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Counsel's Pursuit of Insurance Carrier Helps Thousands of Cancer Patients

Bergonzi v. Central States Health & Life Co. of Omaha, U.S. Dist. Ct., S.D.S.D., No. CIV 02-4096, Nov. 18, 2003.

When Carol Abourezk was diagnosed with soft tissue sarcoma in 1997, one thing she thought she did not have to worry about was how to pay for her trips from Rapid City to Houston for treatment. She had an insurance policy that was supposed to cover cancer treatment and related travel expenses. But when the insurance company refused to pay for the travel and even some of her procedures, arguing that her treatment was experimental, the bills became yet another burden Carol had to bear.

Carol's brother, ATLA member Mike Abourezk of Rapid City, South Dakota, took on the task of convincing the insurance carrier, Central States Health & Life Company of Omaha (CSO), to pay the expenses it had promised to pay. Abourezk did not know that this would become a fight that would consume much of his time over the next several years.

In the beginning, Abourezk tried to reason with CSO. He asked the company to pay Carol's travel costs, pointing out that the policy promised to pay transportation and lodging expenses, regardless of whether the treatment was experimental. Then a nurse Abourezk hired to review the bills discovered that CSO had repeatedly refused to pay for Carol's typical, non-experimental chemotherapy costs, totaling \$100,000 in unpaid benefits in addition to the traveling expenses.

Although CSO agreed to pay the travel costs, it refused to make good on the unpaid benefits. Abourezk made it his mission to find out how many other cancer patients were being mistreated by CSO.

He found more patients than he expected. For instance, he met a man who had undergone surgery to have a cancerous prostate removed. During the surgery, the doctors discovered the cancer had spread to other areas. They decided against removing the prostate because they did not want to make a terminally ill patient incontinent as well. CSO refused to pay for the surgery, saying it pays only to have cancer removed. Many people had been denied coverage for the insertion of a catheter used to administer chemotherapy. CSO claimed the

policy covered only the professional services necessary to administer the treatment, but not the products used during the process.

“All of these people, like my sister, were easy to underpay and get away with it, because they are deathly ill and have no room in their increasingly short lives to focus on money,” Abourezk said.

After filing suit on behalf of his sister, he was approached by several other patients wanting to sue CSO. He consulted two other attorneys, ATLA members Michael N. White and Richard H. Friedman of Seattle, about bringing a class action suit. White and Friedman advised against it, reasoning that a class action would mean years of litigation, and many patients would not live long enough to receive payment. The three lawyers opted instead to file four individual cases joined in one action. Sadly, Carol died in 1999, and her estate’s case was put on hold while the consolidated cases went forward.

Plaintiffs alleged breach of contract and bad faith. The litigation team had obtained CSO memoranda during discovery, showing that the insurer expected to save 66 percent of its costs by underpaying and that it had promised huge bonuses to executives who increased profits. In July 2001, a federal court ruled that CSO had been underpaying plaintiffs and granted them summary judgment for breach of contract. *Johnson v. Central States Health & Life Co. of Omaha, U.S. Dist. Ct., S.D.S.D., No. 00-4135, July 9, 2001.* During the trial for punitive damages, CSO decided to settle for a confidential amount.

“I felt we had won because now CSO would have to start paying all the other people properly. Unfortunately, I was wrong,” said Abourezk.

Although it was now clear that CSO would lose any cases filed against it, the company continued refusing to remedy the underpayments. Abourezk offered to drop his sister’s case and not pursue the \$100,000 if the insurer changed its policy and corrected the underpayments to all of the other patients. CSO refused.

Not knowing where to turn to get the benefits owed to his sister and hundreds of other patients, Abourezk wrote a letter to the Nebraska director of insurance, requesting that he pressure CSO to compensate its insureds. The director, who had previously been the vice president of CSO, refused.

As Carol’s case moved through the litigation process, Abourezk continued to find more patients who had been underpaid. Every time he notified CSO that he had contacted a patient, the insurer would send that person a check for the underpayments. Several of these checks arrived after the patients had already died.

“It was very frustrating for me, because I could only find so many people on my own, and CSO was playing a waiting game,” Abourezk said. “Every day people would die, and then

CSO would never have any more worry about having to pay that claim.”

The situation changed when Abourezk met Kay Bergonzi, a single mother with breast cancer who had been underpaid by CSO. He explained to her that they could either proceed with an individual case with the prospect of a large recovery, or they could pursue a class action, which might take years and provide far less compensation. Kay decided to file a class action suit, although doing so limited her potential recovery to the \$10,000 CSO owed her.

“Kay made huge financial sacrifices to bring a class action that would help 1,200 other people, instead of just taking the route that would greatly benefit herself,” said Abourezk.

For the class action, the litigation team brought in Peter Kahana, a class action specialist from Philadelphia. CSO—after being doggedly pursued by Abourezk for five years and paying out millions in the individual lawsuits and to keep others from suing—realized how much would be at stake if the class action plaintiffs prevailed. The company finally agreed to settle for \$20 million. Of that amount, \$7.5 million goes to 1,236 plaintiffs who were underpaid, and approximately \$9.6 million will be used to pay participants of the disputed policy who are diagnosed with cancer in the future.

Abourezk, who is refusing to take a fee in these cases except on amounts the plaintiffs receive that exceed the underpayment amounts, has decided to use his earnings to fund the initial costs of other insurance bad faith cases. He recently secured a \$12 million punitive award against three insurance companies who denied a nursing home employee workers’ compensation.

Although Abourezk acknowledges that the team’s victory against CSO is a nice way to honor his sister, he says the plaintiffs deserve all the credit.

“They are all heroes. They changed a lot of lives all over this country for the better.”

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