doctors then assign them to you?

23 MR. LEVY: To me being - - - no, they would
24 - - - they would - - -

25 JUDGE PIGOTT: Hanover. What - - -

1 MR. LEVY: They would - - - they would
2 present the claim to me.

3 JUDGE PIGOTT: Right. Well - - -

4 MR. LEVY: Why they didn't do in this case
5 - - -

6 JUDGE PIGOTT: Why don't they do it now?

7 MR. LEVY: Why don't they do it now? I
8 have no idea why they don't do anything.

9 JUDGE PIGOTT: Well, the reason I'm saying
10 that is I thought you would then say, well, because
11 they already assigned them to Aetna.

12 MR. LEVY: Because - - -

13 JUDGE PIGOTT: If Aetna then said, you
14 know, we're going to re - - - you know, assign them
15 back to you, Doc - - -

16 MR. LEVY: Um-hum.

17 JUDGE PIGOTT: - - - and then you could
18 submit them to Hanover, and fight with them over
19 time, this and, you know, and everything else, that
20 would fix this.

21 MR. LEVY: And that's what - - - that's
22 what happens quite frequently, because commer - - -
23 if you go back and you read some of the guidance - -
24 -

25 CHIEF JUDGE DIFIORE: What's your answer to

1 that question, I - - -

2 MR. LEVY: If they - - - if they come back
3 to us now in 2016, and say, we want to submit the
4 claim, all right, we have certain rights under the
5 regulation, including the timing of the claim
6 relative to the service.

7 JUDGE PIGOTT: You have thirty days to turn
8 them down?

9 MR. LEVY: Well, no, I don't, I would have
10 thirty days to make a decision - - -

11 JUDGE PIGOTT: Right.

12 MR. LEVY: - - - one of those decisions
13 might be that, oh, by the way, you did not timely
14 submit your claim to us - - -

15 JUDGE PIGOTT: Right. I hear that.

16 MR. LEVY: - - - and you had forty five
17 days to do that.

18 JUDGE RIVERA: Is there any scenario in
19 which you pay?

20 JUDGE GARCIA: Right.

21 MR. LEVY: There could be.

22 JUDGE RIVERA: Please tell me, you said
23 there were three, the first one you didn't pay, so
24 what are the other two?

25 MR. LEVY: I'm sorry, Your Honor.

1 JUDGE RIVERA: I'm sorry, at the beginning
2 I had asked this question - - -

3 MR. LEVY: We were talking about the - - -

4 JUDGE RIVERA: - - - how do we - - - how
5 do we address the error, and now you're saying these
6 errors are quite frequent, under what scenario do you
7 pay?

8 MR. LEVY: Here - - - here is a scenario
9 where - - -

10 JUDGE RIVERA: That's what the statutory
11 scheme requires. So how do you pay?

12 MR. LEVY: How do I pay?

13 JUDGE RIVERA: When do you end up paying
14 when these errors occur?

15 MR. LEVY: I would pay in a situation where
16 a healthcare provider - - -

17 JUDGE RIVERA: Yes.

18 MR. LEVY: - - - is told by Aetna, okay,
19 at the initial - - - at the initial stage, I'm sorry,
20 you submitted to us incorrectly, you are supposed to
21 submit this to the no-fault insurer. And then,
22 within a reasonable period of time, not eight years
23 after the fact, the healthcare provider - - -

24 JUDGE RIVERA: Okay. So you're saying - -
25 - so you're saying the doctor sends it to them, they

1 look at it and say, you sent it to the wrong person,
2 I'm sending it back to you, now you go deal with it.
3 I get that error, and I see your point there. But
4 this error is, they paid, maybe they didn't have to,
5 but they did. Are you taking the position that then
6 you never have to pay?

7 MR. LEVY: My position is - - - is that on
8 the facts that this particular record, based on what
9 they did in this case - - -

10 JUDGE RIVERA: Yes.

11 MR. LEVY: I have no responsibility to pay
12 these claims. And Aetna has no right to recover - -
13 -

14 JUDGE RIVERA: Because of this error.

15 MR. LEVY: Because they sat on all of this
16 for so many years.

17 And one of the things we talked about prompt
18 payment in these particular situations, in the regulation,
19 the prov - - - the timing provision is important. And the
20 timing provision is important because a no-fault carrier
21 not only has a prompt obligation to pay, but they're
22 entitled to evaluate the claims within the scope of when
23 that time occurs to evaluate all of the facts and
24 circumstances that Hanover, at this point in time, would
25 never have the opportunity.

1 CHIEF JUDGE DIFIORE: Can you no longer
2 perform that analysis at this stage?

3 MR. LEVY: At this point, there is no way
4 to do that eight years - - - eight years after the
5 fact, Your Honor. The - - - you're talking about a
6 time scenario where, looking at causation, looking at
7 medical necessity, these things are done, as Judge
8 Pigott knows and has pointed out, we have thirty days
9 to pay or deny. The reason we have thirty days to
10 pay or deny is not only for the purposes of prompt
11 payment, but the corresponding public policy is that
12 we need to find the facts out as they occurred. So
13 MRIs, hospital services, surgical services - - -

14 JUDGE PIGOTT: If there was a - - - if
15 there was a finding, let's say someone decided that
16 under equitable distribution - - -

17 JUDGE RIVERA: Subrogation.

18 JUDGE PIGOTT: - - - you should pay - - -

19 JUDGE FAHEY: It's your wife you're talking
20 about.

21 MR. LEVY: If I'm paying under equitable
22 distribution, Your Honor, I think I have a problem.

23 JUDGE PIGOTT: You and I barely know each
24 other.

25 Under equitable subrogation, wouldn't that solve

1 this?

2 MR. LEVY: No, it doesn't solve it for two
3 reasons. Number one, is that the principles of
4 equitable subrogation can't apply here because
5 equitable subrogation re - - - is an issue of fault.
6 Okay. As we talked about last time, there has to be
7 an element of fault on someone who you're insuring in
8 order for that premise to apply.

9 Outside of the no fault in property
10 casualty and environmental, where there are
11 unregulated insurance industries, equitable
12 subrogation fits. And I think that's one of the
13 reasons that instinctively, Judge Fahey said - - -

14 JUDGE FAHEY: Well, the problem - - - the
15 problem with that argument is in - - - I understand
16 your argument, the problem is it isn't precluded. I
17 can see why you would desire to have it precluded,
18 because it's such a well-regulated area, and - - - I
19 think what you're saying is equitable subrogation
20 would wreak havoc if we don't follow these rules.

21 MR. LEVY: It - - - it not only - - -

22 JUDGE FAHEY: Let me just finish my
23 thought.

24 MR. LEVY: Sure.

25 JUDGE FAHEY: But - - - but that being the

1 case, in point of fact it doesn't wreak havoc, it's
2 very seldom called because what we are confronted
3 with, and I worked for Kemper for eight years, dealt
4 with a number of these things, very rare, that - - -
5 usually the adjusters work this stuff out, and in
6 point of fact, this never happens, what we see right
7 here today.

8 So that's when you've reached the point and
9 say, well, does equity and good conscience apply when
10 one party has paid the debt of another. And that's -
11 - - that's the simplicity and beauty of equitable
12 subrogation.

13 MR. LEVY: But that assumes, for purposes
14 of this analysis, that they have no obligation to
15 pay. And as we talked about before, there are at
16 least, on this record, there was an equal obligation
17 to pay.

18 JUDGE PIGOTT: Isn't that - - - isn't that
19 an allegation though within the context of equitable
20 subrogation claim?

21 MR. LEVY: No. Because within the context
22 of an equitable subrogation claim, the normal
23 situation is, my insured did something which caused
24 your insurer harm.

25 JUDGE PIGOTT: Um-hum.

1 MR. LEVY: Okay. And so I'm paying for
2 something which your insurer did. I'm going to pay
3 in the first instance, and then I'm going to come
4 after your insured, and directly after you as the
5 insurer, in order to do that.

6 That can't be the case here, and that's
7 exactly - - - by the way, that principle is embodied
8 specifically in 5105. When you look at the statute
9 specifically, it says that the circumstances under
10 which a no-fault insurer can recover against another
11 insurer, or self-insurer that provides no fault, is
12 when they would be able to prove liability against
13 their insured as a matter of law.

14 JUDGE FAHEY: Problem is is, they are
15 outside of this system.

16 MR. LEVY: And that's - - -

17 JUDGE FAHEY: They're not - - - they're not
18 part of this system.

19 MR. LEVY: And that's been our - - -

20 JUDGE FAHEY: It would be like - - - it's
21 like Ms. Herrera, she is totally outside this system.

22 MR. LEVY: No, actually Ms. Herrera is
23 actually inside.

24 JUDGE FAHEY: Well, she's in it now, she's
25 in it; you're right about that.

1 MR. LEVY: She's actually - - -

2 JUDGE FAHEY: But you're outside the
3 system.

4 MR. LEVY: And that's - - - you know, the
5 interesting thing about it is that - - - and we
6 didn't touch upon this in the first argument, is,
7 before this case started - - -

8 JUDGE FAHEY: Um-hum.

9 MR. LEVY: - - - there was a whole series
10 of arbitrations between Ms. Herrera and Hanover where
11 she argued the thirty-day rule, and she was rejected.
12 She filed for master arbitration, she lost. If she
13 wasn't satisfied at that point, she could have filed
14 an Article 75.

15 JUDGE PIGOTT: But she lost that one
16 because she wasn't a healthcare provider, right?

17 MR. LEVY: She lost that one - - - she lost
18 that one not because of that, but because the
19 arbitrator rejected, and the master arbitrator
20 rejected the arguments about the fact that Hanover
21 did not properly pay or deny what she claimed were
22 bills, but which the arbitrator and the master
23 arbitrator characterized to the contrary.

24 And so - - - by the way, at that point,
25 when she assigns her claims to - - - to Aetna, which

1 is the only - - - the only matter in which they are
2 here before this court - - -

3 JUDGE RIVERA: Let's say we disagree with
4 you, whatever court - - - and they - - - they could
5 proceed with their claim, is whatever court has to
6 hear that going to be bound by that decision, that
7 the documentation that was submitted didn't
8 constitute a bill under the statute?

9 MR. LEVY: Because the question is, what
10 did Ms. Herrera have to assign at that point in time
11 to Aetna. Because her rights had already been
12 adjudicated. Whether this court agrees or disagrees
13 with that - - -

14 JUDGE RIVERA: I'm saying, can they
15 relitigate - - - well, they never got to litigate,
16 can they litigate that?

17 MR. LEVY: They could have - - - well, they
18 - - - they can't relitigate it.

19 JUDGE RIVERA: Why did they stop with the
20 arbitrator's determination?

21 MR. LEVY: Absolutely. Because they're
22 here as an assignee. They ob - - - they stepped into
23 the shoes of Ms. Herrera, and that's something that
24 they completely turned a blind eye to in this case.
25 They plead their case as an assignee. They don't

1 plead their cases as an equitable subrogee; they
2 don't plead it under implied indemnity. There are
3 issues of preservation here because this court's
4 jurisdiction over the argument is based upon what's
5 in the Supreme Court record. If they wanted to
6 advance these claims or these theories, they could've
7 done that.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MR. LEVY: Thank you, Your Honor. I
10 appreciate the time.

11 CHIEF JUDGE DIFIORE: Mr. Dachs.

12 JUDGE RIVERA: Other than the equitable
13 subrogation, is there any scenario under which they
14 pay with this mistake, or is this the only way - - -

15 MR. DACHS: There is no scenario in which
16 they pay - - -

17 JUDGE RIVERA: - - - they'll end up
18 paying.

19 MR. DACHS: - - - despite counsel's
20 generous statements last time that, you know, maybe
21 we'll pay when we get it, because when they get it,
22 they're going to say, as he alluded to today, it's
23 untimely, we're not paying this. So they've created
24 that situation by not denying when they first got
25 these bills on the grounds of untimeliness - - -

1 JUDGE ABDUS-SALAAM: But according to them,
2 they never got the bills.

3 MR. DACHS: - - - and everything else that
4 they had - - - I'm sorry.

5 JUDGE ABDUS-SALAAM: This situation
6 actually, counsel, in my view, was created when you
7 paid the bills that you could have denied because you
8 were not the no-fault carrier. And now, although you
9 said in your opening you were here to protect Ms.
10 Herrera and other, you know, clients or other
11 consumers of your medical insurance, you are really
12 here to get paid; that's what you are here for.

13 MR. DACHS: Well - - -

14 JUDGE ABDUS-SALAAM: She is already
15 protected if their argument is true.

16 MR. DACHS: We are going to get paid either
17 from Ms. Herrera or from Hanover.

18 JUDGE ABDUS-SALAAM: Well, according to
19 them, you're not.

20 MR. DACHS: It's Ms. Herrera, that really -
21 - - to go back to the arbitration - - -

22 JUDGE ABDUS-SALAAM: Did you dispute that
23 the DSF is saying that, you know, she is absolved
24 from any lien that you have?

25 MR. DACHS: I don't know where that came

1 from; that's never been raised before. I am not
2 aware that that's - - - that that's the rule.

3 JUDGE ABDUS-SALAAM: Well, if that's true
4 then - - - let's assume for the sake of this argument
5 that it is true, so she is not going to have to pay
6 your lien.

7 MR. DACHS: Well, I don't know - - - I
8 can't address that because that's not - - - that's
9 not on the table at this point. No one's made that
10 argument until today. But - - -

11 JUDGE STEIN: But isn't - - - but isn't the
12 point that, had you gone back to the doctors and
13 said, look, you're - - - you're submitting this to
14 the wrong person - - -

15 MR. DACHS: Okay. I - - - I - - -

16 JUDGE STEIN: - - - go ahead and submit it
17 to Aetna, that we wouldn't be here at all.

18 MR. DACHS: I have to clarify again what I
19 tried to clarify earlier, which is, I don't
20 necessarily want to parse these two submissions, but
21 there was the nineteen thousand dollar submission,
22 and the twenty-four thousand dollar submission. The
23 nineteen thousand dollar submission is different
24 because the second submission came after they
25 prospectively denied. They announced, we are not

1 going to be paying these claims.

2 JUDGE PIGOTT: But I - - - when I go to the
3 doctor, they always ask me, is this - - - was this
4 the result of a car accident, was this, you know, did
5 this happen at work, and - - - and they - - - and
6 they, you know, and they treat it accordingly. And
7 so when it comes to you to pay, don't you have that
8 information?

9 MR. DACHS: I can't explain why they paid
10 the first time. That's what I'm trying to say. But
11 I can explain why they paid the second time. Because
12 by the time it came to them the second time, they
13 were the source for payment, because they had already
14 denied. But I - - - again, I don't - - - I don't see
15 that we have to parse this.

16 What - - - what's also happening here is
17 counsel's conflating the assignment that was
18 originally given to the doctors, with the assignment
19 that we're relying on in this case, which is the
20 assignment of - - - from Ms. Herrera to Aetna to
21 collect the benefits that - - - that they claim after
22 the arbitration.

23 JUDGE ABDUS-SALAAM: Already assigned this
24 to the doctors.

25 MR. DACHS: I'm sorry.

1 JUDGE ABDUS-SALAAM: He had already
2 assigned those to the doctors and the hospitals.

3 MR. DACHS: And they were paid.

4 JUDGE ABDUS-SALAAM: That's his argument.

5 MR. DACHS: And they were paid, so that's
6 over. And now, we have other bills that were
7 submitted, not by the doctors, they were submitted by
8 the - - - by her attorney.

9 JUDGE RIVERA: Let's say - - - let's say we
10 agree with you that you're stepping into her shoes,
11 are you bound by the arbitrator's decision that the
12 documentation does not constitute bills?

13 MR. DACHS: Well, that has to be analyzed
14 as to whether it's correct or not. They - - - they
15 ruled that they weren't bills, but if you look at it
16 carefully, what they're saying is, they weren't bills
17 as to Ms. Herrera, who was submitting the claim for
18 arbitration, because the bills had already been paid.

19 But as to Aetna, they are bills, and that's
20 - - - those are the bills that were submitted by
21 Harry Katz, as the attorney, who was at that point
22 acting on behalf of Aetna. And he was acting on
23 behalf of Aetna because the arbitrator, and there was
24 some discussion about this last time, but the
25 arbitrator - - - the lower arbitrator says, "If any

1 person and or entity have a claim against respondent
2 in this matter, it is applicant's private healthcare
3 provider, not the applicant."

4 JUDGE STEIN: You can't have it both ways.
5 You can't say that you're stepping into her shoes and
6 - - - and trying to recover this claim on her behalf,
7 but then say, yeah, but they may not be bills to her,
8 but they're bills to us.

9 MR. DACHS: We are saying - - - that's why
10 I said, we are saying both. And I - - - I - - - if
11 you rule that we have no claim under the assignment,
12 that's not our demise, because then we go back to the
13 equitable subrogation argument. And I - - - that has
14 been the argument that I have put forth with greater
15 strength than the assignment, and I understand that
16 there are some issues. I still think we survive on
17 the assignment issue, but if there is no assignment
18 that we can benefit from, there is no question that
19 this is an equitable subrogation case.

20 Your Honors already know the definitions, I
21 don't have to - - - I don't have to tell you what it is,
22 but it fits exactly this scenario. If somebody pays
23 something that they did not have an obligation to pay, and
24 it was the obligation of another, you go to that person
25 and say, we paid for you, you pay us.

1 JUDGE RIVERA: What about the fact that
2 it's a heavily regulated area - - - so your position
3 is you're simply, as Judge Fahey said, outside the
4 scheme - - -

5 MR. DACHS: Exactly.

6 JUDGE RIVERA: Or is there a different
7 position in which - - -

8 MR. DACHS: No, exactly right. The fact
9 that we're outside the scheme enables us to do what
10 we're doing today.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MR. DACHS: That argument does not help
13 them; it helps us.

14 MR. LEVY: Thank you, Your Honors.

15 MR. DACHS: Thank you very much.

16 CHIEF JUDGE DIFIORE: You're welcome.

17 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Aetna Health Plans v. Hanover Insurance Company (Reargument), No. 97 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

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

Date: May 9, 2016