IN THE COURT COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ANDREW BERKOWITZ, M.D.,	:	July Term 2006
Individually and on behalf of all others	:	
Similarly situated,	:	No. 4134
Plaintiff,	:	
v.	:	Commerce Program
PRISON HEALTH SERVICES, INC.	:	
And CITY OF PHILADELPHIA,	:	Control Number 010121
Defendants.	:	
	:	

ORDER

AND NOW, this 16th day of January 2009, upon consideration of Plaintiff's Motion for Class Certification, all responses in opposition, Memoranda, all matters of record, after oral argument and in accord with the attached Opinion, it hereby is **ORDERED** that the Motion for Class Certification is **DENIED**.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

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OPINION

Presently before the court is a motion for class certification. The City of Philadelphia contracts with Prison Health Services (hereinafter "PHS") to provide onsite health services and staff to the City of Philadelphia prison system. In addition to onsite health services, PHS also sets up a network of medical providers who provide medical services to prisoners that PHS is unable to provide at the City's prisons. As it pertains to these providers, PHS negotiates a series of written contracts with these providers who provide medical services to prisoners when PHS is unable to provide the services on site. The services include but are not limited to dermatologists, dentists, cardiologists, pharmacies, oral surgeons, physical therapists, ambulances and medical laboratories.

In addition to the on site providers and the contract providers, a less formal network of non contract providers exits to fill the gaps whenever an inmate needs medical treatment. Non contract providers become part of PHS' provider network by virtue of treating an inmate and do not have any rate agreements with the City or PHS. The non contract providers are divided into three categories: non contract providers who provide "inpatient hospitalization" services, non contract providers who provide "out patient

hospitalization" and non contract providers who provide "specialty services". Plaintiff, Dr. Berkowitz seeks to certify and represent a class of these non contract providers.

Prior to September 1, 2004, PHS was responsible for paying the non contract providers. PHS usually paid the non contract providers the current Medicare rate. In December 2003, a policy titled "Provider Dispute of Default Reimbursement Rate" was implemented. The Policy provided as follows:

> PHS reimburses non-contract providers, by default, the applicable state's Medicare allowable for services provided. Should a provider call in to dispute the default reimbursement rate, the provider will be asked to put their concern in writing and fax it to the attention of VP Network Development. Upon receipt of the document, it will be distributed to a Network Development. Upon receipt of the document, it will be distributed to a Network Development team member.

Upon receipt of the written document, the VP Network Development Team Member will contact the provider to address the concern and negotiate a contract. If the provider is willing to negotiate and agrees to a rate, a contract will be drafted and sent. If the provider refused to negotiate a discount for the service they would be asked to put their refusal in writing so sufficient documentation could be maintained in the provider's file. Should the provider continue to accept PHS patients, they would be reimbursed at 100% of authorized and covered services. No contract would be drafted and alternative providers will try to be identified.

Commencing September 1, 2004, the City began to bear the responsibility for paying bills and invoices submitted by providers for inpatient hospitalization services. The City paid these non contract providers the Medicare rate, which it believed was the prevailing rate paid to physicians in Philadelphia. PHS continued to remain responsible for payments to non contract providers who treated inmates for specialty services and

outpatient hospital services. These non contract providers were paid the current Medicare rate subject to PHS' internal policy allowing a provider of specialty services or outpatient hospitalization to protest the rate, file an appeal or negotiate a rate.

Plaintiff Andrew Berkowitz (hereinafter Dr. Berkowitz") is a physician who provided in patient hospital services to Philadelphia inmates as a non contract provider from 1989 to 2007. In the summer of 2004, Dr. Berkowitz received a letter from PHS advising that the City would be responsible to pay for inpatient hospital services provided to City inmates or detainees and promising to pay Dr. Berkowitz's charges for providing such care. Dr. Berkowitz did not have a contract with PHS or the City. Dr. Berkowitz submitted bills for services rendered at his regular billing rate. Defendants paid Dr. Berkowitz the Medicare rate. The total charges for the services rendered to the inmates by Berkowitz were $13, 821.33. Dr. Berkowitz was paid $4, 232.84. Dr. Berkowitz now seeks to recover the difference between the billed rate and the paid rate. In the amended complaint, Dr. Berkowitz alleges claims for breach of contract and unjust enrichment and seeks an accounting.

DISCUSSION

The sole issue before this court is whether the prerequisites for certification are satisfied. The purpose behind class action suits is "to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate". [1] For a suit to proceed as a class action, Rule 1702 of the Pennsylvania Rules of Civil Procedure requires that five criteria be met:

[1] DiLucido v. Terminix Intern, Inc., 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (1996).

(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;
(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709;
(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Rule 1708 of the Pennsylvania Rules of Civil Procedure requires:

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth [below]

a) Where monetary recovery alone is sought, the court shall consider

(1) whether common questions of law or fact predominate over any question affecting only individual members;
(2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
(3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

(b) Where equitable or declaratory relief alone is sought, the court shall consider

(1) the criteria set forth in subsections (1) through (5) of subdivision (a), and
(2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.

(c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

The burden of showing each of the elements in Rule 1702 is initially on the moving party. This burden "is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made." [2] The moving party need only present evidence sufficient to make out a prima facie case "from which the court can conclude that the five class certification requirements are met."[3]

. In other contexts, the *prima facie* burden has been construed to mean "some evidence," "a colorable claim," "substantial evidence," or evidence that creates a rebuttable presumption that requires the opponent to rebut demonstrated elements. In the criminal law context, "the *prima facie* standard requires evidence of the existence of each and every element." [4] However, "The weight and credibility of the evidence are not factors at this stage."[5]

In the family law context, the term "'*prima facie* right to custody' means only that the party has a colorable claim to custody of the child."[6] Similarly, in the context of employment law, the Commonwealth Court has opined that a *prima facie* case can be

[2] Cambanis v. Nationwide Ins. Co., 348 Pa. Super. 41, 45, 501 A.2d 635, 637 (1985).

[3] Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d 137,153-154 (2002)(*quoting* Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 451 A.2d 451, 455 (1982).

[4] Commonwealth v. Martin, 727 A.2d 1136, 1142 (Pa. Super. 1999), *alloc. denied*, 560 Pa. 722, 745 A.2d 1220 (1999).

[5] Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa. Super. 2001).

[6] McDonel v. Sohn, 762 A.2d 1101, 1107 (Pa. Super. 2000).

established by "substantial evidence" requiring the opposing party to affirmatively rebut that evidence.[7]

Courts have consistently interpreted the phrase "substantial evidence" to mean "more than a mere scintilla," but evidence "which a reasonable mind might accept as adequate to support a conclusion."[8] In Grakelow v. Nash, 98 Pa. Super. 316 (Pa. Super. 1929), a tax case, the Superior Court said: "To ordain that a certain act or acts shall be *prima facie* evidence of a fact means merely that from proof of the act or acts, a rebuttable presumption of the fact shall be made;…it attributes a specified value to certain evidence but does not make it conclusive proof of the fact in question."

Class certification is a mixed question of fact and law.[9] The court must consider all the relevant testimony, depositions and other evidence pursuant to Rule 1707 (c). In determining whether the prerequisites of Rule 1702 have been met, the court is only to decide who shall be the parties to the action and nothing more. The merits of the action and the plaintiffs' right to recover are excluded from consideration.[10] Where evidence conflicts, doubt should be resolved in favor of class certification. In making a certification decision, "courts in class certification proceedings regularly and properly employ reasonable inferences, presumptions, and judicial notice."[11] Accordingly, this court must refrain from ruling on plaintiff's ultimate right to achieve any recovery, the credibility of the witnesses and the substantive merits of defenses raised.

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[7] *See, e.g.,* Williamsburg Community School District v. Com., Pennsylvania Human Rights Comm., 512 A.2d 1339 (Pa. Commw. 1986).

[8] SSEN, Inc., v. Borough Council of Eddystone, 810 A.2d 200, 207 (Pa. Commw. 2002).

[9] Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d.154 (2002).

[10] 1977 Explanatory Comment to Pa. R. Civ. P. 1707.

[11] Janicik, 451 A.2d at 454,455.

"The burden of proof to establish the five prerequisites to class certification lies with the class proponent; however, since the hearing on class certification is akin to a preliminary hearing, it is not a heavy burden."[12] The *prima facie* burden of proof standard at the class certification stage is met by a qualitative "substantial evidence" test. The burden of persuasion and the risk of non-persuasion however, rests with the plaintiff.

Our Superior Court has instructed that it is a strong and oft-repeated policy of this Commonwealth that, decisions applying the rules for class certification should be made liberally and in favor of maintaining a class action.[13] Likewise, the Commonwealth Court has held that "in doubtful cases any error should be committed in favor of allowing class certification."[14] This philosophy is further supported by the consideration that "[t]he court may alter, modify, or revoke the certification if later developments in the litigation reveal that some prerequisite to certification is not satisfied."[15]

Within this context, the court will examine the requisite factors for class certification.

1. Numerosity

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[12] Professional Flooring Co. v. Bushar Corp., 61 Pa. D&C 4th 147, 153, 2003 WL 21802073 (Pa. Com. Pl. Montgo. Cty. Apr. 14, 2003)(*citing* Debbs v. Chrysler Corp., 810 A.2d 137, 153-54 (Pa. Super. 2002); Janicik v. Prudential Inc. Co. of America, 451 A.2d 451, 455 (Pa. Super. 1982)). *See also* Baldassari v. Suburban Cable TV Co., 808 A.2d 184, 189 (Pa. Super. 2002); Cambanis v. Nationwide Insurance Co., 501 A.2d 635 (Pa. Super. 1985).

[13] Weismer by Weismer v. Beech-Nut Nutrition Corp., 615 A.2d 428, 431 (Pa. Super. 1992). *See also* Janicik, 451 A.2d at 454, *citing and quoting* Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968) ("in a doubtful case . . . any error should be committed in favor of allowing the class action").

[14] Foust v. Septa, 756 A.2d 112, 118 (Pa. Commw. 2000).

[15] Janicik, 451 A.2d at 454.

To be eligible for certification, the petitioner must demonstrate that the class is "so numerous that joinder of all members is impracticable."[16] A class is sufficiently numerous when "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants should plaintiffs sue individually."[17] Plaintiff need not plead or prove the actual number of class members, so long as he is able to "define the class with some precision" and provide "sufficient indicia to the court that more members exist than it would be practicable to join."[18]

In the amended complaint, Dr. Berkowitz alleges that “more than 25 healthcare providers have been improperly underpaid by defendant.”[19] Plaintiff has also shown a potential class of 300 non-contract healthcare providers whom PHS and the City paid the Medicare rate rather than the providers’ billed rates. Based on the foregoing the court finds that the numerosity requirement has been satisfied.

II. Commonality

The second prerequisite for class certification is that “there are questions of law or fact common to the class.”[20] Common questions exist “if the class members’ legal grievances arise out of the ‘same practice or course of conduct on the part of the class

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[16] Pa.R.C.P. 1702(1).

[17] Temple University v. Pa. Dept. of Public Welfare, 30 Pa.Cmwlth. 595, 374 A.2d 991, 996 (1977) (123 members sufficient); ABC Sewer Cleaning Co. v. Bell of Pa., 293 Pa.Super. 219, 438 A.2d 616 (1981) (250 members sufficient); Ablin, Inc. v. Bell Tel. Co. of Pa., 291 Pa.Super. 40, 435 A.2d 208 (1981) (204 plaintiffs sufficiently numerous).

[18] Janicik, 451 A.2d at 456.

[19] Amended Complaint p. 18.

[20] Pa. R. Civ. P. 1702(2).

opponent."[21] Thus, it is necessary to establish that "the facts surrounding each plaintiff's claim must be substantially the same so that proof as to one claimant would be proof as to all." [22] However, where the challenged conduct affects the potential class members in divergent ways, commonality may not exist.[23] "While the existence of individual questions is not necessarily fatal, it is essential that there be a predominance of common issues shared by all class members which can be justly resolved in a single proceeding." [24]

In examining the commonality of the class' claims, a court should focus on the cause of injury and not the amount of alleged damages. "Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification."[25] Where there exists intervening and possibly superseding causes of damage however, liability cannot be determined on a class-wide basis.[26] Related to this requirement for certification is whether trial on a class basis is a fair and efficient method of adjudication under the criteria set forth in Rule 1708. Another important requirement in determining whether a class should be certified are the requirements of Rules 1702 (a) (5) and 1708 (a) (1), whether common questions of law and fact predominate over any question affecting only individual members. In addition to the existence of common questions of law and fact, plaintiffs must also establish that the

[21] Janicik, supra. 133, 451 A.2d at 457.

[22] Weismer by Weismer v. Beechnut Nutrition Corp., 419 Pa. Super. 403, 615 A.2d 428 (1992).

[23] Janicik , supra. 457.

[24] D'Amelio v. Blue Cross of Lehigh Valley, 347 Pa. Super. 338, 487 A.2d 995, 997 (1985).

[25]See Weismer by Weismer v. Beech-Nut Nutrition Corp., 419 Pa. Super. 403, 409, 615 A.2d 428, 431 (1992).

26 Cook v. Highland Water and Sewer Authority, 108 Pa. Cmwlth. 222, 231, 530 A.2d 499, 504 (1987).

common issues predominate. Accordingly the analysis of predominance under Rule 1708 (a) (1) is closely related to that of commonality under Rule 1702(2).[27]

Since the criteria of Rule 1702 (2) and (5) and have not been met by the proofs presented at the class certification hearing or the record presented therein, no discussion of the other requirements for certification is necessary.

Plaintiff proposes to certify a class for trial as follows

> All non-contract healthcare providers whom the City of Philadelphia and/or Prison Health Services, Inc. paid at rates below the providers' billed rates for services provided to City of Philadelphia inmates and/or detainees in the absence of any written or express agreement specifically permitting defendants to pay at a rate below the billed rate.

For the reasons set forth below individualized issues predominate and the requirements for class certification have not been met and Class Certification is denied.

When there is no express contract between the parties, as the case is here, a plaintiff may still recover under a quasi –contract theory. In this situation, a contract is implied by the law. A quasi contract imposes a duty, not as a result of any agreement, whether express or implied but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another.[28] In determining if the doctrine applies, the court focuses not on the intention of the parties, but rather on whether the defendant has been unjustly enriched. The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant and

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[27] Janick, supra. 451 A.2d at 461.

[28] Although plaintiff's amended complaint alleges a claim for breach of contract in addition to the claim for unjust enrichment, plaintiff's brief and argument place much emphasis on the claim of unjust enrichment. Hence the court focuses its discussion on the claim for unjust enrichment. This however is no indication that the claim for breach of contract is subject to class certification since individualized issues of fact and law exist which predominate and preclude class certification.

acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.[29]

When unjust enrichment is present, the law implies the existence of a contract requiring the defendant to pay to the plaintiff the reasonable value of the benefit conferred.[30] In this case, the reasonable value of the benefit conferred, the medical services, will vary depending upon the service provided and institution providing the service. Hence, any assessment of the reasonableness of the provider's charges will necessarily include consideration and recognition of the particular provider's costs, functions and services to determine whether those charges are reasonable as compared to the charges of others.

While the proposed class of health care providers did confer a benefit upon the defendants and defendants appreciated the benefit, the proposed class members do not stand in the same relationship to the defendants.[31] As such, the value of the health care service will vary depending upon the provider.[32]

In Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc.,[33] the court implying a promise to pay a reasonable fee for a health provider's services based on the absence of an express contract stated that "in a situation such as

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[29] AmeriPro Search, Inc. v. Fleming Steel Co., 787 A.2d 988 (Pa. Super. 2001).

[30] Mitchell v. Moore, 729 A.2d 1200 (Pa. Super. 1999).

[31] *Cf.* In re Pennsylvania Baycol Third Party Payor Litigation, 2005 Phila. Ct. Com. Pl. LEXIS 129 (Pa. C.P. 2005)(all class members stand in precisely the same relation to defendant. Either it would be inequitable for defendants to retain the payments made to them by TPPs while refunding the deductible or co-pay for the same purchase or it is acceptable.)

[32] *See* Defendant's Expert Report. *See also* Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc., 832 A.2d 501 (Pa. Super. 2003).

[33] 832 A.2d 501 (Pa. Super. 2003).

this, the defendant should pay for what services are ordinarily worth in the community. Services are worth what people ordinarily pay for them." Here, although Dr. Berkowitz testified that he regularly received 100% payment for services provided, a review of the records does not support this statement. The record demonstrates that Dr. Berkowitz received full charges only five percent of the time.[34] As such, the rates that Dr. Berkowitz charges cannot be considered the value of the benefit conferred because that is not what he ordinarily receives payment for in this community.

Here, not only do individualized issues exist regarding what the people in this community would pay to the providers, but there is also the issue of certifying a class composed of different types of health care providers. The class that plaintiff seeks to certify includes not only physicians but also includes specialist such as oncologists, surgeons and cardiologists, physician assistants, nurse practitioners, dentists, dental hygienists, physical therapists, chiropractors and other medical providers. These medical providers are paid for services at many different rates which are neither statutorily determined nor standardized within the industry.[35] Hence, an individualized factual determination will be necessary to determine the reasonable rate for the service provided.

Accordingly, based on the proper analysis of the expert reports and consideration of all the other evidence and in accordance with the applicable standards and burdens of

[34] Berkowitz deposition p. 71.

[35] *Cf.* McShane v. Recordex Acquisition Corp., C.P. Phila. 2004 Pa. Dist. & Cnty. Dec. LEXIS 303 (Pa. C.P. 2004) (The only claim presented herein is a single question of law as to the proper interpretation of 42 Pa.C.S. § 6152. This question of statutory interpretation presented is, did the legislature, in enacting the Medical Records Act, which all parties concur is applicable to these charges, intend electronically retrieved copies not explicitly mentioned in the Act, to be charged at the rate for paper copies or the rate for copies of microfilm. Beyond that question of interpretation of law the only issues presented are the mathematical calculation of overcharges to and overpayment by each member of the class. The only issue presented is the interpretation of the law to the charges incurred for electronically retrieved records.).

proof, the court finds that plaintiff has failed to meet his burden of commonality and class certification is denied.

CONCLUSION

For the foregoing reasons, the motion for class certification is denied.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.