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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

FOLWEILER CHIROPRACTIC, PS, a
Washington professional services corporation,

Plaintiff,

v.

AMERICAN FAMILY INSURANCE
COMPANY,

Defendant.

No.: 16-2-16112-0 SEA

ORDER GRANTING UNOPPOSED
MOTION TO AMEND COMPLAINT,
CERTIFY A SETTLEMENT CLASS,
APPOINT CLASS REPRESENTATIVE
AND CLASS COUNSEL, AND GRANT
PRELIMINARY APPROVAL OF CLASS
SETTLEMENT

The parties have advised the Court that the case has settled on a class-wide basis consistent with the Plaintiff’s proposed Amended Complaint. This matter now comes before the Court on the Plaintiff’s motion for an order that provides the following relief:

1. Grants leave to file an amended complaint (“AC”) for settlement purposes only, that brings the class period up to the present, i.e. the date on which Preliminary Approval of the class settlement is granted, adds a new defendant, American Family Mutual Ins. Co., the parent of

1 Defendant American Family Insurance Company and adds a claim relating to Code 41 reductions
2 made to Washington provider bills submitted on Medical Payment (“MedPay” claims);

3 2. Grants certification of a Settlement Class for purposes of furthering the settlement
4 of the Lawsuit and appoints Dr. David Folweiler as Class Representative and Folweiler’s counsel
5 as Class Counsel;

6 3. Grants approval of the proposed form of Notice to be sent by mail, individually to
7 Settlement Class members advising them of the settlement and their rights to exclude themselves
8 or object to the settlement terms;

9 4. Grants preliminary approval of the settlement and necessary distributions to the
10 Settlement Administrator;

11 5. Sets the date for Class members to exclude themselves or object as January 31,
12 2020; and

13 6. Sets the date for an in-court hearing on final approval of the settlement and entry
14 of judgment dismissing the action with prejudice as February 19, 2020 at 3:30 p.m.

15 Plaintiff’s motion is unopposed by Defendant American Family.

16 Upon review and consideration of Plaintiff’s unopposed Motion, the Attachments to the
17 Motion, the Declaration of Plaintiff’s Counsel and exhibits attached thereto, the files and record,
18 and the Court being otherwise fully informed of the issues, does hereby GRANT the motion in
19 its entirety and makes the following findings and conclusions
20
21

22 **I. FINDINGS AND CONCLUSIONS**

23 **A. Amendment of the Pleadings**

24 ORDER GRANTING UNOPPOSED MOTION TO
25 AMEND COMPLAINT, CERTIFY A SETTLEMENT
26 CLASS, APPOINT CLASS REPRESENTATIVE AND
CLASS COUNSEL AND GRANT PRELIMINARY
APPROVAL OF CLASS SETTLEMENT - 2
(No.16-2-16112-0 SEA)

BRESKIN | JOHNSON | TOWNSEND PLLC
1000 Second Avenue, Suite 3670
Seattle, Washington 98104 Tel: 206-652-8660

1 1. The parties advise that on September 10 and 11, they mediated the case with
2 mediator Stew Cogan, a well-known and experienced Seattle mediator.

3 2. As a result of the mediation and the “arms-length” negotiations at the mediation,
4 the parties arrived at a settlement that requires amendment of the Complaint to bring the class
5 period up to the present, i.e. the date on which preliminary approval of the settlement is granted,
6 and adds American Family Mutual Insurance Company, the parent of the current Defendant, as an
7 additional settling defendant.

8 3. The motion is unopposed.

9 4. CR 15 provides for amendment of the Complaint “when justice so requires” and
10 CR 23(d) and (e) provide for entry of orders in furtherance of the class action and settlement of a
11 class action.
12

13 5. The proposed amendments to the Complaint are consistent with the terms of the
14 parties’ settlement and should be granted.

15 **B. Certification of a CR 23(b)(3) Settlement Class**

16 1. A settlement class may be certified if the requirements of CR 23(a) and one subsection
17 of CR 23(b) are met.

18 2. The “numerosity” requirement of CR 23(a)(1) for a settlement class is met because
19 the Amended Complaint alleges that the class consists of at least 900 Washington health care
20 providers from different geographic areas of Washington.
21

22 3. The number and geographic dispersion of class members make individual joinder
23 impracticable.
24

1 4. The “commonality” requirement of CR 23(a)(2) for a settlement class is met
2 because the claims to be settled raise common issues of fact and law relating to the Defendants’
3 alleged practice of reducing payments of Washington Personal Injury Protection (“PIP”) and
4 Medical Payment (“MedPay”) claims to the 85th percentile. Whether Defendants alleged practice
5 is consistent with Washington law and/or is an “unfair” Consumer Protection Act (“CPA”) practice
6 raises a common issue for the CPA claims of all individual class members.

7
8 5. The “typicality” requirement of CR 23(a)(3) is met for a settlement class because
9 Plaintiff Folweiler’s claim arises from the same alleged conduct, practice or course of conduct as
10 the claims of the Class.

11 6. The “adequacy of representation” requirement of CR 23(a)(4) for a settlement class
12 because Plaintiff Folweiler has no interest in the settlement or settlement of his claim that is
13 antagonistic to the interests of the settlement Class and he has retained competent counsel who
14 have knowledge and experience adjudicating similar CPA claims in PIP and MedPay cases.

15 7. The “predominance” requirement of CR 23(b)(3) is met for a settlement class
16 because the common issues of fact and law relating to whether the Defendants’ practice is
17 consistent with Washington law and/or is an unfair CPA practice predominates on the Class claim
18 over any issue relating solely to individual members of the settlement class.

19 8. The “superiority” requirement of CR 23(b)(3) is met for a settlement class because
20 the Amended Complaint alleges that the average individual class member claim is small and likely
21 not more than \$300. Resolving the class claims in a class settlement is a superior method for
22 adjudicating the claims compared to individual adjudications and will promote judicial economy.
23
24

1 9. The “maintenance” factor or consideration under CR 23(b)(3) is not applicable to
2 a settlement class because the class claim will be resolved through settlement not trial.

3 10. Because the requirements of CR 23(a) and (b) have been met for a settlement class
4 and certification would be in furtherance of the parties’ settlement, the Plaintiff’s motion for
5 certification of the proposed settlement Class should be granted.

6 11. Dr. Folweiler is an appropriate class representative based on his involvement in the
7 case to date, his background and experience in prior class action settlements and the absence of
8 any conflicts with the settlement of the class claims here. He will adequately protect the interests
9 of the settlement class and should be appointed the Class representative for a proposed settlement
10 class.

11 12. Plaintiff Folweiler’s counsel have significant knowledge of the Class claim and
12 significant experience resolving prior similar PIP and MedPay class actions through class-wide
13 settlements. Plaintiff Folweiler’s counsel will adequately protect the interests of the settlement
14 class and should be appointed Class Counsel.

15
16
17 **C. The Settlement Class, Class Representative, and Plaintiff’s Class Counsel**

18 1. The Court provisionally certifies the following class for settlement purposes only:

19 All Washington healthcare providers who from July 8, 2012 through the date of
20 preliminary approval had their PIP or MedPay claims for reimbursement of
21 medical expenses reduced by Defendants based on an explanation code P0041 as
set out in the Explanation of Remittance form sent to the provider.

22 2. The Court appoints Folweiler Chiropractic, P.S. as the representative of the
23 certified Settlement Class.

1 3. The Court appoints Class Counsel to represent the Settlement Class as follows:

2 David E. Breskin
3 Brendan W. Donckers
4 Breskin, Johnson, & Townsend, PLLC
5 1000 Second Avenue, Suite 3670
6 Seattle, Washington 98104

7 **D. Preliminary Approval of the Settlement Agreement**

8 1. The Court has reviewed the Settlement Agreement, pleadings, and proceedings to
9 date in this matter. The definitions in the Settlement Agreement are hereby incorporated as though
10 fully set forth in this Order, and capitalized terms shall have the meanings attributed to them in the
11 Settlement Agreement.

12 2. The Parties have agreed to resolve the above-captioned matter upon the terms and
13 conditions set forth in the Settlement Agreement filed with the Court. The Settlement Agreement
14 is preliminarily approved as “fair, adequate and reasonable” under *Pickett v. Holland American*
15 *Lines*, 147 Wn. 2d 178 (Wash. 2001), and therefore the Class notice of the settlement described
16 below should be disseminated. In making this determination, the Court has considered the factors
17 set forth in *Pickett*, as well as the current posture of the Lawsuit, the risks and benefits to the Parties
18 involved in both Settlement of these claims, the extent of discovery undertaken of the critical
19 factual issues, the duration of the Lawsuit and the continuation of the Lawsuit.

20 3. The Court finds that the Settlement provides meaningful monetary benefits to the
21 Class members and falls within the range of reasonableness compared to other similar settlements
22 in prior similar King County Court class actions. These benefits appear reasonable given the
23

1 relative merits of the Plaintiff's claims and the Defendant's defenses, the likely costs, uncertainties
2 and length of further litigation and the recommendation of experience counsel.

3 4. The Court finds that the proposed distribution formula for payment of valid class
4 claims submitted to the settlement administrator, the proposed class representative incentive award
5 to Dr. Folweiler and the proposed attorney fee and cost award to Plaintiff/Class counsel appear
6 reasonable and fall within the range of reasonableness compared to other similar settlements in
7 prior similar King County Superior Court class actions.

8 5. The Court also finds that the Settlement between the Settlement Class and the
9 Defendants was arrived at by arm's-length negotiations by experienced counsel with the assistance
10 of a well-respected mediator, and is in the best interests of the Class Members. The Settlement has
11 key indicia of fairness, in that: (1) the negotiations occurred at arm's-length and involved an
12 experienced private mediator; (2) there was extensive litigation and discovery in the Lawsuit and
13 other cases concerning the critical factual issues; and (3) the proponents of the Settlement are
14 experienced in similar litigation.

15 6. Accordingly, the Court further finds that there is a sufficient basis for notifying the
16 Settlement Class of the Settlement, and for enjoining the Class Members from proceeding in any
17 other action pending the Court's determination of whether final approval of the Settlement should
18 be granted.
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- a. Obtaining and processing the requisite data for notice;
- b. Establishing a Settlement Website, Post Office box and toll-free telephone line;
- c. Responding to requests and other inquiries from Class Members, and forwarding written inquiries to the Parties if warranted;
- d. Printing, mailing, or arranging for the dissemination of notice;
- e. Handling returned mail not delivered to Class Members;
- f. Receiving and maintaining on behalf of the Court any Class Member correspondence regarding requests for exclusion and/or objections to the Settlement;
- g. Reviewing and determining the validity of all claims filed;
- h. Processing and transmitting distributions to Class Members;
- i. Carrying out such other responsibilities as are provided for in the Settlement Agreement or may be ordered by the Court or agreed upon by the Parties.

6. The following sets forth deadlines regarding the duties of the Settlement

Administrator:

- a. As soon as practicably possible and no later than January 10, 2020, the Settlement Administrator shall establish and make operational the Settlement Website, Post Office box and toll-free telephone line and post, among other things, the Preliminary Approval on the Settlement Website;
- b. As soon as practicably possible and no later than January 10, 2020, the Settlement Administrator shall make the Long Form Notice and the Claim Form available to the Class Members on the Settlement Website;
- c. As soon as practicably possible and no later than January 10, 2020, the Settlement Administrator shall mail the Postcard Notice to all of the Class Members by first-class mail using the last known mailing address of the Class Member.

1 3. Plaintiff's Motion for approval of the parties' proposed Notice Plan and Form of
2 Class Notice is GRANTED and the approved Notice Plan and Form of Notice shall be
3 implemented and disseminated in furtherance of the Class settlement.

4 4. The motion for Preliminary Approval of the Class Settlement is GRANTED.

5 In furtherance of the Settlement and consistent with its terms, the Court enters the further
6 Order relating to the settlement claims process, submission of requests for exclusion and
7 objections:
8

9 **B. Further Order Relating to Settlement, Claims Submissions, Requests for**
10 **Exclusion, and Objections, Release, and Further Proceeding**

11 In furtherance of the settlement and consistent with its terms, the Court enters the further
12 order. It is ORDERED:

13 1. Any Class Member wishing to submit a claim under the Settlement must submit a
14 complete and signed Claim Form to the Settlement Administrator via electronic mail or first-class
15 U.S. Mail, postmarked no later than within 60 days after the Final Approval Hearing. The date of
16 the postmark on the return mailing envelope shall be the exclusive means used to determine
17 whether a claim has been timely submitted. Any Claim Forms submitted after this date shall be
18 void.
19

20 2. Each Class Member who wishes to be excluded from the Settlement Class and
21 follows the procedures set forth in this paragraph shall be deemed excluded from the Settlement
22 Class. Any member of the Settlement Class wishing to be excluded from the Settlement must send
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1 to the Settlement Administrator by first-class U.S. Mail a written request to be excluded from the
2 Settlement. The request must include:

- 3 a. The individual's name and address;
- 4 b. A statement that he or she wants to be excluded from the Settlement in *Folweiler*
5 *Chiropractic, P.S. v. American Family Insurance Company, et al.*, No. 16-2-16112-0
6 SEA (Sup. Ct. King County WA), and;
- 7 c. The individual's signature.

8 3. Class Members who do not timely exclude themselves and who wish to object to
9 any aspect of the Settlement, including the requested Attorneys' Fees and Expenses or Case
10 Contribution Fees, must send their written objection to the Court and counsel, via first-class mail,
11 postage prepaid, to:

12 *The Court:*

13 Clerk of the Court
14 King County Superior Court
15 516 3rd Avenue
16 Seattle, Washington 98104

17 *Class Counsel:*

18 David E. Breskin
19 Breskin Johnson & Townsend PLLC
20 1000 2nd Avenue
21 Seattle, Washington 94104

22 *Defense Counsel:*

23 T. Robert Scarborough
24 Sidley Austin LLP
25 One South Dearborn
26 Chicago, Illinois 60603

4. To be considered, any such objection shall include:

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Seattle, Washington 98104 Tel: 206-652-8660

- 1 a. The name of the Action (*Folweiler Chiropractic, P.S. v. American Family Insurance*
2 *Company, et al.*, No. 16-2-16112-0 SEA);
- 3 b. The objector's full name, address, and telephone number;
- 4 c. An explanation of the basis upon which the objector claims to be a Class Member;
- 5 d. All grounds for the objection, accompanied by any legal or factual support for the
6 objection known to the objector or his counsel;
- 7 e. The identity of all counsel who represent the objector, including any former or current
8 counsel who may be entitled to compensation for any reason related to the objection to
9 the Settlement or fee application and legal and factual support for such fees;
- 10 f. The identity of all counsel representing the objector who will appear at the Final
11 Approval Hearing (if any);
- 12 g. A statement confirming whether the objector intends to personally appear and/or testify
13 at the Final Approval Hearing;¹ and
- 14 h. The objector's signature (an attorney's signature is not sufficient).

15 5. All Class Members who timely exclude themselves shall not be members of the
16 Settlement Class, shall not be bound by the Settlement Agreement or the Final Approval Order,
17 and shall relinquish their rights to submit a claim or receive benefits with respect to the Settlement
18 Agreement, should it be approved, and relinquish their rights to file an objection to the Settlement.
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22 ¹ No Settlement Class Member or counsel hired at the Settlement Class Member's own
23 expense shall be entitled to be heard at the Final Approval Hearing unless the objector or his or
24 her attorneys who intend to make an appearance at the Final Approval Hearing state their intention
25 to appear in the objection filed with the Court.

1 6. Any member of the Settlement Class who fails to file and serve a valid and timely
2 written objection in the manner specified above shall be deemed to have waived all objections and
3 shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement.

4 7. Settlement Class Members who do not timely exclude themselves shall be bound
5 by all the terms and provisions of the Settlement Agreement, including any release set forth therein,
6 the Final Approval Order, whether or not such Class Member objected to the Settlement or
7 submitted a Claim Form.

8 8. The Settlement Administrator shall provide copies of any requests for exclusion
9 and objections to the extent received by it to Class Counsel and Defendants' Counsel as provided
10 in the Settlement Agreement and upon request

11 9. Upon final approval of the settlement Plaintiff and members of the Settlement Class
12 who have not properly excluded themselves from the Settlement Class will have released claims
13 against Defendants as defined in the Settlement Agreement and incorporated herein.

14 10. The Final Approval Hearing shall be held before this Court located at 516 3rd
15 Avenue in Seattle, Washington, 98104 on **February 19, 2020, at 3:30 p.m.**, to determine whether
16 the Settlement Agreement is fair, reasonable, and adequate and should receive Final Approval. At
17 that time, the Court will also rule on Class Counsel's application for any Fees and Expenses and
18 Plaintiff's Case Contribution Fee.

19 11. In summary, the relevant dates for the Settlement approval process are as follows:
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<u>Deadline</u>	<u>Dates</u>
Entry of Court Order granting Preliminary Approval	December 23, 2019
Website launch	January 10, 2020
Notice is mailed and published	January 10, 2020
Deadline for objections and requests for exclusion	February 10, 2020
Deadline for Filing Claims	April 20, 2010
Filing Deadline for Plaintiff's Motion for Final Approval	February 13, 2010
Final Approval Hearing	February 19, 2020

12. These dates may be extended by order of the Court, for good cause shown, without further notice to the Settlement Class, except that notice of any such extensions shall be posted to the Settlement Website. Members of the Settlement Class should check the Settlement Website regularly for updates and further details regarding extensions of these deadlines.

13. In the event the Parties fail to obtain a Final Approval Order as contemplated in the Settlement Agreement, or the Settlement Agreement is terminated pursuant to its terms or the Effective Date does not occur for any reason, the Parties have reserved all of their rights, including the right to continue with the Lawsuit or to oppose any effort to certify the case as a class action.

14. The preliminary certification of the Settlement Class shall be binding only with respect to the settlement of this Lawsuit. In the event that the Settlement Agreement is terminated pursuant to its terms or is not approved in all material respects by the Court, or such approval is reversed, vacated, or modified in any material respect by this or any other court, the certification

1 of the Settlement Class shall be deemed vacated, the Lawsuit shall proceed as if the Settlement
2 Class had never been certified, and no reference to the Settlement Class, the Settlement Agreement,
3 or any documents, communications, or negotiations related in any way thereto shall be made for
4 any purpose in this Lawsuit, or any other action or proceeding. Moreover, in the event that the
5 Settlement Agreement is terminated pursuant to its terms or is not approved in all material respects
6 by the Court, the Amended Complaint shall be withdrawn and Plaintiff shall proceed under the
7 previously operative complaint.

8
9 15. Neither the Settlement Agreement nor any of its provisions, nor any of the
10 documents (including but not limited to drafts of the Settlement Agreement, the Preliminary
11 Approval Order, or the Final Approval Order), negotiations, or proceedings relating in any way to
12 the Settlement, are not and shall not be construed as, offered in evidence as, received in evidence
13 as, and/or deemed to be evidence or a presumption, concession, or admission of any kind by any
14 of the Parties of (i) the truth of any fact alleged or the validity of any claim or defense that has
15 been, could have been, or in the future might be asserted in the Lawsuit, or any other litigation,
16 court of law or equity, proceeding, arbitration, tribunal, investigation, government action,
17 administrative proceeding, or other forum, or (ii) any liability, responsibility, fault, wrongdoing,
18 or otherwise. However, nothing contained herein shall prevent the Settlement Agreement (or any
19 of the documents relating in any way to the Settlement) from being used, offered, or received in
20 evidence in any proceeding to approve, enforce, or otherwise effectuate the Settlement or the Final
21 Approval Order.
22

King County Superior Court
Judicial Electronic Signature Page

Case Number: 16-2-16112-0
Case Title: FOLWEILER CHIROPRACTIC VS AMERICAN FAMILY INS
CO
Document Title: ORDER CERTIFYING SETTLEMENT CLASS ETC

Signed by: John Ruhl
Date: 12/30/2019 2:24:49 PM



Judge/Commissioner: John Ruhl

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: 6A525D55EB6EDD1D8D3683F58F2E80754B69D73B
Certificate effective date: 3/18/2019 8:27:16 AM
Certificate expiry date: 3/18/2024 8:27:16 AM
Certificate Issued by: C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA,
O=KCDJA, CN="John Ruhl:
3AXS1AvS5hGZA1z3AFk6yQ=="