STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF DURHAM	05 CVS 5606

MACY M. HAMM, Individually and on behalf of All Others Similarly Situated, Plaintiff	)	
v.	)	**ORDER ON CLASS CERTIFICATION**
BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, Defendants	)	

THIS CAUSE, designated exceptional and assigned to the undersigned by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, came before the court for hearing upon Plaintiff's Motion for Class Certification pursuant to North Carolina Rule of Civil Procedure 23 (the "Motion") and was so heard on August 3, 2007; and

THE COURT, having considered the Motion, the briefs of the parties regarding the Motion, arguments of counsel, appropriate matters of record, and the ends of justice FINDS and CONCLUDES that:

I.

PROCEDURAL BACKGROUND

1. On November 3, 2005, Plaintiff Macy M. Hamm ("Ms. Hamm") filed her Complaint in behalf of herself and all others similarly situated.

2. On January 30, 2006, Defendants filed their Answer to the Complaint.

3. On February 7, 2007, Ms. Hamm filed her Motion.

4. On March 21, 2007, the court filed a Consent Order, which dismissed, without prejudice, the Complaint's claims against Defendant Blue Cross and Blue Shield of North Carolina Foundation.

5. On August 3, 2007, the court heard oral argument on the Motion.

II.

THE PARTIES

1. Ms. Hamm is a citizen and resident of North Carolina.

2. Defendant Blue Cross and Blue Shield of North Carolina is a non-profit corporation duly organized and authorized to conduct business under the laws of the State of North Carolina with a principal place of business in Durham County, North Carolina.

III.

MS. HAMM'S COMPLAINT

1. The Complaint alleges, among other things, that:

a. Defendant is a preferred provider organization ("PPO") in that it is an insurer that holds contracts with health care providers who have agreed to accept from Defendant special reimbursement or other terms for health care services on a fee-per-service basis.

b. Defendant has enrolled groups, including businesses, employees of the State of North Carolina, employees of counties within the State of North Carolina and employees of municipalities within the State of North Carolina into their PPO plans, which include the plans "Blue Options" and "Blue Advantage."

c. Blue Advantage is a preferred provider benefits plan offered by Defendant in that it is a health plan under which enrollees, or members of the plan, are given incentives -- through differentials in deductibles, coinsurance, or co-payments -- to obtain health care services from health care providers who are under a contract with Defendant.

d. Ms. Hamm purchased Blue Advantage health insurance from Defendant in or around 2003. Ms. Hamm has renewed her Blue Advantage policy each year through the filing of her Complaint, and is currently a member of the Blue Advantage plan.

e. On or about June 12, 2003, Ms. Hamm gave birth to a son. Following his birth, Ms. Hamm's son became a dependent member of her Blue Advantage plan and has remained a member under Plaintiff's Blue Advantage plan through the present.

f. At all times relevant, the terms of the contracts with the member's of Defendant's PPO plans, including, without limitation, Blue Advantage and Blue Options, provided that:

i. a "member" of the PPO plan(s) is an individual who is eligible for coverage under the health benefits plan and who is enrolled for coverage, including subscribers and dependents;

ii. members have the choice to obtain medical services from an "in-network provider," defined as a hospital, doctor, or other medical practitioner or provider of medical services and supplies that has been designated as a PPO plan provider; or an "out-of-network provider,"

defined as a medical provider that has not been designated as a PPO plan provider;

iii. members who choose to receive care from an "in-network provider" will not be responsible for any charge over the "allowed amount," which is the charge that the Defendant determines is reasonable for covered services provided to a member;

iv. "in-network providers" agree to limit charges for covered services to the "allowed amount";

v. members are responsible for any amounts over the "allowed amount" for services rendered by "out-of-network providers"; and

vi. members are responsible for the amounts above the benefit maximum amounts.

g. "Benefit period maximums" are defined as the dollar amount that each member can receive in paid benefits from Defendant for certain services.

h. From June 12, 2003, through the present, Ms. Hamm's son received extensive medical treatment from "in-network providers" for cerebral palsy, including extensive physical and speech therapies, reaching the "benefit period maximums" under Ms. Hamm's PPO plan prior to the close of the benefit period.

i. Subsequent to reaching the "benefit period maximums," Ms. Hamm's son continued to receive therapies from "in-network providers" although Ms. Hamm was responsible for payment for the therapies.

j. Under the terms of the PPO plan, Ms. Hamm was and is responsible only for payment of the "allowed amount" for those medical services provided to Ms. Hamm's son by "in-network providers" after those services reached the "benefit period maximums."

k. However, after the "benefit period maximums" were reached, Defendant and their "in-network providers" charged Ms. Hamm the provider's ordinary rate or an amount which was in excess of the "allowed amount" for those services Ms. Hamm's son received from "in-network providers."

2. Upon such allegations, Ms. Hamm contends that Defendant caused her and those similarly situated to suffer damages by (a) breaching its contracts of insurance, (b) breaching its duty of good faith, and (c) committing unfair and deceptive trade practices.

3. Further, Ms. Hamm seeks a declaratory judgment that, under their contracts of insurance with Defendant, Ms. Hamm and those similarly situated are not responsible for payment of amounts in excess of the "allowed amount" for medical services received from "in-network providers."

4. Regarding such claims, Ms. Hamm seeks to have certified and represent a class of plaintiffs (the "Putative Class"), pursuant to Rule 23 of the North Carolina Rules of Civil Procedure ("Rule 23").

5. Pursuant to the Motion, Ms. Hamm defines the Putative Class as:[1]

[1] To the extent Ms. Hamm's Motion defines the Putative Class in a manner different from that in her Complaint, the court does not find such variance to be substantive and elects to consider the class as defined in the Motion. *See Blitz v. Express Image, Inc.*, 2006 NCBC 10 ¶ 15 n.2 (N.C. Super. Ct. Aug. 23, 2006), http://www.ncbusinesscourt.net/opinions/2006%20NCBC%2010.htm.

a. Individuals who were ever a member of one of Defendant's PPO plans between November 2002 and the present;

b. Whose PPO plan was not an ERISA plan;

c. Who in any benefit period reached their benefit period maximum or who reached their lifetime maximum as those phrases are defined under the terms of their PPO contract; and

d. Who were charged by in-network providers more than the allowed amount for covered services or supplies after they reached their benefit period maximum or lifetime maximum.

IV.

CLASS CERTIFICATION

A.

RELEVANT LAW

1. In North Carolina, class actions are governed by Rule 23.

2. Rule 23(a) provides that: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued."

3. "The party seeking to bring a class action under Rule 23(a) has the burden of showing that the prerequisites to utilizing the class action procedure are present." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282, 354 S.E.2d 459, 465 (1987). The requirements for class certification are (a) the existence of a class; (b) the class members within the jurisdiction of the court must adequately represent any class

members outside the jurisdiction of the court; (c) the class must be so numerous as to make it impracticable to bring each member before the court; (d) the party representing the class must fairly insure the representation of all class members; and (e) adequate notice must be given to the class members. *Id.* at 282–84, 354 S.E.2d at 465–66.

4. Where all the prerequisites are met, it is within the trial court's discretion to determine whether a class action is superior to other available methods for the adjudication of the controversy. *Id.* at 284, 354 S.E.2d at 466.

5. Further, the trial court has broad discretion in deciding whether a class action should be certified and is not limited to consideration of matters expressly set forth in Rule 23 or in case law. *Id.*

6. For example, when making class certification decisions the trial court should not prematurely determine the merits -- such as whether the defendant breached the contract at issue.[2] However, when the plaintiffs' claims are of a type that allow the measure of damages to be assessed before determination of the breach, the trial court is not prohibited from considering the maximum damages recoverable by class members if they were to prevail on the merits, and whether the value of such recovery renders the claims inappropriate for class resolution.[3] Further, when elements of the potential class members' claims, or defenses applicable to individual members, render

[2] *Maffei v. Alert Cable TV of NC, Inc.*, 316 N.C. 615, 617–18, 342 S.E.2d 867, 870 (1986) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974), and providing that "[w]hat *Eisen* would preclude [as part of a class certification analysis in a case alleging that defendant cable company breached a uniform subscriber contract by failing to provide twelve hours of ESPN regular programming] is a decision by the trial judge that the defendant had or had not breached the contract. Likewise, if the complaint had alleged and the answer had denied a contract to provide specific [ESPN programs], the trial judge could not have found that the damages were limited to the value of *general* [ESPN] programming without making a preliminary determination of the contested question of contract coverage, which would amount to a determination on the merits of the suit.")(emphasis in original).

[3] *Id.* at 617–22, 342 S.E.2d at 869–72 (holding it proper for the trial court -- upon a consent motion to have the court determine the appropriate measure of damages before granting class certification -- to delineate what the proper legal measure of damages would be, and distinguishing such exercise from the calculation of the actual amount of damages, which would be determined by a jury).

the determination of any general liability secondary to the determination of individual issues, the court may deny class certification.[4]

B.

CONTENTIONS OF THE PARTIES

7. Ms. Hamm contends that she has met the prerequisites of Rule 23 and that the court should certify the Putative Class. In support of this contention, Ms. Hamm argues that:

a. She has an interest in the same issues of law and of fact as each of the members of the Putative Class, and that such common issues predominate over any issues affecting only individual members;

b. The predominant issue affecting the Putative Class is the construction of the standardized contracts of insurance, which define the parties' rights and liabilities, regarding the issue of whether members of the Putative Class are responsible for payment of more than the "allowed amount" for medical services received from "in-network providers" after reaching a "benefit period maximum";

c. She is a member of the Putative Class, her claims are typical of those of the other members, she has no conflicts of interests with the Putative Class, and she will fairly and adequately represent the interest of all members of the class;

[4] *Compare Pitts v. American Sec. Ins. Co.*, 144 N.C. App. 1, 12, 550 S.E.2d 179, 187 (2001), *aff'd per curiam by an equally divided court*, 356 N.C. 292, 569 S.E.2d 647 (2002)(reasoning that it was error for the trial court to consider a possible defense to some of the proposed class members' claims at the class certification stage since the merits of individual plaintiff's claims should not be considered at the certification stage of the proceeding); *with Blitz,* 2006 NCBC 10 ¶¶ 45–46 (denying class certification when any common issues would be subordinate to the necessary inquiry into whether each member of the proposed class had invited or permitted facsimile transmissions so as to be precluded from stating a claim for unsolicited facsimiles under the federal statute at issue).

d. She is well-educated and willing to take a leading role in the litigation to insure the protection of the interests of any absentee members of the Putative Class; and

e. She is represented by experienced and able counsel who will adequately protect the interests of the Putative Class.

8. Defendant counters that Ms. Hamm fails to meet two of the prerequisites of Rule 23 because she has not (a) proven the existence of a feasible class, or (b) demonstrated that she is an adequate class representative.

C.

ANALYSIS

i.

EXISTENCE OF A CLASS

9. "[A] 'class' exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Crow*, 319 N.C. at 280, 354 S.E.2d at 464. To determine whether common issues predominate over issues affecting only individual class members, the court does not simply line up the common issues against those that require individual consideration. Rather, the test is whether the individual issues are such that they will predominate over common ones in terms of being the focus of the litigants' efforts. *See Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 550–53, 613 S.E.2d 322, 327–28 (2005).

10. Ms. Hamm argues that the Putative Class constitutes a "class" under Rule 23 because each of its members has an interest in common issues of law and of fact,

including the predominate issue of whether the uniform insurance contracts provide that members of the Putative Class are not responsible for payment of more than the "allowed amount" for medical services received from "in-network providers" after reaching a "benefit period maximum."

11. Defendant argues that Ms. Hamm has failed to prove the existence of a feasible class because:

a. Contrary to Ms. Hamm's framing of the issues, "the threshold issue" is whether Defendant allows "in-network providers" to charge more than the "allowed amount" for covered services in excess of a benefit maximum, and if Defendant has not allowed such practice as to a particular benefit maximum[5] -- which it insists it has not as to services received in excess of "dollar maximums"[6] -- then the members of the Putative Class have no injury of which to complain;

b. The Putative Class would require the court to make extensive individualized inquiries including whether each member of the Putative Class (i) actually paid more than the "allowed amount," (ii) belonged to an ERISA-exempt plan, or (iii) exhausted his or her administrative remedies; and

c. "The threshold question here is not whether proposed class members will have different amounts of damages. It is whether the proposed

[5] Defendant contends that there are two types of "benefit maximums" -- "dollar maximums" (i.e. limits on the monetary amount Defendant will pay for "covered services"), and "visit maximums" (i.e. limits on the number of "covered services" an insured receives). Defendant purports to treat these two types of "benefit maximums" differently. Defendant concedes that there is no cap on the amount an insured may be charged by an "in-network provider" for visits in excess of a "visit maximum," and contends that its contracts provide for the same by excluding visits in excess of "visit maximums" from "covered services." Defendant alleges, however, that services in excess of "dollar maximums" are still "covered services" under the terms of its contracts, and that, accordingly, the amount an insured may be charged by an "in-network provider" is limited to the "allowed amount." (Dunlap Aff. ¶¶ 14, 15, 18, 19, 23, 26, 30.)

[6] Ms. Hamm disagrees, and cites to the depositions of two "in-network providers" indicating that Defendant does not always limit the amount charged to the insured to the "allowed amount" for services in excess of "dollar maximums." (Andrews Dep. 55–59, 86–87; Troy Spring Dep. 69–71.)

class members suffered any injury for which BCBSNC may be held liable. If an in-network provider does not charge and collect more than the allowed amount from a proposed class member, BCBSNC cannot be held liable for 'allowing' such charges under any of Plaintiff's theories of liability."

12. These arguments by the Defendant effectively (a) concede that the members of the Putative Class share a common interest in the issue of whether Defendant may be held liable if it allowed "in-network providers" to charge more than the "allowed amount" for "covered services," which it admits it does for services received in excess of "visit maximums"; and (b) acknowledge that such common issue predominates over individual issues affecting members of the Putative Class. Accordingly, Defendant's recast of the "dispositive issues" does not support Defendant's contention that Ms. Hamm has failed to prove the existence of a class.

13. Defendant's further arguments that a class does not exist similarly are unpersuasive, because:

a. The contention that Defendant did not allow "in-network providers" to charge more than the "allowed amount" as to visits in excess of "dollar maximums" -- essentially an argument that Defendant did not breach its contracts -- is a merit-based defense not properly before the court at this stage of this civil action;[7]

b. The contention that no claim exists for visits in excess of a "visit maximum" because services in excess of a "visit maximum" are not "covered services" -- essentially an argument that Defendant's construction of the contract

[7] *See Maffei*, 316 N.C. at 617–18, 342 S.E.2d at 870 (interpreting *Eisen* to preclude the trial court from determining whether or not a breach of contract occurred at the class certification stage).

is the only viable construction -- is a merit-based defense not properly before the court at this stage of this civil action;[8]

c. Individualized inquiries into whether a given member of the Putative Class paid more than the "allowed amount" -- as may be necessary to determine the amount of damages, if any -- do not predominate over the common liability issue[9] of whether Defendant contracted with the members of the Putative Class to limit the amount they paid for "covered services" in excess of a benefit maximum to the "allowed amount," and, if so, whether Defendant breached such contract;[10]

d. The inquiries that may be required to determine whether given members of the Putative Class were members of an ERISA exempt plan can be made in broad fashion (i.e. the inquiry would be into the status of various "group"

[8] In addition, although there is pragmatic appeal to Defendant's argument that -- in the interest of the litigants' and the court's resources -- a class should not be certified when it is clear that no claim exists, the construction of the contracts at issue here is not as clear to the court as it is to Defendant.

[9] Defendant strenuously argues that both *Harrison*, 170 N.C. App. 545, 613 S.E.2d 322, and *Blitz*, 2006 NCBC 10, compel the conclusion that individual issues predominate over common issues in this matter. However, neither *Harrison* (finding that the inquiry into discrete oral agreements and undocumented damages would predominate over common issues), nor *Blitz* (finding that the inquiry into discrete relationships between the parties would predominate over common issues), involved the sort of uniform, mechanized and documented evidence of the parties' relationships that are presented in this matter.

[10] Additionally, Defendant's argument that no member of the Putative Class would have a claim unless he or she can "show they actually paid more the allowed amount" is misplaced. *See Bowen v. Fidelity Bank*, 209 N.C. 140, 144, 183 S.E. 266, 268 (1935) ("In a suit for damages for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least.")(citation omitted). Notably, the possibility that, even if plaintiff prevails, some class members may only be entitled to nominal damages is not the same as it being clear that no class member could possibly recover more than a *de minimus* amount. *C.f. Maffei*, 316 N.C. 615, 342 S.E.2d 867. Further, Plaintiff seeks a declaration regarding the future rights of the members of the Putative Class, which would not necessarily require any member to prove actual damages. *See* N.C. Gen. Stat. § 1-254 (providing that under the Declaratory Judgment Act a "contract may be construed either before or after there has been a breach thereof."); *Iowa Mutual Ins. Co. v. Fred M. Simmons, Inc.*, 258 N.C. 69, 73, 128 S.E.2d 19, 22 (1962) ("Generally, questions involving the liability of insurance companies under their policies are proper subjects for declaratory relief[]" provided that an actual controversy exists)(citations omitted); *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 629, 518 S.E.2d 205, 208 (1999) (providing that an "actual controversy sufficient to confer jurisdiction under the Declaratory Judgment Act" exists when the parties are not asking the court to "interpret the document in anticipation of future acts, but in light of past and present action").

plans, not into the status of each individual member of a given group), and does not otherwise predominate over the common issues; and

e. The contention that any given member of the Putative Class must have exhausted his or her "administrative remedies" (i.e. the grievance procedures outlined in Defendant's contracts) to be able to participate in the Putative Class, and that such requirement necessitates individual inquiries -- essentially an argument that Defendant's construction of the contracts is the only viable construction -- is a merit-based defense not properly before the court at this time.[11]

14. Ms. Hamm contends that she is contractually entitled to pay no more than the "allowed amount" for services received from "in-network providers" in excess of any "benefit period maximum." The Defendant disagrees. This issue defines the Putative Class and is common to its members. It predominates over individual issues.

15. Ms. Hamm has demonstrated the existence of a class pursuant to Rule 23.

ii.

ADEQUACY

16. The second prerequisite to class certification is that the class representatives must (a) have no conflict of interest with the members of the class, (b) have a genuine personal interest and not a mere technical interest in the outcome of the case, and (c) adequately represent any class members outside of this state.

[11] Interpretation of a limitation of actions covenant contained in a uniform contract, as here, does not require the same sort of individual inquiry as a review of whether each class member met a statutory element of liability. *C.f. Blitz*, 2006 NCBC10.

Faulkenbury v. Teachers' and State Employees' Ret. Sys., 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1977).

17. Ms. Hamm argues that she will adequately represent the Putative Class as to the common issues because services her son received were, or were treated as, services from an "in-network provider" in excess of a "benefit maximum."

18. Defendant argues that Ms. Hamm is not an adequate representative of the Putative Class because her claims are barred by two defenses[12] unique to her factual situation, which create a conflict between her and the members of the Putative Class, such defenses being that:

a. The only provider that actually charged Ms. Hamm more than the "allowed amount" was an "out-of-network" provider; and

b. The services received by Ms. Hamm's son, upon which Ms. Hamm bases her claims, were to treat development dysfunction, which is explicitly excluded from being a "covered service."

19. Despite Defendant's arguments, Ms. Hamm has shown that that the services her son received were, or were treated as, services from "in-network providers" in excess of a "benefit maximum." Therefore, Ms. Hamm's contentions as to such services are typical to those of the members of the Putative Class. Accordingly, the individual defenses that may be applicable to Ms. Hamm's claim do not render her inadequate to represent the Putative Class as to the common issue of whether the uniform insurance contracts provide that members of the Putative Class are not responsible for payment of more than the "allowed amount" for services they receive

[12] Defendants actually recite three "unique" defenses; however, one such defense is that Ms. Hamm failed to exhaust her administrative remedies, and the court has already dealt with that argument. *See supra* Section IV ¶ 13. e.

from “in-network providers” after reaching a “benefit period maximum.” *See Pitts*, 144 N.C. App. at 12, 550 S.E.2d at 187 (quoting 1 *Newberg on Class Actions* § 3.05, at 3-88 -90 (3d ed. 1992) as saying that the focus of class certification “is properly on the typicality of the plaintiff’s claim as it applies to the general liability issues [and] not on the plaintiff’s ultimate ability to recover”)(alteration in source).

20. Ms. Hamm adequately represents the Putative Class.

iii.

NUMEROSITY

21. The third prerequisite to class certification is that the members of the proposed class are so numerous that it is impractical to bring them all before the court. *Faulkenbury*, 345 N.C. at 697, 483 S.E.2d at 431.

22. Ms. Hamm contends that the exact size of the Putative Class is unknown to her, but ascertainable via the Defendant’s mechanized processes, and likely to range from the hundreds to the thousands.

23. The members of the Putative Class are sufficiently numerous so as to certify a class.

iv.

SUPERIORITY

24. Where common issues predominate, the named representative will adequately protect the interests of the members of the proposed class, and the class members are sufficiently numerous, it is within the trial court’s discretion to determine whether a class action is superior to other available methods for the adjudication of the controversy. *Crow*, 319 N.C. at 284, 354 S.E.2d at 466.

25. A class action is a superior method for adjudicating Ms. Hamm's claims for reasons including that:

a. The controversy is over a contract of insurance that is standardized over hundreds of thousands of North Carolinians. The interpretation of such standardized agreement on a class-wide basis will provide certainty and prevent inconsistent adjudications. *See id.* ("Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results.")

b. The Defendant's highly mechanized claims processing allows not only for systematic, if any, breach of contracts, but also for the systematic discovery and remedy of such breaches. Although such system does nothing to lessen the Plaintiff's burden, it does simplify cumbersome class notice and discovery issues.

V.

CONCLUSION

NOW THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, it hereby is ORDERED, ADJUDGED and DECREED that:

1. The Plaintiff's Motion for Class Certification should be, and hereby is, GRANTED.

2. The certified class shall include:

a. Individuals who were ever a member of one of Defendant's PPO plans between November 2002 and the present;

b. Whose PPO plan was not an ERISA plan;

c. Who in any benefit period reached their benefit period maximum or who reached their lifetime maximum as those phrases are defined under the terms of their PPO contract; and

d. Who were charged by in-network providers more than the allowed amount for covered services or supplies after they reached their benefit period maximum or lifetime maximum.

3. The court may consider further dividing the class in due course, as justice may require.

4. The court will conduct a status conference in this matter at 12:00 noon on August 26, 2008, at the North Carolina Business Court at 227 Fayetteville Street, Fourth Floor, Raleigh, North Carolina. At that time the Parties shall be prepared to discuss class management issues, including class notice mechanics and procedures; and the calendaring of a hearing on Plaintiff's pending motion for summary judgment.

This the 5th day of August, 2008.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases