

## Billing Contractor Must Fork Over Docs In Surprise-Billing Suit

By **Kellie Mejdrich**

Law360 (December 2, 2022, 9:13 PM EST) -- A California federal judge ordered billing contractor MultiPlan on Friday to fork over hundreds of documents it had previously withheld from discovery in a lawsuit brought by patients alleging their insurer lowballed them on out-of-network claim reimbursements, finding the company had waived all claimed protections in its privilege log.

U.S. Magistrate Judge Joseph C. Spero in a **33-page order** granted an August motion to compel from the proposed class, which sought sanctions against United Behavioral Health and MultiPlan for producing evidence and other materials past the cutoff date for discovery.

Judge Spero said MultiPlan's failure to heed an October order about the discovery dispute, combined with the court's findings of an in-camera review of previously withheld documents, meant the company would have to produce all documents on its revised privilege log by Dec. 16.

"MultiPlan's conduct has significantly increased the prejudice to plaintiffs associated with its failure to produce an adequate privilege log as the length of the delay has almost doubled since plaintiffs initially sought judicial intervention on this issue. Moreover, in light of MultiPlan's response to the October 3, 2022 order, the undersigned is not confident that giving MultiPlan a further opportunity to revise its privilege log will result in prompt resolution of the parties' disputes as to the remaining withheld documents," Judge Spero said.

The underlying suit was first filed in 2020 from a proposed class led by five patients known only by their initials, L.D., D.B., B.W., R.H. and C.J. — four employed by Apple and one who worked for Tesla. They claim they faced surprise costs for out-of-network health coverage after United failed to reimburse providers per the terms of their health plan coverage.

The patients allege that MultiPlan and United violated both the Employee Retirement Income Security Act and the Racketeer Influenced and Corrupt Organizations Act when they engaged in a scheme to underpay the claims by repricing them based on comparable claims in the same geographic area. The proposed class filed a motion for class certification in August.

Judge Spero said Friday that circumstances had "decidedly changed" since an October order when the court concluded "a finding of blanket waiver of privilege and work product protection based on MultiPlan's failure to produce an adequate privilege log was too drastic a sanction."

In his Oct. 3 order, which also responded to the August sanctions motion, Judge Spero said that "while a close call," MultiPlan hadn't waived its privilege and work product protection assertions regarding documents in a privilege log by producing it late. But Judge Spero found MultiPlan hadn't sufficiently justified its assertions, directed the company to revise its log and set out a process for the court to conduct an in-camera review of documents.

Judge Spero said in his Friday order that he expected MultiPlan to change its privilege log to take the ruling into account, make a good-faith effort to narrow its disputes and supply more details to support privilege claims with supporting declarations.

But Judge Spero said that instead, "MultiPlan simply ignored the rulings and guidance in the October 3, 2022 order on these issues, insisting that it was not bound by those rulings and filing an unsolicited supplemental brief to that effect on October 28, 2022."

In its supplemental brief, MultiPlan pointed to a recent decision out of California's central district court to support the company's conclusion that it was not a fiduciary under ERISA and said it was therefore "not subject to the fiduciary exception to attorney-client privilege." Many of MultiPlan's privilege assertions were based on the company not being subject to the fiduciary exception.

But Judge Spero said arguments challenging rulings in the October order "have no merit" and reiterated that for the purposes of discovery, "MultiPlan should be considered a plan fiduciary as to conduct that relates to the fiduciary duties owed to plan participants, namely, the repricing of plan members' claims."

As for the court's in-camera review, Judge Spero said that "the sample documents contain a significant amount of material that MultiPlan has withheld in contravention of the rulings in the October 3, 2022 order, which supports the court's conclusion that a finding of waiver is appropriate."

This isn't the first discovery loss for defendants in the case — United was **sanctioned** by Judge Spero and barred from using tens of thousands of pieces of evidence produced after the discovery cutoff in an earlier order on Sept. 21 that found the company's late submissions were unjustified and harmful to the proposed class.

Matt Lavin, counsel for the proposed class, said Judge Spero's order was "an extraordinarily well-reasoned opinion."

"The court spent considerable time on it. It sends a clear message that ERISA fiduciaries, including companies like MultiPlan, should take heed of their discovery obligations," Lavin said.

Counsel for Multiplan declined to comment. Representatives for United didn't immediately respond to requests for comment Friday.

The proposed class is represented by Matthew M. Lavin, Thomas Edward Kelly and Aaron Richard Modiano of Arnall Golden Gregory LLP, by Wendy Aline Mitchell of Napoli Shkolnik PLLC and by David M. Lilienstein and Katie Joy Spielman of DL Law Group.

United Behavioral Health is represented by Geoffrey M. Sigler, Heather Lynn Richardson, Joshua Lipton, Nicole Renee Matthews, Matthew Guice Aiken and Lauren Margaret Blas of Gibson Dunn & Crutcher LLP.

MultiPlan is represented by Errol J. King Jr. and Craig L. Caesar of Phelps Dunbar LLP.

The case is LD et al. v. United Behavioral Health et al., case number 4:20-cv-02254, in the U.S. District Court for the Northern District of California.

--Editing by Nick Petrucio.