

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MDL NO.: 1334

IN RE: MANAGED CARE LITIGATION

THIS DOCUMENT RELATES ONLY TO
PROVIDER TRACK CASES

CHARLES B. SHANE, M.D., et al.

Plaintiffs,

v.

HUMANA, INC.; AETNA, INC.; AETNA –USHC, INC.;
CIGNA; COVENTRY HEALTH CARE, INC.;
HEALTH NET, INC.; HUMANA HEALTH PLAN, INC.;
PACIFICARE HEALTH SYSTEMS, INC.; PRUDENTIAL
INSURANCE COMPANY OF AMERICA; UNITED HEALTH
GROUP; UNITED HEALTH CARE; WELLPOINT HEALTH
NETWORKS, INC.; AND ANTHEM, INC.

Defendants.

TIMOTHY N. KAISER, M.D., and SUZANNE LeBEL
CORRIGAN, M.D., on behalf of a class of others similarly situated,

Plaintiffs,

v.

CIGNA CORPORATION; CIGNA HEALTHCARE OF
ST. LOUIS, INC.; and CIGNA HEALTHCARE OF
TEXAS, INC.,

Defendants.

**ORDER PRELIMINARILY APPROVING PROPOSED SETTLEMENT AMONG
CIGNA HEALTHCARE AND PHYSICIANS**

The Court having reviewed and considered the Joint Motion for Preliminary Approval of Settlement Among *CIGNA HealthCare* and Physicians (“Joint Motion”) filed on September 4, 2003, and having reviewed and considered the terms and

EXHIBIT 2

conditions of the proposed Settlement as set forth in the Settlement Agreement Among CIGNA HealthCare and Physicians dated September 4, 2003 (the “Agreement”), a copy of which has been submitted with the Joint Motion, and on the basis of such submissions, together with any other submissions by the parties in support of the Joint Motion, and all prior proceedings had in this consolidated multi-district litigation, good cause for this Order having been shown,

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The terms of the Agreement are hereby *preliminarily* approved, subject to further consideration at the Fairness Hearing provided for below. The Court concludes that the proposed Settlement is sufficiently within the range of reasonableness to warrant the conditional certification of the settlement Class, the scheduling of the Fairness Hearing and the circulation of Initial Notice to the Class, each as provided for in this Order. Capitalized terms in this Order should have the meaning assigned to them in the Agreement unless otherwise defined herein.

Conditional Certification of the Class

2. For purposes of settlement only, pursuant to Federal Rules of Civil Procedure 23(a), (b)(2) and (b)(3), solely with respect to CIGNA HealthCare and the other Released Persons, a settlement class is hereby conditionally certified as follows (the “Class”):

any and all Physicians, Physician Groups and Physician Organizations (and all Persons claiming by or through them, such as Physicians’ Assistants and Advanced Practice Registered Nurses), who or which provided Covered Services to any CIGNA HealthCare member or any individual enrolled in or covered by a plan offered or administered by any Person named as a defendant in the *Shane* complaint or by any of their respective current or former Subsidiaries from August 4, 1990 through the date of the entry of the Preliminary Approval Order; provided, however,

that the Class shall not include any Physician who is or was an employee of a CIGNA HealthCare staff-model HMO at the time of providing such Covered Services.

Class Representative Plaintiffs are hereby conditionally certified as representatives of the Class defined above. This conditional certification of the Class and Class representatives is solely for purposes of effectuating the proposed Settlement. If the Agreement is terminated or is not consummated for any reason, the foregoing conditional certification of the Class and appointment of Class representatives shall be void and of no further effect and the parties to the proposed Settlement shall be returned to the status each occupied before entry of this Order without prejudice to any legal argument that any of the parties to the Agreement might have asserted but for the Agreement, and provided that in such circumstances any further ruling by this Court or an appellate court on the propriety of this Court's order dated September 26, 2002, certifying classes in *In re Managed Care Litigation*, MDL 1334, shall apply to the Released Persons as if the Released Persons had participated in further proceedings with respect to that Order.

Based on the Court's review of the Joint Motion and supporting materials, the Court conditionally finds that the proposed Class satisfies Rule 23(a) of the Federal Rules of Civil Procedure in that:

- A. The Class, which consists of hundreds of thousands of Physicians, Physician Groups and Physician Organizations, is so numerous that joinder of all Persons who fall within the class definition is impracticable;
- B. The commonality requirement is satisfied where members of the Class share at least one common legal or factual issue. Here, there are questions of law common to the Class, including allegations under RICO and other causes of action as set forth in the Plaintiffs' Third Amended Complaint in *Kaiser* and in the Second Amended Consolidated Class Action Complaint in *Shane*. There are also questions of fact common to the Class, including certain factual

issues related to whether computer systems were inadequate and whether computer programs were systematically used to improperly deny or delay payment for health care services furnished by members of the Class;

- C. The claims of the Class representatives are typical of the claims of the Class; and
- D. The Class representatives will fairly and adequately protect the interests of the Class and are represented by qualified counsel who are competent to represent the Class and prosecute this Litigation.

The Court further conditionally finds that the proposed Class satisfies Rule 23(b)(2) of the Federal Rules of Civil Procedure in that CIGNA HealthCare is alleged to have acted on grounds generally applicable to the Class as a whole, thereby making appropriate final injunctive relief with respect to the Class as a whole. The Court notes that the terms of the Agreement include substantial injunctive relief.

The Court further conditionally finds that the proposed Class satisfies Rule 23(b)(3) of the Federal Rules of Civil Procedure which requires that common issues predominate and that a class action is superior to other available methods for the fair and efficient resolution of this controversy. The Court notes that the terms of the Agreement include procedures for resolving claim disputes, including mechanisms for independent external review and other independent decision-makers, that absolve individual Class Members, for example, from having to prove, pursuant to RICO, that they relied to their detriment on alleged misrepresentations and nondisclosures, with the result that the Court need not resolve many individual factual and legal issues that might otherwise arise. The Court further notes that because the Litigation is being settled, rather than litigated, it need not consider the manageability issues that would be presented by a nationwide class litigation with respect to such individualized issues. *Amchem Prods., Inc. v. Windsor*,

117 S. Ct. 2231, 2240 (1997). Against this background, and in light of the Complaints' allegations of systemic computer and claims processing issues, the Court conditionally finds that common issues predominate and that a class action is superior to other available methods for the fair and efficient resolution of this controversy.

Fairness Hearing; Right to Appear and Object

3. A Fairness Hearing shall take place before the undersigned, United States District Judge Federico A. Moreno, at the United States Courthouse, Courtroom IV, Tenth Floor, Federal Justice Building, 99 Northeast 4th Street, Miami, Florida 33132, on _____, at _____, to determine:

- (a) whether the Court should certify the Class and whether Class representatives and Class Counsel have adequately represented the Class;
- (b) whether the proposed Settlement, on the terms and conditions provided for in the Agreement, should be finally approved by the Court as fair, reasonable and adequate;
- (c) whether the Released Claims of the Class Members in this Litigation should be dismissed on the merits and with prejudice as to CIGNA HealthCare;
- (d) whether the application for attorneys' fees, costs and expenses to be submitted by Class Counsel and Kaiser Counsel in connection with the Fairness Hearing should be approved;
- (e) whether the application for incentive awards to Class representatives to be submitted in connection with the Fairness Hearing should be approved;

(f) whether each Tag-Along Action should be dismissed with prejudice as to Released Claims against CIGNA HealthCare with the exception of any Tag-Along Action with respect to any named plaintiff that has timely submitted an Opt Out request; and

(g) such other matters as the Court may deem necessary or appropriate.

4. The Court may finally approve the proposed Settlement at or after the Fairness Hearing with any modifications agreed to by the Settling Parties and without further notice to the members of the Class.

5. Any putative Class Member who or which has not timely and properly provided notice of an election to Opt Out of the Class and the proposed settlement in the manner set forth below, and any other interested Person, may appear at the Fairness Hearing in person or by counsel and be heard, to the extent allowed by the Court, either in support of or in opposition to the matters to be considered at the hearing, provided, however, that no putative Class Member who or which has elected to Opt Out from the Class shall be entitled to object; and provided further that no Person shall be heard, and no papers, briefs or other submissions shall be considered by the Court in connection with its consideration of those matters, unless on or before _____, 2003 [**Objection Date – 60 days after original notice**], such Person:

(a) files with the Court a notice of such Person's intention to appear, together with a written statement of objection setting forth such Person's objections, if any, to the matters to be considered and the basis therefore, together with all

other support, papers or briefs that he, she or it wishes the Court to consider and intends to rely upon at the Fairness Hearing, and

(b) serves copies of all such materials either by hand or overnight delivery, on Notice Counsel and Defendants' Counsel at the addresses specified in the Initial Notice. All responses by the Settling Parties to objections shall also be served by hand or overnight delivery on the objecting Person or his, her or its attorney. Objectors' papers may be supplemented ten (10) days prior to the Fairness Hearing following the filing of any responsive papers by the Settling Parties and served in the manner and on counsel described above.

6. The Court may adjourn the Fairness Hearing, or any adjournment thereof, including the consideration of the application for attorneys' fees, costs and expenses, without further notice of any kind other than an announcement of such adjournment in open court at the Fairness Hearing or any adjournment thereof.

Form and Timing of Notice

7. The Initial Notice substantially in the form attached as Exhibits 6 and 7 to the Agreement is hereby approved.

8. The Plan of Notice attached as Exhibit 5 to the Agreement is approved.

9. Costs of providing Notice shall be paid as set forth in the Agreement.

10. Pursuant to the Plan of Notice, the Settling Parties, in cooperation with the Settlement Administrator, shall cause the Initial Notice, substantially in the form attached as Exhibit 6 to the Agreement, to be sent by first class mail to the addresses of

all Persons set forth on the Class List within thirty (30) days of entry of this Order or by _____, 2003. Notice to any individual Physician at his or her business address is sufficient notice to that Physician's Physician Group or Physician Organization. Notice shall also be sent to any Person who requests it from the Settlement Administrator or Class Counsel.

11. In addition to the mailing of the Initial Notice as called for in paragraph 10 of this Order, the Settling Parties shall perform the other steps of publication notice to the Class as detailed in the Plan of Notice, including but not limited to the following:

- A. By _____, 2003 [**no later than thirty (30) days prior to the Opt Out Deadline**], the summary form of the Initial Notice, substantially in the form attached as Exhibit 7 to the Agreement, will have been published in the legal notices sections of the national editions of *The Wall Street Journal* and *USA Today* one day a week for two consecutive weeks. In addition, to the extent reasonably practicable within the schedule fixed by the Court, the Settling Parties will seek to have the summary form of Initial Notice published at least once, no later than _____, 2003 [**30 days prior to the Opt Out Deadline**], in a nationwide periodical addressing issues of concern to Physicians, such as *The Journal of the American Medical Association* or *The American Medical News*.
- B. An internet website will be created and maintained by the Settlement Administrator that will be available for public access by _____ [**within thirty (30) days after the date of the entry of the Preliminary Approval Order**]. The website will allow putative Class Members to download, view and print copies of the forms of Initial Notice and will contain an automated number and e-mail address maintained by the Settlement Administrator. It will also contain a link to the website maintained by Class Counsel.

12. Having considered the manner of giving Initial Notice to putative Class Members as described in the Plan of Notice, the Court finds that the notice given in the form and manner provided as set forth in paragraphs 7 through 11 of this Order and in the Plan of Notice is the best means of notice to members of the Class that is practicable under the circumstances and, when completed, shall constitute due and sufficient notice of the proposed Settlement and the Fairness Hearing to all Persons affected by and/or entitled to participate in the proposed Settlement or the Fairness Hearing, in full compliance with the requirements of due process and the Federal Rules of Civil Procedure.

Ability of Putative Class Members to Opt Out of Settlement Class

13. All putative Class Members who wish to Opt Out of the Class must do so by sending a written request for exclusion to the Settlement Administrator by first-class mail to the address in the Initial Notice, signed by the putative Class Members and providing all information called for in the Initial Notice. To be considered timely, and thereby effectively exclude a Person from the Class, the envelope delivering a completed Opt Out request for such Person must be postmarked no later than _____, 2003 (the “Opt Out Deadline” [**60 days after Notice Date**]). At the Fairness Hearing, the Settlement Administrator shall file an Affidavit or Declaration with the Clerk of the Court (with a copy to Class Counsel and Defendants’ Counsel) attaching a final list in machine-readable form of those Opt Out requests filed by the Opt Out Deadline and not then revoked.

14. Any putative Class Member that does not properly and timely request exclusion from the Class (or who requests exclusion but revokes that request as

permitted by the Agreement) shall be included in such Class and, if the proposed Settlement is approved and becomes effective, shall be bound by all the terms and provisions of the Agreement, including but not limited to the releases, waivers and covenants not to sue described therein, whether or not such Person shall have objected to the Settlement and whether or not such Person makes a claim upon, or participates in, the Settlement Consideration to be provided under the Agreement.

Other Provisions

15. The Court hereby vacates so much of the Order of Preliminary Approval and Conditional Class Certification entered by Chief Judge G. Patrick Murphy of the United States District Court for the Southern District of Illinois on November 26, 2002 in *Kaiser, et al. v. CIGNA Corporation, CIGNA HealthCare of St. Louis, Inc., and CIGNA HealthCare of Texas, Inc.* (Case No. 02-1179-GPM), as applies to Class Members under the proposed Settlement.

16. The Court hereby lifts its Order Granting Plaintiffs' Motion for Preliminary Injunction, entered on December 12, 2002, that enjoined Defendants and its attorneys "from proceeding in any manner with the proposed settlement that [w]as 'preliminarily' approved in the *Kaiser, et al. v. CIGNA Corp., et al.*, Civil Action No. 02-1179-GPM, United States District Court for the Southern District of Illinois, without the express approval of this Court, and from contacting in any way the members of the class certified by this Court."

17. The Court further appoints and designates as Class Counsel the MDL Class Counsel in this Litigation.

18. Archie C. Lamb, Jr., Harley S. Tropin and Edith M. Kallas are hereby appointed as Notice Counsel for purposes of this proposed Settlement.

19. Notice Counsel and Defendants' Counsel are hereby authorized and ordered to retain Poorman-Douglas Corporation as the Settlement Administrator in accordance with the terms of Section 9.1 of the Agreement.

20. Notice Counsel and Defendants' Counsel are hereby authorized and ordered to retain an Independent Review Entity in accordance with the terms of Section 9.2 of the Agreement.

21. CIGNA HealthCare is hereby authorized and ordered to appoint an Internal Compliance Officer in accordance with the terms of Section 15.1 of the Agreement.

22. Notice Counsel are authorized and ordered to designate a Compliance Dispute Facilitator in accordance with the terms of Section 15.2 of the Agreement.

23. CIGNA HealthCare is authorized to communicate with putative Class Members regarding the provisions of the Agreement, so long as such communications are not inconsistent with the Initial Notice, the Notice of Commencement of the Class Period, or other agreed upon communications concerning the Agreement. CIGNA HealthCare shall not discourage the filing of any claims allowed under the Agreement or advise Class Members with respect to the category or categories of claims that the Class Members should or should not file under the Agreement. CIGNA HealthCare shall refer to the Settlement Administrator or Class Counsel any inquiries from Class Members about claims to be filed under the Agreement.

24. Any Class Member may enter an appearance in this Litigation, at his, her or its own expense, individually or through counsel of his, her or its own choice, in connection with paragraph 5 above or otherwise. Any Class Member who does not enter an appearance will be represented by Class Counsel.

25. All proceedings against or concerning CIGNA HealthCare in this Litigation, other than proceedings as may be necessary to carry out the terms and conditions of the proposed Settlement, are hereby stayed and suspended until further order of the Court. Pending final determination of whether the proposed Settlement and the Agreement should be approved and the Class permanently certified, all putative Class Members and all Signatory Medical Societies are hereby barred and enjoined from commencing or prosecuting any action asserting any Released Claims.

26. All proceedings against or concerning CIGNA HealthCare in Tag-Along Actions (as defined in Section 17.1 of the Agreement) to the extent of Released Claims, other than proceedings as may be necessary to carry out the terms and conditions of the proposed Settlement, are hereby stayed and suspended until further order of the Court.

27. No discovery with regard to the proposed Settlement or the Agreement shall be permitted as to any of the Settling Parties other than as may be directed by the Court upon a proper showing by the party seeking such discovery by motion properly noticed and served in accordance with this Court's Local Rule 7.1.

28. As to any action brought by or on behalf of putative Class Members that asserts any claim that as of Final Approval would constitute a Released Claim against CIGNA HealthCare (other than the *Kaiser* or *Shane* actions) that has been,

or will in the future, be consolidated with the Provider Track Actions under MDL Docket No. 1334, all proceedings as to CIGNA HealthCare in each such action are hereby stayed with respect to the claims that are Released Claims under the Agreement pending entry of the Final Order and Judgment.

29. Neither the Agreement, in whole or in part, whether effective, terminated, or otherwise, or any of its provisions or any negotiations, statements or proceedings relating to it shall be construed as, offered as, received as, used as or deemed to be evidence of any kind in *Kaiser* or *Shane* or in any other action, or in any judicial, administrative, regulatory or other proceeding, except in a proceeding to enforce this Agreement. Without limiting the foregoing, neither the Agreement nor any related negotiations, statements or proceedings shall be construed as, offered as, received as, used as or deemed to be evidence of an admission or concession of liability or wrongdoing whatsoever or breach of any duty on the part of CIGNA HealthCare, the Defendants or the Plaintiffs, or as a waiver by CIGNA HealthCare, the Defendants or the Plaintiffs of any applicable defense, including without limitation any applicable statute of limitations.

30. In the event that the Agreement is terminated or is not consummated for any reason, the proposed Settlement and all proceedings had in connection therewith shall be null and void, except to the extent expressly provided to the contrary in the Agreement, and without prejudice to the rights of the parties to the Agreement before it was executed.

DONE AND ORDERED after a hearing in open court at the United States District Courthouse in Miami, Florida, on _____, and signed this ___ day of _____, 2003.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE