

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CLERK OF THE
DISTRICT COURT
KRISTIE LEE BOELTER

2015 DEC 29 PM 3 36

FILED
BY _____ **KP(17)**
DEPUTY

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

PETER BYORTH and ANN McKEAN, on
behalf of themselves and all those similarly
situated,

Plaintiffs,

vs.

USAA CASUALTY INS. CO. and JOHN
DOES I-X

Defendants,

Case No.: DV-15-0511
Judge Gregory R. Todd

**ORDER CERTIFYING CLASS
UNDER MONTANA RULE OF CIVIL
PROCEDURE 23(a)**

INTRODUCTION

This matter comes before the Court on a Motion to Certify Class filed on
November 19, 2015. On November 25, 2015 Defendant filed its Motion to Strike Class
Allegations from the Complaint. Having read the briefs, this Court deems the matter
submitted.

BACKGROUND

1
2 On September 25, 2011 Peter Byorth (Byorth) was injured when he was struck
3 by a motor vehicle while riding his bicycle. At the time of his injury Byorth was insured
4 by United Services Automobile Association (USAA) Casualty Insurance Company.
5 Byorth's policy provided medical payment coverage of \$10,000. Byorth submitted
6 claims totaling \$85,000 which USAA in turn submitted to Auto Injury Solutions (AIS) for
7 file review. AIS determined that Byorth's claims were for procedures that were not
8 medically necessary and USAA denied his claims based on coding errors.

9 On February 10, 2014 Ann McKean, (McKean) was injured in a motor vehicle
10 accident. At the time of her injury McKean was insured by a USAA policy that also
11 provided for medical payment coverage of \$10,000. McKean submitted claims for
12 medical payment in excess of \$10,000 which USAA in turn submitted to AIS for a file
13 review. AIS determined that McKean's claims were for procedures that were not
14 medically necessary and USAA denied her claims based on coding errors.

15
16 On April 24, 2015 Byorth and McKean filed suit on behalf of themselves and all
17 those similarly situated alleging that USAA violated Montana law with respect to its
18 claims handling practices. On June 11, 2015 USAA filed its notice of removal to
19 Federal District Court. On September 30, 2015 the Federal District Court issued its
20 remand order citing a lack of diversity jurisdiction due to USAA's failure to satisfy the
21 amount in controversy requirement.
22
23
24
25

STANDARD OF REVIEW

1
2 Trial courts are afforded the broadest discretion when reviewing a decision on
3 class certification because the trial court is in the best position to consider the most fair
4 and efficient procedure for conducting any given litigation. *Jacobsen v. Allstate*, 2013
5 MT 244, ¶ 25, 371 Mont. 393, 402, 310 P.3d 452, 459.

DISCUSSION

7 Under Montana Rule of Civil Procedure 23(a) a class action may be certified if
8 the following four criteria are met:

- 9 (1) the class is so numerous that joinder of all members is impracticable;
10 (2) there are questions of law or fact common to the class;
11 (3) the claims or defenses of the representative parties are typical of the
12 claims or defenses of the class; and,
13 (4) the representative parties will fairly and adequately protect the
14 interests of the class.

15 *Id.* A class action must be certified at “an early practicable time after a person
16 sues or is sued as a class representative, the court must determine by order
17 whether to certify the action as a class action.” Mont. R. Civ. P. 23(c)(1)(A). The
18 order certifying the class must “define the class and the class claims, issues, or
19 defenses, and must appoint class counsel under Rule 23(g).” Mont R. Civ. P.
20 23(c)(1)(B).

I. NUMEROUSITY

21 Byorth proposes a class “comprised of all persons who satisfy the
22 following criteria: (a) all Montana consumers who (b) were insured by USAA for
23 med pay benefits and (c) who submitted a claim for med pay benefits within the
24 applicable statute of limitations, and (d) had their claim wrongfully denied in
25

1 whole or in part following a "file review" by AIS or because of an asserted "coding
2 error." Compl. ¶ 28.

3 In his brief, Byorth asserts that "USAA has stated in discovery that 154
4 med pay claims were submitted by Montana consumers over the past three
5 years." Pl. Br. Ex. 1. USAA counters, "[p]laintiff's proposed class is not
6 ascertainable; rather, it is a fail-safe class: one whose members cannot be
7 identified unless USAA CIC is found liable after a full trial." Def. Br. 5.

8 Insurance policies are undoubtedly contracts, and in Montana, "[t]he
9 period prescribed for the commencement of an action upon any contract,
10 obligation, or liability founded upon an instrument in writing is within 8 years."
11 Mont. Code Ann. § 27-2-202(1). In its answer to Plaintiff's interrogatory number
12 4, USAA indicated that 154 med pay claims were submitted by Montana
13 consumers over the past three years. Therefore, looking beyond the pleadings, it
14 would appear from USAA's answer that not only can the members be identified;
15 USAA has already done so for three of the past eight years.

17 USAA next argues that "[class] members cannot be identified unless the
18 Court legally determines which members, if any, have been "wrongfully denied";
19 med-pay coverage." Def. Br. 6. However, a determination under Rule 23(a)
20 does not require the Court to reach a legal conclusion on the ultimate issue
21 before certifying a class.

22 Here, all members of the proposed class, including Byorth and McKean,
23 were subject to the same claims processing procedure of outsourcing claims to
24 AIS. It is this common practice that may or may not be actionable that defines
25

1 the class. That the practice may be actionable does not alter how many Montana
2 residents were subjected to it. Because USAA could provide the total number of
3 med-pay claims submitted by Montana residents that were outsourced to AIS in
4 the last three years, it is reasonable to extrapolate that it could do so for the past
5 eight years.

6 Therefore, Plaintiff's class description must be modified to provide more
7 specificity. Plaintiffs' current class description is as follows: (a) all Montana
8 consumers who (b) were insured by USAA for med pay benefits and (c) who
9 submitted a claim for med pay benefits within the applicable statute of limitations,
10 and (d) had their claim wrongfully denied in whole or in part following a "file
11 review" by AIS or because of an asserted "coding error." Compl. ¶ 28. The
12 Court modifies (c) to provide more specificity as follows: (c) who submitted a
13 claim for med pay benefits from April of 2007 to April of 2015. The Court
14 modifies (d) to eliminate the preliminary legal determination as follows: (d) had
15 their claim denied in whole or in part following a "file review" by AIS or because of
16 an asserted "coding error."

18 It is impracticability, not impossibility, that the Court must consider, and
19 where, as here, more than 100 plaintiffs are likely to be represented, joinder is
20 impractical and Rule 23(a)(1) is satisfied.

21 **II. COMMONALITY**

22 USAA argues that "[p]laintiffs have pleaded a controversy about insured-
23 specific medical issues, where individual issues concerning class definition,
24 liability, and calculation of damages will overwhelm any issues common to the
25

1 putative class, if any, and there is simply no amount of discovery that will cure
2 this defect.” Def. Br. 7. However, commonality requires:

3 plaintiffs’ common legal or factual contentions must “demonstrate that the
4 class members ‘have suffered the same injury’ ” by asserting a common
5 contention “of such a nature that it is capable of classwide resolution—
6 which means that determination of its truth or falsity will resolve an issue
7 that is central to the validity of each one of the claims in one stroke.

8 *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 36, 371 Mont. 393, 407, 310 P.3d
9 452, 462 (citing *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338 (2011)). The
10 lesson of *Wal-Mart* with respect to commonality is that plaintiffs in class action
11 cases must have common questions of law or fact that resulted in a common
12 injury. It is the addition of the common injury that significantly raises the burden
13 for Federal Rule 23(a)(2) plaintiffs.

14 Montana’s Rule of Civil Procedure 23 is identical to its federal counterpart
15 and therefore, it follows that the U.S. Supreme Court’s interpretation of an
16 identical rule is persuasive. The Montana Supreme Court’s analysis applying the
17 more restrictive post *Wal-Mart* standard found that “federal courts applying *Wal-*
18 *Mart*’s commonality analysis have focused on the presence of just this sort of
19 common contention alleging that a defendant’s programmatic conduct violates
20 the law.” *Jacobsen* at ¶ 44, 371 Mont. at 413, 310 P.3d at 466. Subsequent
21 comments on the Montana Code reflect this view stating in part, “commonality is
22 met when a single issue is common to all class members regardless of
23 differences among the class . . . employees satisfied the more stringent federal
24 requirement because their claims depended on a common contention that was
25

1 capable of class-wide resolution.” Mont. Code Ann. *Former Rule 23* (comment
2 on commonality – More Stringent Requirement Satisfied)(2014).

3 Here, under the more restrictive *Wal-Mart* commonality standard, plaintiffs
4 allege that there are common questions of law including “whether or not USAA
5 violated Montana law with respect to its med pay claims handling practices.”
6 Compl. ¶ 29. The resolution of this common question will resolve an issue
7 central to all claims in one stroke. The degree of each plaintiff’s injury may need
8 individualized adjudication. Despite the possibility of subsequent litigation to
9 determine the extent of any damages a class member may have suffered, the
10 fact of a common injury due to defendant’s programmatic conduct can be
11 resolved in one stroke. Therefore, Plaintiffs have satisfied the commonality
12 element.

13 **III. TYPICALITY**

14 The typicality requirement “is designed to ensure that the interests of the
15 named representative are aligned with the interests of the class members, the
16 rationale being that a named plaintiff who vigorously pursues his or her own
17 interests will necessarily advance the interests of the class.” *Jacobsen* at ¶ 51,
18 371 Mont. 393, 417, 310 P.3d 452, 468.

19 USAA does not dispute that Byorth and McKean’s claims are typical of the
20 class, rather, USAA asserts that individual issues would dominate the Court’s
21 evaluation of Plaintiffs’ claims on the merits. Def. Br. 8.

22 Plaintiffs have alleged USAA has violated Mont. Code Ann. § 33–18–201
23 subsections (1), (2), (4), (6) and (7) as well as general breach of contract, breach
24
25

1 of fiduciary duty, and punitive damages. As the Montana Supreme Court noted
2 in *Jacobsen*, class-wide punitive damages would violate a Defendant's Due
3 Process right where the potential of granting class-wide punitive damages would
4 occur before determining whether individual class members suffered actual
5 damages. *Jacobsen*, ¶ 78, 371 Mont. 393, 429, 310 P.3d 452, 476. Therefore,
6 in this case, class-wide punitive damages are likewise inappropriate because
7 punitive damages require an individualized determination and cannot be resolved
8 on a class-wide basis.

9 In order to prevail on their Unfair Trade Practices claim, Plaintiffs'
10 individual legal claims would encompass facts common to other members of the
11 class such as; 1) did USAA misrepresent its policy provisions? 2) Did USAA
12 refuse to pay claims without conducting a reasonable investigation? And, 3) did
13 USAA neglect to effectuate a fair and prompt settlement? The factual evidence
14 produced by Byorth and McKean to substantiate each of these would be
15 evidence typical of each class member such as policy provisions, claim denials,
16 and medical payments.

17
18 In order to prevail on their breach of contract claim Plaintiffs would
19 likewise need to produce factual evidence that would be typical of other members
20 of the class such as policy provisions, claim denials, and medical payments.
21 These individual factual issues are not only capable of class-wide resolution, they
22 are likely to be typical of other members of the class especially because they
23 arose from an alleged common practice or course of conduct by USAA.
24 Therefore, Plaintiffs have satisfied the typicality requirement under Rule 23(a)(3),
25

1 and their individual factual issues will likely not dominate the Court's evaluation of
2 their claims on the merits.

3 **IV. ADEQUACY**

4 Montana Rule of Civil Procedure 23(a)(4) requires that
5 representative parties will fairly and adequately protect the interests of the
6 class. Adequate representation requires that the named representative's
7 attorney is qualified, competent, and able to conduct the litigation and the
8 named representative's interests are not antagonistic to the class
9 interests.

10 *Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶ 57, 366 Mont. 450,
11 470, 288 P.3d 193, 209. Here, USAA does not dispute counsel's competency or
12 that the representative parties will fairly and adequately protect the interests of
13 the class, rather, USAA argues that members have the incentive to seek relief
14 individually. Def. Br. 14.

15 Incentive to seek relief individually is not, by itself, a measure of
16 inadequacy, especially when other putative class members may not be aware
17 that their rights have been violated and have not sought relief individually.
18 Therefore, because the representative parties have interests that are aligned with
19 the putative class, and counsel is competent and experienced in complex civil
20 litigation, Rule 23(a)(4) is satisfied.

21 Under Mont. R. Civ. P. 23(c)(1)(B) the Court must define the class, certify
22 the claims, and appoint class counsel under Rule 23(g). It is to these issues the
23 Court now turns.

24 **V. CLASS COUNSEL**

25 The Court appoints Mr. John Heenan and Ms. Colette B. Davies as class
counsel and takes notice of counsel's ability to conduct complex civil litigation.

1 The Court notes that the firm, Bishop & Heenan, has adequate resources
2 available to represent the certified class in this action.

3 **VI. CERTIFIED CLASS**

4 Under Mont. R. Civ. P. 23(b)(3) the Court certifies the following class:

5 (a) all Montana consumers who (b) were insured by USAA for med pay benefits
6 and (c) who submitted a claim for med pay benefits from April 2007 to April 2015,
7 and (d) had their claim denied in whole or in part following a "file review" by AIS
8 or because of an asserted "coding error."

9 **VII. CERTIFIED QUESTION**

10 Under Mont. R. Civ. P. 23(c)(1)(B) the Court certifies the following
11 question: "Whether or not USAA violated Montana law with respect to its med-
12 pay claims handling practices."
13

14 **VIII. CLASS NOTICE**

15 Class counsel must submit to the Court a proposed class notice that complies
16 with Mont. R. Civ. P. 23(c)(2)(B), no later than thirty (30) days from the date of this
17 order for approval.
18

19
20
21 **ORDER**

22 For the reasons stated above,

23 **IT IS HEREBY ORDERED** that Plaintiffs class is certified as a Rule 23(b)(3)
24 class.
25

1 **IT IS FURTHER ORDERED** that John Heenan and Colette B. Davies are
2 appointed as class counsel.

3 **IT IS FURTHER ORDERED** that class counsel will submit to this Court a
4 proposed class notice in compliance with Rule 23(c)(2)(B) no later than 30 days from
5 the date of this order.

6 DATED AND ORDERED this ^{to} 24 day of December, 2015.

7
8 
9 HON. GREGORY R. TODD, District Court Judge
DV-15-0511

10 cc: John Heenan and Colette B. Davies, Bishop & Heenan, Class counsel.
11 Ian McIntosh and Kelsey E. Bunkers, Crowley Fleck PLLP, attorneys for USAA
12 Jessica G. Scott, Wheeler Trigg O'Donnell PLLP, attorney for USAA
13
14

15 **CERTIFICATE OF SERVICE**

16 This is to certify that the foregoing was caused to be served upon the parties or
17 their attorneys of record at their last-known address this 28 day of December, 2015.

18 By 
19 Erik P. Rathie
Law Clerk to HON. GREGORY R. TODD
20
21
22
23
24
25