

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

PENNSYLVANIA ORTHOPAEDIC SOCIETY,  
on behalf of its members and all others similarly  
situated individuals,

Plaintiffs

v.

INDEPENDENCE BLUE CROSS, et al.

Defendants.

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

DECEMBER TERM, 2002  
NO. 0002

ASSIGNED TO COMMERCE  
PROGRAM

ROBERT P. GOOD, M.D., on behalf of himself  
and all others similarly situated,

Plaintiffs

v.

INDEPENDENCE BLUE CROSS, QCC  
INSURANCE COMPANY, KEYSTONE  
HEALTH PLAN EAST, INC., AMERIHEALTH  
HMO, INC., and AMERIHEALTH, INC.

Defendants.

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

DECEMBER TERM, 2002  
NO. 0005

ASSIGNED TO COMMERCE  
PROGRAM

JOHN R. GREGG, M.D.

and

VINCENT J. DISTEFANO, M.D., on behalf of  
themselves and all others similarly situated,

Plaintiffs

v.

INDEPENDENCE BLUE CROSS, QCC  
INSURANCE COMPANY, KEYSTONE  
HEALTH PLAN EAST, INC., AMERIHEALTH  
HMO, INC. and AMERIHEALTH, INC.

Defendants.

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

JURY TRIAL DEMANDED

DECEMBER TERM, 2000

NO. 03482

ASSIGNED TO COMMERCE  
PROGRAM

Superior Court Docket  
No. 1190 EDA 2004  
No. 1345 EDA 2004  
No. 1450 EDA 2004  
No. 1451 EDA 2004  
No. 1517 EDA 2004

**OPINION**

**Albert W. Sheppard, Jr., J. .... September 7, 2004**

This Opinion is submitted relative to five appeals of this court's Order dated April 22, 2004, which in pertinent part, granted certification of the settlement class in these three consolidated actions, granted the Motion for Final Approval of the Settlement, overruled the Objections to the settlement and voided the opt-outs and called for a second opt-out period. The court's Order of April 22, 2004 is attached to this Opinion as Appendix "A." In support of that Order, the court filed Findings of Fact, Discussion and Conclusions of Law, attached to this Opinion as Appendix "B."<sup>1</sup>

Although the April 22<sup>nd</sup> Order was not technically a final order, the five appeals were nonetheless lodged. This court filed a Final Order, Judgment and Discontinuance with Prejudice ("Final Order") on September 1, 2004, which confirmed the substantive provisions of the prior April 22<sup>nd</sup> Order.

For purposes of this Opinion, this court will consider these appeals applicable to both the April 22 and September 1, 2004 Orders.<sup>2</sup>

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<sup>1</sup> Also, by Order dated April 30, 2004, the court denied appellants' Emergency Application for Supersedeas.

<sup>2</sup> This court submits that it would not advance the cause of justice to require that second appeals be filed.

Record Materials Relied Upon For  
Purposes of this Opinion

With regard to these five appeals, this court will rely on the Findings of Fact, Discussion and Conclusions of Law attached as Appendix “B.” Further, the court will rely upon the Final Order which is attached as Appendix “C.” This court respectfully requests that the Superior Court accept and deem Appendices “A” through “C” as incorporated into this Opinion.

Certain matters which occurred subsequent to the April 22<sup>nd</sup> Order must be briefly discussed.

Joint Report of The Parties  
Concerning Second Opt-out Period

On July 22, 2004, class counsel and counsel for the defendants filed a Joint Report of the Parties Concerning Second Opt Out Period (“Joint Report”). In paragraphs 1 through 8 of the Joint Report, counsel outlined the procedures employed to effectuate the requisite notice and review of the operative opt-outs.

In sum, there were approximately 2,043 opt-outs covering 3,718 providers embodying the individual and group opt-outs. See Joint Report, ¶¶ 13-14 and Exhibit “A.” It is important to recognize that this represents a significant reduction in the number of opt-outs when compared with the original – but tainted – opt-outs. In summary, considering participating and non-participating providers, the percentage of opt-outs is less than six percent (6%). This court suggests that this confirms this court’s finding that class members had been misled during the first opt-out period. Further, this constitutes another reason to deem the class settlement reasonable.

Finally, it is also important to note that the defendants-released parties have determined not to exercise any withdrawal rights they may have under the Class Action Settlement Agreement.

Approval of the Fee Petition Filed by Class Counsel

Class counsel filed a Petition seeking fees and costs in the amount of 5 million dollars.

This court applied the following factors set forth in Rule 1716 of the Pennsylvania Rules of Civil Procedure in determining that the fees requested are appropriate:

- (1) the time and effort reasonably expended by the attorney in the litigation;
- (2) the quality of the services rendered;
- (3) the results achieved and benefits conferred upon the class or upon the public;
- (4) the magnitude, complexity and uniqueness of the litigation; and
- (5) whether the receipt of a fee was contingent on success.

Pa. R. Civ. P. 1716.

Further, under the lodestar method and the percentage of recovery method the fees requested are similarly appropriate.

Suffice it to say that the efforts of class counsel were of a nature and extent that this court is persuaded that the fees requested are fair and reasonable.<sup>3</sup> It is important to recognize that the defendants do not intend to fund the attorney's fees by a reduction in the changes accepted in the Settlement Agreement. (See Final Order, ¶ 11). The court approved the fees in its Final Order of September 1, 2004. (Appendix "C").

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<sup>3</sup> Class counsel did outstanding work. In all respects this court was impressed by their efforts.

### Incentive Awards to Class Representatives

This court approved individual incentive awards of \$20,000 to each named plaintiff – Dr. DiStefano, Dr. Goode and the estate of Dr. Gregg. The efforts put forth on behalf of the class by these physicians were important to their cause. They were unstinting and effective in their work for the class.

### Final Judgment

This court entered the Final Order on September 1, 2004 which, among other things, reduced its prior Orders to a final judgment.

### Elements of the Five Appeals

A few brief comments pertinent to the five appeals are submitted to assist the appellate court.

The five appeals of this court's Order are:

- Appellants Medical Society of the State of New York, the South Carolina Medical Association, the Tennessee Medical Association, the Medical Society of New Jersey, Joseph Fallon, M.D., Terrence R. Malloy, M.D. and Bruce Zakheim, M.D. filed an appeal docketed as Superior Court Docket No. 1190 EDA 2004.
- Appellant American Medical Association filed an appeal docketed as Superior Court Docket No. 1345 EDA 2004.
- Appellants Martin D. Trichtinger, M.D., William W. Lander, M.D., Nancy S. Roberts, M.D., Beverly K. Dolberg, M.D. and the Pennsylvania Medical Society filed an appeal docketed as Superior Court Docket No. 1450 EDA 2004.

- Appellant Louis P. Bucky, M.D. filed an appeal docketed as Superior Court Docket No. 1451 EDA 2004.
- Appellant Rosalind Kaplan, M.D. filed an appeal docketed as Superior Court Docket No. 1517 EDA 2004.

Though the entire Findings of Fact, Discussion and Conclusions of Law (attached to this Opinion as Appendix “B”) is pertinent to these appeals, the court suggests that particular Findings and sections of the Discussion are especially relevant for certain appeals.

For the appeal docketed No. 1190 EDA 2004, Findings of Fact ¶¶ 160-62 are relevant to Drs. Malloy and Fallon, and Findings of Fact ¶¶ 44-48 concern actions brought by Drs. Zakheim and Malloy. Finding of Fact ¶ 159 (including footnote 26) is relevant in that it lists the entities which filed objections to the settlement, and Appellant Medical Society of New Jersey is not among them. Pages 56-60 of the Discussion relate to the court’s conclusion that the Medical Society of the State of New York, the South Carolina Medical Association, the Tennessee Medical Association, Joseph Fallon, M.D., and Terrence R. Malloy, M.D. lacked standing to object to the settlement. Notwithstanding the standing issue, pages 80-82, 86-88, and 89-94 of the Discussion address the appellants’ objections.

For the appeal docketed No. 1345 EDA 2004, Finding of Fact ¶159 lists the American Medical Association as having filed an objection to the settlement. Pages 57-60 of the Discussion relate to the court’s conclusion that appellant American Medical Association lacked standing to object.

For the appeal docketed No. 1450 EDA 2004, Finding of Fact ¶ 159 states that appellants Martin D. Trichtinger, M.D., William W. Lander, M.D., Nancy S. Roberts, M.D., Beverly K. Dolberg, M.D. and the Pennsylvania Medical Society filed their objections to the settlement, and Findings of Fact ¶¶ 169-171 specifically pertain to Dr. Trichtinger. Pages 57-60 of the Discussion concerns the court's conclusion that the Pennsylvania Medical Society lacked standing to object to the settlement. Pages 77-80 and 86-95 of the Discussion address these appellants' objections.

For the appeal docketed No. 1451 EDA 2004, Findings of Fact ¶¶ 159 and 163 specifically concern Dr. Bucky.

For the appeal docketed No. 1517 EDA 2004, Findings of Fact ¶¶ 159 and 164 relate to Dr. Kaplan. Pages 82-84 and 93 (footnote 53) of the Discussion address Dr. Kaplan's objections to the settlement.

#### Conclusion

This court respectfully submits that based upon the above discussion and the pertinent sections of Appendices "A" through "C," its Orders of April 22, 2004 and September 1, 2004 should be affirmed.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**