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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

CV'11 - 1440 HU.

ERHARDT PHYSICAL THERAPY
AND SPORTS MEDICINE, P.C.,

Case No.: _____

Plaintiff,

v.

**CLASS ACTION ALLEGATION
COMPLAINT**
(Violation of O.R.S. 656.248; Unjust
Enrichment)

LIBERTY MUTUAL FIRE INSURANCE
COMPANY; LIBERTY NORTHWEST
INSURANCE CORPORATION; THE FIRST
LIBERTY INSURANCE CORPORATION;
LIBERTY INSURANCE CORPORATION;
AND EMPLOYERS INSURANCE
COMPANY OF WAUSAU,

DEMAND FOR JURY TRIAL

Defendants.

1.

This is a class action brought on behalf of Oregon health care providers (“providers” or “class members”) who provide or have provided services to injured workers, and who received payments from defendants that were discounted pursuant to a private, unregulated contract with so-called “Preferred Provider Organizations” (or “PPOs”). Plaintiff and members of the class seek to recover all of the discounted amounts that defendants did not pay to plaintiff and members of the class, based on defendants’ application of a private contract between defendants and any PPO, which resulted in a lower payment amount than was required under Oregon workers’ compensation law.

2.

Plaintiff is a health care provider and an Oregon Professional Corporation with its principal office in Columbia County, Oregon. During the class period, plaintiff and members of the class received payments from defendants for workers’ compensation health services that plaintiff had provided and billed pursuant to Oregon statutes and administrative rules governing the worker’s compensation system.

3.

Defendant Liberty Mutual Fire Insurance Company is and at all relevant times was a domestic corporation organized under the laws of Wisconsin with its principal place of business in Boston, Massachusetts. Defendant conducts and is registered to do business in Oregon.

4.

Defendant Liberty Northwest Insurance Corporation is and at all relevant times was a domestic corporation organized under the laws of Oregon with its principal place of business in Boston, Massachusetts. Defendant conducts and is registered to do business in Oregon.

5.

Defendant The First Liberty Insurance Company is and at all relevant times was a domestic corporation organized under the laws of Illinois with its principal place of business in Boston, Massachusetts. Defendant conducts and is registered to do business in Oregon.

6.

Defendant Liberty Insurance Corporation is and at all relevant times was a domestic corporation organized under the laws of Illinois with its principal place of business in Boston, Massachusetts. Defendant conducts and is registered to do business in Oregon.

7.

Defendant Employers Insurance Company of Wausau is and at all relevant times was a domestic corporation organized under the laws of Wisconsin with its principal place of business in Boston, Massachusetts. Defendant conducts and is registered to do business in Oregon.

8.

On information and belief, throughout the class period each of the defendants was a Property and Casualty Company authorized by the State of Oregon for Casualty insurance and including workers' compensation insurance. On information and belief, defendants are all organized under the ownership of Liberty Mutual Holding Company, Inc.

9.

This Court has jurisdiction under 28 U.S.C. 1711 *et seq.* and 28 U.S.C. 1332(d) because the matter in controversy exceeds \$5,000,000, exclusive of interest and costs, and is a class action in which a member of the class of plaintiffs is a citizen of a state different from defendants.

10.

Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(a) and (c) because defendants engage in substantial business in this district and because a substantial part of the conduct giving rise to the claims occurred in this district.

11.

Throughout the class period, defendants entered into private contracts with various PPOs.

12.

The contracts between defendants and the various PPOs purported to allow defendants to access and apply a so-called “PPO discount” to the amount of payment defendants were otherwise required to pay to providers pursuant to the applicable Oregon workers’ compensation statutes and rules.

13.

Throughout the relevant time period, applicable Oregon workers’ compensation statutes and rules did not allow workers’ compensation insurers, like defendants, to apply any PPO contract discounts to the payment of workers’ compensation medical fees.

14.

Or. Rev. Stat. 656.248 and *former* Ore. Admin. R. 436-009-0040 established three exclusive methods for determining the amount that workers’ compensation insurers, like defendants, were required to pay to providers for services rendered to injured workers: (1) according to the fee schedule adopted by the Oregon Workers’ Compensation Division; (2) according to the provider’s submitted billing if the amount of the billing was less than the fee schedule (or if the fee schedule did not contain an applicable rate for the service); or (3)

according to the contract rate set out in a Managed Care Organization contract, if the injured worker was enrolled in the Managed Care Organization.

15.

Throughout the relevant time period, and in violation of the Oregon statutes and rules, defendants knowingly applied PPO discounts to providers' bills pursuant to defendants' contracts with various PPOs, and paid to plaintiff and other members of the class amounts less than plaintiff and members of the class were entitled to receive under the applicable Oregon workers' compensation statutes and rules.

16.

Defendants' repeated and knowing discounting of providers' bills for workers' compensation medical services pursuant to private PPO contracts violated Oregon law in that such discounts were not permitted by the exclusive statutory and regulatory methodologies for determining payment under Oregon law, and those discounts benefitted defendants in that defendants did not pay the actual, higher amounts to providers that were required under the applicable Oregon statutes and rules.

17.

Pursuant to Fed. R. Civ. Proc. 23, plaintiff brings this class action on its own behalf and as a representative of a proposed class of others similarly situated, consisting of: All health care providers in the State of Oregon who, within the six years preceding the date of filing this lawsuit, received payment from any defendant for any workers' compensation medical bill that was discounted pursuant to a so-called PPO contract or agreement.

18.

The class is so numerous that joinder of all members is impractical. Plaintiff does not know the exact size of the class but, on information and belief, believes that hundreds of medical providers statewide who provide services to injured workers' under the Oregon state workers' compensation systems have been damaged by defendants' illegal PPO discounting.

19.

The precise number of class members and their contact information are readily ascertainable from defendants' records. Class Members may be notified of the pendency of this action by first-class mail, supplemented, if deemed necessary or appropriate by the Court, by published notice.

20.

On information and belief, in addition to other relevant data, the names and locations of providers who are members of the class, the amount of any PPO discount applied to a payment made to plaintiff or members of the class, and the dates of all services provided by plaintiff or members of the class are available in an electronically searchable format in a database maintained by defendants.

21.

This action can be maintained as a class action under Fed. R. Civ. P. 23(a) and (b) because there are questions of law and fact common to the class that predominate over questions affecting only individual members. These common questions include, but are not limited to the following:

- (a) Whether the discounting of plaintiff's and other class member's workers' compensation medical billings pursuant to private PPO agreements was or was not permitted under

applicable Oregon statutes and rules, including Ore. Rev. Stat. 656.248 and/or *former* Ore. Admin. R. 436-009-0040 (1);

- (b) Whether defendants' discounting of plaintiff's and other class member's workers' compensation medical billings pursuant to private PPO agreements denied plaintiff and other members of the class of payments required by applicable Oregon statutes and rules;
- (c) Whether defendants improperly benefitted from the discounts it applied to plaintiff's and other class members' workers' compensation medical billings pursuant to private PPO agreements by paying to providers less than required by law; and
- (d) Whether it would be unjust to allow defendants to retain those benefits.

22.

Plaintiff's claims and defenses are typical of the claims and defenses of the class that plaintiff proposes to represent. If defendants have illegally applied PPO discounts to plaintiff's bills for workers' compensation medical services pursuant to private PPO agreements, then each member of the proposed class will have suffered an identical harm and would be, like plaintiff, entitled to relief.

23.

Plaintiff is an adequate representative of the class because its interests do not conflict with the interests of the members of the class. Plaintiff has retained counsel experienced in complex class action litigation and intends to vigorously prosecute this action. The interests of the class members will be fairly and adequately represented by plaintiff and its counsel. Plaintiff is willing to take an active part in the litigation and to perform the duties expected of a class representative.

24.

Trying the individual claims of class members would result in inconsistent or varying decisions on those claims and would establish incompatible standards of conduct for defendants.

25.

Trying the individual claims of class members would create a risk of findings and rulings that are, as a practical matter, dispositive of the interests of other class members and would deny other class members the opportunity to protect their own interests.

26.

A class action is superior to other available methods of the fair and efficient adjudication of the controversy, for at least the following reasons:

(a) The prosecution of separate actions creates a risk of inconsistent or varying adjudications;

(b) The common questions of law and fact described in paragraph 21 above predominate over questions affecting only individual members. On information and belief, the amount of damages for each class member can be calculated via defendants' records and/or computer systems;

(c) Individual class members would have little interest in individually controlling the prosecution of separate actions because the amount of each individual claim is relatively small compared to the complexities of the issues and the expenses of litigation.

(d) This is a desirable forum because this Court has significant experience managing class actions;

(e) A class action will be an efficient method of adjudicating the claims of the class members; and

(f) Class members have claims that are not significant in amount relative to the expense of the litigation, so separate actions would not afford significant relief to the members of the class. The damages caused to members of the proposed class are likely relatively small as to any particular bill submitted to defendant. The amount of underpayment is the amount of any PPO discount applied by defendants to any payment made to a class member.

FIRST CLAIM FOR RELIEF

(Violation of Or. Rev. Stat. 656.248 and/or *former* Or. Admin. R. 436-009-0040)

27.

Controlling Oregon workers' compensation statutes and rules established three exclusive methods for determining the amount that workers' compensation insurers, like defendants, must apply to determine the amount of payment due to a medical provider for services rendered to injured workers. Those statutes and rules did not permit application of a PPO discount to providers' bills for workers' compensation medical services.

28.

By applying a private PPO discount to plaintiff's and other class members' workers' compensation bills, defendants violated Ore. Rev. Stat. 656.248 and/or *former* Ore. Admin. R. 436-009-0040(1).

29.

Defendants knowingly applied the impermissible PPO discount and, to defendants' benefit, denied plaintiff and members of the class the proper amount of payment required by law. Plaintiff and all members of the class have been injured by the same violation and in a similar manner, and are entitled to recover damages from defendants, including prejudgment interest.

SECOND CLAIM FOR RELIEF

(Unjust Enrichment)

30.

Defendants retained a benefit by impermissibly applying a PPO discount to plaintiff's and other providers' bills for workers' compensation medical services in that defendants retained and did not pay to plaintiff and other providers the amounts required by applicable Oregon workers' compensation statutes and rules. Plaintiff and members of the class would have expected remuneration from defendants in the amount allowed under applicable workers' compensation statutes and rules had they known that PPO discounting was illegal.

31.

Defendants received, and were aware that they were receiving, a benefit in the amount of the unpaid discount amounts.

32.

It would be unjust to allow defendants to retain the benefit of its illegal application of PPO discounts to providers' bills for workers' compensation medical services because, among other reasons, Oregon statutes and rules strictly dictate the amount of proper payments and defendants' conduct violates those laws and denies the providers the compensation due to them.

33.

Plaintiff and the class are entitled to recover all amounts wrongfully discounted from their workers' compensation payments by defendants' application of discounts under a PPO agreement, plus prejudgment interest.

34.

As a direct and proximate result of defendants' unjust enrichment, plaintiff and the class have suffered injury and are entitled to reimbursement, restitution, and disgorgement from defendant of the benefit retained by defendants.

JURY DEMAND

35.

Plaintiff hereby demands a trial by jury for all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, plaintiff individually, and on behalf of all others similarly situated, prays for the following relief:

- A. An order certifying the defined class with plaintiff as class representative and naming plaintiff's counsel as class counsel;
- B. On the first claim for relief, a judgment against defendants, and awarding members of the class their damages in an amount to be proven at trial plus prejudgment interest;
- C. On the second claim for relief, a judgment against defendants, and awarding members of the class their damages in an amount to be proven at trial plus prejudgment interest;
- D. Prejudgment and postjudgment interest, as afforded by law;
- E. All costs of these proceedings; and
- F. All such other legal and equitable relief to which plaintiff and members of the classes are entitled.

DATED this 29th day of November, 2011.

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By: 

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