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8 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
9 **IN AND FOR KING COUNTY**

10 FOLWEILER CHIROPRACTIC, PS, a  
11 Washington professional services corporation,

12 Plaintiff,

13 v.

14 AMERICAN FAMILY INSURANCE  
15 COMPANY,

16 Defendant.

Cause No.:

**CLASS ACTION**

COMPLAINT FOR VIOLATION OF  
CONSUMER PROTECTION ACT RCW §§  
19.86,

DEMAND FOR JURY TRIAL

17 Plaintiff, Folweiler Chiropractic, PS, (“Plaintiff” or “Folweiler”), individually and on  
18 behalf of all members of the Class of similarly situated Washington health care providers, alleges  
19 the following Complaint and causes of action against American Family Insurance Company  
20 (“Defendant” or “American Family”):

**I. PARTIES**

21 1.1 Folweiler Chiropractic, PS (“Folweiler”) is a professional services corporation that  
22 provides chiropractic and massage therapy care in King County, Washington.

23 1.2 Defendant American Family Insurance Company (“American Family”) is a foreign  
24 insurance company that is licensed to do business in Washington and did business in Washington  
25 and King County during the period from July 8, 2012 to July 8, 2016. American Family has sold  
26 and/or underwritten automobile insurance policies in the State of Washington that provided

1 Personal Injury Protection (“PIP”) coverage requiring the payment of “all reasonable and  
2 necessary” medical expenses incurred by a covered person arising from a covered accident within  
3 the meaning of the PIP statute, Chapter 48.22 RCW.

## 4 **II. JURISDICTION AND VENUE**

5 2.1 This Court has jurisdiction pursuant to RCW 2.08.010 and RCW 4.28.185.

6 2.2 As shown by the Explanation of Remittance forms (“EORS”) attached as **Exhibit**  
7 **1**, Plaintiff Folweiler billed American Family for services provided in King County to patients  
8 with PIP coverage under a American Family policy and was paid less than the amount billed by  
9 Folweiler for specific CPT procedures.

10 2.3 Defendant paid Folweiler less than the amount billed based on P0041 reductions.  
11 The reduction was determined according to a percentile of charges in the FAIR Health (“FH”)  
12 database of providers charges within a “geo-zip” geographic area. The reduced payments were  
13 made in King County, Washington, to Folweiler.

14 2.4 Over the period from July 8, 2012 to July 8, 2016, American Family did substantial  
15 business within King County, Washington.

16 2.5 Pursuant to RCW 4.12.025, venue is proper in the King County Superior Court.

## 17 **III. FACTUAL ALLEGATIONS**

### 18 **A. Plaintiffs’ Individual Factual Allegations**

19 3.1 Plaintiff re-alleges and incorporates the allegations set forth in paragraphs 1.1  
20 through 2.5 above.

21 3.2 During the period from July 8, 2012 to July 8, 2016, Folweiler treated patients  
22 who had PIP coverage under an auto policy issued and/or underwritten by Defendant American  
23 Family. Examples of such occasions are shown in the American Family EORs attached as  
24 **Exhibit 1** and incorporated into this Complaint by reference.

25 3.3 On those occasions when Folweiler provided such care and treatment, American  
26 Family directed Folweiler to bill American Family for the treatment rather than the patient.

1           3.4     Over the period from July 8, 2012 to July 8, 2016, American Family had a general  
2 policy and practice of directing Washington providers to bill American Family rather than the  
3 patient for medical expenses under the PIP coverage in the American Family policy.

4           3.5     When Folweiler billed American Family, American Family accepted Folweiler’s  
5 bill as a claim for payment of reasonable and necessary medical expenses under the patient’s PIP  
6 coverage.

7           3.6     Over the period from July 8, 2012 to July 8, 2016, American Family understood  
8 that the Washington PIP statute, Chapter 48.22 RCW, required that automobile insurers offer PIP  
9 coverage that provided “medical and hospital benefits” with minimum limits of \$10,000.

10          3.7     American Family also understood that the term “medical and hospital benefits”  
11 was defined in RCW 48.22.005(7) to mean the payment of “all reasonable and necessary” medical  
12 expenses incurred by a covered person arising from a covered accident.

13          3.8     American Family also understood that the Washington PIP statute required that all  
14 reasonable medical expense bills submitted by a provider under its PIP coverage be paid in full if  
15 the treatment was necessary and otherwise covered by its insurance policy provisions.

16          3.9     From July 8, 2012 to July 8, 2016, American Family understood that WAC  
17 §284.30.330 of the Washington Administrative Code required insurers to implement and adopt  
18 reasonable practices and procedures for investigating PIP insurance claims.

19          3.10    American Family also understood that WAC §284.30.330 required insurers to  
20 reasonably investigate a PIP insurance claim before refusing to pay the claim in full.

21          3.11    From July 8, 2012 to July 8, 2016, American Family had a policy and practice of  
22 relying on a computer database to determine payments of all medical expense bills submitted by  
23 Washington providers. The database was created by FAIR Health and utilized to compare the  
24 amount billed by the provider for each CPT procedure with the amount represented by the 80th  
25 percentile of charges in the FH database for the same CPT procedure in the same “geo-zip”  
26

1 geographical area. The “geo-zip” area was defined as the area with the same first 3 digits in the 5  
2 digit zip code associated with the provider’s billing address.

3 3.12 From July 8, 2012 to July 8, 2016, American Family’s practice was to limit PIP  
4 payments to no more than the 80th percentile amount in the FH database.

5 3.13 When the computer’s review found that the provider’s billed amount was greater  
6 than the 80th percentile amount, the computer automatically limited the “Payment Amount” to the  
7 80th percentile amount and would show the reason for the reduction as an explanation code  
8 P0041.

9 3.14 The computer created an EOR form that set out the date of service, the CPT  
10 procedure code, the “Charged Amount”, the “Payment Amount”, and an explanation code.

11 3.15 The EOR defined a P0041 explanation code as follows:

12 For Dates of Service 5/31/11 and prior, the amount allowed is based on  
13 benchmark data provided by Ingenix. For Dates of Service 6/1/11 and  
14 greater, the amount allowed was reviewed using the FH (Fair Health) RV  
15 Benchmark Database. Medical Providers are asked to accept the  
16 reasonable amount as full payment for health care services and not bill the  
17 patient for additional charges. We require supporting documentation to  
18 reconsider charges for additional payment.

19 Examples of such EORs created by the computer are attached as **Exhibit 1**.

20 3.16 From July 8, 2012 to July 8, 2016, the provider’s bill was paid by American Family  
21 at the reduced amount set out as the “Payment Amount” in the EOR. The “Payment Amount” had  
22 been set by a computer using the FH database.

23 3.17 No one in the billing department at American Family or anyone else at American  
24 Family made a decision that the provider’s billed amount was not a reasonable amount for that  
25 provider to charge in that provider’s geographic area for the CPT procedure billed before  
26 American Family sent the provider a reduced payment.

3.18 From July 8, 2012 to July 8, 2016, the American Family claims representative or  
adjustor assigned to the PIP claim did not make a decision that the provider’s billed amount was

1 an unreasonable amount for that provider to charge in that provider's geographic area for the CPT  
2 procedure billed before American Family sent the provider a reduced payment that was based on  
3 the alleged prevailing billing practices.

4 3.19 The claims representative or adjustor did not know how the computer determined  
5 the "Payment Amount" or amount allowed on the EOR.

6 3.20 The claims representative or adjustor did not know the identity, background,  
7 credentials, experience, or any other personal characteristic of the individual providers in the area  
8 whose bills the computer used as comparators in arriving at the 80th percentile amount.

9 3.21 No one at American Family associated with the payment of the provider's bill  
10 knew the identity, background, credentials, experience or any other personal characteristic of the  
11 individual providers in the area whose bills the computer used as comparators in arriving at the  
12 80th percentile amount.

13 3.22 From July 8, 2012 to July 8, 2016, the American Family representative or adjustor  
14 assigned to the PIP claim did not independently investigate whether the amount billed was a  
15 reasonable amount for that provider to charge for that CPT procedure in that provider's city. Nor  
16 did the representative or adjustor investigate if the amount billed was a reasonable amount to bill  
17 for the specific area that had the same five digit zip code as the address where the treatment had  
18 actually been provided.

19 3.23 No one at American Family associated with the payment of the provider's bill  
20 independently investigated whether the amount billed was a reasonable amount for that provider  
21 to charge for that CPT procedure in that provider's city. Nor did anyone associated with the  
22 payment of the bill investigate if the amount billed was a reasonable amount to bill for the specfiic  
23 area that had the same five digit zip code as the address where the treatment had actually been  
24 provided.

25 3.24 The claims representative or adjustor did not know whether the amount billed was  
26 a reasonable amount for that provider to charge based on the provider's background, credentials,

1 usual and customary fee, the amount paid by other auto insurers, the provider's overhead costs, or  
2 any other individualized characteristic or factor relating to that particular provider.

3 3.25 No one at American Family associated with the payment of the provider's bill  
4 knew whether the amount billed was a reasonable amount for that provider to charge based on the  
5 provider's background, credentials, usual and customary fee, the amount paid by other auto  
6 insurers, the provider's overhead costs, or any other individualized characteristic or factor relating  
7 to that particular provider.

8 3.26 From July 8, 2012 to July 8, 2016, American Family knew that the amounts that  
9 exceeded the 80th percentile amount in the FH database could be a reasonable amount for the  
10 provider to charge for the CPT procedure billed.

11 3.27 From July 8, 2012 to July 8, 2016, the amounts Folweiler billed American Family  
12 that were reduced based on the alleged prevailing billing practices were reasonable.

13 3.28 The amount billed by Folweiler and reduced by American Family were Folweiler's  
14 usual and customary amounts billed to automobile insurers for the CPT procedure billed.

15 3.29 The amounts billed by Folweiler were paid by other automobile insurers that did  
16 not use the 80th percentile amount in the FH database to determine the amount to be paid.

17 3.30 In 2010, a Washington provider, Dr. David Kerbs, filed a class action against  
18 Progressive in King County Superior Court for the State of Washington. In the complaint, Dr.  
19 Kerbs alleged in words and/or substance that Progressive had a practice of reducing provider  
20 payments on PIP claims based on the 90th percentile of the Ingenix MDR database. This type of  
21 reduction is identified in the Complaint as an explanation code 41 reduction. Dr. Kerbs alleged in  
22 words and/or substance that the "amount allowed" on the EOR and paid by Progressive based on a  
23 code 41 explanation was due to a computer setting the amount at the 90th percentile amount in the  
24 Ingenix database for the same CPT procedure in the provider's geographic area.

25 3.31 In his complaint, Dr. Kerbs alleged in words and/or in substance that Progressive's  
26 practice of making code 41 reductions to provider bills on PIP claims violated the Washington PIP

1 statute, the WAC insurance regulations pertaining to unfair claims handling practices, and was an  
2 unfair business practice that violated the Washington Consumer Protection Act (“CPA”).

3 3.32 On January 12, 2012, the King County Superior Court certified Dr. Kerbs’s CPA  
4 claim on behalf of a litigation class of all Washington providers who were paid less than the  
5 amount billed by Progressive from August 26, 2010 to August 1, 2011 due to a code 41 reduction  
6 that was based on Progressive’s use of the 90th percentile of the Ingenix to set the amount allowed  
7 and paid. Folweiler was a member of the Kerbs class.

8 3.33 In August 2012, the liability phase of Dr. Kerbs’s class action was tried before a  
9 King County jury of 12 jurors. The jury found that Progressive’s practice of making code 41  
10 reductions based on the 90th percentile of the Ingenix MDR database was an unfair business  
11 practice that violated the Consumer Protection Act and caused injury to the provider’s business.

12 3.34 On September 21, 2012, the King County Superior Court entered a judgment on  
13 liability pursuant to the jury’s Special Verdict. A copy of the judgment is attached as **Exhibit 2**  
14 and incorporated to this Complaint by reference.

15 3.35 The FH database that American Family used from July 8, 2012 to November 23,  
16 2015 in paying PIP claims in Washington relied on data collection methods that were similar to  
17 the data collection methodes used by Ingenix to create the Ingenix database.

18 3.36 One similar method was that both the Ingenix and FH dataases had data that was  
19 collected from specific health care insurers that then used their databases pay insurance claims.

20 3.37 Another similar data collection method was that both the Ingeix and FH databases  
21 did not contain any data that was collected from Washington providers directly. Another  
22 similarity was that niether the Ingenix nor FH databases had at least one bill charge from every  
23 provider in the same geographic area that billed an auto insurer for the same CPT procedure.

24 3.38 Another similar data collection method was that both the Ingenix and FH databases  
25 did not contain any data that was collected from Washington auto insurers.

1           3.39    The FH database that American Family used from July 8, 2012 to July 8, 2016, in  
2 paying Washington PIP claims relied on methodologies that were similar to the Ingenix MDR  
3 database.

4           3.40    One such similar methodology was to use “geo-zip” geographical areas that were  
5 based on the first three digits of the zip code associated with the provider’s billing address. Both  
6 FH and Ingenix used the same three-digit “geo-zip” areas for the state of Washington.

7           3.41    Some of the same flaws with with the Ingenix database identified by Dr. Bernard  
8 Siskin and/or the federal court in McCoy v. Health Net, Inc., 569 F.Supp.2d 448 (D.N.J. 2008)  
9 were flaws with the FH database that American Family used from July 8, 2012 to July 8, 2016.

10          3.42    Prior to July 8, 2012, American Family had no analysis or expert opinion that the  
11 Ingenix database and the FH database it used were materially different in any way with regard to  
12 American Family’s use of these databases to pay Washington provider bills on PIP claims.

13          3.43    Prior to July 8, 2012, American Family did not determine that using a percentile of  
14 the FH database would produce a materially different result with regard to the payment of all  
15 reasonable medical bills submitted on Washington PIP claims than what the result would have  
16 been had American Family used the Ingenix MDR database.

17          3.44    Prior to July 8, 2012, American Family did not investigate whether its use of a  
18 percentile of the FH database to make prevailing billing practices reductions had resulted in the  
19 same type of unfair CPA practice that the King County Superior Court jury in the Kerbs’s case  
20 found was an unfair CPA practice when Progressive used a percentile of the Ingenix database of  
21 provider charges to make code 41 reductions to Washington provider bills.

22          3.45    Prior to July 8, 2012, American Family had no facts showing that its practice of  
23 using a percentile of the FH database to make prevailing billing practices reductions to  
24 Washington provider bills was materially different than Progressive’s practice of using a  
25 percentile of the Ingenix database to make code 41 reductions.



1 3.46 Prior to July 8, 2012, American Family had no analysis or expert opinion that its  
2 practice of using a percentile of the FH database to make P0041 reductions to Washington  
3 provider bills was materially different than Progressive's practice of using a percentile of the  
4 Ingenix database to make code 41 reductions.

5 3.47 During the period from July 8, 2012 to July 8, 2016, Folweiler suffered injury and  
6 damage to its business as a direct and proximate result of American Family's practice of making  
7 P0041 reductions to Washington provider bills in the manner described above.

8 **B. Putative Class Allegations**

9 3.48 The Putative Class incorporates herein by reference each and every allegation  
10 contained in paragraphs 1.1 to 3.47 above as if fully set forth here.

11 **1. American Family's Practices With Regard to the Members of the Putative**  
12 **Class**

13 3.49 Over the period from July 8, 2012 to July 8, 2016, there were Washington health  
14 care providers who billed American Family for medical expenses incurred by patients with PIP  
15 coverage under a American Family policy and were paid less than the amount billed based solely  
16 on P0041 explanation code.

17 3.50 American Family directed these providers to bill American Family directly for the  
18 treatment under the applicable PIP policy rather than billing the patient.

19 3.51 These providers billed American Family their usual and customary charge for the  
20 CPT procedure that that the providers billed other auto insurers.

21 3.52 These providers were paid the amounts billed American Family for the CPT  
22 procedures by other auto insurers that did not use a percentile of a database to limit their payment  
23 under their PIP coverage to Washington providers.

24 3.53 This group of Washington providers who billed American Family over the period  
25 from July 8, 2012 to July 8, 2016 and were paid less than the amount billed due to a P0041  
26 reduction. The providers were paid less than the amount billed based on American Family's

1 practice of limiting the “Payment Amount” or amount allowed to no more than the 80<sup>th</sup> percentile  
2 of the FH database as automatically determined by a computer.

3 3.54 The group of Washington providers who billed American Family over the period  
4 from July 8, 2012 to July 8, 2016 and were paid less than the amount billed due to a P0041  
5 reduction is a class of at least 900 Washington providers (“the Class members”).

6 3.55 American Family applied the same practices described in paragraphs 3.3 to 3.53  
7 above to these Class members that American Family applied to the bills of Folweiler.

8 3.56 American Family applied the same practice of using a computer to set the  
9 “Payment Amount” or amount allowed and paid at no more than the 80<sup>th</sup> percentile of the FH  
10 database to the bills of all Class members who had P0041 reductions.

11 3.57 The EORs that American Family sent to the Class members show occasions when  
12 American Family reduced the provider’s bill based on a P0041 reduction.

13 3.58 The 900 members of the Class described in paragraphs 3.49 – 3.56 above are  
14 dispersed geographically over the State of Washington in multiple cities and counties.

15 3.59 Plaintiff Folweiler is a member of this class of Washington providers.

16 3.60 Prior to paying the members of this class of Washington providers less than the full  
17 amount billed based on a P0041 reduction, American Family had not entered into a contract with  
18 the provider to accept less than the provider’s usual and customary charge for the services billed  
19 other auto insurers. American Family had not entered into any contract with the provider to  
20 accept less than the market rate for the services provided, defined as the amount a willing patient  
21 would pay on the open market for the services. Nor did American Family offer to pay the  
22 provider in cash, in full, at the time of service.

23 3.61 Over the period from July 8, 2012 to July 8, 2016, American Family did not have a  
24 practice of offering to pay providers a reduced “cash rate” at time of service.

1           3.62    American Family knows of no occasion when American Family paid a provider in  
2 cash, in full, at the time of service instead of requiring that the provider bill American Family for  
3 the service.

4           3.63    American Family knows of no occasion when American Family paid a provider  
5 without requiring the provider to bill American Family by CPT numbered procedures and by the  
6 number of units of that CPT numbered procedure to be paid.

7           3.64    When American Family paid the Class member less than the full amount billed  
8 based on a P0041 reduction, the amount paid was not based on a PPO or insurance plan rate.

9           3.65    The amount paid was not based on a fee schedule set by the State of Washington.

10          3.66    The State of Washington has not adopted a fee schedule that sets the fee to be paid  
11 providers for CPT procedures billed on a PIP claims. Other states, like New Jersey, have adopted  
12 such a fee schedule.

13          3.67    When American Family paid the Class member from July 8, 2012 to July 8, 2016  
14 less than the full amount billed based on a P0041 reduction, the American Family claims  
15 representative or adjustor assigned to the claim did not independently investigate whether the  
16 amount billed was a reasonable amount for the provider to charge for the CPT procedure based on  
17 that provider's background, credentials, years of practice, overhead costs, reputation, the medical  
18 market in which the provider competed with other providers that provided the same treatment  
19 services, the amount paid by other auto insurers, or any other individual circumstance relating to  
20 the provider.

21          3.68    Before American Family sent the reduced check or payment to the Class member  
22 that was based on a P0041 reduction, no one at American Family made such an investigation.

23          3.69    In paying Class members over the period from July 8, 2012 to July 8, 2016, the  
24 person who made the payment for American Family relied solely on a "Payment Amount" set out  
25 in the EOR as the amount to pay the provider for the CPT procedure billed.

1           3.70    The Class members suffered injury to their businesses and/or property as a direct  
2 and proximate result of American Family’s practice of making P0041 reductions from July 8,  
3 2012 to July 8, 2016.

4           3.71    The total amount of prevailing billing practices reductions made to the bills of each  
5 individual Class member from July 8, 2012 to July 8, 2016 was small and averaged less than  
6 \$300.

7           3.72    The total amount of all P0041 reductions on all bills of all members of the Class  
8 from July 8, 2012 to July 8, 2016 total less than \$1 million.

9           3.73    The total amount in controversy on the claims of the members of the Class  
10 described in this Complaint is substantially less than Five Million Dollars (\$5,000,000). The  
11 maximum amount of all damages, treble or exemplary damages, costs and attorneys fees, and/or  
12 any other relief awardable under Washington law is less than Five Million Dollars (\$5,000,000).

13           3.74    Many of the Class members whose bills were reduced by American Family based  
14 on P0041 reductions were class members in the Kerbs case and had their bills reduced by  
15 Progressive using a code 41 reduction that was also based on a percentile of a database of charges.  
16 These providers billed American Family the same amounts for the same CPT procedure that the  
17 jury and Judge Armstrong found were reasonable amounts in the Kerbs case when billed to  
18 Progressive. Folweiler was one such Kerbs class member.

19           **C.     Civil of Procedure Rule 23 Allegations**

20           3.75    Folweiler brings this action as a Class Action pursuant to Civil Rule 23 of the  
21 Washington State Superior Court Civil Rules. Plaintiff seeks to certify the following Class:

22           All Washington health care providers who from July 8, 2012 to July 8, 2016 (the  
23 “Class period”) had their PIP claims for reimbursement of medical expenses  
24 reduced by Defendant American Family Insurance Company (“American Family”) based solely on an explanation code P0041 as set out in the Explanation of Remittance form sent to the provider.

1           3.76   **CR 23(a)(1):** Class certification is proper under CR 23(a) (1) because the members  
2 of the class total at least 900 health care providers and the providers are geographically dispersed  
3 over numerous cities and counties in the state of Washington.

4           3.77   Because of the number of Class members and their geographic dispersion,  
5 individual joinder of each putative class member is not practicable.

6           3.78   **CR 23(a)(2):** Class certification is proper under CR 23(a)(2) because American  
7 Family applied a common practice of making P0041 reductions to the bills of all class members  
8 over the class period from July 8, 2012 to July 8, 2016. American Family’s practices raise  
9 questions of law and fact common to all members of the Class including::

10           a.       Whether over the Class period, the P0041 reductions made to class member bills  
11 were based on American Family’s use of the 80<sup>th</sup> percentile of the FH database to limit payments  
12 on PIP claims.

13           b.       Whether over the Class period, American Family’s P0041 reductions were based  
14 on a computer automatically setting the “Payment Amount” that was shown on the EOR that  
15 went to providers based on the 80<sup>th</sup> percentile of the FH database.

16           c.       Whether over the Class period, American Family used or relied on a percentile of  
17 the FH database to make P0041 reductions without conducting its own independent investigation  
18 of whether the amount billed was a reasonable amount for that provider to charge.

19           d.       Whether over the Class period, American Family had knowledge of any flaws with  
20 the FH database or limitations in using a percentile of the database to set or determine provider  
21 payments under its PIP coverage.

22           e.       Whether over the Class period, American Family had any knowledge of any  
23 similarities between the Ingenix database and the FH database it used over the Class period.

24           f.       Whether American Family’s practice over the Class period of making P0041  
25 reductions violated the requirement in the PIP statute, RCW 48.22.005(7), to pay “all reasonable”  
26 medical expenses submitted.

1 g. Whether American Family's practice over the Class period of making P0041  
2 reductions violated WAC §284.30.330 et seq. that required American Family to adopt and  
3 implement reasonable procedures for investigating PIP insurance claims before refusing to pay  
4 them in full.

5 h. Whether American Family's practice over the Class period of making P0041  
6 reductions violated WAC §284.30.330 et seq. that required American Family to independently  
7 investigate a PIP insurance claim before refusing to pay it in full.

8 i. Whether American Family's practice of making P0041 reductions over the Class  
9 period was an unfair business practice that violated the Washington Consumer Protection Act,  
10 RCW 19.86 et seq.

11 j. Whether there were any benefits to providers from American Family's practice of  
12 making P0041 reductions, whether the benefits substantially outweighed any detriments to the  
13 providers, and whether providers could avoid having their bills reduced based on P0041  
14 reductions when submitting PIP claims to American Family for payment of reasonable medical  
15 expenses incurred by a covered patient.

16 k. Whether American Family's practice is an unfair practice that violates the CPA in  
17 relationship to the applicable Washington law and regulations relating to the payment of PIP  
18 insurance claims, including RCW 4.22.005(7) and WAC §284.30.330 et seq.

19 l. Whether class members sustained injury to their business caused by American  
20 Family's practice in the form of reduced payments, delay in payment of reasonable medical  
21 expenses, out of pocket administrative costs or added expenses, business interruption or  
22 inconvenience, or in some other manner.

23 m. Whether class members sustained monetary damages to their business caused by  
24 American Family's practice.

25 3.79 **CR 23(a)(3):** Class certification is proper under CR 23(a)(3) because Folweiler's  
26 claims are typical of the claims of the members of the putative class and American Family's

1 defenses to the claims of Folweiler are also typical of the defenses to such claims. The claims and  
2 defenses are typical because they arise out of the same common policies and practices which  
3 Progressive applied to all Class member bills submitted under its PIP coverage. The claims arise  
4 from the same alleged unfair scheme undertaken by American Family to deprive Washington  
5 providers of full compensation for their services based on P0041 reductions.

6       3.80   **CR 23(a)(4):** Class certification is proper under CR 23(a)(4) because Folweiler can  
7 fairly and adequately represent the interests of the other members of the Class. He has no interests  
8 that are antagonistic to the interests of the Class members in seeking full payment of all bills  
9 reduced using P0041 reductions. Folweiler has retained skilled attorneys who have represented  
10 claimants and class members with similar claims to those brought in this lawsuit. Folweiler's  
11 counsel were appointed Class counsel in the Kerbs case discussed in paragraph 3.30 above.

12       3.81   **CR 23(b)(3):** Class certification is proper under CR 23(b)(3) because the questions  
13 of law and fact common to the class, as set forth above in paragraph 3.64 predominate over any  
14 questions affecting only individual members of the class. Common questions predominate  
15 because American Family undertook a common course of conduct towards all members of the  
16 class of Washington health care providers and applied its practices at issue to all bills submitted  
17 under its PIP coverage during the class period.

18       3.82   Class certification is proper under CR 23(b)(3) because a class action is a superior  
19 method for adjudicating the claims of the members of the class than hundreds of individual  
20 actions in numerous cities and counties of Washington that raise the identical factual and legal  
21 issues concerning American Family's reimbursement practices based on prevailing billing  
22 practices reductions.

23       3.83   Class certification is a superior method of adjudicating the claims because the  
24 individual class members have little interest in individually controlling the prosecution of their  
25 claims. The average amount of the individual claims in controversy is likely to be less than \$300.  
26

1           3.84    The class members are busy health care professionals who have limited time to  
2 devote to the prosecution of their individual claims.

3           3.85    Class certification is a superior method of adjudicating the claims because there is  
4 no significant individual litigation already commenced by Washington health care providers  
5 against American Family raising the identical claims relating to the FAIR Health database.

6           3.86    Class certification is a superior method of adjudicating the claims because it is  
7 desirable to concentrate the litigation and claims in a single forum to avoid duplicity of actions  
8 and inconsistent adjudications of identical claims. King County is a desirable forum for litigation  
9 of the class claims because it is the County in which most class members are located and where  
10 the Defendants’ in-state witnesses are likely located. The cost to the court system of the various  
11 counties where class members are located would be substantial if the claims were adjudicated on  
12 an individualized basis.

13           3.87    Class certification is a superior method of adjudicating the claims because there are  
14 few difficulties likely to be encountered in the adjudication of the class members’ legal claims.  
15 The King County Superior Court certified a litigation class that alleged similar claims in the Kerbs  
16 case. The common liability issues were tried to a jury on a class basis and a verdict entered.

17                           **IV.    LEGAL CLAIMS AND CAUSES OF ACTION**

18                           **COUNT I:    VIOLATION OF CONSUMER PROTECTION ACT**

19           4.1    Plaintiffs re-allege each and every allegation as set forth in paragraphs 1.1 to 3.87  
20 above as through set forth here.

21           4.2    American Family’s practice over the class period of making P0041 reductions  
22 violated the requirement in the PIP statute, RCW 48.22.005(7), to pay “all reasonable” medical  
23 expenses submitted.

24           4.3    American Family’s practice over the class period of making P0041 reductions  
25 violated WAC §284.30.330 et seq. that required American Family to adopt and implement  
26 reasonable procedures for investigating PIP insurance claims before refusing to pay them in full.



1           4.4     American Family’s practice over the class period of making P0041 reductions  
2 violated WAC §284.30.330 et seq. that required American Family to independently investigate a  
3 PIP insurance claim before refusing to pay it in full.

4           4.5     American Family’s practice of making P0041 reductions occurred in the course of  
5 its business and in commerce.

6           4.6     American Family’s practice in making P0041 reductions was part of a generalized  
7 course of conduct repeated on thousands of occasions when provider bills were submitted to  
8 American Family for payment under its PIP coverage over the class period.

9           4.7     American Family’s practice affected the public interest.

10          4.8     The business of insurance affects the public interest. RCW48.01.030.

11          4.9     American Family’s practice of making P0041 reductions occurred in the course of  
12 its insurance business and affected at least 900 Washington health care providers or more over the  
13 Class period.

14          4.10    American Family’s practice of making P0041 reductions over the class period was  
15 an unfair practice that violated the Washington Consumer Protection Act, RCW 19.86 et seq.

16          4.11    There were no benefits to providers from American Family’s practice of making  
17 P0041 reductions. Any benefit to providers of American Family’s practice was substantially out-  
18 weighed by the detriments to the providers in having their bills reduced. Providers could not avoid  
19 having their bills reviewed and reduced based on P0041 reductions when submitting PIP claims to  
20 American Family for payment of reasonable medical expenses incurred by a covered patient.

21          4.12    American Family’s practice of making P0041 reductions over the class period was  
22 an unfair business practice that violated the Washington Consumer Protection Act, RCW 19.86 et  
23 seq., in relationship to the requirements of the PIP statute and WAC §284.30.330 et seq.

24          4.13    Class members sustained injury to their business caused by American Family’s  
25 practice in the form of reduced payments, delay in payment of reasonable medical expenses, out  
26 of pocket administrative costs or added expenses, business interruption or inconvenience.

1           4.14 Class members sustained damages that were proximately caused as a direct result  
2 of American Family’s practice.

3           4.15 American Family is liable to Plaintiff and the Class for statutory, actual and treble  
4 damages, prejudgment interest, attorneys’ fees and costs under the CPA, RCW 19.86 et seq.

## 5   **V. DAMAGES**

6           Plaintiff and the Class incorporate the allegations made in paragraphs 1.1 – 4.15 above as  
7 though fully set forth herein.

8           5.1 As a direct and proximate result of American Family’s wrongful conduct described  
9 in paragraphs 1.1 – 4.15 above, the Plaintiff and the Class sustained injury to their property and  
10 business and damages in amount that will be established at trial, but which amount is substantially  
11 less than \$5,000,000.

12           5.2 The injury and damages include but is not limited to loss of income from under-  
13 payment of their bills, delayed payment of their bills, loss of revenue due to time spent away from  
14 their health care practice to address American Family’s wrongful conduct and out of pocket  
15 expenses. Excluded from damages are P0041 reductions that were subsequently paid in full by  
16 American Family and reduction made on PIP claims with exhausted policy limits.

17           5.3 Folweiler’s individual claim is less than \$50,000.

## 18   **VI. PRAYER FOR RELIEF**

19           WHEREFORE, Plaintiffs and the Class respectfully pray that this Court enter judgment in  
20 their favor and against Defendant American Family on their Consumer Protection Act claim and  
21 that the Court:

22           6.1 Certify the case as a Class Action under CR 23 on behalf of the alleged Class.

23           6.2 Award actual damages to be established at trial as provided by the Consumer  
24 Protection Act (CPA), RCW 19.86 et seq.;

25           6.3 Award treble damages as provided by the CPA, RCW 19.86 et seq.;

