

NOV 14 2011

IN THE SUPREME COURT OF THE STATE OF NEW YORK
IN AND FOR THE COUNTY OF MONROE

MEDICAL SOCIETY OF THE	:	Index No. 9769-01
STATE OF NEW YORK,	:	
	:	
Plaintiff,	:	<u>AMENDED COMPLAINT</u>
	:	
vs.	:	
	:	
EXCELLUS, INC.; EXCELLUS	:	
HEALTH PLAN, INC.; and	:	
EXCELLUS BENEFITS SERVICES,	:	
INC.,	:	
	:	
Defendants.	:	

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 COUNTY CLERK
 MONROE COUNTY

Plaintiff, Medical Society of the State of New York ("MSSNY" or "plaintiff"), by its attorneys, brings this action both on its own behalf and on behalf of its members against Excellus, Inc.; Excellus Health Plan, Inc.; and Excellus Health Benefits Services, Inc. (collectively referred to herein as "Excellus" or "defendants") and alleges the following upon information and belief, except as to paragraphs pertaining to plaintiff's own actions, which are alleged upon personal knowledge:

INTRODUCTION

1. MSSNY brings this action both on its own behalf and on behalf of its members to enjoin defendants from engaging in the numerous unfair and deceptive acts and practices, identified herein, which are designed to delay, deny, impede and reduce lawful reimbursement to MSSNY members who are participating physicians in defendants' networks and who have rendered medically necessary health care services to members of defendants' managed care plans.

MSSNY does not bring this action as an assignee of enrollees' rights to benefits. Moreover, this action does not otherwise seek benefits or other remedies under the Employment Retirement Income Security Act of 1974 ("ERISA"), nor does it arise under or relate to ERISA.

2. As a result of the extraordinarily unequal bargaining positions between the MSSNY members and defendants, and the physicians' reliance on Excellus to provide access to significant portions of their patient information base, Excellus has been able to force physicians to enter into one-sided contracts which infringe upon the doctor-patient relationship and threaten the continuity of care physicians provide to their patients.

3. As discussed in detail below, defendants have employed a variety of means to effect their improper and deceptive scheme, including, but not limited to, one or more of the following practices:

- Defendants systematically deny reimbursement to MSSNY members for medically necessary services by, *inter alia*, (i) routinely and unjustifiably refusing to pay for, or reducing payment for, more than one healthcare service per visit or incident, referred to as "bundling"; (ii) routinely and unjustifiably reducing retroactively the amount of reimbursement remitted to MSSNY members, referred to as "downcoding"; (iii) routinely and unjustifiably denying increased levels of reimbursement for complicated medical cases which require MSSNY members to expend extra time and resources on the treatment of the patient, referred to as "modifiers"; (iv) routinely and unjustifiably denying payment for procedures performed during "global periods" for *unrelated* procedures; and (v) routinely and unjustifiably refusing to pay for

treatments by physician specialists by falsely claiming that referrals were not obtained from the patients' primary care physicians.

- Defendants systematically deny payment to MSSNY members for medically necessary claims to achieve internal financial targets without regard for individual patients' medical needs by, *inter alia*, (i) improperly employing software programs to automatically downcode procedures and/or deny payment to MSSNY members identified as "high utilizers," without any clinical review, oversight or justification; and (ii) improperly applying so-called "guidelines" in a manner that Excellus knows is unreasonable for the purpose of denying payment for medically necessary treatments.

- Defendants fail to provide adequate staffing to handle MSSNY physician inquiries. In this regard, Excellus has created and maintains an inefficient administrative system designed to frustrate payment to MSSNY members by requiring physicians to make excessive telephone inquiries to obtain proper reimbursement of claims.

- Defendants routinely and unjustifiably fail to make payments to the MSSNY members within the time period prescribed by applicable provisions of New York State law, and routinely and unjustifiably fail to pay interest on past-due claims required under Excellus' contractual agreements with MSSNY members and under applicable provisions of New York State law.

- Defendants fail to provide sufficient explanation for their payment denials and reductions.

- Defendants consistently refuse to provide participating physicians with Excellus' fee schedules for Current Procedure Terminology Codes ("CPT Codes") (the codes recognized by physicians and insurers for reimbursement).

- Defendants require physicians to enter into one-sided physician agreements in order for them to provide medical care to patients who receive healthcare through defendants' managed care plans.

4. As a result of their improper, unfair and deceptive scheme, defendants have deprived MSSNY members of millions of dollars of lawful reimbursement for healthcare services provided to defendants' plan members.

5. Adequate and timely reimbursements to MSSNY members are necessary in to ensure that physicians are able to maintain their practices to provide medically sound care and continuity of care to patients. The delivery of healthcare services patients have been promised by defendants depends on reimbursement adequate to cover the costs of delivering such healthcare. Defendants' failure to provide reimbursement to MSSNY members which is adequate to cover the costs of delivering healthcare services to Excellus' enrollees has resulted in tremendous hardships for defendants' participating physicians.

6. As a result of the unfair and deceptive practices, defendants have repeatedly violated GBL § 349 and other statutory law, and will continue to do so absent injunctive relief. Excellus' wrongful conduct causes direct injuries to MSSNY members and strikes at the very heart of the mission of the MSSNY -- which is to ensure that quality medical care is available to

the public. By bringing this action, MSSNY seeks an order enjoining Excellus from continuing its wrongful practices.

7. Both MSSNY members and MSSNY in its own capacity have been injured by the egregious acts and practices of defendants set forth in this Complaint. Excellus' wrongful conduct causes direct injury to MSSNY members by delaying, denying, impeding and reducing lawful compensation for services MSSNY members have provided to Excellus' enrollees.

8. Excellus' wrongful conduct also causes direct injury to MSSNY because MSSNY has been, and continues to be, frustrated by defendants' practices in its efforts to achieve its purpose (described more fully below) of ensuring the delivery of quality medical care to the people of the State of New York.

9. As a result of Excellus' unfair and deceptive conduct, MSSNY has been required to devote significant resources to dealing with the issues concerning defendants' unfair practices. Specifically, MSSNY devotes the time of over 20 employees and three departments to dealing with the practices at issue herein, including representatives of the Division of Socio-Medical Economics, the Division of Governmental Affairs, and the Office of the General Counsel. Their efforts to counteract the unfair and deceptive practices at issue herein include, inter alia, counseling MSSNY members on how to counteract the practices at issue, corresponding with defendants and advocating on MSSNY members' behalf, communicating with regulators regarding the practices at issue, and legislating for legal reform.

10. Defendants' conduct also injures consumers of defendants' healthcare products and the general public. Defendants' conduct has adversely impacted, and continues to adversely

impact, members of defendants' plans and the general public by, among other things: (a) imposing financial hardships on, and in some cases threatening the continued viability of, the practices run by MSSNY members; (b) threatening the continuity of care provided to patients by MSSNY members, as required by sound medical judgment; (c) requiring MSSNY and MSSNY members to expend considerable resources in seeking reimbursement that could otherwise be used to provide enhanced healthcare services to defendants' plan members; (d) making it more costly and difficult for MSSNY and MSSNY members to maintain and enhance the availability and quality of care that all patients receive; and (e) increasing the costs of rendering healthcare services in New York as a result of the additional costs incurred, and considerable effort expended by MSSNY and MSSNY members, in seeking reimbursement from Excellus for services rendered.

THE PARTIES

11. Plaintiff MSSNY is a New York not-for-profit corporation organized and existing under the laws of the State of New York since 1807. MSSNY represents approximately 27,000 licensed physicians, medical residents, and medical students in New York State.

12. The philosophy and purpose of MSSNY is to promote the highest standards of medical care in the State of New York. MSSNY strives to enhance the delivery of medical care of high quality to all people in the State of New York and to promote high standards in, among other things, the practice of medicine in an effort to ensure that quality medical care is available to the public.

13. MSSNY is also dedicated to the professional and personal development of MSSNY members by representing the profession as a whole and advocating health-related rights, responsibilities and issues to promote a favorable environment for the practice of medicine and improvement of the health of the people of the State of New York. MSSNY serves as a resource for its members and assists them in addressing the many issues and needs which they face in providing healthcare to their patients.

14. Both MSSNY members and MSSNY in its own capacity have been injured by the egregious acts and practices of defendants as set forth in this Complaint.

15. Defendant Excellus Health Plan, Inc. is a New York corporation with its principal place of business at 165 Court Street, Rochester, New York. Excellus Health Plan, Inc. is engaged in the business of offering healthcare products to New York residents. Excellus Health Plan, Inc. also does business as BlueCross BlueShield of Central New York, BlueCross BlueShield of the Rochester Area and BlueCross BlueShield of Utica-Watertown.

16. Defendant Excellus, Inc. is a New York corporation with its headquarters and principal place of business at 150 East Main Street, Rochester, New York.

17. Defendant Excellus Health Benefit Services, Inc. is a New York corporation with its principal place of business at 30 Perinton Hills Mall, Fairport, New York.

JURISDICTION AND VENUE

18. The claims alleged herein arise under § 349 of Article 22-A of the General Business Law, entitled Consumer Protection from Deceptive Acts and Practices ("GBL § 349"), and other statutory law.

19. This Court has jurisdiction over defendants pursuant to CPLR § 301 because they do sufficient business in New York, have sufficient minimum contacts with New York, including offices located here, and otherwise intentionally avail themselves of the markets in New York by establishing and maintaining physician networks and administering healthcare plans with tens of thousands of subscribers in New York, and by promoting, marketing, selling and distributing its healthcare services in this state, so as to render the exercise of jurisdiction by the New York courts permissible under traditional notions of fair play and substantial justice.

20. This Court is a proper venue for this action given that Excellus has its principal place of business in Rochester, conducts a substantial amount of its business in Rochester, has numerous participating providers in Rochester, and provides healthcare products and services to numerous Rochester residents. Moreover, it is the chosen forum of the plaintiff.

FACTUAL ALLEGATIONS

Background

21. Excellus is among the largest health insurers in the New York area and sells a variety of healthcare insurance products. Each healthcare product offered by Excellus in the State of New York allows members to select physicians from a network of participating physicians.

22. Excellus Inc. was formed in January 1996 when it took over Blue Cross Blue Shield of Central New York. Simultaneously, Blue Cross Blue Shield of Central New York changed its name to Excellus Health Plan, Inc. A year later, in January 1997, Excellus, Inc. took control of Excellus BlueCross BlueShield of the Rochester Area. In November of that same

year, BlueCross BlueShield of Utica-Watertown merged into Excellus, Inc. By that time, Excellus had increased its coverage area to 31 counties in Upstate New York, with over 1.67 million members. Effective December 31, 1998 the BlueCross BlueShield Plans of Central New York, the Rochester Area and Utica-Watertown restructured their corporations into a single legal entity called Excellus Health Plan, Inc.

23. Excellus is now seeking to merge with the Buffalo-based Univera HMO. The merger would create New York's second-largest health insurer, and give the new organization more than 2 million members and market share of 70 percent or more in some counties.

24. Excellus contracts with independent practice associations "(IPAs)" (comprised of groups of physicians) other medical groups and individual physicians, to provide health care services to Excellus members.

25. Defendants' agreements with MSSNY physicians and IPAs all provide that Excellus will reimburse participating physicians for the provision of medically necessary healthcare services to defendants' plan members.

26. With respect to MSSNY physicians who contract directly with Excellus, they enter into a standardized, one-sided agreements. Although the terms of these agreements are far less favorable to the physicians than to defendants, physicians are compelled to sign such agreements because the physicians need to participate in defendants' health plans to increase and/or maintain their patient volume, and to make finite and necessary healthcare services available to as many people in the community as possible.

27. The relevant contractual terms contained in these agreements are identical or substantially similar. Excellus does not allow individual physicians to negotiate these agreements. These agreements all provide that MSSNY members agree to render medically necessary healthcare services to defendants' plan members in exchange for prompt reimbursement from Excellus at specified rates.

28. With respect to reimbursement, the agreements state as follows:

Reimbursement of Physician. Excellus/BCBS will compensate Physician for all Covered Services rendered to Members at the rate and/or in the manner described in Exhibit A of this Agreement. Excellus/BCBS may amend the amounts payable to Physician as set forth in Exhibit A at any time upon sixty (60) days prior written notice to Physician.

"Attachment A" states that physicians will be paid in accordance with Excellus' fee schedules, but no fee schedules are attached to the agreement. Moreover, with respect to the method of obtaining payment for Covered Services, Excellus' agreements state:

Billing and Payment. Physician shall bill Excellus/BCBS or its designee for Covered Services rendered by Physician to Members in a manner and format acceptable to Excellus/BCBS. The billing form should be submitted within 30 days of the date of service, but will be accepted so long as submitted within 90 days of the date of service. If Physician submits claims electronically to Medicare then Physician agrees to submit claims electronically to Excellus/BCBS. We will promptly pay Physician directly. Excellus/BCBS will only make payment pursuant to correctly-billed claim forms which include appropriate procedure and diagnosis codes. Physician agrees to bill utilizing the most current and inclusive codes (5 digit CPT) that accurately reflect the services rendered.

29. According to the express terms of the agreements, participating physicians are also required to cooperate with defendants in their efforts to conduct quality assurance and utilization review. The agreements state:

6. **Utilization Management, Quality Improvement and Other Procedures.**

Physician agrees to cooperate in, and comply with, the standards and requirements of each of the following Excellus/BCBS initiatives; quality improvement, utilization management, credentialing, member grievance, and clinical encounter data collection programs related to any of this initiatives. These include, but are not limited to, reviews and action plans to improve the quality of care delivered to Members, data collection and measuring tools such as HEDIS, the New York State Quality Assurance Reporting Requirements (QARR) and similar initiatives, as well as precertification, referral authorizations and other programs designed to assure appropriate utilization at reasonable cost....

These terms can be, and are, utilized by Excellus in an improperly narrow fashion. Excellus alters these contractual terms to deny providers payment for services rendered to plan members.

30. As the foregoing paragraph indicates, defendants employ "utilization review" systems to determine, both prospectively and retroactively, whether, Excellus, in its sole discretion, deems healthcare services to be compensable. However, neither the agreements nor any other documents provided to participating physicians contain an adequate description of any guidelines, policies, or procedures for determining whether a healthcare service is compensable. This determination is within defendants' sole discretion, and is subject to change from one claim to another.

31. As set forth in detail below, contrary to the terms of its agreements with IPAs and participating physicians, defendants have refused to pay for all or a portion of the medically necessary healthcare services provided by MSSNY members to defendants' plan members and have delayed or reduced payment for other services. Additionally, defendants have failed to act in good faith, choosing instead to wrongfully exploit the utilization review process to delay and

deny payment, and/or to compromise MSSNY members' ability to receive the reimbursement to which they are entitled.

Defendants' Improper and Unfair Contracting Policies and Practices

32. In order to treat patients who are insured by Excellus, Excellus requires MSSNY members, either directly or through IPAs or other medical groups, to enter into the aforementioned agreements with Excellus.

33. If physicians refuse to enter into Excellus' one-sided agreements, those physicians are effectively prevented from seeing and treating patients, including long-time patients, who are covered for health insurance through any of Excellus' plans.

34. Physicians who object to contract provisions contained in Excellus' agreements are faced with an untenable choice. They can either accept agreements that are unfair to both physicians and patients, or they can choose to no longer treat patients who are insured by Excellus. As Excellus continues to gain market share through the acquisition of new companies, taking control of more members, the pressure becomes increasingly great for MSSNY members to join Excellus' network.

Defendants' Wrongful Denial Of Reimbursement For Medically Necessary Healthcare Services

35. Despite Excellus' representations that it will reimburse physicians in a complete and timely manner, defendants have wrongfully denied and/or delayed payment to participating physicians and has thereby injured both MSSNY and MSSNY members. Indeed, to avoid making timely and complete payments under its agreements, Excellus designed and has engaged

in an improper, unfair and deceptive scheme aimed at MSSNY members, that adversely affects MSSNY members, the defendants' plan members, and the general public, whereby Excellus delays, impedes, denies, or reduces payment of legitimate claims for reimbursement for medically necessary healthcare services rendered by MSSNY members to defendants' plan members. Defendants have employed, and continue to employ, a variety of means to carry out their improper, unfair and deceptive scheme, as detailed below.

Defendants' Improper Application of Current Procedural Terminology Codes

36. The American Medical Association ("AMA") has developed and annually publishes CPT Codes. According to the AMA, CPT Codes have been developed to establish a systematic listing of descriptive terms and identifying codes for procedures and services performed by physicians, embodying AMA standards. The CPT Codes provide a numeric system for reporting physicians' procedures and services by coupling a general identification code with a "modifier" to precisely define the procedure or service. The AMA's coding guidelines have been adopted by the federal Health Care Financing Administration (HCFA), and are also published in HCFA's Documentation Guidelines for Evaluation and Management Services.

37. A variety of factors impact the complexity or difficulty of a particular medical service and the corresponding CPT Code, including, *inter alia*, the patient's medical history, the physician's examination, the level of medical decision making, the counseling involved, the coordination of the patient's care, the nature of the presenting problem, and the time required.

38. As set forth in detail below, as part of their unfair and deceptive scheme to delay, deny, impede and reduce lawful reimbursement to MSSNY members, defendants routinely and unjustifiably depart from the AMA CPT coding guidelines recognized by physicians and insurers for processing claims for reimbursement. Moreover, defendants fail to disclose to MSSNY members how they depart from the CPT coding guidelines, thereby making it impossible for MSSNY members to know how defendants calculated providers' compensation.

Defendants' Improper Downcoding of Physician Claims

39. Excellus routinely and unjustifiably reduces payment to participating physicians for healthcare services rendered to Excellus enrollees by engaging in "downcoding." AMA CPT guidelines are carefully designed to reflect relative values of physician services and intended to be followed "as is." Nevertheless, appropriate CPT Codes submitted by physicians are systematically replaced with codes with lower reimbursement rates. The purpose and result of this automatic and improper "downcoding" is to reduce payments due to physicians. Defendants engage in these "downcoding" procedures through the use of software that is not based on medical necessity. Excellus automatically downcodes for the sole purpose of arbitrarily and wrongfully reducing payments to physicians.

40. Excellus also engages in an improper practice is known as "patterns" review. Computer programs identify physicians who perform certain services more frequently than other physicians as "outliers" and flag those physicians' claims for those services. The computer programs are intended to be used only to identify outliers, to facilitate a review of whether the frequently-provided service is in fact medically appropriate in a given instance. Nevertheless,

