[Cite as *Rimedio v. Summacare, Inc.*, 2010-Ohio-5555.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)		**IN THE COURT OF APPEALS** **NINTH JUDICIAL DISTRICT**
NICHOLAS V. RIMEDIO, D.O., et al., Plaintiffs-Appellees, - vs - SUMMACARE, INC., et al., Defendants-Appellants.		**C.A. No. 25068** APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2001-11-5536

DECISION AND JOURNAL ENTRY

Dated: November 17, 2010

GRENDELL, Judge, Eleventh District Court of Appeals, sitting by assignment.

{¶1} Defendants-appellants, SummaCare, Inc., and Akron City Health System, Inc., appeal the Judgment Entry of the Summit County Court of Common Pleas, granting class certification in favor of plaintiffs-appellees, Nicholas V. Rimedio, D.O., and Jeffrey Poling, M.D. For the following reasons, we affirm the decision of the court below.

{¶2} On November 8, 2001, Dr. Rimedio filed a class-action Complaint against SummaCare and the Akron City Health System for breach of contract, fraud, conversion, and unjust enrichment/quantum meruit. SummaCare is a for-profit corporation licensed as a health insuring corporation in the State of Ohio. The Akron City Health System ("ACHS") is a not-for-profit corporation licensed as a physician hospital organization, functioning as an "intermediary organization" under the laws of Ohio.

{¶3} The class represented by Dr. Rimedio was defined as "all physicians listed as 'participating providers' pursuant to their written Member Physician Agreement with ACHS and a separate agreement between ACHS and SummaCare, Inc."

{¶4} According to the terms of the Member Physician Participation Agreement, ACHS would enter into contracts to provide the services of its member physicians to insurance companies, health maintenance organizations, preferred provider organizations, employers, and other such organizations as SummaCare (known as "Sponsors") for the benefit of the "Enrollees" in the Sponsors' health care plans. The member physicians of ACHS would provide health care services to the Enrollees and, in return, "accept fees and payment arrangements as negotiated, contracted, arranged or determined by ACHS." The Member Physician Agreement contained the following provision:

> **{¶5}** Physician agrees that ACHS may withhold all or a part of the fee amounts otherwise due in the event of the threatened insolvency of either ACHS or any Sponsor that is a health maintenance organization ("HMO Sponsor") for so long as necessary to prevent the threatened insolvency from maturing into actual insolvency, when required by state or federal law, or by the Ohio Department of Insurance, or by the ACHS or HMO Sponsor board of directors.

{¶6} The Complaint alleged that Dr. Rimedio "and all class members suffered a 10% withhold of fees earned for services provided to enrollees in SummaCare in violation of their contract with ACHS and in violation of state law."

{¶7} Specifically, Rimedio asserted the 10% withhold provision contained in his Member Physician Agreement violated R.C. 1751.13(D)(1)(a), which prohibits a "health insuring corporation contract with a provider or health care facility" from containing "[a] provision that directly or indirectly offers an inducement to the provider or health care facility to reduce or limit medically necessary health care services to a covered enrollee."

{¶8} Further, Dr. Rimedio asserted that ACHS and SummaCare implemented a 10% withhold fee in violation of the Member Physician Agreement, in that neither corporation was insolvent or threatened with insolvency when the withhold fee was imposed.

{¶9} In an Amended Answer, filed on August 6, 2003, with leave of the trial court, ACHS and SummaCare raised the defense that "[a]ll or a portion of the claims of the purported class members are barred due to a valid arbitration provision contained in the contracts signed by the purported class members." ACHS and SummaCare demanded "the right to arbitrate any and all claims to be asserted by the alleged purported class members arising out of the contracts."

{¶10} On November 7, 2003, the trial court granted Dr. Rimedio's Motion to Certify Class and ordered the action to proceed as a class action. The court defined the class as follows: "All primary care and specialist physicians, who were participating providers in SummaCare, who were subjected to a ten percent withhold of service fees for the inclusive period July 1, 1998 to April 1, 2001." The court struck ACHS and SummaCare's arbitration defense, finding that they had waived their right to arbitration.

{¶11} ACHS and SummaCare appealed the decision. See *Rimedio v. SummaCare, Inc.*, 9th Dist. No. 21828, 2004-Ohio-4971.

{¶12} On appeal, ACHS and SummaCare argued that the trial court erred by revoking its leave to raise arbitration as a defense in the Amended Answer. This court agreed, "find[ing] that Appellants did not waive the arbitration defense with respect to the unnamed class members and that the trial court erred in striking their affirmative defense." 2004-Ohio-4971, at ¶13.

{¶13} ACHS and SummaCare further argued "that class certification was inappropriate because there is no identifiable class, the class representative's claim is

not typical of the claim of the other class members, and the class does [not] meet the requirements of Civ.R. 23(B)(1), (2) or (3)." 2004-Ohio-4971, at ¶16.

{¶14} The Ninth District rejected the argument that there was no identifiable class. It noted the "Appellants produced a document which actually identified some 1,400 physicians who suffered a withhold[,] *** identified the original date that the physician signed the agreement with ACHS, when each physician signed a new or amended agreement, and how much money was withheld from each physician or his employer during the withhold period." 2004-Ohio-4971, at ¶20. "Therefore, the class is properly identifiable and meets the requirements of Civ.R. 23(A)." Id. at ¶22.

{¶15} The Ninth District held that Dr. Rimedio failed to meet the typicality requirement of Civ.R. 23(A)(4), that the class representative must "fairly and adequately protect the interests of the class." The court noted that "[a]bout 700 of the 1,400 or so class members have contracts with arbitration clauses, the others do not." 2004-Ohio-4971, at ¶25. Rimedio "waived his right to assert his arbitration claim, but the other physicians who contracts included arbitration clauses did not." Id. Thus, Rimedio "does not have any interest in protecting the interest of the class members with arbitration clauses who may desire to pursue arbitration," and does not meet the typicality requirement. Id. at ¶27.

{¶16} Finally, the Ninth District concluded that the class was not certifiable under the Civ.R. 23(B) categories, inasmuch as "the prerequisites of Civ.R. 23(A) were not met." 2004-Ohio-4971, at ¶28.

{¶17} On September 22, 2004, the Ninth District issued its decision reversing the lower court's Opinion and Order, and remanding.

{¶18} On May 23, 2005, Dr. Rimedio filed a Renewed Motion to Certify Class and/or Subclasses. He urged the court to certify a combination of four subclasses:

physicians "who did not execute a Member Physician Participation Agreement which contained an arbitration clause"; physicians "whose Member Physician Participation Agreement with SummaCare contain[ed] an arbitration provision for at least part of the withhold period"; physicians "whose Member Physician Participation Agreement with SummaCare did not contain an arbitration provision at the time the withhold was implemented"; and physicians "who [are] subject to an arbitration provision contained in the Member Physician Participation Agreement."

{¶19} On September 9, 2005, Dr. Rimedio filed a Motion to Amend Complaint, "to specifically name/add Jeffrey Poling, M.D., Steve Pap, M.D., David Linz, M.D., Dean Mayors, M.D., Lee Sprance, M.D., and Nicholas Bisconti, M.D. as party plaintiffs" and "representative[s] of the subclass of those physicians who are participating providers in SummaCare whose Member Physician Participation Agreement with SummaCare contains an arbitration provision."

{¶20} On September 23, 2005, the trial court granted Dr. Rimedio leave to amend the Complaint.

{¶21} On October 25, 2006, the trial court issued a Judgment Entry, denying Dr. Rimedio's Renewed Motion to Certify Class and/or Subclasses. The court held that, in light of the Ninth District's ruling in *Rimedio v. SummaCare*, 2004-Ohio-4971, "all further attempts to assert class action status are barred by the doctrines of issue preclusion and the law of the case." The court further held that, if it were "at liberty to consider a renewed motion for certification," certification would be "inappropriate because the seven requisite elements have not been met," specifically the requirements of typicality, predominance of common questions, and greater efficiency or economy.

{¶22} Dr. Rimedio and the newly added plaintiffs appealed the decision. See *Rimedio v. SummaCare, Inc.*, 172 Ohio App.3d 639, 2007-Ohio-3244. On appeal, they

challenged the trial court's denial of the Renewed Motion for Certification on the basis of res judicata/law of the case and the failure to satisfy the requirements of Civ.R. 23.

{¶23} On June 27, 2007, the Ninth District reversed the lower court's judgment, holding that "the renewed motion to certify the class *** is not barred by the doctrine of res judicata." 2007-Ohio-3244, at ¶17. "While our [prior] decision may have been law of the case vis-a-vis an attempt to recertify the class with Dr. Rimedio as the only named plaintiff, it was not the law of the case vis-a-vis the new plaintiffs named in the amended complaint." Id. at ¶14. This court had not "foreclosed inquiry into whether the newly added plaintiffs cure the initial problem with respect to typicality." Id. at ¶15. The court did not address Rimedio's arguments as to whether the plaintiffs satisfied the requirements for class certification. It remanded the case for further proceedings, noting that the trial court was "not prevent[ed] ***, upon proper analysis, from certifying one of the 23(B) type classes." Id. at ¶16.

{¶24} On March 13, 2009, the plaintiffs filed a Partial Voluntary Dismissal, dismissing Drs. Bisconti, Mayors, Sprance, Pap, and Linz. Drs. Rimedio and Poling remained party plaintiffs.

{¶25} On June 15, 2009, the trial court held a final hearing on Drs. Rimedio and Poling's Motion to Certify Class.

{¶26} On October 5, 2009, the trial court granted Drs. Rimedio and Poling's Motion to Certify, by adopting the Plaintiffs' Proposed Order (Certification of Class).[1] The court found that Rimedio and Poling had satisfied all the requirements for class certification and certified the following two subclasses:

1. As originally issued, the ruling was captioned Plaintiffs' Proposed Order (Certification of Class). On November 3, 2009, the trial court re-issued the ruling with the caption Judgment Entry (Certification of Class).

{¶27} All primary care and specialist physicians who are participating providers in SummaCare who were subjected to a ten percent (10%) withhold of service fees for the inclusive period July 1, 1998 to April 1, 2001 and who did not execute a Member Physician Participation Agreement which contained an arbitration clause (Dr. Rimedio is the representative of this class); and

{¶28} All primary care and specialist physicians who are participating providers in SummaCare who were subjected to a ten (10%) withhold of service fees for the inclusive period of July 1, 1998 to April 1, 2001, and whose Member Physician Participation Agreement with SummaCase contains an arbitration provision for at least part of the withhold period (Dr. Poling is the representative of this class).

{¶29} On October 29, 2009, ACHS and SummaCare filed their Notice of Appeal. On appeal, they raise the following assignments of error:

{¶30} "[1.] The purported class is not identifiable under Civil R. 23(A) because an individualized assessment of the issues pertaining to each individual class member is required in order to determine whether they belong to the class."

{¶31} "[2.] The class representatives' claims and defenses are not typical of the claims and defenses of the entire class because the entire class was subject to different contracts that were entered into during vastly different financial periods of the Defendants."

{¶32} "[3.] The trial court erred in granting class certification under Civ.R. 23(B)(3) because individual questions, rather than common questions predominate and a class action under the facts of this case is neither an efficient or superior method of resolution."

{¶33} "A trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion." *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, at the syllabus; *Vinci v. American Can Co.* (1984), 9 Ohio St.3d 98, at paragraph one of the syllabus. The Ohio Supreme Court has confirmed the trial court's discretion in deciding class certification issues in subsequent decisions. *Hamilton v. Ohio Sav. Bank*, 82 Ohio

St.3d 67, 70, 1998-Ohio-365 (rejecting a de novo standard of review); *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 483, 2000-Ohio-397 (rejecting the proposition that "a mere finding that the trial court's analysis is 'lacking rigor'" is sufficient cause to reverse). Rather, "the court of appeals remains bound to affirm that determination absent a showing of an abuse of discretion." *Baughman*, 88 Ohio St.3d at 483.

{¶34} "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Civ.R. 23(C)(1).

{¶35} An action may be maintained as a class action "if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Civ.R. 23(A).

{¶36} "[I]n addition," the trial court in the present case must have found "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Civ.R. 23(B).

{¶37} Finally, there are "[t]wo prerequisites *** implicitly required by Civ.R. 23": the class must be identifiable and unambiguous; and the class representatives must be members of the class. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, at paragraphs one and two of the syllabus and 96.

{¶38} In their first assignment of error, ACHS and SummaCare argue the two certified subclasses fail to meet the requirement that they be identifiable and

unambiguous. The identification of the class as "[a]ll primary care and specialist physicians *** subjected to a *** withhold of service fees" ignores the fact that some physicians assigned all or part of their service fees, including the withhold, to their employers. "If the physician assigned his income to the employer ***, the employer is a real party in interest, and *** must be a party." Since the only way of determining who the real parties in interest are is by examining the individual Member Physician Participation Agreements, "it is not administratively feasible to determine class membership with reasonable effort."

{¶39} For example, during part of the period from July 1, 1998, to April 1, 2001, Dr. Rimedio was employed by Northeast Ohio Primary Care Physicians, Inc. ("NEOPCP"). According to the Employment Agreement, NEOPCP paid Dr. Rimedio an annual salary and he assigned and transferred to NEOPCP "all fees or other income attributable to the professional services rendered by [him] in the course of employment by [NEOPCP]." Similarly, Dr. Poling, during the period from July 1, 1998, to April 1, 2001, was variously employed by Pioneer Physicians Network and a Dr. Kontak. Revenues generated by Poling would be paid directly to either the Network or Kontak.

{¶40} The requirement that the certified class be identifiable and unambiguous "does not require a class certification to identify the specific individuals who are members so long as the certification provides a means to identify such persons." *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 63 (citations omitted). "The fact that members may be added or dropped during the course of the action is not controlling. The test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class." Id.

{¶41} In the present case, the two certified classes comprised physicians subject to the 10% withhold whose contracts with SummaCare contained an arbitration clause and physicians subject to a 10% withhold whose contracts did not contain an arbitration clause. These two classes are identifiable and unambiguous.

{¶42} During discovery, ACHS and/or SummaCare produced a list of 1,414 physicians and other entities subjected to the withhold during the period specified by the trial court. This document also specifies the dates on which the physicians originally contracted with ACHS and the dates on which a new or amended agreements was executed. Cf. *Rimedio*, 2004-Ohio-4971, at ¶20. Only Member Physician Participation Agreements entered into after 1999 contained an arbitration provision. Thus, membership in either of the two classes is determinable by reference to this list alone. Id. at ¶22 ("[t]he court need only look at the list provided by Appellants to identify the members of the class").

{¶43} ACHS and SummaCare's argument that certain members of the class are not the real party in interest is unavailing. "The issue of standing does not affect the existence of a suitable class for certification." *Arndt v. P & M, Ltd.*, 163 Ohio App.3d 179, 2005-Ohio-4481, at ¶17; cf. *Ortiz v. Fibreboard Corp.* (1999), 527 U.S. 815, 831 (rejecting a challenge to class certification on the basis that the "vast majority" of the class members were without compensable injury and, thus, lacked standing to sue: "class certification issues are *** 'logically antecedent' to Article III concerns") (citations omitted). "The requirement of standing, as far as it applies to a proceeding to determine class certification, applies to the named class representatives." *Arndt*, 2005-Ohio-4481, at ¶18; *Pyles v. Johnson*, 143 Ohio App.3d 720, 732, 2001-Ohio-2478.

{¶44} Accordingly, Ohio courts have held that the issue of whether all class members possess a compensable injury is not an impediment to class certification. In

Arndt, the trial court certified a class comprising all residents of a manufactured home park that was subject to recurrent flooding. 2005-Ohio-4481, at ¶6. The court of appeals rejected the argument that a majority of the class members lacked standing because they had not suffered property damage, in part, because "a class consisting of all current residents *** is not ambiguous merely because all the current residents of P & M Estates may have not suffered a compensable injury." Id. at ¶17.

{¶45} In *Konarzewski v. Ganley, Inc.*, 8th Dist. No. 92623, 2009-Ohio-5827, the trial court declined to certify a class comprising persons who had signed Retail Installment Sales Contracts and/or Conditional Delivery Agreements with the Ganley automobile dealership. Id. at ¶19. The court of appeals reversed. On appeal, it was argued that certification was properly denied because some members of the class never purchased a vehicle, some members of the class understood the terms of the agreements they entered, and some members of the class obtained other financing. The court of appeals rejected the arguments as "irrelevant": "[t]he issue is whether the class is identifiable, not whether the degree of damages suffered by potential class members is variable." Id. at ¶22.

{¶46} In *Brandow v. Washington Mut. Bank*, 8th Dist. No. 88816, 2008-Ohio-1714, the trial court certified a class comprising persons who had paid off mortgages held by Washington Mutual Bank "where the mortgage satisfaction was not recorded within 90 days of satisfaction." Id. at ¶4. On appeal, it was argued that certain class members would be legally barred from recovery under prior case law [the *Gilbert* case] and "that an individual inquiry would be needed to determine if the member is excluded." Id. at ¶19. The court of appeals rejected the argument: "determining whether the *Gilbert* case excludes class members goes to the merits of the case; the

merits cannot be considered in determining whether to certify a class." Id. (citations omitted).

{¶47} For the purposes of class certification, then, the identification of class members in terms of physicians who are participating providers in SummaCare and who have executed Member Physician Participation Agreements is sufficiently definite. ACHS and SummaCare's concerns regarding the real party in interest do not render the certified classes unidentifiable or ambiguous and may be addressed at a later stage in the proceedings. Cf. Civ.R. 17(A) ("[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest").

{¶48} The first assignment of error is without merit.

{¶49} In the second assignment of error, ACHS and SummaCare argue that the class representatives, Drs. Rimedio and Poling, do not satisfy the element of typicality, i.e., "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Civ.R. 23(A).

{¶50} "[T]he requirement of typicality serves the purpose of protecting absent class members and promoting the economy of class action by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class." *Baughman*, 88 Ohio St.3d at 484, (citation omitted); *Marks*, 31 Ohio St.3d at 202. "The typicality requirement has been found to be satisfied where there is no express conflict between the representatives and the class." *Warner*, 36 Ohio St.3d 91, at paragraph four of the syllabus; *Marks*, 31 Ohio St.3d at 202.

{¶51} Appellants' first argument under this assignment of error is that the Member Physician Participation Agreements entered into by Drs. Rimedio and Poling

are significantly different from the contracts of other class members with respect to the condition precedent for the imposition of the withhold.

{¶52} Dr. Rimedio's initial Member Physician Participation Agreement was executed in 1995 and contained the following provision with respect to the withhold: "Physician agrees that ACHS may withhold all or a part of the fee amounts otherwise due in the event of the threatened insolvency of either ACHS or any Sponsor that is a health maintenance organization ('HMO Sponsor') for so long as necessary to prevent the threatened insolvency from maturing into actual insolvency, when required by state or federal law, or by the Ohio Department of Insurance, or by the ACHS or HMO Sponsor board of directors."

{¶53} In 1999, Dr. Rimedio executed a new Member Physician Agreement with ACHS, containing the following provision with respect to the withhold: "Physician agrees that ACHS may withhold all or part of the fee amounts otherwise due in the event of the threatened insolvency of ACHS for so long as necessary to prevent the threatened insolvency from maturing into actual insolvency, when required by the state or federal law, or by the Ohio Department of Insurance, or by the ACHS Board of Directors."

{¶54} Dr. Poling's initial Member Physician Participation Agreement was executed in 1992 and contained the following provision with respect to the withhold: "Physician acknowledges that when required by State or Federal law, either a Plan or ACHS will have the right to withhold all or a part of Physician's payment in the event of threatened insolvency for so long as necessary to prevent the threatened insolvency from maturing into actual insolvency."

{¶55} In 1999, Dr. Poling executed a new Membership Agreement with ACHS containing an identical withhold provision as Dr. Rimedio's 1999 Agreement.

{¶56} A 1989 version of the Physician Participation Agreement used by ACHS provided as follows with respect to the withhold: "Physician agrees, that when required by state or federal law, either a Plan or ACHS shall have the right to withhold all or part of the ACHS member's compensation (both physician and hospital) in the event of insolvency for so long as it is necessary to prevent such insolvency."

{¶57} A 1991 version of the Physician Participation Agreement used by ACHS provided as follows with respect to the withhold: "Physician acknowledges that when required by state or federal law, either a contracted Plan or ACHS will have the right to withhold all or part of Physician's payment in the event of threatened insolvency for so long as it is necessary to prevent the threatened insolvency from maturing into actual insolvency."

{¶58} ACHS and SummaCare note that, according to the 1992, 1995, and 1999 Agreements to which Drs. Rimedio and Poling were subject, a withhold could be imposed if ACHS and, alternatively, a Plan or a Sponsor were threatened with insolvency. Under the 1989 Agreement, however, the withhold could only be imposed "in the event of insolvency." Thus, appellants argue, Drs. Rimedio and Poling's claims could be defeated by a demonstration of threatened insolvency, but such a demonstration would not defeat the claims of the physicians subject to the 1989 Agreement. Appellants also note that the entities that must be threatened with insolvency differ among the various contracts, being variously identified as ACHS, the Plan, or the Sponsor.

{¶59} ACHS and SummaCare's arguments fail to demonstrate a lack of typicality between the class representatives and the class members. The Ohio Supreme Court has definitively rejected the proposition that the class representatives must be "identically situated" to potential class members. *Baughman*, 88 Ohio St.3d at 485

("[t]ypicality does not require a complete identity of claims") (citation omitted). "The defenses or claims of the class representatives must be typical of the defenses or claims of the class members. They need not be identical." *Planned Parenthood*, 52 Ohio St.3d at 64.

{¶60} "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Baughman*, 88 Ohio St.3d at 485 (citation omitted). When that is the case, "the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims." Id.

{¶61} In the present case, Drs. Rimedio and Poling's claims are based on ACHS and SummaCare's imposition of a withhold in violation of their Agreements with the physicians and on the alleged unconstitutionality of the withhold provisions. Common to all the claims of the proposed class is ACHS and SummaCare's imposition of the withhold; this conduct underlies the claims of all potential class members. The contractual variations among class members are not significant, turning on whether ACHS, or a Sponsor or Plan, was actually insolvent or merely threatened with insolvency. While a demonstration of threatened solvency will not defeat the claims of all potential class members, the failure to make this demonstration may be dispositive of virtually all class members' claims.

{¶62} Finally, ACHS and SummaCare's arguments fail to demonstrate any express conflict between the representatives and the class. A determination that ACHS was threatened with insolvency is not inconsistent or contrary to a determination that ACHS was actually insolvent; nor is the determination that SummaCare was threatened with or actually was insolvent contrary to a determination that another Plan or Sponsor to the Agreement was threatened with insolvency.

{¶63} ACHS and SummaCare also argue under this assignment of error that Drs. Rimedio and Poling's claims are atypical because they signed new Member Agreements with ACHS in 1999, after the withholds had been put into effect. Thus, appellants claim there is an issue whether the doctors have waived, are estopped, or are bound by accord and satisfaction from challenging the withholds that they "knew about" when they signed their new Agreements. We disagree.

{¶64} The Ohio Supreme Court rejected a similar argument in *Baughman*. In that case, plaintiffs alleged that they were misled into purchasing multi-vehicle uninsured motorist coverage, when such coverage was unnecessary as uninsured motorist law at the time did not allow "other owned vehicle" exclusions. State Farm claimed the class representatives failed to satisfy the typicality requirement because they admittedly were aware of the current state of the law yet continued to purchase multi-vehicle coverage. 88 Ohio St.3d at 486. The Supreme Court held that, in general, "a defense of non-reliance is not destructive of typicality," and "most courts have rejected any adequacy challenge that the plaintiff or some class members were not actually deceived on the ground that that fact goes to the merits of the individual's right to recover and will not bar class certification." Id. (citation omitted).

{¶65} In the present case, ACHS and SummaCare's argument is weaker than the one put forth in *Baughman*. Drs. Rimedio and Poling's basic claims are for breach of contract and the unconstitutionality of the withhold provision. Rimedio and Poling's awareness of the withhold implemented in 1998 is irrelevant to both these claims, nor is it in conflict with the claims of class members who executed Member Agreements prior to the imposition of the withhold. Rather, the determinative issues for liability are ACHS' and SummaCare's solvency and the contractual provision's constitutionality.

{¶66} The second assignment of error is without merit.

{¶67} In the third and final assignment of error, ACHS and SummaCare argue that the requirements of Civ.R. 23(B)(3), "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," are not satisfied by the certified classes.

{¶68} "[A] claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 429-430, 1998-Ohio-405 (citation omitted). "[I]n determining whether common questions of law or fact predominate over individual issues, it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication." *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313.

{¶69} ACHS and SummaCare cite to numerous individual issues that, they claim, predominate over the common questions of law and fact. Under certain Member Physician Participation Agreements, a withhold may be instituted where ACHS is threatened with insolvency. Under other Agreements, a withhold may be instituted if a Plan or Sponsor is threatened with insolvency and, under that version of the Agreement, ACHS must actually be insolvent before a withhold may be imposed. Appellants raise the possibility of ACHS being threatened with insolvency for only a part of the 31-month period during which a withhold was imposed. They note that whether individual class members consented to the withholds is essential to the determination of the claims for conversion and unjust enrichment. Finally, they claim that an individual assessment of

all claims is necessary to determine if the class members had assigned any part of the fees received from ACHS to a physicians group or other entity.

{¶70} The trial court's Judgment Entry identified the "primary" common issues in the case as follows: "whether the withhold implemented by the Defendants was, in the first place, legal; and secondly, if legal, whether they breached the contract by improperly implementing a withhold because they were not "threatened with insolvency" at the time they implemented the withhold."

{¶71} There was no abuse of discretion in the trial court's determination common issues predominate over the individual issues raised by ACHS and SummaCare. The two questions identified by the trial court, i.e., the constitutionality and breach of the withhold provision, are common to a potential class of 1,400 persons. ACHS and SummaCare's potential liability in both cases is based upon a single provision contained in a series of standardized contracts executed throughout the 1990s and its imposition of a withhold over a 31-month period. The variables affecting ACHS and SummaCare's potential liability are minimal: the constitutionality of the provision itself and the state of their solvency. These two determinations constitute "generalized evidence" and a "significant aspect" of plaintiffs' claims common to all individual class members.

{¶72} Accordingly, the present claims are ideally suited for resolution by class action. *Hamilton*, 82 Ohio St.3d at 80 ("[t]he purpose of Civ.R. 23(B)(3) was to bring within the fold of maintainable class actions cases in which the efficiency and economy of common adjudication outweigh the interests of individual autonomy") (citations omitted).

{¶73} It has often been remarked that "[c]laims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and

breach of contract cases are routinely certified as such." *Thompson v. Community Ins. Co.* (S.D.Ohio 2002), 213 F.R.D. 284, 292 (citation omitted); *Holznagel v. Charter One Bank*, 8th Dist. No. 76822, 2000 Ohio App. LEXIS 5877, at *17; *Cope*, 82 Ohio St.3d at 430 ("[c]ourts *** generally find that a wide variety of claims may be established by common proof in cases involving similar form documents or the use of standardized procedures and practices").

{¶74} In *Hamilton v. Ohio Savings Bank*, for example, plaintiffs were borrowers who claimed Ohio Savings Bank had improperly calculated the interest on their residential mortgage loans. They raised "legal claims for breach of contract, fraud, conversion, waiver and estoppel, and unjust enrichment, as well as a statutory claim for violations of the federal Truth in Lending Act." 82 Ohio St.3d at 77. Ohio Savings Bank objected that class certification was inappropriate because it would require "an inquiry into each borrower's understanding of the terms of his or her loan" and that "elements of inducement and reliance must be proven on an individual basis." Id. at 82 and 83.

{¶75} The Ohio Supreme Court rejected these arguments, explaining: "the questions of law and fact which [are] common to each respective subclass arise from identical or similar form contracts. The gravamen of every complaint within each subclass is the same and relates to the use of standardized procedures and practices. *** While the class is numerically substantial, it is certainly not so large as to be unwieldy. Class action treatment would eliminate any potential danger of varying or inconsistent judgments, while providing a forum for the vindication of rights of groups of people who individually would be without effective strength to litigate their claims." Id. at 80. As in the present case, the facts in *Hamilton* presented a "classic case for treatment as a class action." Id. (citations omitted).

{¶76} None of the arguments raised by ACHS and SummaCare obviate this conclusion. Contrary to their position, the variations among the contracts are not substantial. Four of them allow withholds in the event of threatened insolvency and one of them in the case of actual insolvency. Three of them only consider ACHS' solvency, while one considers the solvency of ACHS and a Sponsor, and another the solvency of ACHS and a Plan. To the extent that these variations require distinct demonstrations of proof, the subclasses may, if necessary, be redefined by the trial court. Civ.R. 23(D) ("[i]n the conduct of actions to which this rule applies, the court may make appropriate orders *** determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument"); *Hamilton v. Ohio Savings Bank* (1999), 136 Ohio App.3d 273, 279 (pursuant to Civ.R. 23(D), "[a]lready-certified subclasses *** may be redefined by the trial court as the class action proceeds"); *Estate of Reed v. Hadley*, 163 Ohio App.3d 464, 2005-Ohio-5016, at ¶32 ("[i]f the trial court deems it necessary, the court could redefine the subclasses according to the contract each sub-class signed").

{¶77} With respect to the argument that some class members had assigned their right to recover fees to various employers, we stated that the standing of individual class members was not an impediment to class certification. Here, we conclude that such assignments do not raise individual concerns over the common questions of law and fact.

{¶78} It is undisputed that the Member Physician Participation Agreements at issue were executed between ACHS and the member physicians, not their employers or partnership groups. Dr. Rimedio's 1995 Agreement contained the following provision: "Physician acknowledges that the agreement is personal to physician and agrees that Physician may not assign any of physician's rights or delegate any of physician's duties

in this Agreement." Drs. Rimedio and Poling's 1999 Agreement, Poling's 1992 Agreement, and the 1989 and 1991 Agreements contained similar non-assignment clauses.[2] Thus, the liability issues in the present action derive exclusively from the contracts between ACHS and the class members.

{¶79} The assignment issue, then, becomes operative when and if damages are determined. The Ohio Supreme Court has held, "[w]hile potential dissimilarity in remedies is a factor to be considered in determining whether individual questions predominate over common questions pursuant to Civ. R. 23(B)(3), that alone does not prevent a trial court from certifying the cause as a class action." *Vinci*, 9 Ohio St.3d 98, at paragraph three of the syllabus; *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 232; *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. No. 86596, 2007-Ohio-4013, at ¶84 ("if common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied, even if individual damages issues remain") (citation omitted).

{¶80} The assignment issue in the present case implicates who ultimately recovers, rather than the amount of the recovery. The same list identifying the physicians subject to the withhold and the dates on which Agreements were executed with ACHS also identified the amounts withheld. If ACHS and SummaCare are ultimately found liable, determining the amount of damages will be relatively simple. Thus, the burden of determining whether a class member's recovery has been assigned to another entity will not unduly complicate the determination of damages.

{¶81} The third assignment of error is without merit.

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2. The 1999 Agreement is identical to the 1995 Agreement. The 1989 and 1991 Agreements provide: "This Agreement may not be assigned by either party, without the written consent of the other, which consent will not be unreasonably withheld.

{¶82} For the foregoing reasons, the Judgment of the Summit County Court of Common Pleas, granting class certification in favor of plaintiffs-appellees, is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

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DIANE V. GRENDELL
FOR THE COURT

TRAPP, P.J., Eleventh District Court of Appeals, sitting by assignment
CANNON, J., Eleventh District Court of Appeals, sitting by assignment
CONCUR

APPEARANCES:

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