

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

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

FOLWEILER CHIROPRACTIC, PS, a
Washington professional services corporation,

Plaintiff,

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.

Defendant.

NO. 15-2-17846-6 SEA

~~[PROPOSED]~~ ORDER GRANTING
PLAINTIFF'S UNOPPOSED MOTION
RE: PRELIMINARY APPROVAL OF
CLASS-WIDE SETTLEMENT

This matter came before the Court on the Plaintiffs' Unopposed Motion for Preliminary Approval of the Class-Wide Settlement reached in the case. The Court considered the Plaintiff's motion, the supporting Declaration of Plaintiff's Counsel, the Attachments to the Motion that included the settlement agreement, form of class notice and claim form, and the exhibits attached thereto that included the Complaint. The Court is also knowledgeable of the claim in this action and the facts relating to that claim from the extensive motions practice before this Court in *Folweiler Chiropractic v. FAIR Health, Inc.* King County Case no. 15-2-13107-9 SEA over which

1 this Court is presiding. Based on this knowledge, the materials and pleadings of record and being
2 fully advised of the issues raised the Court enters the following Findings and Conclusions:

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

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

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

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

21 4. In August 2015, Progressive responded to the Complaint by filing a CR 12(b)(6)
22 motion to dismiss. Progressive asserted that Folweiler's Complaint failed to state a claim upon
23 which relief could be granted. Progressive denies Folweiler's allegations.

24 **B. The Settlement Process**

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

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

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

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

11 **C. The Settlement**

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

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

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

23 **The Class Representative Fee ("Incentive Fees")**

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

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

1 12. Folweiler's counsel seeks an attorney fee and expense award of \$135,000 to be
2 paid by Progressive separate and apart from the class benefit, i.e. the fee award does not diminish
3 the amount of benefits available to the class. The requested fee of \$135,000 is approximately
4 10.3% of the class benefits available under the settlement to the class and well below the standard
5 benchmark for class action fees used by the federal courts within the Ninth Circuit of 25 to
6 33.33%. The requested fee appears reasonable in light of this fact, the contingency fee agreement
7 between counsel and Folweiler and fee awards in similar PIP cases.

8 **D. The Settlement and Fee Requests Should be Granted Preliminary Approval**

9 13. Based on the above findings and conclusions, the settlement and proposed awards
10 appear fair, adequate and reasonable and should be granted preliminary approval subject to the
11 right of class members to object or exclude themselves from the settlement.

12 **E. Certification of a Settlement Class**

13 14. The following settlement class should be certified for settlement purposes only:

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

20 15. The proposed settlement class is similar to litigation and settlement classes certified
21 in similar PIP cases and meets the requirements of CR 23(a) and (b)(3):

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

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

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

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

5 e. CR 23(b)(3) is met because the common issues raised in the case concerning
6 Progressive's liability and the risks associated with proving liability for purposes of analyzing the
7 fairness of the settlement predominate over any issue affecting only individual members of the
8 class. The superiority requirement of CR 23(b)(3) is met because the average claim of the class
9 members is small. A class action is a superior method for adjudicating these small claims
10 compared to adjudication through hundreds of individual lawsuits.

11 **F. The Proposed Notice Plan and Form of Notice Should be Approved**

12 16. The parties proposed that individual mailed notice be sent to class members.
13 Individual mailed notice meets the requirement of CR 23(c)(2) and CR 23(e). The claim form will
14 be mailed with the notice.

15 17. The proposed form of notice adequately notifies the class members of the
16 settlement and their rights to exclude themselves from the settlement or object, if they wish.

17 **G. The Claim Form Should be Approved**

18 17. The parties request that the Court approve the claim form to be used by class
19 members. The proposed claim form is simple and designed to provide an easy way for class
20 members to submit a claim and obtain the class benefit. It should be approved.

21 **H. Dates for Class Member Objections and Exclusions**

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

26 19. These time periods appear reasonable and adequate under the circumstances.

27 **BASED ON THE ABOVE FINDINGS AND CONCLUSIONS, IT IS ORDERED:**

1 1. Plaintiffs' Unopposed Motion for Preliminary Approval of Class-Wide Settlement,
2 class presentative and attorney fee awards is GRANTED;

3 2. The following settlement class is certified for settlement purposes only:

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

10 3. Dr. David Folweiler is appointed the class representative and David Breskin,
11 Breskin Johnson & Townsend, P.L.L.C., are appointed class counsel.

12 4. The form of Notice (Attachment B to the Motion) and Claim Form (Attachment C
13 to the Motion) are approved and shall be provided to individual class members by mail as
14 described in the settlement agreement (Attachment A to Motion) within 30 days of the order
15 granting preliminary approval or by **September 5, 2016**.

16 5. Not later than 21 days after mailing or by **September 26, 2016**, Class Members
17 who wish to exclude themselves from the settlement must mail their exclusions from class action
18 with the procedure set out in the Class Notice. The exclusion must be post-marked by that date.

19 6. Not later than 21 days after mailing or by **September 26, 2016**, Class Members
20 who wish to object to the settlement shall mail their objections to Class Counsel in the manner
21 described in the Class Notice. The objection must be post-marked by that date.

22 7. The Fairness Hearing on the parties' Motion for Final Approval of the Settlement
23 shall be set for hearing on **November 4, 2016 at 9:00 a.m.**

24 8. All claims must be filed by **December 5, 2016**.

25 DATED: *Aug 9, 2016*

[Signature]
26 Hon. William Downing

[Signature] Barbara A. Mack

1 Presented by:

2 BRESKIN JOHNSON & TOWNSEND, PLLC

3 By: *s/ Dave Breskin*

4 Dave Breskin, WSBA #10607

5 1000 Second Avenue, Suite 3670

6 Seattle, WA 98104

7 (206) 652-8660 Telephone

8 (206) 652-8290 Facsimile

9 dbreskin@bjtlegal.com

10 *Attorney for Plaintiff*

CERTIFICATE OF SERVICE

I, Jamie Telegin, under penalty of perjury under the laws of the State of Washington, hereby certify that on this 1st day of August, 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 Legal Messenger
 Via Email

Attorney for Progressive Insurance, Defendants

/s/ Jamie Telegin
Jamie Telegin, Legal Assistant