

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

PENNSYLVANIA ORTHOPAEDIC SOCIETY,  
on behalf of its members and all others similarly  
situated individuals,

Plaintiffs

v.

INDEPENDENCE BLUE CROSS, et al.

Defendants.

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

COPIES SENT  
PURSUANT TO Pa. R.C.P. 236

SEP 1 2004

DECEMBER TERM, 2002  
NO. 0002

ASSIGNED TO COMMERCE  
PROGRAM

KTH

ROBERT P. GOOD, M.D., on behalf of himself  
and all others similarly situated,

Plaintiffs

v.

INDEPENDENCE BLUE CROSS, QCC  
INSURANCE COMPANY, KEYSTONE  
HEALTH PLAN EAST, INC., AMERIHEALTH  
HMO, INC., and AMERIHEALTH, INC.

Defendants.

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

DECEMBER TERM, 2002  
NO. 0005

ASSIGNED TO COMMERCE  
PROGRAM

JOHN R. GREGG, M.D.

and

VINCENT J. DISTEFANO, M.D., on behalf of  
themselves and all others similarly situated,

Plaintiffs

v.

INDEPENDENCE BLUE CROSS, QCC  
INSURANCE COMPANY, KEYSTONE  
HEALTH PLAN EAST, INC., AMERIHEALTH  
HMO, INC. and AMERIHEALTH, INC.

Defendants.

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

JURY TRIAL DEMANDED

DECEMBER TERM, 2000

NO.: 03482

ASSIGNED TO COMMERCE  
PROGRAM

FINAL ORDER, JUDGMENT AND DISCONTINUANCE WITH PREJUDICE

AND NOW, this 1<sup>st</sup> day of September, 2004, pursuant to and in accordance with Pennsylvania Rules of Civil Procedure 1715(c) and (d), and pursuant to and in accordance with the Court's April 22, 2004 Order ("April 22 Order"), April 22, 2004 Findings of Fact, Discussion and Conclusions of Law ("April 22 Opinion"), and the Class Action Settlement Agreement, on which this Court rendered final approval on April 22, 2004, all of which are incorporated by reference herein, the Court hereby ORDERS, ADJUDGES and DECREES as follows:

1. For purposes of this Final Order, Judgment and Discontinuance With Prejudice ("Order"), the terms "Class Counsel," "Class Representatives," "Independence Blue Cross" (including the definition of "Released Parties[y]"), "Litigation," "Providers," "Settled Claims," "Settlement Class", and "Final Judicial Approval" shall have the meanings set forth in the Class Action Settlement Agreement.

2. The Court has jurisdiction over the subject matter of this Litigation and all acts within this Litigation, and over all the parties to this Litigation, including all members of the Settlement Class.

3. The class certified and approved by the Court for the purposes of settlement ("Settlement Class") includes:

All Providers (1) who submitted claims for payment or reimbursement to Independence Blue Cross and/or any Released Party for medical services, procedures and/or products and (2) who have been, claim to have been, and/or may have been denied payment or reimbursement or have, claim to have, and/or may have received reduced payment or reimbursement on such claims. The Settlement Class includes, but is not limited to, all claims by Providers for downcoding and/or bundling, however described or characterized.

4. The term “Providers” includes:

any and all physicians, health care providers, group practices and/or any individual or group that (1) provides, or provided at any time during the period January 1, 1993 to the date of Final Judicial Approval, medical services, procedures and/or products to an individual who has, or had at any time through the date of Final Judicial Approval, health insurance through Independence Blue Cross and/or any Released Party or (2) submitted at any time during the period January 1, 1993 to the date of Final Judicial Approval, a claim for payment or reimbursement for any medical services, procedures and/or products to Independence Blue Cross and/or any Released Party. As used herein, Providers shall also refer to any association of Providers, including any medical or professional association of any kind. The term “Providers” shall not include hospitals.

5. On April 22, 2004, this Court ordered that a Second Notice of Class Action Settlement (“Second Notice”) and correspondence from the Court be published via various methods and disseminated to all class members for whom a timely opt-out attempt was submitted during the first opt out period (the “Affected Class Members”). The Court holds that the Second Notice and correspondence from the Court, their content and methods and manner of publication and dissemination were the best practicable under the circumstances; adequately advised the Affected Class Members of, among other things, the Class Action Settlement Agreement, the second opt period, the right to opt out, and the manner for exercising the opt out right during the second opt out period; satisfied the requirements of due process and the Pennsylvania Rules of Civil Procedure; and were informative, clear and fair. *See Prince George Center, Inc. v. U.S. Gypsum Co.*, 704 A.2d 141, 148 (Pa. Super. 1997), *app. den.*, 557 Pa. 640, 732 A.2d 1210 (1998), *cert. den.*, 528 U.S. 810 (1999), *citing Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Fischer v. Madway*, 336 Pa. Super. 289, 293-94, 485 A.2d 809, 811 (1984). The Court also finds that during the second opt out period, various medical societies, including the Pennsylvania Medical Society, the Medical Society of New Jersey, and the Medical Society of the State of New York, with the assistance of their attorneys (who also represent plaintiffs in

other class actions and putative class actions in other courts who are also members of this Settlement Class), published communications concerning the Class Action Settlement Agreement on their websites and mailed or electronically mailed other written communications concerning the Class Action Settlement Agreement to class members. These additional communications and the participation of the aforementioned attorneys and medical societies support the Court's holding that Settlement Class Members (including Affected Class Members) received adequate notice of the Litigation, their right to participate therein, the Class Action Settlement Agreement, and their right to opt out.

6. The Court, upon careful consideration of the June 29, 2004, Joint Report of the Parties Concerning Second Opt Out Period ("Joint Report"), finds as follows:

- a. On April 22, 2004, this Court ordered that a Second Notice of Class Action Settlement ("Second Notice") and correspondence from the Court be published via various methods and disseminated to all class members for whom a timely opt-out attempt was submitted during the first opt out period.
- b. Class Counsel and counsel for Independence Blue Cross reviewed all opt-out attempts submitted to Class Counsel during the first opt-out period ended August 1, 2003. Counsel for Independence Blue Cross provided Independence Blue Cross with the names and addresses of all timely opt-outs submitted during the first opt-out period, to the extent that information could be determined from the opt-outs.
- c. In accordance with the Court's April 22 Order, the Second Notice and correspondence from the Court were published on the websites of IBC and the Pennsylvania Orthopaedic Society on April 26, 2004.
- d. A joint press release directing readers to the above-referenced websites was published on [www.prnewswire.com](http://www.prnewswire.com) on April 26, 2004.

- e. The Second Notice was published in the Philadelphia Inquirer on May 3, 2004.
- f. IBC disseminated the Second Notice and correspondence from the Court to class members for whom a timely opt-out attempt was submitted during the first opt-out period via U.S. mail on May 7, 2004.
- g. Pursuant to the Court's April 22 Order, all opt outs were to be postmarked not later than June 9, 2004.
- h. Class Counsel and counsel for Independence Blue Cross reviewed all opt-out attempts submitted to Class Counsel during the second opt-out period ended June 9, 2004.
- i. The names of all opt-out attempts timely submitted during the second opt-out period ended June 9, 2004, were compared to the names of all class members for whom a timely opt-out attempt was submitted during the first opt-out period ended August 1, 2003.
- j. 188 opt-out attempts received during the second opt-out period were submitted by class members for whom a timely opt-out attempt was not submitted during the first opt-out period.
- k. 13 opt-out attempts received during the second opt-out period were not signed by the class members the opt-out sought to exclude.
- l. 79 opt-out attempts received during the second opt-out period were postmarked or sent after June 9, 2004.
- m. There were 2,043 opt-outs submitted during the second opt-out period that were (1) signed by the class member the opt-out sought to exclude; (2) postmarked on or before June 9, 2004; and (3) submitted by class members for whom an opt-out attempt was timely submitted during the first opt-out period.

7. The Court previously determined that during the first opt out period “the great majority of Providers chose to remain in the Settlement Class to take advantage of the benefits of the Class Action Settlement,” and that the reaction of the class as a whole weighed in favor of approving the Class Action Settlement. April 22 Opinion at 74-77. The Court voided all opt outs submitted during the first opt out period, however, because the Court found, among other things, that (1) communications sent by certain lawyers and medical associations to members of the Settlement Class were “false, misleading and confusing,” and “approache[d], if not reache[d], the fields of fraud,” April 22 Opinion at 99, 106; and (2) there was “a strong likelihood that the communications misled class members and caused them to file opt outs.” April 22 Opinion at 108. In the second opt out period, during which communications with class members were previewed by this Court based upon its finding that there was “a likelihood of serious abuse” in the absence of such preview (April 22 Opinion at 114), far fewer class members submitted opt outs. The fact that far fewer class members submitted opt outs during the second opt out period confirms the Court’s finding that class members had been misled during the first opt out period, and further supports the Court’s conclusion that the reaction of the class weighs in favor of approving the Class Action Settlement.

8. The only Settlement Class Members who are excluded from the Settlement Class and the Class Action Settlement Agreement are those Providers whose opt outs are identified in Exhibit A attached to the “Joint Report” (received June 29, 2004; docketed July 22, 2004).

9. Any Settlement Class Member who does not appear on the Opt Out List:

- a. is and shall be included in the Settlement Class;
- b. is and shall be conclusively and forever bound by the Class Action Settlement Agreement (including, but not limited to, the terms of the release in Section IV.B of

the Class Action Settlement Agreement as clarified in the Joint Statement of Parties Regarding Class Action Settlement Agreement) and this Order;

- c. hereby conclusively compromises, settles and releases each and every Settled Claim against Independence Blue Cross and/or any other Released Party;
- d. is and shall be permanently barred and enjoined from (1) initiating, asserting or prosecuting any Settled Claim against Independence Blue Cross or any other Released Party, (2) asserting any and all Settled Claims that the Settlement Class Member had, has, or may have in any Court, (3) filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, administrative or regulatory proceeding or order in any jurisdiction based on any or all Settled Claims against Independence Blue Cross and any other Released Parties, (4) instituting, organizing class members in, joining with class members in, amending a pleading in or soliciting the participation of class members in, any action, including but not limited to a purported class action, in any court against Independence Blue Cross and any other Released Parties based on, involving, or incorporating, directly or indirectly any or all Settled Claims and (5) filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, administrative or regulatory proceeding or order in any jurisdiction based on an allegation that Independence Blue Cross and any other Released Parties' compliance with the provisions of the Class Action Settlement Agreement violates any legal right of any member of the Settlement Class; and

e. is and shall be deemed to have covenanted and agreed not to sue Independence Blue Cross or any of the Released Parties with respect to, or assert, in any forum, any of the Settled Claims.

10. Without limiting any term of the Class Action Settlement Agreement, this Order, including all documents incorporated by reference herein, shall forever be binding upon all Settlement Class Members who do not appear on the Opt Out List, and releases Independence Blue Cross and the Released Parties from any and all claims of Settlement Class Members who do not appear on the Opt Out List that in any way arise from or relate to payment or reimbursement to Providers or coverage for any and all services, procedures, and/or products rendered or provided by such Providers on or before June 11, 2003, including but not limited to any and all claims that were brought or could have been brought in the Litigation.

11. Class Counsel has petitioned the Court for an award of attorneys' fees, costs and expenses in the amount of \$5 million. IBC agreed not to object to the amount of the petition on the conditions that: (1) the total amount sought in all petitions is equal to or less than \$5 million, and (2) more than 94% of the Settlement Class Members are bound by the Class Action Settlement, are deemed conclusively to have settled and released the Settled Claims against IBC, and are barred and permanently enjoined from asserting any and all Settled Claims that such Settlement Class Members had, has, or may have in any Court. The Court finds that all such conditions have been satisfied.

The Court also finds, based upon representations of counsel for IBC, that IBC does not intend to and will not enforce its right in the Class Action Settlement Agreement to fund the payment of attorneys' fees and costs by a reduction in the duration of the phased in changes identified in Section III of the Class Action Settlement Agreement. Accordingly, the Court

deems an award of counsel fees and costs to be an additional benefit that increases the overall value of the Settlement to Settlement Class Members.<sup>1</sup>

The Court independently and carefully reviewed Class Counsel's fee petition, the supporting memorandum of law and all exhibits thereto. The Court hereby awards Class Counsel attorneys' fees and costs and other expenses in the amount of \$5 million, to be paid only upon Final Judicial Approval as defined in the Class Action Settlement Agreement. The Court finds that such an award is justified under any of the three tests applied by Pennsylvania courts to determine the appropriateness of an attorneys' fee award, *i.e.*, Pennsylvania Rules of Civil Procedure 1716, the lodestar method, and the percentage of recovery method. Upon Final Judicial Approval, as defined by the Class Action Settlement Agreement, Defendants are directed to pay this amount into an account denominated as IBC Physician Reimbursement Attorneys Fee Account, to be maintained by David S. Senoff, Esquire, as custodian. Mr. Senoff is directed to distribute those funds in accordance with the agreements entered into among plaintiffs' counsel.

The Court also has reviewed the petitions for incentive awards to the class representatives. The Class Action Settlement Agreement provides that the incentive awards shall not exceed \$20,000 for each class representative, and shall be subject to court review and approval. The Court notes that, as set forth above, IBC will not enforce its right in the Class Action Settlement Agreement to fund such incentive fee payments by a reduction in the duration

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<sup>1</sup> The Court is aware that, after the August 1, 2003, deadline for submission of objections, the Pennsylvania Medical Society and Settlement Class Members Dr. Martin D. Trichtinger, Dr. William Lander, Dr. Nancy Roberts, Dr. Beverly Dolberg ("PMS Objectors"), objected to any fee award on the grounds that it would be drawn from the settlement fund and therefore negatively impact the benefits provided to Settlement Class Members by the Class Action Settlement Agreement. *See Proposed Findings of Fact and Conclusions of Law of PMS Objectors Regarding the Fairness Hearing*, at 39-41. For the reasons set forth above, the Court finds that this objection is now moot and therefore overrules it. The PMS Objectors also argued that a fee of any amount was inappropriate because Class Counsel had not adequately represented the Settlement Class Members and because Class Counsel had not submitted a fee petition. This Court already determined that Class Counsel adequately represent the class, *see April 22 Opinion* at 46-47, 72-74 & n.36, and Class Counsel's submission of a fee petition, which has been carefully scrutinized by this Court, moots the PMS Objectors' remaining objection. Accordingly, the Court overrules all of the PMS Objectors' objections to an award of attorneys' fees and costs to Class Counsel.

of the phased in changes. The Court thus finds that an award of incentive fees will not negatively impact the benefits received by Settlement Class Members. The Court has not received any objection to an award of such incentive fees to the class representatives.

Notwithstanding the lack of objection, the Court independently and carefully reviewed the class representative's incentive fee petition, the supporting memorandum of law and all exhibits thereto. The Court hereby awards Robert P. Good, M.D., Vincent J. DiStefano, M.D. and the estate of John R. Gregg, M.D., each, the amount of \$20,000., to be paid only upon Final Judicial Approval as defined in the Class Action Settlement Agreement. The Court finds that such an award is justified under the five-factor test set forth in *Milkman v. American Travelers Life Ins. Co.*, 2002 WL 778772, at \*30 (C.P. Phila. Co. April 1, 2002).

12. Every Settled Claim against Independence Blue Cross and/or any other Released Party by any and every Settlement Class Member who does not appear on the Opt Out List, and each of the above-captioned actions and the complaints and amended complaints filed therein, is hereby DISCONTINUED AND DISMISSED WITH PREJUDICE.

13. This Order and the documents it incorporates, including but not limited to the Class Action Settlement Agreement, may be filed in any other action against Independence Blue Cross or the Released Parties to support a defense of *res judicata*, collateral estoppel, release, waiver, good faith settlement, judgment bar or reduction, or any other theory of claim or issue preclusion or similar defense or counterclaim.

14. This Court, without in any way intending to affect the finality of this Order, retains jurisdiction over the parties, including all Settlement Class Members, and the Class Action Settlement Agreement, including its administration, supervision, interpretation and enforcement.

15. The Commerce Program Administrator is directed to enter this Final Order and to mail same to all counsel of record. Within 5 business days of entry of this Order, the parties are ordered to publish the Order on the [www.ibx.com](http://www.ibx.com) and [www.paorthosociety.org](http://www.paorthosociety.org) websites for a period of sixty (60) days, and on the internet via [www.businesswire.com](http://www.businesswire.com) or other similar internet news distribution service.

IT IS SO ORDERED.

BY THE COURT:

A handwritten signature in cursive script that reads "Sheppard". The signature is written in black ink and is positioned above a horizontal line.

ALBERT W. SHEPPARD, JR., J.