

NZa failing to enforce health insurers' duty of care

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The NZa is failing to take action against health insurers when they breach their duty of care regarding the waiting lists in mental healthcare. The legal procedure that insured persons must follow to enforce the duty of care is far too complicated and offers no protection to citizens. “Failure to enforce the duty of care equates to stealing from the vulnerable”, says lawyer [Diederik Schrijvershof](#).

According to the Explanatory Memorandum to the *Zorgverzekeringswet* (Healthcare Insurance Act), the duty of care is one of the pillars of the healthcare system. Citizens are compulsorily insured. They cannot escape the obligation to pay healthcare premiums to health insurers. In return, the insurers are required by law to purchase sufficient care. “A ‘healthcare procurement duty’ is actually a better term”, says lawyer [Diederik Schrijvershof of Maverick Advocaten](#). He has conducted various lawsuits in the past eight years on behalf of healthcare providers relating to the duty of care.

Duty of care = healthcare procurement duty

The [NZa describes on its website](#) what the duty of care for health insurers means in practice. Insurers are required to purchase sufficient care from healthcare providers that are able to provide that care in good time. If that is impossible, insurers must act proactively. They must use healthcare intermediation to find care providers with available capacity. If necessary, they must contract additional care. The NZa must act as a supervisor if health insurers fail to fulfil their duty of care.

Mental healthcare waiting lists

There have been waiting lists in mental healthcare for at least ten years. Despite all kinds of efforts, the problem only seems to be increasing. After deduction of people who are waiting for two types of care, some [60,000 people are now on the waiting list](#). Of these, 40,000 have been waiting longer than the “Treek Standard” (four weeks for the first intake). Why do these people not turn to the courts en masse to enforce their rights? Citizens have no trouble finding their way to court with regard to other types of private-law insurance, such as car insurance. And why isn't the NZa taking firm action against health insurers?

Unfamiliarity with healthcare intermediation

The reason why insured persons do not stand up for their rights is that the legal route is paved with obstacles, Schrijvershof explains. The first step that insured persons have to take is healthcare intermediation. That must be done through their health insurer. Health insurers are required to do everything in their power to reassign waiting patients to other providers within a reasonable time and travel distance. “Many patients aren't aware of this right or don't know how to enforce it. It's a very laborious procedure in practice. The same applies to the NZa supervision of this right, which is still not sufficiently successful.”

Complaining to NZa

The second hurdle is to submit a signal or a formal complaint to the NZa. Most insured persons are unfamiliar with this step, too. The NZa does not clearly draw attention to this possibility on its website. The NZa does not have an easily accessible hotline to report breaches of the duty of care or the care procurement duty, which there has been for healthcare fraud these past ten years. And an insured person can do so effectively only if the first step, healthcare intermediation, has been unsuccessful. The NZa would then have to

investigate whether a health insurer has purchased sufficient care. And, if not, whether the insurer has adequately contracted additional care in good time.

Going to court

Only after a complaint to the NZa has been rejected does the court come into play, but insured persons never take that step. And Schrijvershof knows why: "These are people in need of mental healthcare. They have other things on their minds than lengthy legal proceedings with an insurer, the NZa or in court. They want the mental healthcare services to help them."

Mental healthcare providers turning to NZa

Schrijvershof has assisted mental healthcare providers that turn to the NZa on behalf of their clients and request enforcement of the duty of care/care procurement duty. The providers were able to demonstrate that insurers had purchased insufficient care, resulting in people waiting at the door. "Despite cartloads of evidence that a health insurer had not purchased sufficient care, the NZa found that the complaint was inadmissible and at best conducted a pro forma investigation. It did not ask enough questions and often took the insurer's word for it. A mental healthcare provider is not allowed to conduct such proceedings on behalf of insured persons, because they are not direct stakeholders, according to the NZa. The insured themselves must do so. But the legal route is far too complicated for those people."

Clients' association applies to the court

Patients' associations could also take the legal route to the NZa on behalf of patients. But that is possible only if their articles of association allow them to do so. "The NZa passes the ball back, to the patients waiting for mental healthcare. The NZa knows that these people are unlikely to find their way to the NZa and will not bring a legal action. The legal route offers them no protection. The people on the waiting lists are the victims, but they are nevertheless required to pay healthcare premiums. Failure to enforce the duty of care equates to stealing from the vulnerable."

Demand for care and duty of care

What could the NZa do to enforce the duty of care? The best approach would be to legally tackle the problem at the source, says Schrijvershof. At the beginning of the year, the NZa should immediately check whether the care purchased matches the demand for care in a region. "I know for sure that in some regions only 50 to 80 percent of the demand for care has been purchased at the start of a year. I appreciate that insurers use turnover ceilings to control costs. But those turnover ceilings must be realistic. If the NZa opens a hotline for complaints about the duty of care, it will soon become apparent in which regions this is a problem and the NZa will be able to take timely and targeted action."

Order subject to a penalty

The NZa cannot impose fines for breach of the duty of care. But it can give an instruction to insurers, to ensure that they contract sufficient care (or additional care) in a timely manner, and attach an order subject to a penalty to that instruction. The NZa has failed to do so for years, which has caused significant harm, says Schrijvershof. "The NZa should bare its teeth. If health insurers know that violating the duty of care will not be sanctioned, they will get away with it. That is not only extremely harmful for the people who need help, but also for the affordability of healthcare. People are out of the running for longer periods and their demand for care increases, which leads to higher costs. Supervising the duty of care is a core task of the NZa."

NZa and the duty of care

What should the NZa do to enforce the duty of care? “The NZa primarily reports on the state of affairs, without exercising its powers to effectively enforce the duty of care” says Schrijvershof. “The NZa invariably says that the waiting lists are a multi-headed monster. That they are due to the shortage of psychologists and psychiatrists. That it’s very difficult for mental healthcare providers to offer cost-effective care, because the costs of real estate are so high.”

Proactive policy of health insurers

“That may well be true, but it’s not enough,” continues Schrijvershof. “Health insurers and the NZa cannot simply look in the rear-view mirror from the claims perspective. We have seen staff shortages coming for years. Insurers may be expected to demonstrate foresight and take a proactive approach to deal with such shortages in good time, otherwise the duty of care/healthcare procurement duty will be jeopardised.”

Turnover ceiling

“The NZa applies double standards”, Schrijvershof observes. “If providers announce [a ban on the admission of new clients](#), the NZa is all over them. But when health insurers demonstrably flout their duty of care, the NZa’s reticence is remarkable. About four years ago, I assisted a large mental healthcare provider. At the beginning of the year, it reported that too little care had been purchased. But instead of purchasing sufficient care – i.e. increasing the turnover ceiling – the health insurer kept coming back to the provider with new questions. That was weird, since it was obvious that the specific demand for care in the region in question was greater than the contracted care offered.”

Ban on admission of new clients

That mental healthcare provider ultimately stopped admitting new clients. “Mental healthcare providers don’t do so readily. There must really be something wrong. Their basic approach is to help people. No longer admitting new clients truly is a last resort. The provider and the insurer were then called to account by the NZa. The NZa's first message was: “I don't want to see you fighting in the streets.” What was that supposed to mean? The NZa was well aware that the mental healthcare provider had raised the issue months ago already. It had asked the insurer time and again to purchase sufficient care as soon as possible. Finally, in November, additional contracts were reluctantly entered into. But the insurer and the NZa could have avoided the need to no longer admit new clients. And this happens all the time.”