

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GUARDIAN FLIGHT LLC, et al.,

Plaintiffs,

v.

**AETNA LIFE INSURANCE
COMPANY et al.,**

Defendants.

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Civil Action No. 3:24-cv-00680-MPS

JURY TRIAL DEMANDED

**PLAINTIFFS’ JOINT SUR-REPLY IN OPPOSITION TO DEFENDANTS’
MOTIONS TO DISMISS PLAINTIFFS’ SECOND AMENDED COMPLAINT**

Plaintiffs Guardian Flight, LLC (“Guardian Flight”), REACH Air Medical Services, LLC (“REACH”), CALSTAR Air Medical Services, LLC (“CALSTAR”), Med-Trans Corporation (“Med-Trans”), Air Evac EMS, Inc. (“Air Evac”), and AirMed International LLC (“AirMed”) (collectively “Plaintiffs”) file this joint sur-reply in opposition to the motions to dismiss filed by Defendants Aetna Life Insurance Company, Aetna Health, Inc., and Aetna Health and Life Insurance Company (collectively “Aetna,” Docs. 121 and 127) and Cigna Health and Life Insurance Company (“Cigna,” Docs. 123 and 124), and would respectfully show the Court as follows:

INTRODUCTION

In *NEMS PLLC v. Harvard Pilgrim Health Care of Connecticut, Inc.* (“*NEMS*”), the Connecticut Supreme Court ruled that a violation of Connecticut’s state surprise billing law does not provide an independent basis for liability under the Connecticut Unfair Trade Practices Act (“CUTPA”). 2024 WL 3892879, at *4 (Conn. Aug. 21, 2024). Instead, a CUTPA claim against an insurer must be based on conduct prohibited by the Connecticut Unfair Insurance Practices Act (“CUIPA”), which can include conduct that violates another statutory duty such as a surprise

billing law. As explained below, Plaintiffs' CUTPA claim meets this requirement and Defendants' motion to dismiss it should be denied.

ARGUMENT AND AUTHORITIES

The *NEMS* dispute concerned how patient responsibility was calculated and applied to insurer payment obligations under Connecticut's surprise billing law. The *NEMS* plaintiff claimed it was being underpaid because the defendant insurer was misapplying patient responsibility in violation of the surprise billing law's requirements. *Id.* at *2. The court concluded that violation of a surprise billing requirement alone does not state an independent claim under CUTPA because unfair trade practices by insurers are governed by CUIPA. *Id.* at *4. Yet the court clarified that violating a surprise billing law requirement could be the basis for not fairly and equitably settling claims as required by CUIPA. *Id.* at *6-7.

The *NEMS* defendant argued that the Connecticut Supreme Court did not need to answer the remaining two certified questions relating to surprise billing law payment requirements if violation of that law did not provide an independent basis for a CUTPA violation. *Id.* at *6. The court disagreed, noting that defendants' potential liability under CUTPA depended on what the state surprise billing law required and thus whether it had been violated. *Id.* at *6-7. The court explained:

The plaintiff also claims that the defendant violated 38a-816(6)(F) [of CUIPA] “when it failed to settle or resolve the [disputed] claims...despite...that its legal obligations [were] clear ***under the surprise billing law.***” Whether the defendant's payments to the plaintiff ***were fair and equitable***, and whether ***liability was reasonably clear***, depends in no small part on which party has correctly interpreted ***the requirements imposed by the surprise billing law.***”

Id. at *7 (emphasis added).

In other words, “plaintiff's allegations” of surprise billing law violations “state a colorable CUTPA claim” if plaintiffs' interpretation of it was correct. *Id.* The *NEMS* defendant could be

held liable for committing an unfair settlement practice under CUTPA (via CUIPA) if it was not fairly and equitably settling claims in light of the state surprise billing law's requirements.

A simple example demonstrates how CUTPA and the surprise billing law operate after the decision in *NEMS*. As the Connecticut Supreme Court explained, the state surprise billing law requires an insurer to pay an out-of-network emergency provider the greatest of three amounts: 1) the in-network rate, 2) the 80th percentile charge; or 3) Medicare rates. *Id.* The 80th percentile of charge “typically will be higher than the in-network or Medicare reimbursement rates and is the reimbursement to which the provider will be entitled in almost all cases.” *Id.* Suppose an insurer started paying OON emergency providers the lesser of these three amounts instead of the greater (which would typically be Medicare rates). That would not only violate the state surprise billing law, it would also violate CUIPA (and thus CUTPA) because the insurer would not be “attempting in good faith to effectuate prompt fair and equitable settlements of claims in which liability has become reasonably clear.” Conn. Gen. Stat. § 38a-816(F).

Here, Plaintiffs likewise assert that Defendants violated CUIPA (and thus CUTPA) by not promptly, fairly and equitably settling claims through a scheme that included violations of the No Surprises Act (“NSA”). Doc. 109 at ¶ 44. For example, Defendants’ failure to pay IDR awards within thirty days violated the NSA and likewise violated the good faith settlement obligations in CUIPA. That said, other parts of the scheme violated CUIPA but not the NSA. To illustrate, unlike Connecticut’s surprise billing law, the NSA does not mandate the amount of the initial payment an insurer makes. But, per CUIPA, initial payments must still be “fair and equitable.” Conn. Gen. Stat. § 38a-816(F). Plaintiffs will prove at trial that they have not been.

Defendants argue that a CUIPA claim cannot arise prior to a final IDR award being issued because until then their liability is not reasonably clear. This is wrong and tantamount to an insurer

saying a CUIPA claim cannot be asserted against it by a policyholder until that policyholder obtains a final judgment establishing the full extent of its claim payment liability. However, CUIPA claims are litigated alongside payment disputes all the time. Indeed, requiring prompt and fair insurance payments up front limits the number of policyholders who have to resort to litigation to be fairly paid. *State v. Acordia, Inc*, 310 Conn. 1, 37 (Conn. 2013) (noting that CUIPA is the “source of public policy with respect to general insurance practices”). The same requirement applies to OON transports and IDR proceedings. Low-balling providers and forcing them to pursue IDR for fair payment violates CUIPA the same way that low-balling policyholders and forcing them to pursue litigation for fair payment does.

Plaintiffs do not disagree that after the *NEMS* decision, merely proving a violation of the NSA does not establish an independent violation of CUTPA. However, as explained above, violations of the NSA can provide the factual and legal predicate for a violation of CUTPA. Here, Plaintiffs’ complaint asserts that Defendants have violated CUTPA through a series of unfair practices. Doc. 109 at ¶ 42. They explain that these practices include conduct that violates the NSA and ERISA. *Id.* at ¶ 43. They further explain that these practices “also constitute engaging in unfair settlement practices in violation of” CUIPA. *Id.* at ¶¶ 40-45. Plaintiffs have asserted a cause of action for violation of CUTPA that fully complies with the *NEMS* decision, and there is no basis to dismiss that claim. The jury is entitled to hear all of the facts underlying Defendants’ unfair payment practices in determining whether Defendants are not fairly and equitably settling claims for OON air ambulance transports provided by Plaintiffs.

Dated: September 20, 2024

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CERTIFICATE OF SERVICE

I certify that on September 20, 2024, a true and correct copy of the foregoing was served electronically on all counsel of record.

/s/ Adam T. Schramek

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