

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATALIE M. GRIDER, M.D. and)	Civil Action
KUTZTOWN FAMILY MEDICINE, P.C.,)	No. 2001-CV-05641
)	
Plaintiffs)	
v.)	
)	
KEYSTONE HEALTH PLAN)	
CENTRAL, INC.,)	
HIGHMARK, INC.,)	
JOHN S. BROUSE,)	
CAPITAL BLUE CROSS,)	
JAMES M. MEAD and)	
JOSEPH PFISTER,)	
)	
Defendants)	

O R D E R

NOW, this 20th day of December, 2006, upon
consideration of the following submissions:

1. Plaintiffs' Amended Motion for Class Certification, filed December 12, 2005; together with:
 - (a) Defendants' Joint Answer to Plaintiffs' Amended Motion for Class Certification, which answer was filed on behalf of all defendants on January 10, 2006;
 - (b) Notice of Supplemental Authority filed by defendant Highmark, Inc. on September 18, 2006;
 - (c) Plaintiff's List of Class Legal and Factual Issues under Fed.R.Civ.P. 23(c)(1)(B) and *Wachtel v. Guardian Life Ins. Co.*, 453 F.3d 179 (3d Cir. 2006), which list was filed October 5, 2006;
 - (d) Plaintiffs' List of Class Defenses under Fed.R.Civ.P. 23(c)(1)(B) and *Wachtel v. Guardian Life Ins.Co.*, 453 F.3d 179 (3d Cir. 2006), which list was filed October 5, 2006;

- (e) Defendants' Joint Response to Plaintiffs' List of Class Claims, Issues and Defenses, which response was filed on behalf of all defendants on October 20, 2006; and
- (f) Plaintiffs' Reply to Defendants' Joint Response to Plaintiffs' List of Class Claims, Issues and Defenses, which reply was filed October 30, 2006;

upon consideration of the briefs of the parties; after hearing conducted on March 6, 7, 8, 9 and 10, 2006; and for the reasons articulated in the accompanying Opinion,

IT IS ORDERED that Plaintiffs' Amended Motion for Class Certification is granted in part and denied in part.

IT IS FURTHER ORDERED that Counts I,¹ III² and IV³ of plaintiffs' Amended Complaint are certified as class actions pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that plaintiffs' motion for class certification of Count V of their Amended Complaint is denied.⁴

¹ Count I of plaintiffs' Amended Complaint alleges conspiracy to commit RICO violations pursuant to 18 U.S.C. § 1962(d) in violation of 18 U.S.C. § 1962(c).

² Count III of plaintiffs' Amended Complaint alleges violation of section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968.

³ Count IV of plaintiffs' Amended Complaint alleges violation of the prompt-payment provision of Pennsylvania's Quality Health Care Accountability and Protection Act, Act of May 17, 1921, P.L. 682, No. 284, §§ 2101-2193, as amended, 40 P.S. §§ 991.2101 to 991.2193.

⁴ Count V of plaintiffs' Amended Complaint alleges breach of contract against defendant Keystone Health Plan Central, Inc.

IT IS FURTHER ORDERED that a class is certified for the period from January 1, 1996 through and including October 5, 2001 on behalf of the following subclasses:

All medical service providers in connection with medical services rendered to patients insured by defendant Keystone Health Plan Central, Inc. who during the period January 1, 1996 through October 5, 2001:

(1) submitted claims for reimbursement on a fee-for-service basis for covered services which claims were denied or reduced through the application of automated edits in the claims processing software used by defendants to process those claims; and/or

(2) received less in capitation payments than the provider was entitled through the use and application of automated systems to "shave" such payments in the manner alleged in plaintiff's Amended Complaint filed October 6, 2003.

IT IS FURTHER ORDERED that the following factual issues are certified for class treatment:

(1) common automated bundling practices;

(2) common automated downcoding practices;

(3) a common failure to pay clean claims within the applicable statutory time period;

(4) a common failure to timely place patients on capitation rolls;

(5) a common failure to pay appropriate capitation or fee-for-service on guest members;

(6) common proof of a conspiracy to defraud in violation of RICO;

(7) a common failure to recognize CPT prescribed modifiers;

(8) whether defendants improperly suspended claims to delay or deny payment;

(9) whether defendants failed to pay for medically necessary covered services; and

(10) whether defendants followed a "pursue and pay" or a "pay and pursue" strategy for the payment of claims under the Pennsylvania prompt payment statute.⁵

IT IS FURTHER ORDERED that the following legal issues⁶ are certified for class treatment:

(1) whether defendants committed mail or wire fraud;

(2) whether defendants violated the Pennsylvania prompt payment statute⁷; and

(3) whether defendants conspired in violation of RICO⁸.

IT IS FURTHER ORDERED that the following common defenses are certified for class treatment:

(1) whether the class claims are barred by disclosures contained in Keystone's common standard form, fill-in-the-blanks Primary Care Physician Provider Contract, specialist Consulting Agreement or Keystone's Administrative Manual (including updates and revisions), in effect during the class period;

(2) whether the class claims are barred by disclosures contained in the Highmark/Pennsylvania Blue Shield ("PBS") Procedural Terminology Manuals distributed by Highmark to its network of physicians during the class period;

(3) whether the class claims are barred by disclosures contained in the Highmark/PBS "Policy Review & News" distributed by Highmark to its network of physicians during the class period;

⁵ See footnote 3, above.

⁶ While each of these issues are based, in part, upon factual determinations, whether those factual allegations, if proven, constitute mail fraud, wire fraud, violation of the Pennsylvania prompt payment statute, conspiracy, and RICO violations are among the ultimate legal conclusions for determination in this case.

⁷ See footnote 3, above.

⁸ See footnotes 1 and 2, above.

(4) whether the class claims are barred by the Statements of Remittance ("SORs") sent to providers with their reimbursement checks;

(5) whether endorsements on the SORs to the effect that acceptance of the "allowed amount" (that is, defendants' fee schedule amount) constituted a release and satisfaction of the class' claims for reimbursement for medical services even when such allowed amount was not paid;

(6) whether the class claims are barred because the injuries and damages of the class members were caused by the conduct of others, not defendants;

(7) whether the class claims are barred by the applicable statute of limitations; and

(8) whether the class claims are barred because of the absence of any material misrepresentations, misleading disclosures or omissions by defendants in their standard form, Primary Care Physician Provider Contract and specialist Consulting Agreement.

IT IS FURTHER ORDERED that pursuant to Rule 23(g) of the Federal Rules of Civil Procedure Kenneth A. Jacobsen, Esquire, Louis C. Bechtle, Esquire, Francis J. Farina, Esquire and Joseph A. O'Keefe, Esquire are each appointed class counsel.

IT IS FURTHER ORDERED that plaintiff Natalie M. Grider, M.D., both in her individual capacity and as President of plaintiff Kutztown Family Medicine, P.C., is approved as class representative.

IT IS FURTHER ORDERED that on or before January 19, 2007 defendant Keystone Health Plan Central, Inc., shall provide plaintiffs' counsel with the name and last known address of

every physician having a contract with Keystone during the class period.

IT IS FURTHER ORDERED that on or before January 26, 2007 class counsel shall present to counsel for defendants and the undersigned a proposed class notice⁹ and a specific proposal for service of the class notice upon all class members in accordance with the requirements of Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that defendants shall have until on or before February 6, 2007 to object to plaintiffs' proposed class notice and service proposal.

IT IS FURTHER ORDERED that a Rule 16 Status Conference shall be conducted on the record by the undersigned on February 12, 2007 at 9:30 o'clock a.m. in a courtroom to be designated at the James A. Byrne United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, or at such other time, place and location designated by the undersigned, to resolve any objections to plaintiffs' proposed class notice and service proposal, and to approve the class notice.

IT IS FURTHER ORDERED that on or before March 15, 2007 plaintiffs shall serve the approved class notice upon all class

⁹ The official commentary to Fed.R.Civ.P. 23 notes that: "The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms." Fed.R.Civ.P. 23 Advisory Committee Notes 2003.

members in the manner approved by the undersigned pursuant to Federal Rule of Civil Procedure 23(c)(2)(B).

IT IS FURTHER ORDERED that on or before March 30, 2007 plaintiffs shall file a copy of the Notice provided to class members and a certification by class counsel detailing the method of service, identifying those members to whom individual notice was provided, the reasons why any members of the class could not be identified through reasonable effort, and the proposed method by which notice will be provided to members who could not be identified through reasonable effort.

IT IS FURTHER ORDERED that the Clerk of Court is directed to remove this matter from the civil suspense docket.

BY THE COURT:

/s/ JAMES KNOLL GARDNER
James Knoll Gardner
United States District Judge IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATALIE M. GRIDER, M.D. and)	Civil Action
KUTZTOWN FAMILY MEDICINE, P.C.,)	No. 2001-CV-05641
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Plaintiffs)	
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KEYSTONE HEALTH PLAN)	
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HIGHMARK, INC.,)	
JOHN S. BROUSE,)	
CAPITAL BLUE CROSS,)	
JAMES M. MEAD and)	
JOSEPH PFISTER,)	
)	
Defendants)	

* * *

APPEARANCES:

KENNETH A. JACOBSEN, ESQUIRE
LOUIS C. BECHTLE, ESQUIRE
FRANCIS J. FARINA, ESQUIRE
JOSEPH A. O'KEEFE, ESQUIRE
 On behalf of Plaintiffs

JOHN S. SUMMERS, ESQUIRE
DANIEL SEGAL, ESQUIRE
JOHN S. STAPLETON, ESQUIRE
 On behalf of Defendants Keystone Health Plan
 Central, Inc., and Joseph Pfister

DANIEL B. HUYETT, ESQUIRE
JEFFREY B. BUKOWSKI, ESQUIRE
 On behalf of Defendants Capital Blue Cross
 and James M. Mead

MICHAEL L. MARTINEZ, ESQUIRE
KATHLEEN TAYLOR SOOY, ESQUIRE
 On behalf of Defendants Keystone Health Plan
 Central, Inc., Capital Blue Cross, Joseph Pfister
 and James M. Mead

SANDRA A. GIRIFALCO, ESQUIRE
MARY J. HACKETT, ESQUIRE

On behalf of Defendants
Highmark, Inc. and John S. Brouse
* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Plaintiffs' Amended Motion for Class Certification filed December 12, 2005.

Defendants' Joint Answer to Plaintiffs' Amended Motion for Class Certification was filed January 10, 2006. A class certification hearing was conducted by the undersigned on March 6, 7, 8, 9 and 10, 2006. Plaintiffs presented the testimony of five witnesses¹⁰ and 161 exhibits. Defendants presented the testimony of two witnesses¹¹ and 191 exhibits.

At the conclusion of the hearing, we took the matter under advisement. Thereafter, we reviewed the transcript of the hearing testimony. We also reviewed the voluminous paper exhibits consisting of more than 15 linear feet and containing approximately 45,625 pages. In addition, we reviewed the

¹⁰ Plaintiffs' witnesses were defendant Joseph M. Pfister, the former Chief Executive Officer of defendant Keystone; Ruth Jurkiewicz, Manager of Special Process Claims and Claims Operations at defendant Keystone; Nina E. Boldosser, an employee in the Electronic Data Interface Department of Amisys Synertech Health System Solutions, LLC; Dr. Natalie M. Grider, the individual plaintiff and proposed class representative; and Susan Heffner, the Office Manager at plaintiff Kutztown Family Medicine.

¹¹ Defendants' witnesses were M. Lindsey Gunn, the Director of Medical Payment and Policy Division of defendant Highmark; and Steven M. Wiggins, who was qualified as an expert in the field of economics and econometrics.

extensive contents of five compact computer discs containing approximately 72,520 more pages of exhibits, for a total of approximately 118,145 pages of exhibits.

Based upon our review of the testimony and exhibits, and for the following reasons, we grant in part and deny in part Plaintiffs' Amended Motion for Class Certification. Specifically, we grant plaintiffs' motion for class certification against all defendants on Count I of plaintiffs' Amended Complaint alleging conspiracy to commit RICO¹² violations pursuant to 18 U.S.C. § 1962(d) in violation of 18 U.S.C. § 1962(c); Count III of plaintiffs' Amended Complaint alleging violation of RICO under 18 U.S.C. § 1962(c); and Count IV of plaintiffs' Amended Complaint alleging violation of the prompt-payment provision of Pennsylvania's Quality Health Care Accountability and Protection Act¹³ because we conclude that plaintiffs have satisfied all the prerequisites of class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure regarding those counts.

We deny plaintiffs' motion for class certification on Count V of plaintiffs' Amended Complaint alleging breach of contract against defendant Keystone Health Plan Central, Inc.

¹² Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

¹³ Act of May 17, 1921, P.L. 682, No. 284, §§ 2101-2193, as amended, 40 P.S. §§ 991.2101 to 991.2193.

because we conclude that individual issues will predominate over any common issues of law and fact regarding plaintiffs' breach of contract claims.

JURISDICTION

Jurisdiction is based upon federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441(b). The court has supplemental jurisdiction over plaintiffs' pendent state law claims. See 28 U.S.C. § 1367. Venue is proper pursuant to 28 U.S.C. § 1391(b) because a substantial number of the events giving rise to plaintiffs' claims allegedly occurred in this judicial district.

PARTIES

Plaintiff Natalie M. Grider, M.D. is a family practitioner and President of plaintiff Kutztown Family Medicine, P.C. ("Kutztown"). Plaintiffs and their affiliates provide medical services to about 4,000 patients who are insured by defendant Keystone Health Plan Central, Inc. ("Keystone").

Keystone is a Health Maintenance Organization ("HMO") organized under the Pennsylvania Health Maintenance Organization Act.¹⁴ Defendant Joseph Pfister is the former Chief Executive Officer of Keystone.

Defendant Highmark, Inc., formerly known as Pennsylvania Blue Shield ("PBS"), is an insurance company which

¹⁴ Act of December 29, 1972, P.L. 1701, No. 364, §§ 1-17, as amended, 40 P.S. §§ 1551-1567.

during the entire class period (January 1, 1996 through October 5, 2001) was a 50% owner of Keystone. Defendant John S. Brouse is the former Chief Executive Officer of Highmark.

Defendant Capital Blue Cross ("Capital") is an insurance company which during the entire class period was a 50% owner of Keystone. Defendant James M. Mead is the former Chief Executive Officer of Capital. In 2003 Capital purchased Highmark's ownership interest in Keystone. Keystone is now a subsidiary of Capital.

Plaintiffs contend that during the proposed class period defendants Capital and Highmark directed and controlled the operations of Keystone and received all of its profits. Plaintiffs allege that defendants and various non-parties together form what is styled as the "Managed Care Enterprise", an entity which allegedly operates to defraud plaintiffs and the proposed class through a variety of illegal methods. Defendants deny those allegations.

PROCEDURAL HISTORY

On October 5, 2001 plaintiffs filed their Complaint in the Court of Common Pleas of Philadelphia County. Defendants removed the action to this court on November 7, 2001.¹⁵ By Order

¹⁵ This action was originally assigned to our colleague United States District Judge Anita B. Brody. The case was transferred from the docket of District Judge Brody to the docket of Senior District Judge Thomas N. O'Neill, Jr., on November 16, 2001 and from the docket of Senior Judge O'Neill to the undersigned on December 19, 2002.

and Opinion of the undersigned dated September 18, 2003, we granted in part and denied in part Defendants' Motion to Dismiss, which motion was filed January 23, 2002.

Specifically, we denied defendants' motion to dismiss based upon Pegram v. Herdrich¹⁶, the McCarran-Ferguson Act¹⁷ and the state-action-immunity doctrine.¹⁸ Defendants' motion to dismiss Count I of plaintiffs' Complaint alleging conspiracy to commit RICO violations was denied. Defendants' motion to dismiss Count II alleging aiding and abetting RICO violations was granted. Defendants' motion to dismiss Count III alleging illegal investment of racketeering proceeds under 18 U.S.C. § 1962(a) was granted without prejudice to file an amended complaint.

In addition, defendants' motion to dismiss Count IV was granted in part and denied in part relating to allegations of fraud, extortion, bribery and violations of the Travel Act¹⁹ and Hobbs Act.²⁰ Defendants' motion to dismiss Count V alleging a violation of the Pennsylvania Quality Health Care Accountability and Protection Act was denied. Defendants' motion to dismiss Count VI alleging violation of a duty of good faith and fair

¹⁶ 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000).

¹⁷ 15 U.S.C. § 1012.

¹⁸ See Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

¹⁹ 18 U.S.C. § 1952.

²⁰ 18 U.S.C. § 1951.

dealing was granted. In all other respects, Defendants' Motion to Dismiss was denied.²¹

On October 6, 2003 plaintiffs filed their Amended Complaint. On November 14, 2003 Defendants' Motion to Dismiss and/or Strike Certain Portions of the Amended Complaint was filed.

On December 30, 2003 a Status Conference was held by the undersigned pursuant to Federal Rule of Civil Procedure 16. At that conference the court attempted, albeit unsuccessfully, to attain consensus between counsel for the parties regarding an appropriate schedule for the completion of discovery, dispositive motions and trial. On January 14, 2004, a comprehensive Rule 16 Status Conference Order was entered by the undersigned memorializing the decisions made at the status conference held December 30, 2003.

From late 2003 until mid-2005, a plethora of motions were filed both with this court and with United States Magistrate Judge Arnold C. Rapoport. The January 2, 2003 Standing Order of the undersigned provides that all discovery disputes which cannot be amicably resolved shall be brought to the attention of

²¹ In their Amended Complaint, plaintiffs changed the numbering of some of the counts which were also contained in the original Complaint. This was necessary to accommodate our dismissal of Counts II and VI from the original Complaint and plaintiffs' inclusion of a new count numbered V in the Amended Complaint.

Magistrate Judge Rapoport "by letter or other informal means".²² Moreover, the Standing Order provides that: "Any party contending that the Order of the Magistrate Judge is clearly erroneous or contrary to law may file a Petition to Reconsider, together with a proposed Order, directed to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A)."

On March 12, 2004 defendants Highmark and Capital filed notice with the Judicial Panel on Multidistrict Litigation ("MDL") that the within action may be a "tag-along" action to In re Managed Care Litigation, MDL No. 1334 pending before United States District Judge Federico A. Moreno in the United States District Court for the Southern District of Florida. On March 17, 2004 defendants Capital and Highmark sought a stay of all proceedings in this court pending a decision by the MDL panel. By Order dated May 5, 2004 we denied defendants' motion for stay.²³

²² We note that because of the number of disputes and animosity between the parties, Magistrate Judge Rapoport eventually required the parties to file formal motions rather than utilize his usual less formal dispute resolution procedures.

²³ Defendants have vacillated on the applicability of the In re Managed Care Litigation throughout this case. Defendants specifically argued that Judge Moreno's decision on the motion to dismiss was inapplicable to this litigation even though the issues of both cases were virtually identical. See 135 F.Supp.2d 1253 (S.D.Fla. 2001) However, after our September 2003 decision on Defendants' Motion to Dismiss, defendants changed course and argued to the MDL Panel that this case should be included in that litigation.

Specifically, in the letter seeking to add this action to the MDL case, current counsel for defendants Capital and Highmark stated: "The Gridler Amended Complaint demonstrates that these actions raise common issues of

(Footnote 14 continued):

On April 26, 2004, partly in response to the filing of innumerable motions and the slow pace of discovery, we extended the deadlines set in our January 14, 2004 Rule 16 Status Conference Order. Moreover, on August 5, 2004, because of the inability of the parties to resolve any of their discovery disputes without court intervention, we placed this matter into civil suspense but required the parties to continue the discovery process.

From late 2004 into the summer of 2005 the parties continued their incessant motion practice and exhibited a complete inability to agree on even the most basic matters. The level of acrimony and litigiousness exhibited by counsel in this matter was unprecedented in the twenty-five years of judicial experience of the undersigned.

In response to plaintiffs' request for appointment of a special master and over defendants' objection, we appointed

(Continuation of footnote 14):

fact." (See Letter from Tracy A. Roman, Esquire, dated March 12, 2004 to Michael J. Beck, Clerk, Judicial Panel on Multidistrict Litigation, attached as Exhibit A to the Motion of Defendants Capital Blue Cross and Highmark Inc. for a Stay of All Proceedings.)

Finally, regarding the current motion for class certification, defendants argue that the decisions of Judge Moreno and the United States Court of Appeals for the Eleventh Circuit regarding certification of certain claims in the MDL Managed Care Litigation are neither applicable to, nor persuasive on, some issues involved in this matter (certification of claims brought under RICO and the applicable prompt pay statute), but are applicable and persuasive concerning another issue (breach of contract claim).

Karolyn Vreeland Blume, Esquire,²⁴ as Special Discovery Master by Order dated August 25, 2005, pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure.

The next day, on August 26, 2005 we entered an Order granting in part, and denying in part, Defendants' Motion to Dismiss and/or Strike Certain Portions of the Amended Complaint. Specifically, we granted defendants' motion to dismiss all allegations of RICO violations in Counts I and II of the Amended Complaint based upon 18 U.S.C. § 1962(a).

Moreover, we granted defendants' motion to dismiss Count V (breach of contract) of plaintiffs' Amended Complaint against defendants Capital Blue Cross, Highmark Inc., John S. Brouse, James M. Mead and Joseph Pfister. (Count V remains against defendant Keystone only.) We further granted defendants' motion to dismiss plaintiffs' claim for punitive damages from

²⁴ Attorney Blume is known to the court as an attorney of over 29 years experience. She received a Bachelor of Arts degree with honors in political science in 1974 from Skidmore College and a Juris Doctorate degree from Villanova University School of Law in 1977.

Attorney Blume spent the first 15 years of her career in a private, general law practice handling a broad spectrum of claims and issues for individual, business and non-profit organization clients. From 1992 through 2001 she served as Senior Law Clerk to United States Magistrate Judge Arnold C. Rapoport handling a wide variety of civil and criminal matters involving both state and federal law. Thereafter, from 2001 until 2004 Attorney Blume served as in-house counsel for PPL Corporation. Formerly she served as President of the Bar Association of Lehigh County. Attorney Blume is the founder and owner of Conflict Resolution Services located in Allentown, Pennsylvania. Currently, she provides mediation and arbitration services at all stages of conflict for businesses and other ventures.

Attorney Blume's knowledge and experience made her uniquely qualified to serve as Special Discovery Master in this matter considering the contentiousness exhibited by the parties in the discovery process.

Counts I, III and V of plaintiffs' Amended Complaint and struck the request for punitive damages from the Amended Complaint.

Finally, we granted defendants motion to strike paragraphs 14(f), 53(f), 53(h), 124 (as it relates to allegations regarding 18 U.S.C. § 1962(b)) and paragraphs 2(j), (m), (o), (u), (v), (w) and (x) from the prayer for relief contained in Count III of plaintiffs' Amended Complaint. We denied defendants' motion to dismiss or strike in all other respects.

On September 12, 2005 all defendants answered plaintiffs' Amended Complaint and asserted affirmative defenses to plaintiffs' claims. Defendant Keystone also asserted a counterclaim for recoupment or set-off.

By Order dated and filed September 26, 2005 we set deadlines for class discovery,²⁵ expert reports, and expert depositions regarding class discovery; plaintiffs' deadline for filing an amended motion for class certification; defendants' deadline for a response to plaintiffs' motion for class certification; a hearing date for plaintiffs' motion for class

²⁵ We note that while February 1, 2006 was the deadline established by the court for the completion of class discovery in this matter, class discovery continued, with the constant participation and oversight of Special Discovery Master Blume. Documents offered and received into evidence at the class certification hearings included those produced on the evening of Friday, March 3, 2006 when defense counsel forwarded to plaintiffs' counsel computer disks containing thousands of pages of information regarding claims submissions. We further note that there are ongoing disputes on both sides concerning the production of documents which were unresolved at the time of the class certification hearing and continue to be unresolved as of the date of this Opinion.

certification;²⁶ deadlines for trial expert reports and depositions; a dispositive motion deadline; a deadline for motions in limine; and a trial date.

On February 3, 2006 we entered an Order specifically advising the parties how the class certification hearings would be conducted, set deadlines for among other things, the filing of potential exhibits, witness lists, proposed findings of fact and conclusions of law prior to the hearing and set time limits for the presentation of evidence.²⁷

On March 6-10, 2006 we conducted the class certification hearing in this matter. On March 10, 2006, the record was closed, closing arguments were heard by the court and the matter was taken under advisement.

On September 18, 2006 defendant Highmark filed its Notice of Supplemental Authority to bring three subsequent

²⁶ In our September 26, 2005 scheduling Order, we directed the parties to submit the majority of any record in support of, or in opposition to, plaintiffs' motion for class certification by way of affidavit, deposition or admission except for those matters which required credibility determinations by the undersigned or involved complex expert testimony. Furthermore, we scheduled the entire week of March 6-10, 2006 for the presentation of any evidence and to conduct closing arguments.

²⁷ The class certification hearing was conducted March 6, 7, 8, 9 and 10, 2006. Plaintiffs were allotted 10 hours of hearing time to conduct the direct examination of plaintiffs' witnesses, the cross-examination of defendants' witnesses, the proffer of plaintiffs' exhibits, and the articulation of all objections to defendants' testimony and exhibits.

Similarly, all defendants collectively shared 10 hours of hearing time to conduct the direct examination of defendants' witnesses, the cross-examination of plaintiffs' witnesses, the proffer of defendants' exhibits, and the articulation of all objections to plaintiffs' testimony and exhibits. At the hearing, neither plaintiffs, nor defendants, utilized all of the time allotted by the court under this procedure.

decisions to the attention of the court. Included were two recent decisions of the United States Court of Appeals for the Third Circuit in Beck v. Maximus, Inc., 457 F.3d 291 (3d Cir. 2006) and Wachtel v. Guardian Life Insurance Co. of America, 453 F.3d 179 (3d Cir. 2006).

On October 2, 2006 we conducted a Rule 16 conference on the record to discuss the applicability of the Beck and Wachtel cases, if any, to this action. During the conference, the parties disagreed as to the applicability of these new decisions to Plaintiff's Amended Motion for Class Certification, but agreed that these decisions did not require reopening the record.

At the conclusion of the conference, the undersigned directed plaintiffs to file a list of all the claims, issues and defenses which they contend are appropriate for class treatment or to which they specifically seek class certification.²⁸ In addition, we permitted the parties to file additional briefs after the filing of plaintiffs' list of all claims, issues and defenses.²⁹

²⁸ On October 5, 2006 pursuant to our directive Plaintiff's List of Class Legal and Factual Issues under Fed.R.Civ.P. 23(c)(1)(B) and *Wachtel v. Guardian Life Ins.Co.*, 453 F.3d 179 (3d Cir. 2006) ("Common Issue List") and Plaintiffs' List of Class Defenses under Fed.R.Civ.P. 23(c)(1)(B) and *Wachtel v. Guardian Life Ins.Co.*, 453 F.3d 179 (3d Cir. 2006) ("Common Defense List") were both filed.

²⁹ On October 20, 2006 Defendants' Joint Response to Plaintiffs' List of Class Claims, Issues and Defenses was filed. On October 30, 2006 Plaintiffs' Reply to Defendants' Joint Response to Plaintiffs' List of Class Claims, Issues and Defenses was filed.

CONTENTIONS OF THE PARTIES

Plaintiffs' Contentions

Plaintiffs seek to certify this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs' central assertion is that when contracting with plaintiffs, defendants intentionally misrepresented, and failed to disclose, internal HMO policies and practices that were designed to systematically reduce, deny, and delay reimbursement payments to plaintiffs and their business.

Plaintiffs entered into an HMO-physician agreement with defendant Keystone in December 1998 to provide medical services to the HMO's members. In addition to a complex bonus system, the agreement provides for two basic methods by which plaintiffs are paid for rendering medical services: (1) capitation³⁰ and (2) fee-for-service.

Plaintiffs allege a variety of ways in which defendants used the mail and wires to defraud plaintiffs by wrongfully delaying and denying compensation due under both methods of payment. Plaintiffs also assert that the HMO-physician agreement contains a number of misrepresentations and material omissions. Specifically, plaintiffs allege that defendants (1) "shave" capitation payments by purposefully under-reporting the number of

³⁰ A "capitation" is "an annual fee paid a doctor or medical group for each patient enrolled under a health plan." Webster's Third New International Dictionary 332 (1968).

patients enrolled in plaintiffs' practice group; and (2) defraud plaintiffs of fees for medical services rendered by wrongfully manipulating CPT³¹ codes to decrease the amount of reimbursements.

In their Amended Complaint, plaintiffs also assert a number of RICO claims premised on extortion in violation of the Hobbs Act,³² bribery,³³ and violations of the Travel Act.³⁴ However, plaintiffs do not seek class certification on those issues.

Plaintiffs assert state law causes of action alleging violations of the prompt-payment provision of Pennsylvania's Quality Health Care Accountability and Protection Act, and breach of contract against defendant Keystone only. Plaintiffs seek class certification on these state law claims.

Plaintiffs seek certification for a class period from January 1, 1996 until October 5, 2001 for the following claims in plaintiffs' Amended Complaint: (1) Count I--conspiracy to commit RICO violations pursuant to 18 U.S.C. § 1962(d) in violation of 18 U.S.C. § 1962(c); (2) Count III--violation of RICO under

³¹ CPT codes refer to the standardized American Medical Association Current Procedural Terminology code set. The CPT codes were developed by the association to describe the medical services and procedures performed for the insured patient.

³² 18 U.S.C. § 1951.

³³ 18 U.S.C. § 1954.

³⁴ 18 U.S.C. § 1952.

18 U.S.C. § 1962(c); (3) Count IV-- violation of 40 P.S. § 991.2166 (Pennsylvania prompt payment statute, also known and referred to as Act 68); (4) Count V--breach of contract against defendant Keystone.

Plaintiffs seek class certification for this period on behalf of the following proposed subclasses:

All providers who:

1. submitted claims for reimbursement on a fee-for-service basis for covered services which claims were denied or reduced through the application of automated edits in the claims processing software used by defendants to process those claims; and/or

2. received less in capitation payments than the provider was entitled through the use and application of automated systems to "shave" such payments in the manner alleged in plaintiff's Amended Complaint and in the accompanying Memorandum of Law.

Plaintiffs' Amended Motion for Class Certification at page 1.

Concerning their RICO claims, plaintiffs only seek certification of a class based upon the RICO predicate acts of mail and wire fraud (18 U.S.C. §§ 1341 and 1343). Plaintiffs do not seek certification of a class based upon other RICO predicate acts of violations of the Hobbs Act (18 U.S.C. § 1951), the Travel Act (18 U.S.C. § 1952), interference with an employee benefit plan (18 U.S.C. § 1954) or other claims alleged in plaintiffs' Amended Complaint. Plaintiffs assert that they have focused their motion for class certification specifically and

narrowly on the identical claims certified for class treatment by other courts throughout the country, that is claims of "bundling", "downcoding" and capitation "shaving".

Common Issues

As noted above, and pursuant to our October 2, 2006 directive, Plaintiffs' Common Issue List was filed on October 5, 2006. In that regard, plaintiffs seek certification of the following 22 factual and legal issues:

1. Whether defendants systematically bundled and downcoded claims and failed to recognize modifiers through secret "edits" in their claims processing systems and software as alleged in plaintiffs' Amended Complaint and presented at the class hearing.

2. Whether defendants followed and applied the standardized American Medical Association ("AMA") Current Procedural Terminology ("CPT") code set in processing the class' claims.

3. Whether the HCFA Form 1500 required by defendants to be used by members of the physician class in filing claims required the use of CPT codes.

4. Whether the virtually identical provisions in the Primary Care Physician Provider Contract and the specialist Consulting Agreement which required Keystone to pay providers for the "applicable procedure" performed by the provider required Keystone to pay for the CPT codes reported and billed by the provider, not as bundled and downcoded by defendants through secret edits in their claims processing system.

5. Whether defendants agreed to pay, through contract or otherwise, for medically

necessary "covered services" and "applicable procedures" based on the AMA's CPT code set.

6. Whether defendants' policies and practices on "integral" services, "independent" procedures, "multiple surgical" procedures and other devices used to bundle and downcode claims, thereby denying and reducing reimbursements to providers, were disclosed in Keystone's standard form, fill-in-the-blanks Primary Care Physician Provider Contract and specialist Consulting Agreement.

7. Whether defendants policies and practices on "integral" services, "independent" procedures, "multiple surgical" procedures and other devices used to bundle and downcode claims, thereby denying and reducing reimbursements to providers, were disclosed in Keystone's Administrative Manual.

8. Whether defendants had a duty to disclose in Keystone's standard form, fill-in-the-blanks Primary Care Physician Provider Contract, specialist Consulting Agreement and Administrative Manual their policies and practices of bundling and downcoding provider claims.

9. Whether Statements of Remittance ("SORs") sent to providers which excluded CPT codes submitted with the original claim were false and misleading and contributed to the fraud perpetrated on the providers.

10. Whether the endorsement on the SORs which stated that acceptance by the provider of the "allowed amount" indicated on the SOR (*i.e.*, the amount set by Keystone under its fees schedules) released the providers' claims, when defendants not only did not pay that "allowed amount" but, through their bundling practices, paid nothing whatsoever.

11. Whether Keystone's standardized Primary Care Physician Provider Contract and its Administrative Manual in effect during

the class period were vague or misleading in describing the scope of services that were "capitated."

12. Whether Keystone omitted and excluded its detailed list of capitated services (by CPT code) from its standard form Primary Care Physician Provider Contract and its Administrative Manual, and improperly denied as "capitated" dozens of CPT codes which appeared on that list.

13. Whether defendants had a duty to disclose Keystone's detailed list of capitated services in Keystone's form Primary Care Physician Provider Contract and its Administrative Manual.

14. Whether defendants:

--"shaved" capitation payments by systematically transferring patients to "guest membership" or other so-called "dummy" accounts without notice to the provider or any request by the member; and

--delayed making capitation payments to providers for newly enrolled members.

15. Whether defendants systematically "suspended" payments while they pursued coverage from other insurers under their coordination of benefits ("COB") practices.³⁵

16. Whether defendants' pursue and pay practices violated Keystone's standard Primary Care Physician Provider Contract and specialist Consulting Agreement, its Administrative Manual and Keystone's Administrative Services Agreement with Synertech, Inc., which required a "pay and

³⁵ This practice is known as a "pursue and pay" practice.

pursue"³⁶ policy for processing the class' claims.

17. Whether the provision of the Administrative Manual which defines a "clean claim" for Act 68 and other purposes as one filed "on a HCFA 1500 form or electronically", requires defendants to process claims filed in such a manner and not deviate from that definition.

18. Whether defendants systematically delayed or denied reimbursements for trauma and other high cost, expensive medical procedures in violation of Act 68 and Keystone's standard form PCP Provider Contract and specialist Consulting Agreement.

19. Whether defendants and third parties engaged in an "enterprise" and concerted activity during the class period to perpetrate the violations of law alleged in plaintiff's Amended Complaint and presented at the class hearing.

20. Whether each individual and corporate defendant was a member of the "managed care enterprise" alleged in plaintiffs' Amended Complaint and presented at the class hearing.

21. Whether defendants used wire communications and the mails to perpetrate the violations of law alleged in plaintiffs' Amended Complaint and presented at the class hearing.

22. Whether plaintiffs' claims or designated facts shall be deemed to be established under Rule 37(b)(2) of the Federal Rules of Civil Procedure.

³⁶ A pay and pursue policy is a system in which Keystone pays the provider for the services rendered for medical services to a patient and follows up after payment to the provider with any claims against other insurance companies which may also be responsible for all, or some portion, of the payment made to the provider.

Common Defenses

In addition to the 22 factual and legal issues plaintiffs seek to have certified for class treatment, and pursuant to our October 2, 2006 directive, plaintiffs filed their Common Defense List on October 5, 2006. Plaintiffs do not seek certification of these common defenses. The 24 common defenses raised by defendants as identified by plaintiffs include the following:

1. The class claims are barred by disclosures contained in Keystone's common standard form, fill-in-the-blanks Primary Care Physician Provider Contract and specialist Consulting Agreement.

2. The class claims are barred by disclosures contained in Keystone's Administrative Manual (including updates and revisions thereto) in effect during the class period.

3. The class claims are barred by disclosures contained in the Highmark/PBS Procedural Terminology Manuals distributed by Highmark to its network of physicians during the class period.

4. The class claims are barred by disclosures contained in the Highmark/PBS "Policy Review & News" ("PRN") distributed by Highmark to its network of physicians during the class period.

5. The class claims are barred by the SORs sent to providers with their reimbursement checks, which SORs failed to list the medical codes and procedures submitted by the providers in their original claims.

6. Endorsements on the SORs to the effect that acceptance of the "allowed amount" (that is, defendants' fee schedule amount) constituted a release and satisfaction of the class' claims for reimbursement for medical services when such allowed amount was not paid.

7. Defendants should be precluded from offering defenses or introducing evidence of defenses under Rule 37(b)(2) of the Federal Rules of Civil Procedure.

8. The class claims are barred by the doctrine of primary jurisdiction.

9. The class claims are barred because their injuries and damages were caused by the conduct of others, not defendants.

10. The class claims are barred by failure to exhaust administrative or contractual remedies.

11. The class claims are barred by the applicable statute of limitations.

12. The class claims are barred by the McCarran-Ferguson Act.

13. The class claims are barred because defendants are immune from suit under the state action immunity doctrine.

14. The class claims are barred because they are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA").³⁷

15. The class claims are barred because allowing their prosecution conflicts with Pennsylvania state administrative schemes governing insurance.

16. The class claims are barred by the doctrine of res judicata.

³⁷ 29 U.S.C. §§ 1001-1461.

17. The class claims are barred by the doctrine of collateral estoppel.

18. The class claims are barred because the medical services for which the class seeks compensation were not covered services.

19. The class claims are barred because of the absence of any material misrepresentations, misleading disclosures or omissions by defendants in their standard form, fill-in-the-blanks Primary Care Physician Provider Contract and specialist Consulting Agreement.

20. The class claims are barred because defendants lack the requisite scienter, specific intent or willfulness to commit fraud.

21. The class claims are barred because defendants had no duty to disclose the information which plaintiffs allege was withheld, omitted or only partially disclosed in this litigation.

22. The class claims are barred under the doctrines of settlement, release or accord and satisfaction (to the extent not included above with respect to the SORs).

23. The class claims are barred because plaintiffs and other class members knowingly and voluntarily accepted the terms of their Primary Care Physician Provider Contracts and specialist Consulting Agreements with defendants and received some benefits under those contracts.

24. The class' equitable claims are barred because adequate remedies exist at law.

Defendants' Contentions

Defendants assert that plaintiffs have not satisfied any of the factors for class certification. Initially,

defendants assert that plaintiffs' proposed class is not ascertainable. Defendants contend that the proposed class definition is improper because it is vague, overbroad and includes "central issues of liability" as part of the class definition.

Defendants also contend that plaintiffs do not have standing to proceed because plaintiffs have not demonstrated that they have suffered any injuries. In addition, defendants contend that individualized issues will overwhelm common issues in this matter and that a class action is not the superior method for fairly and efficiently resolving this controversy.

More specifically, defendants assert that individual issues overwhelm common issues because plaintiffs' claims require determinations on a provider-by-provider and claim-by-claim basis and because under RICO, plaintiffs must show not only injury, but also proximate causation, for each class member's injuries.

Next, defendants allege that plaintiffs' claims are not typical of the class they seek to represent because plaintiffs are paid almost exclusively on a capitation, not a fee-for-service, basis; and those claims cannot by definition be typical of specialists who bill on a fee-for-service basis. Additionally, individual plaintiffs will be subject to individual and unique defenses including reliance, materiality, ratification, release and waiver. Moreover, defendants contend

that plaintiffs fail to identify any evidence that other providers suffered the same or similar injuries alleged by plaintiffs.

Defendants assert that plaintiffs and their counsel are not, and will not, adequately represent the proposed class because of possible conflicts of interest, the lack of familiarity with the basic facts of this case and the conduct of counsel in this case and other cases.

Finally, defendants assert that we should not simply accept the allegations of plaintiffs' Amended Complaint and are, in fact, required to look beyond the pleadings when determining the propriety of certifying a class.

Because the scope of our factual review is of the utmost importance, we address that question first.

DISCUSSION

Scope of Review

Plaintiffs contend that the determination of class certification is required to be based on the allegations contained in their Amended Complaint. More specifically, plaintiffs contend that it is inappropriate to determine the merits of the claims of the class representatives at the class certification stage and that this is what defendants seek from

the court. Plaintiffs rely on a number of cases in support of their contentions.³⁸

On the contrary, defendants assert that we must look beyond the pleadings and that an examination of the elements of the underlying causes of action is critically important to the determination of whether class certification is proper. Defendants contend that in this circuit, the court is required to conduct its own inquiry as to whether the requirements of Rule 23 have been satisfied and that the court must go beyond plaintiffs' untested factual and legal allegations in determining the propriety of certifying a class. Defendants rely on a number of cases for their contentions.³⁹

For the following reasons, we agree and disagree in part with each party regarding the proper scope of review of plaintiffs' factual allegations.

In Eisen, supra, the United States Supreme Court stated, "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." 417 U.S. at 178,

³⁸ Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); In re: Cephalon Securities Litigation, 1998 WL 470160 (E.D.Pa. Aug. 12, 1998)(Green, J.); Neuberger v. Shapiro, 1998 WL 826980 (E.D. Pa. Nov. 15, 1998)(Ludwig, J.).

³⁹ Gariety v. Grant Thornton LLP, 368 F.3d 356 (4th Cir. 2004); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001); Johnston v. HBO Film Management, Inc., 265 F.3d 178 (3d Cir. 2001).

94 S.Ct. at 2154, 40 L.Ed.2d at 749 quoting Miller v. Mackey International, 452 F.2d 424, 427 (5th Cir. 1971).

Thereafter, in General Telephone Company of the Southwest v. Falcon, 557 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) the Supreme Court stated, "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff[s'] claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." 557 U.S. at 160, 102 S.Ct. at 2372, 72 L.Ed.2d at 752.

In Newton, supra and Johnston, supra, and based upon the Supreme Court's decision in Falcon, supra, the United States Court of Appeals for the Third Circuit recognized that in certain circumstances it is appropriate for the court to look beyond the pleadings when making its class certification decision. Newton, 259 F.3d at 166; Johnston, 265 F.3d at 186.

Based upon our review of the relevant precedent, we conclude that neither plaintiffs nor defendants are entirely correct on the scope of review of plaintiffs' allegations. It is clear that in appropriate circumstances we have the authority to go beyond the pleadings to make our class certification decision, Falcon, Newton, Johnston, but we are not required to do so. Moreover, it is equally clear that if we do go beyond the

pleadings we do not determine whether plaintiffs have stated a cause of action which may ultimately prevail on the merits.

Eisen, supra.

Accordingly, we conclude that where appropriate to go beyond the pleadings, we shall do so. If going beyond the pleadings is unnecessary to our inquiry, we are not required to, but may, look beyond the pleadings. However, we will not make the forbidden determination of whether plaintiffs' have stated a claim or whether they may likely prevail on their claims. The relevant inquiry will be limited to whether, where necessary, plaintiffs have come forward with some evidence to support their contentions.

Federal Rule of Civil Procedure 23

Rule 23 of the Federal Rules of Civil Procedure sets forth the prerequisites for class certification. A proposed class must satisfy the four criteria of Rule 23(a): numerosity, commonality, typicality and adequacy of representation.

The certification requirements of Rule 23(a) embrace two basic principles: (1) the necessity and efficiency of adjudicating plaintiffs' claims as a class; and (2) the assurance of protecting the interests of absent class members. Baby Neal v. Casey, 43 F.3d 48, 55 (3d Cir. 1994). A class must comply with each of the elements of Rule 23(a) together with one of the requirements of Rule 23(b). Amchem Products, Inc. v. Windsor,

521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997);

Rodriquez v. McKinney, 156 F.R.D. 112 (E.D.Pa. 1994)(Brody, J.).

Plaintiffs' proposed class seeks money damages, thus, the proposed class must satisfy the requirements of Rule 23(b)(3) regarding the issues of predominance and superiority. More specifically, the relevant issues are whether common questions of law or fact predominate and whether a class action represents the superior method for adjudicating the case. Newton, 259 F.3d at 181.

In that regard the applicable sections of Rules 23(a) and (b) provide:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the

members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(a) and (b).

A class action is an appropriate means for expeditious litigation of the issues where a large number of individuals may have been injured, although no one person may have been damaged to a degree which would induce the institution of individual litigation. See Eisenberg v. Nissen, 766 F.2d 770, 785 (3d Cir. 1985). "This is especially true when the defendants are corporate behemoths with a proclivity for drawing out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings." Klay v. Humana, Inc., 382 F.3d 1241, 1271 (11th Cir. 2004), cert. denied, 543 U.S. 1081, 125 S.Ct. 877, 160 L.Ed.2d 825 (2005).

Finally, "[t]he interests of justice require that in a doubtful case...any error, if there is to be one, should be

committed in favor of allowing a class action." Eisenberg, 766 F.2d at 755 (quoting Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970)). Taking these considerations together with the requirements of Rule 23, we address plaintiff's request for class certification.

Numerosity

Rule 23(a)(1) provides that the numerosity requirement is satisfied if the class "is so numerous that joinder of all members is impracticable." Joinder must be impracticable, not impossible. In re: One Meridian Plaza Fire Litigation, 1993 U.S. Dist LEXIS 9841 at *21, (E.D.Pa. July 16, 1993)(Buckwalter, J.). There is no magic number that satisfies the numerosity requirement. However, classes that include hundreds or thousands of members generally suffice for purposes of this prerequisite. Weiss v. York Hospital, 745 F.2d 786, 808 (3d Cir. 1984).

In this case, plaintiffs have shown a potential class of thousands of doctors. Specifically, plaintiffs assert that potential class is made up of family practitioners and specialists as follows:

<u>Year</u>	<u>Family Practice Providers</u>	<u>Specialists</u>
1996	1209	3146
1997	1380	3466
1998	1531	3980
1999	1632	4132

2000	1749	4304
2001	1837	4647

Defendants do not dispute that plaintiffs have satisfied the numerosity requirement. Specifically, nowhere in either Defendants' Joint Memorandum of Law in Opposition to Plaintiffs' Amended Motion for Class Certification, or at closing arguments at the class certification hearing,⁴⁰ did any defendant argue that the numerosity requirement has not been satisfied.

Notwithstanding defendants' apparent acquiescence to numerosity, we conclude that the number of family practice providers and specialists averred by plaintiffs, constitutes substantial evidence that the number of potential class members is so numerous that joinder of all of them is impracticable.

Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class". The commonality requirement is satisfied if the named plaintiffs share at least one question of fact or law with the prospective class. Weiss v. York Hospital, 745 F.2d 786, 808-809 (3d Cir. 1984). "Because the requirement may be satisfied by a single common issue, it is easily met...." Baby Neal, 43 F.3d at 56. It is not necessary that all putative class members share identical claims. Hassine v. Jeffes,

⁴⁰ Notes of Testimony of closing arguments held on March 10, 2006 at pages 43-93.

846 F.2d 169, 176-177 (3d Cir. 1988).

"Even where individual facts and circumstances do become important to the resolution, class treatment is not precluded. Classes can be certified for certain particularized issues, and, under well-established principles of modern case management, actions are frequently bifurcated." Baby Neal, 43 F.3d at 57.

Plaintiffs allege that defendants engaged in a pattern of collective behavior, or a common scheme, which has inflicted substantial harm on the entire potential class of plaintiffs which is detrimental the health of their patients and to the welfare of the general public. Plaintiffs assert that defendants have implemented claims-processing software with the ability to manipulate the CPT codes, downcode and bundle claims and delay and wrongfully deny payments to physicians for services performed. Plaintiffs contend that, based upon defendants' actions, the entire claims processing process is fraudulent.

More specifically, plaintiffs assert that because defendants fail to make the appropriate and timely payments, "physicians cannot maintain their practices and cannot provide the continuity of care that patients require and which Plaintiffs seek to provide as a matter of sound medical practice."⁴¹

Defendants seek to lump the commonality issue involved

⁴¹ Plaintiffs' Amended Complaint filed October 6, 2003 at paragraph 9.

in Rule 23(a)(2) with the predominance issue described in Rule 23(b)(3). Specifically, defendants assert that:

- (1) plaintiffs have not proved whether any class member was actually injured;
- (2) plaintiffs' allegations of fraudulent capitation payments require member-by-member analysis;
- (3) plaintiffs' allegations of fraudulent fee-for-service payments require member-by-member analysis;
- (4) the use of automated payment processing does not change the predominance of individualized issues;
- (5) plaintiffs' RICO claims require individualized proof of causation by each provider; and
- (6) individualized questions would predominate at the trial of plaintiffs' contract and prompt payment claims.

The foregoing assertions by defendants are more appropriately addressed during our discussion of the predominance issue, below. Accordingly, we decline to address those assertions here. Moreover, notwithstanding defendants' assertions, we conclude that there are numerous common issues of fact and law which satisfy the requirements of commonality pursuant to Rule 23(a)(2).

Common Facts

The numerous common issues of fact include: (1) common automated bundling practices; (2) common automated downcoding practices; (3) a common failure to pay clean claims within the applicable statutory time period; (4) a common failure to timely

place patients on capitation rolls; (5) a common failure to pay appropriate capitation or fee-for-service on guest members; (6) common proof of a conspiracy to defraud in violation of RICO; (7) a common failure to recognize CPT prescribed modifiers; (8) whether defendants improperly suspended claims to delay or deny payment; (9) whether defendants failed to pay for medically necessary covered services; and (10) whether defendants followed a "pursue and pay" or a "pay and pursue" strategy for the payment of claims under the Pennsylvania prompt payment statute.

Common Legal Issues

The common issues of law, among others, include whether defendants (1) committed mail or wire fraud; (2) violated the Pennsylvania prompt pay statute; and (3) conspired in violation of RICO.⁴²

Common Defenses

In addition, we conclude that numerous defenses are appropriate for classwide treatment, including defendants' contentions that: (1) the class claims are barred by disclosures contained in Keystone's common standard form, fill-in-the-blanks Primary Care Physician Provider Contract, specialist Consulting Agreement and Keystone's Administrative Manual (including updates

⁴² While each of these issues are based, in part, upon factual determinations, whether these factual allegations, if proven, constitute mail fraud, wire fraud, violation of the Pennsylvania prompt payment statute, conspiracy, and RICO violations are among the ultimate legal conclusions for determination in this case.

and revisions), in effect during the class period; (2) the class claims are barred by disclosures contained in the Highmark/PBS Procedural Terminology Manuals distributed by Highmark to its network of physicians during the class period; (3) the class claims are barred by disclosures contained in the Highmark/PBS "Policy Review & News" distributed by Highmark to its network of physicians during the class period; (4) the class claims are barred by the SORs sent to providers with their reimbursement checks; (5) endorsements on the SORs to the effect that acceptance of the "allowed amount" (that is, defendants' fee schedule amount) constituted a release and satisfaction of the class' claims for reimbursement for medical services even when such allowed amount was not paid; (6) the class claims are barred because the injuries and damages of the class members were caused by the conduct of others, not defendants; (7) the class claims are barred by the applicable statute of limitations; and (8) the class claims are barred because of the absence of any material misrepresentations, misleading disclosures or omissions by defendants in their standard form Primary Care Physician Provider Contract and specialist Consulting Agreement.

Based upon the foregoing, we conclude that plaintiffs have satisfied the commonality requirement of Rule 23(a)(2).

Typicality

Rule 23(a)(3) provides that the typicality requirement is satisfied if the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3) The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work for the benefit of the entire class through the pursuit of their own goals. In re Prudential Insurance Company of America, 148 F.3d 283, 311 (3d Cir. 1998).

The typicality test is not overly demanding. See O'Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 289 (E.D.Pa. 2003)(Van Antwerpen, J.). The typicality requirement may be met despite the existence of factual differences between the claims of the named plaintiffs and the claims of the proposed class. Eisenberg, 766 F.2d at 786. If "the class representatives...present those common issues of law and fact that justify class treatment, thereby tending to assure that the absent class members will be adequately represented," then Rule 23(a)(3) is satisfied. Hoxworth v. Blinder, Robinson & Co., Inc., 980 F.2d 912, 923 (3d Cir. 1992)(quoting Eisenberg, 766 F.2d at 786).

The typicality requirement is usually satisfied in cases where the proposed class representatives are challenging the same unlawful conduct which affects the named plaintiffs and the putative class even if there were varying fact patterns.

Baby Neal, 43 F.3d at 58. "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the class of the class members, and if it is based upon the same legal theory."

Hoxworth, 980 F.2d at 923. Moreover, even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories.

Baby Neal, 43 F.3d at 58.

Plaintiffs contend that they have easily met their burden of demonstrating typicality because their primary contention (that defendants unlawfully denied, delayed and reduced reimbursement payments to class members) applies equally to each member of the class. Moreover, plaintiffs assert that the same course of conduct of defendants which gives rise to plaintiffs' claims also gives rise to the claims of the entire class.

Typicality Defenses

Defendants assert four separate reasons why plaintiffs' claims are not typical. First, defendants contend that plaintiffs, who are family practice primary care providers cannot be deemed typical of approximately 4000 specialists whom they seek to represent. Second, defendants assert that plaintiffs cannot be typical of the potential class because plaintiffs fail to present evidence to establish that any other provider received

improper capitation or fee-for-service payments.

Third, defendants contend that plaintiffs are atypical because they have no standing because of the absence of any harm or actual injury to plaintiff. Fourth, defendants assert that plaintiffs are atypical because they are subject to unique defenses of reasonable reliance, materiality and ratification. For the following reasons, we disagree with defendants and find that plaintiffs have met the typicality requirement of Rule 23(a)(3).

Specialists

We disagree with defendants' contention that because plaintiffs are primary care providers they cannot be deemed typical of approximately 4000 specialists whom they seek to represent. Defendants expert Phillips C. Hurd testified at his deposition that if both a primary care provider and a specialist provide the same service, they would each bill the code for the procedure in the same manner.⁴³

Moreover, while it is conceded that only a small portion (approximately 5%) of Dr. Grider's remuneration from Keystone comes from fee-for-service⁴⁴ billing, (the majority

⁴³ Notes of Testimony of the deposition of Phillips C. Hurd conducted August 3, 2004 at page 157.

⁴⁴ In submitting the fee-for-service claim, plaintiffs use a form created by the Health Care Financing Administration and CPT codes developed by the American Medical Association to describe the services performed for the

coming from capitation), there is no difference in how Dr. Grider or any specialist submits fee-for-service claims, or in how they are treated by defendants after submission. The only difference is the number of fee-for-service claims submitted by primary care physicians versus specialists. In addition, plaintiffs have submitted separate proposed subclasses for capitation and fee-for-service claims.

Accordingly, we conclude that the defense assertion that plaintiffs' claims are not typical based upon an alleged difference between primary care physicians and specialists is without merit.

Payments

Defendants further contend that plaintiffs cannot be typical of the potential class because plaintiffs fail to present evidence to show that any other provider received improper capitation or fee-for-service payments. We find it disingenuous for defendants on the one hand to resist discovery requests by plaintiffs for production of documents involving other providers as overly broad, burdensome and irrelevant, and on the other hand to contend that plaintiffs cannot show injury to any other potential class member.

It would not be appropriate to permit defendants to

insured patient.

frustrate the discovery process⁴⁵ and then argue that plaintiffs have not met their burden of production. As noted earlier, the question is not whether plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met. Eisen, 417 U.S. at 178, 94 S.Ct. at 2154, 40 L.Ed.2d at 749. Defendants treat the within motion for class certification as if it were a dispositive summary judgment motion or a trial on the merits. It is neither.

Plaintiffs have produced evidence of possible improper bundling of claims, downcoding, denial of claims as integral without prior notification and untimely payments pursuant to the Pennsylvania prompt pay statute. The evidence does not indicate that these alleged practices have been applied only to plaintiffs Natalie Grider and Kutztown Family Practice, P.C. Rather, it appears that defendants' practices involve all Keystone providers.

Accordingly, we find defendants' assertion that plaintiffs have not shown any harm to any other member of the potential class to be without merit.

Injury

⁴⁵ We are not specifically ruling on any discovery issues in the within Opinion. However, as stated at the class certification hearing, we are concerned about the possibility that numerous relevant discoverable documents have been untimely produced or inappropriately withheld.

In the section above, we addressed defendants' contention that plaintiffs have no standing because plaintiffs have not shown any harm or actual injury to themselves. Plaintiffs have come forward with evidence to support all of their classwide claims. Thus, we conclude that defendants have not stated a valid objection to the typicality requirement.

Unique Defenses

Finally, defendants assert that plaintiffs are atypical because they are subject to unique defenses of reasonable reliance, materiality and ratification. We disagree.

The issue of whether a unique defense against the proposed class representative precludes class certification was recently addressed by the United States Court of Appeals for the Third Circuit in Beck v. Maximus, Inc., 457 F.3d 291 (3d Cir 2006). In Beck, the Third Circuit stated that "[t]o defeat class certification, a defendant must show some degree of likelihood a unique defense will play a significant role at trial. If a court determines an asserted unique defense has no merit, the defense will not preclude class certification." 457 F.3d at 300.

The Third Circuit further stated that a "proposed class representative is neither typical nor adequate if the representative is subject to a unique defense that is likely to become a major focus of the litigation." 457 F.3d at 301.

In their brief, defendants assert three unique defenses

of reasonable reliance, materiality and ratification. However, the only defense that defendants discuss in detail in opposition to plaintiffs' motion for class certification is the issue of reliance. Accordingly, we conclude that on the issues of materiality and ratification and any other purported defenses unique to the proposed class representatives, defendants fail to show some degree of likelihood that a unique defense will play a significant role at trial. Beck, supra. We address the issue of reliance below.

Reliance

RICO prohibits certain conduct involving a "pattern of racketeering activity". 18 U.S.C. § 1962. The RICO statute itself says nothing about reliance as a requirement either for civil liability or for proof of damages. Systems Management, Inc. v. Loisel, 303 F.3d 100, 103 (1st Cir. 2002). Rather, 18 U.S.C. § 1964(c), (RICO's statutory standing provision), provides a private cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962...."

In Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) the United States Supreme Court held that a plaintiff may only sue under section 1964(c) if the alleged RICO violation was the

proximate cause of plaintiff's injury.

Recently, in Anza v. Ideal Steel Supply Corp., ___ U.S. ___, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006) the Supreme Court again reiterated the proximate cause requirement. However, in that case, the majority stated that "because Ideal has not satisfied the proximate-cause requirement articulated in Holmes, we have no occasion to address the *substantial question* whether a showing of reliance is required." ___ U.S. ___, 126 S.Ct. at 1998, 164 L.Ed.2d at 731. (Emphasis added.)

Numerous circuit courts have held that reliance is an element of a RICO action based upon the predicate acts of mail and wire fraud.⁴⁶ In particular, the United States Court of Appeals for the Sixth Circuit has interpreted the section 1964(c) proximate causation provision to require a plaintiff to plead reliance in order to recover on a civil RICO claim predicated on acts of fraud. Central Distributors of Beer, Inc. v. Conn, 5 F.3d 181 (6th Cir. 1993).

Moreover, the United States Court of Appeals for the Fifth Circuit has stated, "The persuasive issues of individual reliance that generally exist in RICO fraud actions create a working presumption against class certification." Sandwich Chef

⁴⁶ See Chisolm v. TranSouth Financial Corporation, 95 F.3d 331 (4th Cir. 1996); Appletree Square I Limited Partnership v. W. R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994); Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991); County of Suffolk v. Long Island Lighting Company, 907 F.2d 1295 (2d Cir. 1990)

of Texas, Inc. v. Reliance National Indemnity Insurance Company, 319 F.3d 205, 219 (5th Cir. 2003).

We have found no decision by the United States Court of Appeals for the Third Circuit which squarely addresses whether reliance is an element that needs to be established in a civil RICO action based upon mail or wire fraud.⁴⁷ However, we are aware that numerous district courts in this circuit have engrafted a reliance requirement in RICO fraud cases.⁴⁸

In addition, we are aware of at least one district court that has borrowed a presumption of reliance from the Third Circuit's securities law jurisprudence and applied it in the RICO context.⁴⁹ Moreover, we are also aware that our colleague United States District Judge Anita B. Brody permitted reliance to be proven by inference in a RICO mail fraud case.⁵⁰

However, in Systems Management, Inc. v. Loisel, the United States Court of Appeals for the First Circuit found no basis for a reliance requirement in RICO actions alleging mail and wire fraud. The First Circuit rejected such a requirement by

⁴⁷ See New Jersey Carpenters Health Fund v. Phillip Morris, Inc., 17 F.Supp.2d 324, 339 n.19 (D.N.J. 1998).

⁴⁸ See Lester v. Percudani, 217 F.R.D. 345, n. 10 (M.D.Pa. 2003)(Conner, J.); Smith v. Berg, 2001 U.S. Dist. LEXIS 15814 (E.D.Pa. Oct 1, 2001)(O' Neill, Jr., J.); Warden v. McLelland, 2001 U.S. Dist. LEXIS 11786 (E.D.Pa. Aug. 8, 2001)(Hutton, J.); Truckway, Inc. v. General Electric, 1992 U.S. Dist. LEXIS 4954 (E.D.Pa. Mar. 30, 1992)(Reed, Jr., J.);

⁴⁹ Spark v. MBNA Corporation, 178 F.R.D. 431, 435-436 (D.Del. 1998).

⁵⁰ Rodriguez v. McKinney, 156 F.R.D. 112 (E.D.Pa. 1994).

reasoning as follows:

It is true that at common law a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud. But RICO bases its own brand of civil liability simply on the commission of specified criminal acts--here, criminal fraud--so long as they comprise a "pattern of racketeering activity"; and criminal fraud under the federal statute does not require "reliance" by anyone: it is enough that the defendant sought to deceive, whether or not he succeeded....

Perhaps there is some surface incongruity in allowing a civil RICO plaintiff to recover for fraudulent acts even though the same plaintiff could not (for lack of reliance) recover for fraud at common law. But Congress structured its civil remedy to allow recovery for harm caused by defined criminal acts, including violation of *section 1341*; and, as noted, the federal mail fraud statute does not require reliance. Thus, under a literal reading of RICO--the presumptive choice in interpretation--nothing more than the criminal violation and resulting harm is required.

This is not a conclusive argument; common law (and other) concepts can often be imported to flesh out a federal statute. Indeed, we assume here that Congress intended to require not only "but for" but also "proximate cause" to link the criminal act with the harm to the plaintiff, even though the statute says nothing specific on this point. But proximate cause--largely a proxy for foreseeability--is not only a general condition of civil liability at common law but is almost essential to shape and delimit a rational remedy: otherwise the chain of causation could be endless.

By contrast, reliance is a specialized condition that happens to have grown up with common law fraud. Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way.... There is no good reason here to depart from RICO's literal language by importing a reliance requirement into RICO.

Loiselle, 303 F.3d at 103-104. (Internal citations omitted.)(Emphasis in original.)

Additionally, in his dissent⁵¹ in Anza, United States Supreme Court Justice Clarence Thomas, relying in part on the First Circuit's decision in Loiselle, stated as follows:

In my view, the mere fact that the predicate acts underlying a particular RICO violation happen to be fraud offenses does not mean that reliance, an element of common-law fraud, is also incorporated as an element of a civil RICO claim.

Petitioners are correct that the common law generally required a showing of justifiable reliance before a plaintiff could recover for damages caused by fraud. But RICO does not confer on private plaintiffs a right to sue defendants who engage in any act of common-law fraud; instead, racketeering activity includes, as relevant to this case, "any act which is indictable under [18 U.S.C. §] 1341 (relating to mail fraud) [and §] 1343 (relating to wire fraud)." And we have recognized that these criminal statutes "did not incorporate *all* the elements of common-law fraud." Instead, the criminal mail fraud statute applies to anyone who "having devised or intending to devise any scheme or artifice to defraud...for the purposes of executing

⁵¹ In dissent, Justice Thomas answers the "substantial question" that the majority did not reach regarding whether reliance is an element that must be pled and proven in a RICO fraud action. ___ U.S. ___, 126 S.Ct. at 1998, 164 L.Ed.2d at 731.

such scheme or artifice or attempting so to do, places in any post office...any manner or thing whatever to be sent or delivered by the Postal Service...." § 1343. See § 1343 (similar language for wire fraud). We have specifically noted that "[b]y prohibiting the 'scheme to defraud,' rather than the completed fraud, the element of reliance...would clearly be inconsistent with the statutes Congress enacted."

Because an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of § 1962, without proof of reliance. Accordingly, it cannot be disputed that the Government could prosecute a person for such behavior. The terms of § 1964(c), which broadly authorize suit by "[a]ny person injured in his business or property by reason of a violation of section 1962," permit no different conclusion when an individual brings a civil action against such a RICO violator.

It is true that our decision in Holmes to apply the common-law proximate law requirement was likewise not compelled by the broad language of the statute. But our decision in that case was justified by the "very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover." This unlikelihood stems, in part, from the nature of proximate cause, which is "not only a general condition of civil liability at common law but is almost essential to shape and delimit a rational remedy." We also decided in Holmes in light of Congress' decision to use the same words to impose civil liability under RICO as it had in § 7 of the Sherman Act, 26 Stat.210, into which federal courts had implied a proximate-cause limitation. Accordingly, it was fair to interpret the broad language "by reason of" as meaning, in all civil RICO cases, that the violation must be both the cause-in-fact and the proximate cause of the

plaintiff's injury.

Here, by contrast, the civil action provision cannot be read to always require that the plaintiff have relied on the defendant's action. Reliance is not a general limitation on civil recovery in tort; it "is a specialized condition that happens to have grown up with common law fraud." For most of the predicate acts underlying RICO violations, it cannot be argued that the common law, if it even recognized such acts as civilly actionable, required proof of reliance. In other words, there is no language in § 1964(c) that could fairly be read to add a reliance requirement in fraud cases only. Nor is there any reason to believe that Congress would have defined "racketeering activity" to include acts indictable under the mail and wire fraud statutes, if it intended fraud-related acts to be predicate acts under RICO only when those acts would have been actionable under the common law.

Because reliance cannot be read into §§ 1341 and 1343, nor into RICO itself, it is not an element of a civil RICO claim.

Anza, ___ U.S. ___, 126 S.Ct. at 2007-2009, 164 L.Ed.2d at 740-742. (Thomas, J., dissenting). (Internal citations omitted.) (Emphasis in original.)

After review of all the pertinent authority on the issue of whether reliance is an element of a RICO fraud action, and in light of no apparent precedent from the Third Circuit, we find the reasoning of both the First Circuit in Loiselle and of Justice Thomas' dissent in Anza persuasive on this issue. We conclude that reliance is not an element of a RICO claim based upon the predicate acts of mail or wire fraud. Moreover, we

specifically reject the decisions of the Second, Fourth, Fifth, Sixth, Eighth and Eleventh Circuits and the district courts within this circuit that have imposed a reliance element as part of RICO mail and wire fraud claims.

In further support of our determination, we note that the Fifth Circuit in Sandwich Chef, supra, imposed a presumption against class certification of RICO claims based upon mail and wire fraud because of the reliance issue. We cannot conceive that Congress would have intended for the judiciary to eliminate from the class action forum an entire category of claims. However, that is the effect of the decisions applying reliance as an element in RICO mail and wire fraud cases. It seems that without presuming reliance it is nearly impossible to have a class certified in an area of the law where it is otherwise appropriate and judicially economical to do so. Moreover, in this circuit, the use of the class action has been viewed as a favorable device. See Baby Neal, supra.

Accordingly because we conclude that reliance is not an element of a RICO fraud action, we determine that defendants have not asserted a unique defense which will preclude a finding of typicality.

In the event that we are mistaken in our application of the caselaw on the issue of reliance, we adopt as persuasive the

reasoning of the United States Court of Appeals for the Eleventh Circuit in Klay v. Humana, supra, for the proposition that plaintiffs will be able to prove classwide reliance based upon circumstantial evidence. In Klay the Eleventh Circuit addressed the issue of reliance in a nearly identical Multi-District Litigation RICO action and determined that, as in this case: (1) the common issues of fact concerning the existence of a conspiracy, a pattern of racketeering activity, and a Managed Care Enterprise are very substantial; and (2) even though each plaintiff must prove his or her own reliance, the circumstantial evidence which could be produced at trial is common to the whole class.

Thus, the Eleventh Circuit found that the "same considerations could lead a reasonable factfinder to conclude beyond a preponderance of the evidence that each individual plaintiff relied on the defendants' representations." 382 F.3d at 1259. The Klay court went on to further discuss these common issues of reliance as follows:

The alleged misrepresentations in the instant case are simply that the defendants repeatedly claimed they would reimburse the plaintiffs for medically necessary services they provide to the defendants' insureds, and sent the plaintiffs various [SOR] forms claiming that they had actually paid the plaintiffs the proper amounts. While the [SOR] forms may raise substantial individualized issues of reliance, the antecedent representations about the defendants' reimbursement practices do not.

It does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants' representations and assumed they would be paid the amounts they were due. A jury could quite reasonably infer that guarantees concerning physician pay--the very consideration upon which these agreements are based--go to the heart of these agreements, and that doctors based their assent upon them.... Consequently, while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue).

Klay, 382 F.3d at 1259.

Based upon the allegations contained in plaintiffs' Amended Complaint and the evidence adduced at the hearing, we conclude that plaintiffs will be able to prove classwide reliance exactly in the manner set forth by the Eleventh Circuit in Klay. Thus, if reliance is an element of a RICO fraud action, plaintiff will not be subject to a unique defense that will "likely become a major focus of the litigation." Beck, 457 F.3d at 301.

Accordingly, we find that plaintiffs have satisfied the typicality requirement because they have demonstrated a common scheme or course of conduct that applies equally to the claims of plaintiff and every prospective class member.⁵² Moreover, based

⁵² "In actions under the Racketeer Influenced and Corrupt Organizations Act (RICO), the typicality requirement is satisfied if the claims of the class representative and the class arise from the same scheme by defendant to defraud the class members." See Moore's Federal Practice § 23.24(8)(d).

upon the record in this case, we conclude that plaintiffs have demonstrated that their claims, even if factually different,⁵³ arise out of the same legal claims and theories as detailed in their Amended Complaint. Finally, we conclude that plaintiff will not be subject to a unique defense apart from the proposed class.

Adequacy

Rule 23 requires that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This section seeks to protect the interests of absent class members. This is a two-part inquiry. "First, the adequacy of representation inquiry 'tests the qualifications of the counsel to represent the class.' Second, it 'serves to uncover conflicts of interest between named parties and the class they seek to represent.'" In re Prudential, 148 F.3d at 312. (Citations omitted.) For the following reasons, we conclude that plaintiffs have satisfied both tests.

Plaintiffs' Counsel

Plaintiffs are represented by four attorneys in this matter. Specifically, lead counsel Kenneth A. Jacobsen, Esquire, and co-counsel Louis C. Bechtle, Esquire, Francis J. Farina,

⁵³ "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." Baby Neal, 43 F.3d at 58.

Esquire, and Joseph A. O'Keefe, Esquire, seek to represent plaintiffs and the proposed class in this matter. Attorneys Jacobsen, Farina and O'Keefe have submitted their resumes to the court. The court is independently familiar with Attorney Bechtle.

Defendants oppose the adequacy of class counsel because of concerns about the conduct of counsel in this and other litigation and the quality of the performance and filings in this case. For the following reasons, we conclude that Attorneys Jacobsen, Bechtle, Farina and O'Keefe are more than adequate class counsel.

As noted by our former colleague, then United States District Judge, now Senior Third Circuit Court of Appeals Judge Franklin S. Van Antwerpen, Attorney Jacobsen "has had extensive experience dealing with multi-million dollar class actions relating to consumer protection, antitrust, environmental law, and securities litigation."⁵⁴

Attorney Bechtle is the former Chief Judge of the United States District Court for the Eastern District of Pennsylvania and presided over numerous class actions in his nearly 30-year career on the bench. Since 2001, Attorney Bechtle has been a partner at the law firm of Conrad, O'Brien, Gellman & Rohn in Philadelphia, Pennsylvania. Formerly, Attorney Bechtle

⁵⁴ O'Keefe, 214 F.R.D. at 289 .

served as the United States Attorney for the Eastern District of Pennsylvania. He brings to plaintiffs' legal team a wealth of knowledge and diverse experience.

Attorney Farina, who is also an accountant, focuses his practice on complex consumer fraud actions and is experienced in class action litigation. Attorney Farina has not previously participated in presentations to this court. However, a review of his qualifications reveals that he possesses experience and training which will be helpful to the class.

The court is familiar with Attorney O'Keefe, who has appeared before the undersigned in other federal actions. He has prior class action litigation experience. In other matters before the undersigned, Attorney O'Keefe has exhibited the requisite legal acumen, respect for the court and opposing counsel and an appropriate zeal in advocating for his clients.

Throughout this litigation plaintiffs' attorneys have individually and collectively displayed their legal skills. The within motion for class certification was well-briefed, the hearing was conducted with exceptional professionalism and the closing argument by Attorney Jacobsen was concise and persuasive. Moreover, throughout this litigation plaintiffs' attorneys have vigorously represented their clients and the prospective class.

All four class counsel bring different skills, knowledge and experience for the benefit of the class as a whole.

Plaintiffs' counsel have exhibited a willingness and aptitude to share the responsibilities in this hard-fought litigation. We recognize that in their zeal to represent their clients, certain counsel have become passionate about this matter. In weighing the positive attributes of the individual counsel for plaintiffs, against the objections propounded by defendants based upon the conduct of certain of plaintiffs' counsel during this litigation, we conclude that plaintiffs' counsel will more than adequately represent the interests of the class.

Proposed Class Plaintiffs

Plaintiffs Natalie Grider, M.D. and Kutztown Family Medicine, P.C. seek to act as class representatives in this matter. Specifically, plaintiffs assert that they are more than adequate class representatives because their interests are aligned with the absent class members and because they have demonstrated their commitment to this case throughout the five years that it has been pending.

Defendants contend that there are a number of reasons why plaintiffs are not adequate class representatives. Initially, defendants aver that plaintiffs are inadequate class representatives because, as primary care physicians, plaintiffs receive a great majority of their revenue through capitation payments and have no motivation to represent and maximize the alleged damages on behalf of the proposed class of physicians

(specialists in particular) who are compensated primarily on a fee-for-service basis.

Next, defendants assert that plaintiffs have already compromised the rights of the absent class members by dropping certain claims from their motion for class certification, such as RICO claims premised on extortion in violation of the Hobbs Act, bribery, violations of the Travel Act and bonus claims⁵⁵ under the individual provider contracts with Keystone. Defendants also contend that plaintiffs are not adequate class representatives because Dr. Joselito Ouano and Dr. Jin Xu, other medical providers who previously worked closely with Dr. Grider as former associates of plaintiff Kutztown, have expressed concern that Dr. Grider will not adequately protect their interests.

Finally, defendants contend that plaintiffs are not adequate class representatives because they are not typical of the absent class members. For the following reasons, we disagree with defendants and conclude that Natalie Grider, M.D. and Kutztown Family Medicine, P.C. are adequate class representatives.

Federal Rule of Civil Procedure 23(a)(4) provides that the adequacy requirement is satisfied if "the representative

⁵⁵ Plaintiffs contend that defendants' undisclosed policies affect the amount of performance-based bonuses that each provider receives from Keystone. For instance, plaintiffs assert that provider complaints to Keystone about its billing practices and about particular payments result in decreased bonus payments from Keystone.

parties will fairly and adequately protect the interests of the class." In assessing plaintiffs as proposed class representatives we must determine if plaintiffs are qualified and capable of pursuing common goals of the class without conflict.

In general, the burden of establishing class requirements rests with plaintiffs. Zlotnick v. Tie Communications, Inc., 123 F.R.D. 189, 190 (E.D.Pa. 1988) (Giles, J.). However, defendants bear the burden of proving plaintiffs' inadequacy. Stewart v. Associates Consumer Discount Company, 183 F.R.D. 189, 196-197 (E.D.Pa. 1998)(Joyner, J.). We conclude that defendants have not met their burden on this issue.

It is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether "the representative parties will fairly and adequately protect the interests of the class"...it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.

Eggleston v. Chicago Journeyman Plumbers, 657 F.2d 890, 895 (7th Cir. 1981).

In our discussion of the typicality requirement, above, we have already addressed defendants' contention that plaintiffs are not typical of the class of specialists they seek to represent because plaintiffs are primary care physicians. We

rejected that contention in part because we concluded that primary care physicians and specialists bill similarly for fee-for-service claims and defendants process those claims similarly.

Moreover, defendants' argument that plaintiff Grider will not adequately represent the fee-for-service providers because she is a family practice doctor who is compensated primarily on a capitation basis is not supported by the evidence adduced during the class certification hearing. We found credible Dr. Grider's testimony that she is very involved in this case. She did not suggest or indicate that she would pursue any class claim more or less vigorously than any other. We find defendants' bald assertions to the contrary unpersuasive.

In the same vein, defendants assert that plaintiffs are compromising the rights of putative class members because plaintiffs fail to seek certification of other claims, including RICO predicate claims premised on extortion in violation of the Hobbs Act, bribery, the Travel Act, or interference with an employee benefit plan, claims based upon the complex bonus system and certain other claims alleged in the Amended Complaint. We disagree.

In their amended motion for class certification, plaintiffs allege that they "have focused these amended class papers specifically and narrowly on the identical claims of 'bundling,' 'downcoding' and capitation 'shaving' uniformly

certified for class treatment by numerous other courts throughout the country.”⁵⁶ These additional claims are not before the court for class certification. Thus, we do not determine if these additional claims would be proper for class treatment.

Plaintiffs’ narrowing of the issues in this fashion reflects either a belief that those excluded claims are not proper for class certification, or a tactical decision to conserve relatively scarce resources and time by focusing on a few stronger claims rather than diluting their efforts by pursuing additional less persuasive, marginal and doubtful claims. Under either interpretation, plaintiffs are demonstrating sound stewardship over the interests of the class. This is particularly so in light of defendants’ assertion that none of plaintiffs’ claims are appropriate for class treatment.

Next, defendants contend that plaintiffs are not adequate class representatives because former associates of Kutztown Family Medicine, Dr. Joselito Ouano and Dr. Jin Xu, have expressed concern that Dr. Grider will not adequately protect their interests. We disagree.

Defendants reliance on the opinions of two former, apparently disgruntled, associates does not satisfy their burden on the issue of plaintiffs’ adequacy as class representatives. Moreover, we find credible and compelling Dr. Grider’s testimony

⁵⁶ Plaintiffs’ Amended Motion for Class Certification filed December 27, 2005 at page 2.

at the class certification hearing that she has support from other physicians, including specialists.⁵⁷ Accordingly, we reject defendants' argument on this issue concerning the inadequacy of plaintiffs as class representatives.

Finally, defendants contend that plaintiffs are not adequate class representatives because they are not typical of the absent class members. Pursuant to the Third Circuit's recent decision in Beck, supra, we must analyze whether plaintiffs' will be subject to a unique defense that will "likely become a major focus of the litigation." Beck, 457 F.3d at 301. As noted above, we determined that there are no such unique defenses.

In short, defendants' claims fail to convince the court that plaintiffs will be inadequate. The court had an opportunity to hear and observe Dr. Grider at the class certification hearing and found her to be intelligent, articulate and very interested in pursuing this action both on her own behalf and on behalf of the proposed class. Dr. Grider's testimony persuaded the court that she is eager to be a diligent class representative notwithstanding the rigors of the litigation process. Moreover, we conclude that based upon the length and contentiousness of the litigation to this point, Dr. Grider has shown an ability and

⁵⁷ Notes of Testimony of Natalie Grider, M.D. as a witness at the class certification hearing on March 8, 2006 at pages 36, 38-39. See also the undated Statement of the Pennsylvania Academy of Family Physicians in Support of Plaintiffs' Motion for Class Certification, signed by John S. Jordan, Executive Vice President. Plaintiffs' Exhibit 99.

desire to be present and persist for the long haul.

Accordingly, we conclude that both Dr. Grider and her medical practice are adequate class representatives and that she and her counsel will act in the best interests of the class as a whole.

Predominance

In order to certify a class, the court must find that questions of law, fact or both predominate over questions affecting only individual members of the proposed class. Fed.R.Civ.P. 23(b)(3). In determining whether common questions predominate, the court's inquiry is directed primarily toward the issue of liability. Bogosian v. Gulf Oil Corporation, 561 F.2d 434, 456 (3d Cir. 1977).

However, "unlike commonality, predominance also measures the number and relative importance of these common issues against the remaining individual issues not susceptible to classwide proof." Lester v. Percudani, 217 F.R.D. at 351.⁵⁸ As noted in our September 18, 2003 decision regarding defendants' original motion to dismiss, the claims brought pursuant to RICO for mail and wire fraud, conspiracy claims and claims under the Pennsylvania prompt payment statute all involve alleged omissions

⁵⁸ In footnote 8 of Lester, Judge Conner clarified the distinction between commonality and predominance by analogy as follows: "Commonality measures the sufficiency of the evidence, testing only whether a plaintiff has properly alleged a single common issue, while predominance examines the weight of the evidence, analyzing whether the number of common issues clearly outweighs individual issues." We adopt this appropriate analogy here.

from the provider contracts and concealment of information concerning claims processing.

Moreover, as indicated above, we have found ten common factual issues, three common legal issues and eight common potential defenses. Moreover, there is the overriding issue regarding the existence of a conspiracy.

Defendants argue that the Rule 23(b)(3) requirement has not been met in this case because individual issues will predominate over issues common to the class. Specifically, defendants assert that: (1) plaintiffs have not proven that any class member was injured; (2) plaintiffs' allegations of fraudulent capitation payments require member-by-member analysis; (3) plaintiffs' allegations of fraudulent fee-for-service payments require member-by-member analysis; (4) the use of automated payment processing does not change the predominance of individualized issues; (5) plaintiffs' RICO claims require individualized proof of causation by each provider; and (6) individualized questions would predominate the trial of plaintiffs' contract and prompt pay claims.

We disagree with defendants that categories (1) through (5) above preclude a finding of predominance. Specifically, plaintiffs have come forward with evidence that they have been injured; a member-by-member analysis is not required for the

determination of *liability*, but may likely be required for determination of damages, on either the fee-for service, capitation and prompt pay claims; and the automated payment system is at the heart of the claims brought by plaintiffs. Moreover, the issue of causation is an element in every case. If defendants were correct, no case could ever be certified for class treatment because of the individualized nature of injury causation and determination of damages.

Furthermore, we disagree that individual issues will predominate on plaintiff's prompt pay claim (half of category 6). Individual analysis will be necessary to determine damages if plaintiffs succeed in proving liability, but those issues do not predominate over the general liability issues of whether defendants improperly delay payment on "clean claims" by suspending all claims even though they are submitted on a fully completed HCFA-1500 form in the manner that defendant Keystone's policies define as a clean claim.

In plaintiffs' RICO claims based upon mail and wire fraud, conspiracy and the prompt pay claim, the common factual and legal issues and common defenses set forth above all apply to those claims and predominate because a common scheme is alleged and applies equally to each member of the proposed class.

However, notwithstanding our predominance determination on plaintiffs' RICO, and the prompt payment statute, claims, we

agree with defendants that individualized questions will predominate on plaintiffs' claim for breach of contract.

"The facts that defendants conspired to underpay doctors, and that they programmed their computer systems to frequently do so in a variety of ways, do nothing to establish that any particular doctor was underpaid on any particular occasion. Klay, 382 F.3d at 1264.

Furthermore, we agree with, and adopt the analysis of, the Eleventh Circuit in Klay regarding certification of plaintiffs' breach of contract claims:⁵⁹

The evidence that each doctor must introduce to make out each breach claim is essentially the same whether or not a general conspiracy or policy of breaching existed. For example, regardless of whether facts about the conspiracy or computer programs are proven, each doctor, for each alleged breach of contract (that is, each alleged underpayment), must prove the services he provided, the request for reimbursement he submitted, the amount he was entitled, the amount he actually received, and the insufficiency of the HMO's reasons for denying full payment. There are no common issues of fact that relieve each plaintiff of

a substantial portion of this individual evidentiary burden.

Klay, 382 F.3d at 1264.

Moreover, although Keystone allegedly breached its contracts with both primary care physician providers and

⁵⁹ See Klay, 382 F.3d 1264-1267.

specialists in the same general way, it did so through a variety of means that are not subject to generalized proof by Dr. Grider or her medical group. Specifically, even though Dr. Grider can produce evidence of breach regarding certain procedures, she cannot produce evidence on most procedures performed by specialists that would each constitute a separate breach of contract.

Furthermore, we would need to create numerous subclasses to determine each allegedly improper group of contract breaches. In this context, individual issues will certainly predominate over any common issues. Thus, certification of plaintiffs' breach of contract claims are not appropriate.

Accordingly, we conclude that common issues of fact and law as well as common defenses outlined above will predominate over individual questions on plaintiffs' RICO claims based on mail and wire fraud, conspiracy claims, and plaintiffs' claim under the Pennsylvania prompt payment statute. By contrast, we further conclude that individual issues will predominate over common issues on plaintiffs' breach of contract claim and that certification of the contract claim for class treatment would be improper.

Superiority

The superiority requirement under Rule 23(b)(3)

requires the court to balance in terms of fairness and efficiency the merits of a class action against other alternative methods of adjudicating plaintiffs' claims. In re Prudential, 148 F.3d at 316. Specifically, Rule 23(b)(3) sets forth four, non-exhaustive elements the court should consider:

The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

A class action is clearly the superior method of adjudicating the dispute between the parties because of the central issue of whether defendants engaged in a conspiracy and the alleged "common course of fraudulent conduct to automatically delay, deny and downcode payments to plaintiffs." In re: Managed Care Litigation, 209 F.R.D. 678, 697 (S.D.Fla. 2002).

Separate Actions

Based upon the difficulties and disputes that have arisen during the discovery process, it is unlikely that any potential member of the plaintiff class would seek to

individually bring suit against defendants on the claims involved here. It is not only the cost of litigation, but the time and effort needed to individually prosecute similar claims against defendants, that make separate actions implausible, if not impossible, for any prospective class members.

Other Litigation

We are aware of litigation that has been brought against other insurers in the state and federal courts throughout the Commonwealth of Pennsylvania and elsewhere, including the multi-district litigation case in Florida.⁶⁰ However, we are not aware of any other individual suits brought against these defendants in either the state or federal courts of Pennsylvania.⁶¹

Desirability of Forum

It is considerably desirable to concentrate this litigation in this district because all of the parties are located near to this court, and the proposed class of physicians are all located in Pennsylvania.

Case Management

Finally, while every class action presents its own

⁶⁰ Klay v. Humana, supra; In re: Managed Care Litigation, supra; Pennsylvania Orthopedic Society v. Independence Blue Cross, December Term 2000, No. 3482 (Consolidated), Control Nos. 081034, 080860 (C.C.P. Phila.).

⁶¹ We note that defendant Keystone Health Plan Central, Inc., operates within the confines of the geographical area of Central Pennsylvania.

unique problems of manageability, and this case has certainly posed numerous problems for the court and the litigants in getting to the class certification stage, we are confident that there is nothing in this case which presents an extraordinary problem that cannot be handled within the parameters of the system already in place. As noted, we have appointed a Special Discovery Master in this action, and she has done an admirable job of resolving many of the underlying disputes which plagued this case prior to her appointment.

Moreover, while there are certainly remaining issues which may be tedious and cumbersome, there are no insurmountable difficulties with managing this case as a class action which would outweigh the ramifications of thousands of potential suits by the individual physicians involved here.

Accordingly, we conclude that a class action is the superior method of adjudicating the claims involved in this case.

Damages

The issue of individual damages is always a factor in a class action. However, the necessity for individual damage calculations does not prevent certification when common liability issues predominate over individual issues and when the court or the parties can calculate individual damages. See *Newton v. Merrill Lynch*, 259 F.3d 154, 187-189 (3d Cir. 2001). In this case, plaintiffs have demonstrated that damages can be proven on

a classwide basis and that they can be computed in a mechanical and efficient manner.⁶²

Accordingly, we conclude that the individual calculation of damages does not, and should not, preclude class certification in this matter.

CONCLUSION

For all the foregoing reasons, we grant in part and deny in part Plaintiffs' Amended Motion for Class Certification. We certify for class treatment against all defendants on Count I of plaintiffs' Amended Complaint alleging conspiracy to commit RICO violations pursuant to 18 U.S.C. § 1962(d) in violation of 18 U.S.C. § 1962(c); Count III of plaintiffs' Amended Complaint alleging violation of RICO under 18 U.S.C. § 1962(c); and Count IV of plaintiffs' Amended Complaint alleging violation of the prompt-payment provision of Pennsylvania's Quality Health Care Accountability and Protection Act. We deny class certification on Count V of plaintiffs' Amended Complaint alleging breach of contract against defendant Keystone Health Plan Central, Inc.

⁶² During the class hearing, plaintiffs' counsel Joseph O'Keefe, Esquire, demonstrated that the information regarding claims submitted by providers can be sorted and classified in numerous ways, including by the codes submitted, the reasons for denial given by defendant Keystone, the amounts paid and numerous other categories of information.

Moreover, defendants' expert Professor Steven N. Wiggins testified that he received information on claims from defendant Highmark and was able to synthesize the information and, generate a report including numerous graphs and pie charts in only a few weeks' time.