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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

FOLWEILER CHIROPRACTIC, PS, a
Washington professional services corporation,

NO. 15-2-17846-6 SEA

Plaintiff,

~~PROPOSED~~ FINAL ORDER
APPROVING CLASS-WIDE
SETTLEMENT AND AWARDED CLASS
COUNSEL FEES AND JUDGMENT

v.

PROGRESSIVE MAX INSURANCE
COMPANY; PROGRESSIVE
NORTHWEST INSURANCE COMPANY;
PROGRESSIVE DIRECT INSURANCE
COMPANY; PROGRESSIVE CLASSIC
INSURANCE COMPANY and
PROGRESSIVE CASUALTY INSURANCE
COMPANY, foreign insurance companies.

Defendants.

This matter came before the Court on November 4, 2016 for final approval hearing for the settlement embodied in the Stipulation of Settlement and the Court's Order Granting Preliminary Approval of Class Wide Settlement entered on August 9, 2016, all of which is incorporated herein.

The Court, having heard all persons properly appearing and requesting to be heard; having considered the papers submitted in support of the proposed settlement and the oral presentations of counsel; having considered all applicable law; and having received no objections made to the proposed settlement; finds that there is no just reason for the delay of entry of this Final Order and Judgment Approving Settlement ("Final Order and Judgment").

1 **A. Plaintiff's Case and Claim**

2 1. In its Complaint, Plaintiff Folweiler Chiropractic, PS alleges that it is a Washington
3 health care provider who submitted treatment bills to the Defendant Progressive insurance
4 companies ("Progressive") for payment under the patient's Personal Injury Protection ("PIP")
5 coverage in a Progressive policy. Folweiler alleges that it was not paid the full amount billed for
6 the treatment rendered because Progressive had a practice of allowing a computer to reduce the
7 amount allowed and paid based on the 90th percentile of charges for the same treatment procedure
8 in Folweiler's area contained in the FAIR Health ("FH") database of provider charges. This type
9 of automatic computer generated reduction is referred to in the Explanation of Benefit ("EOB")
10 sent by Progressive to the provider as an explanation code 41 or x41 reduction.

11 2. On July 23, 2015, Folweiler filed this class action against Progressive on its behalf
12 and on behalf of all other Washington providers who had bills reduced based on Progressive's
13 practice of making code 41 reductions. In the Complaint, Folweiler alleged that Progressive's
14 practice violated the PIP statute's mandate to pay "all reasonable" medical bills submitted, and the
15 Washington Administrative Code requirement to reasonably investigate a PIP insurance claim
16 before refusing to pay it in full. Folweiler also alleged that Progressive's practice violated the
17 Washington Consumer Protection Act.

18 3. In addition to the Complaint, Folweiler served Progressive with initial discovery.

19 4. In August 2015, Progressive responded to the Complaint by filing a CR 12(b)(6)
20 motion to dismiss. Progressive asserted that Folweiler's Complaint failed to state a claim upon
21 which relief could be granted. Progressive denies the allegations in the Complaint, including but
22 not limited to each and every claim asserted by Folweiler..

23 **B. The Settlement Process**

24 5. In September 2015, the parties decided to mediate and put the discovery and
25 motions practice on hold.

26 6. On October 7, 2015, the parties engaged in an all-day mediation with Judge Terry
27 Lukens (ret.) and reached agreement on the outline of a possible settlement.

1 7. In furtherance of the settlement, Progressive produced a spreadsheet showing all
2 Code 41, x41 and other reductions in which a “41” was one of the explanation codes. Progressive
3 also produced a representative to verify the information in the spreadsheet and provide
4 information on Progressive’s practice.

5 8. This discovery, as well as discovery obtained in Folweiler’s suit against FAIR
6 Health, permitted Folweiler and its counsel to adequately assess the strengths and weaknesses of
7 Plaintiff’s claim in this action, and assess whether the terms of the proposed settlement were fair,
8 adequate and reasonable for the class.

9 **C. The Settlement**

10 9. The settlement provides for a “claims made” settlement similar to settlements
11 approved by the King County Superior Court in prior PIP cases against Allstate (this Court and
12 Judge Hayden), Safeco (Judge Shafer), and Hartford (Judge Prochnau). However, the process has
13 been significantly simplified in this case by a simpler claims form that is easier to complete and
14 the inclusion of the claims form with the class notice in one mailing. This is intended to increase
15 the number of claims filed.

16 **The Payments to Class Members Filing Claims**

17 10. Class members will be paid 165% of the FH reductions made to their bills if the
18 bills have not already been subsequently paid by Progressive and are not limited by an exhaustion
19 of PIP benefits. Class members who file claims will also be paid \$25. The settlement appears fair,
20 adequate and reasonable with regard to the claims of the proposed settlement class.

21 **The Class Representative Fee (“Incentive Fees”)**

22 11. Plaintiff seeks a class representative fee of \$5,000 to be paid by Progressive
23 separate and apart from the class benefit. A fee of \$5,000 appears reasonable given Folweiler’s
24 time, effort and participation in the case and incentive fees approved in other, similar PIP cases.

25 **The Proposed Attorney Fee and Expense Award**

26 12. Folweiler’s counsel seeks an attorney fee and expense award of \$135,000 to be
27 paid by Progressive separate and apart from the class benefit, i.e. the fee award does not diminish

1 the amount of benefits available to the class. The requested fee is reasonable in light of the
2 benefits available to the class, the expertise of counsel, the contingency fee agreement between
3 counsel and Folweiler and fee awards in similar PIP cases.

4 **D. Certification of a Settlement Class**

5 13. The following settlement class is certified for settlement purposes only:

6 All Washington health care providers who billed Progressive from June 1, 2011 to
7 December 31, 2013 for medical expenses incurred under a Subject Policy and were
8 paid less than the amount billed due to Code 41 Reductions. Excluded from the
9 Class are: all present or former officers and/or directors of Progressive, Class
Counsel and their resident relatives, the Judge in this case and any resident
relatives, and Progressive's counsel of record and their resident relatives.

10 14. The settlement class is similar to litigation and settlement classes certified in
11 similar PIP cases and meets the requirements of CR 23(a) and (b)(3):

12 a. CR 23(a) (1) is met because the class is so numerous that individual joinder is not be
13 practicable.

14 b. CR 23(a)(2) is met because Plaintiff alleges a common course of conduct and practice
15 by Progressive when paying PIP claims. Progressive used the same process for reducing payments
16 based on a percentile of the FH database. Equally all class members were allegedly harmed in the
17 same manner by being underpaid for their services.

18 c. CR 23(a)(3) is met because Plaintiff's claim arises from the same course of conduct as
19 those of the members of the Class and Plaintiff was allegedly harmed in the same manner.

20 d. CR 23(a)(4) is met because Plaintiff is knowledgeable of Progressive's practice and
21 Plaintiff and the class have the same interest in being paid in full for reductions made to their bills
22 by Progressive. Plaintiff's counsel has substantial experience in these types of PIP class actions
23 and can adequately protect the interests of the settlement class.

24 e. CR 23(b)(3) is met because the common issues raised in the case concerning
25 Progressive's liability and the risks associated with proving liability for purposes of analyzing the
26 fairness of the settlement predominate over any issue affecting only individual members of the
27 class. The superiority requirement of CR 23(b)(3) is met because the average claim of the class

1 members is small. A class action is a superior method for adjudicating these small claims
2 compared to adjudication through hundreds of individual lawsuits.

3 **E. Notice, Form of Notice, and Claim Form**

4 15. In seeking preliminary approval of the settlement, the parties proposed that
5 individual mailed notice be sent to class members and that the claim form be mailed with the
6 notice in one mailing. Finding that individual mailed notice met the requirement of CR 23(c)(2)
7 and CR 23(e), the Court granted this request.

8 16. The Court found that the proposed form of notice adequately notified the class
9 members of the settlement and their rights to exclude themselves from the settlement or object, if
10 they wish and approved the proposed form of notice.

11 17. The parties also asked the Court to approve the claim form to be used by class
12 members. Finding that the claim form was simple and designed to provide an easy way for class
13 members to submit a claim and obtain the class benefit, the Court approved the proposed claim
14 form.

15 18. The Court understands from the parties' representations that the claim form and
16 notice have been mailed to class members

17 **F. Dates for Class Member Objections and Exclusions**

18 19. Plaintiff proposed that class members be given a minimum of 21 days' notice of
19 the settlement in which to exercise their rights to exclude themselves from the settlement and/or
20 object. The parties proposed that notice be sent out within 30 days of the date of preliminary
21 approval and that exclusions and objections be post-marked no later than 21 days after the date of
22 the mailings.

23 20. Because the Court found these time periods reasonable and adequate under the
24 circumstances, the Court granted the parties' request.

25 21. The Court understands from the parties' representations that these time periods
26 have been complied with and that no exclusions or objections have been received.

1 **NOW, THEREFORE, GOOD CAUSE APPEARING, IT IS ORDERED, ADJUDGED**
2 **AND DECREED THAT:**

3 1. The Court possesses jurisdiction over the subject matter of this Action, the Named
4 Plaintiff, the Settlement Class Members, Defendants, and the Released Persons.

5 2. All provisions and terms of the Stipulation of Settlement are hereby found to be
6 fair, reasonable, and adequate as to the Settlement Class Members and the Named Plaintiff, and all
7 provisions and terms of the Stipulation of Settlement are hereby finally approved in all respects.

8 3. Approval of Class-Wide Settlement, class representative and attorney fee awards
9 is GRANTED;

10 4. The Parties to the Stipulation of Settlement are hereby directed to consummate the
11 Stipulation in accordance with its terms.

12 5. This Order is a final judgment in the Action within the meaning of and for the
13 purposes of CR 23(e), 41, and 54 and Washington Rules of Appeal 2.2 and 5.2 as to all claims
14 among Defendants on the one hand, and the Named Plaintiff and all Class Members on the other.
15 Without in any way affecting the finality of this Final Judgment, this Court shall retain continuing
16 jurisdiction over this Action for purposes of:

- 17 A. Enforcing this Final Order, the Stipulation of Settlement;
- 18 B. Hearing and determining any application by any Party to the Stipulation for a
19 settlement bar order; and
- 20 C. Any other matters related or ancillary to any of the foregoing.

21 **IT IS SO ORDERED.**

22
23 DATED: 11/7, 2016

24 
25 _____
26 Hon. William Downing
27

1 Presented by:

2 BRESKIN JOHNSON & TOWNSEND, PLLC

3 By: s/ Roger Townsend

4 Roger Townsend, WSBA #25525

5 1000 Second Avenue, Suite 3670

6 Seattle, WA 98104

7 (206) 652-8660 Telephone

8 (206) 652-8290 Facsimile

9 *Attorney for Plaintiff*

10 MARKOWITZ HERBOLD PC

11 By: s/ J. Matthew Donohue

12 J. Matthew Donohue (admitted *Pro Hac Vice*)

13 1211 S.W. Fifth Avenue, Suite 3000

14 Portland, OR 97204

15 (503) 295-3085 Telephone

16 mattdonohue@markowitzherbold.com

17 *Attorney for Progressive Insurance, Defendants*

CERTIFICATE OF SERVICE

I, Jamie Telegin, under penalty of perjury under the laws of the State of Washington, hereby certify that on this 7th day of November, 2016, I caused the foregoing document to be sent in the manner indicated below, to the following attorneys of record:

Matt Donohue
Kristin M. Malone
Markowitz Herbold PC
1211 S.W. Fifth Avenue, Suite 3000
Portland, OR 97204
(503) 295-3085 Telephone
mattdonohue@markowitzherbold.com
kristinmalone@markowitzherbold.com

Via US Mail
 Via Email

Attorney for Progressive Insurance, Defendants

/s/ Jamie Telegin
Jamie Telegin, Legal Assistant