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March 24, 2003

CLASS ACTION ALERT

PENNSYLVANIA SUPERIOR COURT UPHOLDS TRIAL COURT'S DETERMINATION THAT CHIROPRACTORS COULD NOT SEEK CLASS-WIDE RELIEF AGAINST MANAGED HEALTH CARE COMPANIES FOR ALLEGED BREACHES OF UNIFORM CONTRACTS

In a significant ruling for health insurers, the Pennsylvania Superior Court recently upheld a trial court's refusal to certify a class of chiropractors, despite the chiropractors' claims that defendant-managed health care companies breached uniform contracts by employing uniform policies and practices that improperly denied coverage and payment for chiropractic treatments.[1] The Superior Court determined, by a two-to-one decision, that the evidence which defendants elicited during class discovery demonstrated that the chiropractors could not prove the existence of uniform policies and procedures, and further demonstrated that the chiropractors' claims required highly individualized determinations of "medical necessity" under their contracts. Reargument before the full appeals court was denied despite the chiropractors' claim that the decision "forecloses any challenge to a health insurer's unlawful reimbursement denial tactics from ever being certified as a class action."

BACKGROUND

In August 2000 "in-network" chiropractors, i.e., those who have a contract with the defendants, and subscribers to the defendants' health care plans who sought and were allegedly denied chiropractic treatments filed suit in the Court of Common Pleas of Philadelphia County. Plaintiffs alleged that the defendants employed at least eight uniform practices and policies regarding the pre-certification, coverage and reimbursement of chiropractic care that breached the defendants' uniform contracts with the chiropractors and the subscribers. The plaintiffs' contracts allegedly required the defendants to precertify, cover and pay for chiropractic care subject only to the requirement that it was "medically necessary." The defendants also

[1] *Eisen v. Independence Blue Cross*, 2003 Pa. Super. 438, 2003 WL 22725179 (Pa. Super. Nov. 20, 2003), *rehearing en banc denied*, January 22, 2004. Akin Gump represented the defendants in the trial court and on appeal. Litigation partner Edward F. Mannino argued the appeal, assisted by counsel James L. Griffith and Jason A. Snyderman.

allegedly employed claims processing practices that reduced the amount of their payments to the chiropractors. The plaintiffs sought damages and injunctive relief on behalf of separate classes of both chiropractic providers and subscribers.

Following class discovery, the trial court denied class certification on both alleged classes. It determined that the plaintiffs had failed to prove that there were common questions of law and fact, that the claims of the named plaintiffs were typical of all class members, or that a class action would be a fair and efficient method of adjudicating the claims. Only the chiropractors appealed this ruling to the Superior Court.

THE SUPERIOR COURT OPINION

The Superior Court analyzed the chiropractors' request for class certification under Rule 1702 of the Pennsylvania Rules of Civil Procedure. That rule requires the plaintiffs to establish, among other things, that there are common questions of law and fact, that the claims and defenses are typical among all class members, and that a class action will be a fair and efficient method of adjudicating the claims.

The chiropractors argued that their claim that the defendants breached uniform contracts by employing uniform policies and procedures to defeat coverage and payment for chiropractic care satisfied the elements of class certification. The chiropractors argued that challenges to managed care companies' uniform policies and procedures concerning health care coverage under uniform contracts did not require individual determinations of medical necessity and could be certified as class actions. The chiropractors also urged the Superior Court to follow a Florida federal district court's opinion in multidistrict health care litigation that certified a nationwide class of medical doctors challenging allegedly similar claims processing practices, including alleged "bundling" and "downcoding."[2]

The Superior Court agreed that the chiropractors had "form contracts" with defendants. However, it rejected their claim that this fact established the requisite commonality among the claims. The Superior Court agreed with the defendants that "[i]n each instance . . . a determination of medical necessity must precede authorization or payment for services, and is, perforce, based on individual rather than common factors." In addition, the Superior Court found that variations in coverage for chiropractic care among the different subscribers' health plans was "a variable which, perhaps even more than medical necessity, affects [the defendants'] response to benefit claims."

The Superior Court also carefully considered the evidence that the defendants presented, most of which consisted of the named plaintiffs' deposition testimony. It agreed with the defendants that the plaintiffs had not established the uniformity of any alleged policy or practice and/or its uniform application to the plaintiffs. For example, it noted that the chiropractors' claims of uniform practices were undermined by their testimony that the defendants' "responses were inconsistent, even where the same illness suffered by different patients was involved, and that upon second requests, more visits were sometimes authorized." The Superior Court concluded that these and other "factual variations" precluded a class action, and rejected the plaintiffs' arguments that the factual variations could be addressed later at a damages proceeding.

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[2] *In re Managed Care Litig.*, 209 F.R.D. 678 (S.D. Fla. 2002). The dissenting judge relied heavily on this opinion.

Finally, the Superior Court explicitly held that "[a]uthorization protocols, without more, are not assumed to be arbitrary since the existence of protocols of some description for processing requests for service authorization is neither surprising nor inherently suspect."

WHAT THIS DECISION MAY MEAN FOR YOU

The opinion has implications for any company facing a class action. You may wish to ask yourself the following questions:

1. How might this opinion be used to defend against the numerous nationwide and statewide class actions currently pending against health care companies in federal and state courts, some of which were filed by the same plaintiffs' lawyers who handled this case?

2. How can a defendant utilize discovery of the plaintiffs on class certification to show that uniform contractual provisions require individual determinations of entitlements to payment, or that the company's alleged policies and practices are not actually uniform, so as to preclude class certification?

3. What is the best litigation strategy for eliciting evidence that can be used to support an opposition to a motion for class certification?

Depending on your answers to these questions, you may be able to defeat a motion for class certification that alleges that your company breached a form contract by employing uniform policies and procedures.

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CONTACT INFORMATION

If you have questions about this topic or would like additional information about this case, please contact the partner who normally represents you, or:

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