

IN THE DISTRICT COURT OF
NUECES COUNTY, TEXAS
148TH JUDICIAL DISTRICT

Yolanda Garza, individually and
on behalf of others similarly situated,

Plaintiff,

v.

Cause No. 02-06322-E

Nationwide Mutual Insurance Company,
Nationwide Property and Casualty Insurance
Company, and Nationwide General Insurance
Company,

Defendants.

PRELIMINARY APPROVAL ORDER

This matter is before the Court upon the Parties' Motion(s) for Preliminary Approval of Proposed Stipulation of Class Action Settlement. Having reviewed the record, heard argument of counsel, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the Parties' Motion(s) for Preliminary Approval of Proposed Stipulation of Class Action Settlement is GRANTED as follows:

Preliminary Approval of the Proposed Settlement

1. The Court has jurisdiction over the subject matter of this action, and over the Parties and the Settlement Class (as defined below).

2. For the purposes of preliminarily certifying the Settlement Class and considering the proposed Stipulation of Class Action Settlement (the "Stipulation"), the Court exercises concurrent jurisdiction with the United States District Court for the District of Arizona in the case styled *Cashman v. Allied Insurance, et al.*, United States District Court, District of Arizona,

Case No. CIV-05-415-TUC-RCC (the “Cashman Action”). This Preliminary Approval Order (“Order”) is conditioned upon the entry of the Preliminary Approval Order by the Court presiding over the Cashman Action in substantially the same form attached as Exhibit 2 to the Stipulation.

3. The Court preliminarily approves the proposed settlement and finds that: (a) the proposed settlement resulted from extensive arm’s-length negotiations and was concluded only after Class Counsel had duly investigated the issues raised by Plaintiffs’ claims; (b) the proposed settlement of this action makes available valuable consideration commensurate with the alleged harm; and (c) the proposed settlement evidenced by the Stipulation is sufficiently fair, reasonable and adequate to warrant providing notice of this action and the proposed settlement to the Settlement Class Members and holding a full hearing on the proposed settlement.

4. Capitalized terms used in this Order that are not otherwise defined in this Order shall have the meanings assigned to them in the Stipulation.

Preliminary Certification of the Settlement Class

5. The Court preliminarily approves the Stipulation and its attached exhibits, which are Exhibits: (1) and (2), the Preliminary Approval Orders; (3) the Notice of Proposed Class Action Settlement and Fairness of Stipulation Hearing (“Mail Notice”); (4) the Publication Notice; (5) the Insured’s Claim Form; (6) the Provider Claim Form; and (7) and (8), the Final Orders and Judgments.

6. For purposes of settlement of this action (and only for such purposes, and without an adjudication on the merits or a determination of whether a class should be certified if the settlement is not approved or does not otherwise become final), and pursuant to Texas Rule of

Civil Procedure 42, this action is preliminarily certified as a class action on behalf of the following Settlement Class:

All persons, and their medical providers, who were covered under personal injury protection, medical payments, workers' compensation, or other no-fault or first party medical expense coverages pursuant to an insurance policy issued by a Nationwide/Allied company or one of their affiliates in Covered States: (a) who made an insurance claim to Nationwide/Allied under one or more of the foregoing insurance coverages; (b) who during the Class Period submitted, directly or indirectly, to Nationwide/Allied charges for payment of medical bills that were reviewed or audited; and (c) who received or were tendered payment by Nationwide/Allied in an amount less than the full amount charged under a policy where the applicable coverage limits were not exhausted.

"Covered States" means and includes all states within the United States, except the following excluded states: Delaware, Florida, Hawaii, New Jersey, New York and Pennsylvania.

"Class Period" means the period from December 1, 1992 through the date of the Preliminary Approval Order issued by the court in the Cashman Action.

Excluded from the Settlement Class are: (i) Nationwide/Allied, any entities in which Nationwide/Allied has a controlling interest, and all of their legal representatives, heirs and successors; (ii) members of the judiciary; and (iii) any claims resolved and/or discharged or released prior to the date of the Preliminary Approval Order issued by the court presiding over the Cashman Action.

The Court expressly reserves the right to determine, should the occasion arise, whether the above-captioned action may continue to be certified as a class action for purposes other than settlement, and Nationwide/Allied retains all rights to assert that this action may not be certified as a class action except for settlement purposes.

7. As used in this Order and as defined in the Stipulation, "Nationwide/Allied" means the named defendants in the Lawsuits, Nationwide Mutual Insurance Company, Nationwide Property and Casualty Insurance Company, Nationwide General Insurance Company, Allied Property and Casualty Insurance Company, Allied Insurance and AMCO Insurance Company, and each and all of their present and former affiliates, related companies,

parent companies, subsidiaries, predecessors, successors or assigns, whether or not named herein, including Nationwide Mutual Fire Insurance Company, Nationwide Insurance Company of America, Nationwide Life Insurance Company, Nationwide Assurance Company f/k/a Colonial Insurance Company, Nationwide Indemnity Company, Nationwide Corporation, Nationwide Insurance, Nationwide Affinity Insurance Company of America, National Casualty Company, Nationwide International Underwriters, Nationwide Lloyds, Depositors Insurance Company, CalFarm Insurance Company, Colonial County Mutual Insurance Company, Farmland Mutual Insurance Company, Lone Star General Agency, Inc., Allied Group, Inc., Allied General Agency Company, Colonial Insurance Company of California, Colonial Insurance Company of Wisconsin, Titan Indemnity Company, Titan Insurance Company and each and all of their respective past, present or future officers, directors, associates, stockholders, controlling persons, representatives, employees, attorneys, accountants, financial or investment advisors or agents, heirs, executors, trustees, general or limited partners or partnerships, personal representatives, estates or administrators.

8. Acuna, P.T., Gerald H. Bemis, Sr., D.C., Mark J. Eavenson, D.C., d/b/a Multi-Care Specialists, P.C., and Macaela Cashman are permitted to intervene for the sole purpose of serving as class representatives for the proposed Settlement Class (as defined above) and, together with plaintiff Yolanda Garza, are designated as the representatives of the Settlement Class for the purpose of seeking approval of the settlement of this action, and are referred to herein as the "Class Representatives."

9. Counsel for Yolanda Garza, Acuna, P.T., Gerald H. Bemis, Sr., D.C., Mark J. Eavenson, D.C., d/b/a Multi-Care Specialists, P.C., and Macaela Cashman are hereby preliminarily approved as counsel for the Settlement Class for purposes of seeking approval of

the settlement of this action, and are referred to herein as “Class Counsel.” Class Counsel are as follows:

Austin Tighe
Feazell & Tighe LLP
6300 Bridgepoint Parkway
Bridgepoint 2, Suite 220
Austin, TX 78730

Paul M. Weiss
Freed & Weiss LLC
111 West Washington Street, Suite 1331
Chicago, Illinois 60602

Bradley M. Lakin
Jonathan Piper
The Lakin Law Firm, P.C.
300 Evans Avenue, Box 229
Wood River, Illinois 62095

Bruce G. Macdonald
Todd Jackson
McNamara, Goldsmith, Jackson & Macdonald, P.C.
1670 E. River Road, Suite 200
Tucson, AZ 85718

10. Under Texas Rule of Civil Procedure 42, the requirements of class certification are divided into two subsections, Rules 42(a) and 42(b). For a class to be certified, each of the four requirements of Rule 42(a), as well as one of the four requirements of Rule 42(b) must be satisfied. As established below, the Court preliminarily finds for purposes of the settlement of this action (and only for such purposes, and without an adjudication of the merits or a determination of whether a class should be certified if the settlement is not approved or does not otherwise become final), that the requirements of the Texas Rules of Civil Procedure and any other applicable law have been met.

11. Rule 42(a)(1) requires that “the class be so numerous that joinder of all members is impracticable.” While Texas law does not require proof of the precise number of class members, *Phillips v. Joint Legislative Committee on Performance and Expenditure Review of the State of Mississippi*, 637 F.2d 1014, 1022 (5th Cir. 1981), Texas courts have found this requirement to be satisfied by classes numbering in the hundreds. See *Adams v. Reagan*, 791 S.W.2d 284, 288 (Tex.App.-Fort Worth 1990). Here, the Settlement Class contains thousands of members. Thus, the numerosity requirement is satisfied.

12. Rule 42(a)(2) requires that “there are questions of law or fact common to the class.” A common question is one that when answered as to the named plaintiffs, is answered to the remaining class members. *Health & Tennis Corp. of America v. Jackson*, 928 S.W.2d 583, 590 (Tex.App.-San Antonio 1996). Additionally, the standard for commonality is not high. *Union Pacific Resources Group, Inc. v. Hankins*, 111 S.W.3d 69, 74 (Tex. 2003). Here, the claims of the Class Representatives are uniform with respect to the claims of the Settlement Class Members to the extent that they relate to Nationwide/Allied’s alleged conduct. Thus, the commonality requirement is satisfied.

13. Rule 42(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” The typicality requirement is satisfied if the class representatives demonstrate that their claims have the same essential characteristics as those of the class as a whole. Additionally, all that is required is that the claims arise from the same pattern of conduct and be based on the same legal theory. *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 613 (Tex.App.-Texarkana 1996). Here, the claims of the Class Representatives arise from the same course of alleged conduct which give rise to the claims of all the Settlement Class Members. Thus, the typicality requirement is satisfied.

14. Rule 42(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” This requirement is demonstrated by showing that (1) the class representative, through their attorneys, will vigorously prosecute the class claims, and (2) there is an absence of antagonism or conflict between the class representative’s interests and those of the class members. *Graebel/Houston Movers, Inc v. Chastain*, 26 S.W.3d 24, 32 (Tex.App.-Houston 2000). Here, the Class Representatives have the same interest in attempting to establish their claims against Nationwide/Allied. Additionally, the Class Representatives and the Settlement Class Members are represented by experienced, able counsel. Thus, adequacy of representation is satisfied.

15. Rule 42(b)(3) requires that “the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” In evaluating whether common issues predominate, courts must identify the controlling substantive issues of the case and assess which issues will predominate to determine whether those issues are in fact common to the class. Courts must therefore determine whether common or individual issues will be the object of most of the efforts of the litigants and the court. *Snyder Communications, L.P. v. Magana*, 142 S.W.3d 295, 299 (Tex. 2004). Here, the common issues of the Settlement Class predominate over individual issues. The core issues concerning the tender of payments by Nationwide/Allied in amounts less than the full amount charged under a policy where the applicable coverage limits were not exhausted are common to the Settlement Class. Thus, the predominance of common questions is satisfied.

16. Rule 42(b)(3) also requires that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these

issues include: (a) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against the members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action. Here, a class action is superior because, given the relatively small individual amounts in controversy, the economic interests of the Settlement Class Members are better served through a class action. Additionally, the Parties have represented to this Court and the court presiding over the Cashman Action, that they find it desirable to concentrate the existing litigation in those forums and to conclude their settlement therein. Finally, because superiority is assessed in the context of a proposed class settlement, the Court need not consider manageability issues that might be presented in this case. *See Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997).

17. As established above, the Court further preliminarily finds for purposes of the settlement of this action, and only for such purposes, that the requirements for preliminary certification of a settlement class under Texas Rule of Civil Procedure 42, and any other applicable law, have been met.

Fairness Hearing

18. A hearing (the "Fairness Hearing") will be held on MARCH 6, 2008, at 1:30 p.m., in courtroom 140 ^{of the 14th District} ~~of this~~ Court to determine:

(a) whether this action should be finally certified as a class action for settlement purposes;

(b) whether the proposed settlement of this action should be approved as fair, reasonable and adequate;

(c) whether this action should be dismissed on the merits and with prejudice pursuant to the terms of the proposed settlement;

(d) whether Settlement Class Members should be bound by the release set forth in the Stipulation;

(e) whether Class Counsels' application for an award of attorneys' fees and expenses should be approved; and

(f) whether the Class Representatives' application for incentive awards should be approved.

Pre-Hearing Notice to Settlement Class Members

19. The appointment of a "Settlement Administrator," as agreed in the Stipulation, is approved for purposes of providing notice, administering requests for exclusion and other communications with Settlement Class Members, and otherwise administering the proposed settlement pursuant to the Stipulation and the Order(s) of this Court and the court presiding over the Cashman Action.

20. Pursuant to the terms of the Stipulation, Nationwide/Allied shall cause, through the Settlement Administrator, the Mail Notice, together with either an Insured's Claim Form or a Provider Claim Form, as the case may be, to be provided to potential Settlement Class Members, and such other notice to be provided, as set forth below.

(a) **The Mail Notice.** Within forty-five (45) days of the entry of the Preliminary Approval Order in the Cashman Action or such other time as that court may provide, the Settlement Administrator shall mail the Mail Notice, together with either an Insured's Claim Form or a Provider Claim Form, as the case may be, substantially in the forms filed with this Court as Exhibits 3 and 5 or 6 to the Stipulation, to Settlement Class Members, at their last

known address of record, who are identified by a reasonable search of Nationwide/Allied's available electronic records from whom, or on whose behalf, medical expense charges have been submitted, directly or indirectly, to Nationwide/Allied within the five (5) years preceding the date of the Preliminary Approval Order issued by the court presiding over the Cashman Action, which charges appear to have been submitted to review and adjustment for a Covered Claim reason under a policy where the applicable coverage limits are not identified as exhausted at the time of the Mail Notice.

(b) **Notice by Publication.** Within fourteen (14) days of the date the Mail Notice is mailed, the Publication Notice shall be published, substantially in the form filed with this Court as Exhibit 4 to the Stipulation, in the national edition of the U.S.A. Today, the Journal of the American Medical Association, and Medical Economics.

(c) **Notice to Federal and State Officials.** Nationwide/Allied shall direct the Settlement Administrator to provide notice to regulatory agencies as provided in the Class Action Fairness Act, 28 U.S.C. § 1715.

21. **Internet Notice.** Nationwide/Allied shall establish and maintain, through the Settlement Administrator, a website with downloadable Claim Forms and hyperlinks to Settlement Documents and such other documents the Parties shall reasonably agree upon, as well as frequently asked questions and responses thereto, as the Parties shall reasonably agree upon. The website shall remain operational and accessible through the end of the Notice Period.

22. **Toll Free Number.** Nationwide/Allied shall establish and maintain, through the Settlement Administrator, a toll free number which will provide recorded responses for frequently asked questions to assist Class Members, which shall remain operational through the end of the Notice Period and which will be updated upon the occurrence of significant events in

