

State Associations, Health Care Providers File Class-Action Suit Against BCBS

Pomerantz Haudek Grossman & Gross, LLP, has announced that it and co-counsel Buttaci & Leardi, LLC, have filed a class-action lawsuit against the Blue Cross Blue Shield Association ("BCBSA") and 22 leading BCBS insurers across the country on behalf of a putative nationwide class of health care providers, the [Pennsylvania Chiropractic Association](#) (PCA), the [New York Chiropractic Council](#) (the Council) and the [Association of New Jersey Chiropractors](#) (ANJC). The suit challenges the defendants' abusive practices in using post-payment audits and reviews, and improper repayment demands, to pressure providers to repay substantial sums that have previously properly been paid as health insurance benefits for services provided to BCBS subscribers.

The action alleges that the post-payment audit and review process as applied by the various named BCBS entities violates the Employee Retirement Income Security Act of 1974 (ERISA), in that its repayment demands are retroactive determinations that particular services are not covered under the terms of the BCBS health care plans, but without proper appeal or other protections otherwise available under ERISA for both self-funded and fully insured health care plans offered through private employers. The complaint further alleges that the post-payment audit and review process, as well as the forced withholds of unrelated benefit payments to offset alleged prior overpayments, violate the Racketeer Influenced and Corrupt Organizations Act (RICO).

The PCA, the Council and the ANJC are participating in the action in an associational capacity on behalf of their members, while 14 individual chiropractors and one occupational therapist, located around the country, have sued as the class representatives of the putative class.

According to Gene Venio, executive director of the PCA, "We met on numerous occasions with Blues Senior Management in an effort to establish a fair and balance approach to conducting post-payment reviews, but to no avail." As a result, he added, "The PCA elected to join this action to ensure that the rights of our members are protected." Four of the 15 named individual plaintiffs are Pennsylvania chiropractors.

Dr. John LaMonica, chair of the Council's insurance committee, commented: "This action is an important step by the chiropractic profession to fight back against the egregious actions being taken by Blue Cross Blue Shield companies against our members and other providers nationwide." The Council and the ANJC had previously joined in a class-action recently filed against Aetna, Inc., for similar post-payment audit practices.

In the complaint, the plaintiffs allege that, as a means to maximize its profits, the BCBS entities use their post-payment audit and review process to make retroactive adverse benefit determinations whereby they demand that providers repay funds they had previously received for providing services to BCBS subscribers. Moreover, the BCBS entities frequently withhold new benefit payments for unrelated services to apply toward the alleged overpayments, even where there has been no valid appeal process or validation that any sums are in fact owed by the providers.

"In essence," said plaintiffs' counsel Dr. Brian Hufford of Pomerantz Haudek, "the BCBS Entities

simply state there are overpayments and then just take the money from providers, without valid due process protections. We believe this is a blatant violation of law."

The complaint further alleges that the BCBSA is coordinating the recoupment efforts with its state BCBS licensees on a nationwide basis. Plaintiffs seek to enjoin the BCBS entities from continuing to engage in impermissible audit and recovery practices and to compel them to return the funds they have improperly withheld.

The amount of funds that are at issue in the lawsuit are substantial. On June 30, 2009, the BCBSA announced that its National Anti-Fraud Department had "recovered nearly \$350 million as a result of the anti-fraud investigations in 2008." According to plaintiffs' co-counsel Vincent N. Buttaci of Buttaci & Leardi, "We believe a substantial portion of this 'recovery' falls within the improper practices we are challenging in this action."

[Pomerantz Haudek](#), which has offices in New York, Chicago, Washington, D.C., Columbus, Ohio and the San Francisco Bay area, is acknowledged as one of the premier plaintiff class-action firms, and, in particular, has been a leader in the industry in health care class actions on behalf of providers and patients. Recently, the Pomerantz firm was designated as chair of the Plaintiffs' Executive Committee in a multidistrict litigation pending against Aetna in the District of New Jersey on behalf of both providers and subscribers, challenging how Aetna determines usual, customary and reasonable ("UCR") rates for out-of-network health care services. In making the appointment, the court stressed the significant role Pomerantz had played in a \$249 million settlement of its UCR class action against Health Net, stating that the court had "similarly appointed Pomerantz to be Plaintiffs' spokesman to the Court in the Health Net litigation because the Court found D. Brian Hufford, Esq. to be the attorney most capable of presenting Plaintiffs' position in a clear and concise manner." [Aetna UCR Litig., 2009 Dist. LEXIS 66853, *8 n.4 (D.N.J. July 31, 2009).

[Buttaci & Leardi](#), based in Princeton, N.J., has a dynamic national health care practice, representing licensed health care providers, group practices and other provider-related entities throughout the country. It has extensive experience representing providers in challenging post-payment audits and retroactive recoupments, including those pursued by numerous Blue Cross Blue Shield licensees, and has obtained tremendous success on behalf of its clients.

Counsel for plaintiffs are continuing to investigate these claims, and other related claims that may be added to the litigation.

If you have any questions, please contact D. Brian Hufford, Esq., of Pomerantz Haudek Grossman & Gross, LLP, by phone (614-410-6501) or e-mail (dbhufford@pomlaw.com), or Vincent N. Buttaci, Esq., of Buttaci & Leardi, LLC, by phone (609-919-6312) or e-mail (vnbuttaci@buttacilaw.com).

Source: Joint release from Pomerantz Haudek Grossman and Gross, LLC; Buttaci & Leardi, LLC; and the Pennsylvania Chiropractic Association.