



networks are often referred to as "participating provider organizations," or "PPOs". Each plaintiff participated in First Health's networks, according to provider contracts that each signed with First Health companies.

¶ 4 The initial complaint in this action was filed on September 24, 2004. Plaintiffs sued individually and on behalf of a class of all Illinois health care providers who participated in a network managed by First Health since September 24, 1994, and received payment for services covered by an Illinois workers' compensation program or an Illinois automobile accident policy. Plaintiffs alleged that First Health was liable because First Health payors accessed First Health networks to receive reduced reimbursement rates negotiated by the networks for treatment performed by the participating providers on patients seeking care pursuant to workers' compensation programs or automobile accident policies, where those payors did not provide financial incentives to those patients to encourage them to seek care from the participating providers.

¶ 5 On November 19, 2004, First Health moved to dismiss the complaint or, in the alternative, to stay and compel arbitration. Plaintiffs later filed an amended complaint alleging causes of action against First Health based upon breach of contract, conspiracy, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2004)), and unjust enrichment. Plaintiffs requested damages based on discounts taken on payors' past payments for workers' compensation and auto accident patients who the plaintiff class treated but who were not steered to those providers. Based on the new complaint, First Health removed the case to the United States district court. After briefing on plaintiffs' motion to remand, the federal court remanded the case to the Madison County circuit court on February 17, 2006.

¶ 6 Thereafter, discovery continued, which included third-party discovery of First Health in cases plaintiffs' counsel had filed against First Health payors. The parties agreed to use

discovery from First Health taken in payor cases in this case.

¶ 7 In May 2007, Kathleen Roche, an Illinois chiropractor, like plaintiffs, filed a lawsuit against First Health in St. Clair County on behalf of herself and a class of Illinois medical providers with contracts with First Health (the Roche case). In a legal memorandum filed in the St. Clair County case, Roche described her theory of liability as follows:

"First Health failed to provide any meaningful steerage (sometimes known in the industry as 'hard steerage') to incentivize claimants to utilize the services of Plaintiff and Class. Plaintiff will establish that First Health breached its contract, and engaged in unfair conduct, with the Class by not limiting access to its PPO Network to only those payors who in fact referred claimants to utilize the services of Plaintiff and Class."

Roche's counsel formerly represented the plaintiffs in this case. Several months prior to the filing of the Roche case, plaintiffs had filed a notice in this case that Roche's counsel would no longer be representing plaintiffs.

¶ 8 On August 6, 2007, First Health moved to dismiss the Roche case or to stay that case on the grounds that the Roche case was duplicative of this case and was filed for improper purposes. On February 6, 2008, the St. Clair County circuit court denied First Health's motion. First Health appealed and on March 7, 2008, moved for a stay of the Roche case pending First Health's just-filed appeal. The parties agreed to a stay on March 19, 2008. (We subsequently affirmed the trial court in *Roche v. First Health Group Corp.*, No. 5-08-0113 (Feb. 10, 2009) (unpublished order under Supreme Court Rule 23 (eff. May 30, 2008)).)

¶ 9 In April 2008, First Health's counsel and plaintiffs' counsel began settlement discussions. Over the next several months, the parties continued to negotiate, and by summer, they agreed to seek assistance from a mediator to advance the settlement process. In July 2008, the parties selected Thomas Rakowski, a former circuit and appellate judge

working for JAMS, The Resolution Experts, in Chicago, to mediate the case. By the end of the mediation session, the parties had agreed in principle on class relief, subject to First Health senior officer approval. The parties memorialized their agreement on class relief in a term sheet signed on October 15, 2008. The parties then negotiated the incentive award for each plaintiff and agreed on the amount of attorney fees for class counsel.

¶ 10 The settlement the parties reached contained, in summary fashion, the following terms:

(a) *Payment for Continuing Medical Education.* First Health agreed to pay \$1,250,000 after the settlement's effective date to charitable or other nonprofit organizations that provide continuing medical education selected by First Health and class counsel as being reasonably likely to benefit the settlement class members as a whole, *e.g.*, section 501(c)(3) organizations that provide continuing medical education to Illinois health care providers including in areas appropriate to workers' compensation injuries or similar organizations that address issues of workplace injuries in Illinois.

(b) *Contract Amendment.* Upon the effective date, First Health agreed to amend all existing and future provider agreements with Illinois participating providers to include the following language (either by addendum for existing contracts or by inclusion in its own section in new contracts):

"As part of the Settlement, dated January 12, 2009, of a purported class action lawsuit captioned *Richard C. Coy, D.C. d/b/a Coy Chiropractic Health Center, P.C., and Lawrence Shipley, D.C., v. CCN Managed Care, Inc. and First Health Group, Corp.*, Circuit Court of Madison County, Illinois, Case No. 04-L-1055, First Health agreed to include the following language in its Illinois provider agreements, without concession: Nothing in this contract or any payor

contract requires or provides that there must be a financial incentive to patients in Illinois to encourage such patients who are covered by a workers' compensation program or automobile accident policy to seek treatment from participating providers. The foregoing neither implies nor negates obligations, if any, by payors to provide financial incentives with respect to other insurance coverages."

- (c) *Additional Disclosures to Participating Providers.* Upon the effective date, First Health agreed to include a clear and conspicuous disclosure of the substance of the contract addendum described above wherever on its Web site First Health mentions channeling, steering, or directing in connection with Illinois health care providers. First Health also agreed to describe to its current and prospective Illinois participating providers channeling efforts with respect to workers' compensation programs and automobile accident policies under Illinois law.
- (d) *Increase Payor and Patient Awareness.* For a period of four years after the effective date, First Health agreed to increase its efforts to educate health care payors who contract directly or indirectly with First Health to access First Health PPO networks in Illinois, and to the extent allowed, those payors' insureds and those insureds' claimants or beneficiaries (*i.e.*, patients), about Illinois participating providers in the First Health PPO networks in Illinois and the benefits of using those providers for treatment covered by workers' compensation programs or automobile accident policies.
- (e) *Expedited Membership Termination.* First Health agreed to allow providers to withdraw faster from the First Health networks if they wish. For the first three months after the effective date, upon written notice to First Health, class

members would be permitted to terminate their provider agreement(s) with First Health, regardless of the time for termination otherwise provided pursuant to those class members' provider agreements (which shall remain in force and effect). Unless otherwise agreed by the provider and First Health, the termination will be effective no later than 45 days after First Health receives written notice from the provider.

- (f) *Expedited Membership Reinstatement.* First Health also agreed, for the first three months after the effective date, and upon written request, to allow class members who terminated membership or whose membership was terminated in a First Health PPO network during the class period and prior to the publication of the publication notice to be allowed to seek expedited reinstatement as a First Health participating provider. To be eligible, a class member (i) must not have been terminated for reasons listed in an applicable provider agreement for immediate termination, (ii) must meet all current licensing and credentialing requirements, and (iii) must negotiate and sign a new provider agreement.

¶ 11 The settlement provided for an award of attorney fees and the reimbursement of expenses totaling \$650,000 and incentive awards of \$5,000 to each plaintiff. First Health agreed to pay costs associated with the settlement as well, which to date exceeded \$26,000. The settlement also required First Health to report its compliance within 30 days of the effective date and to provide quarterly reports regarding its compliance for the first year and annual reports thereafter.

¶ 12 Roche noticed a case management conference in the St. Clair County case for October 27, 2008. On October 24, Roche filed a motion for leave to file an amended complaint. At the October 27, 2008, case management hearing, Roche asked that the court set all the

pending motions for presentation. Roche also served a motion seeking to have her counsel appointed "interim class counsel," noticing the motion for a hearing on December 8. Roche requested her counsel to be appointed as "interim class counsel" based on her belief that First Health was engaged in a "reverse auction" between Roche and plaintiffs in this case.

¶ 13 At the December 8, 2008, hearing, First Health offered to inform the St. Clair County court of the status of the settlement in this case, but the court declined the offer. At the close of the hearing the court entered an interim order indicating that a class was ascertainable through objective criteria and was cohesive and that Roche was an adequate interim class representative. The court appointed interim class counsel and reset Roche's motion for class certification for January 27, 2009.

¶ 14 First Health informed plaintiffs of the December 8, 2008, order from the St. Clair County court. On December 11, 2008, plaintiffs moved on an emergency basis in this case to compel First Health to comply with the parties' settlement. At the December 11, 2008, hearing, First Health presented the court with the December 8, 2008, order in the Roche case. After reviewing the order, the circuit court found as follows: "This Court hereby finds that the December 8, 2008[,] Roche Order has no impact on this Court or the proceedings or parties before the Court in the above-captioned case. It is further the finding of this Court that the settlement being given preliminary approval was agreed to among the parties before the December 8, 2008 [*sic*]." The court then heard plaintiffs' emergency motion to enforce the settlement agreement. The court considered evidence from plaintiffs to support the settlement, including the term sheet signed by the parties on October 15, 2008. The court preliminarily approved the settlement and directed the parties to complete formal settlement documents consistent with the parties' term sheet by January 12, 2009. Specifically, the circuit court found that the parties had negotiated the settlement at arms length, and it preliminarily found that the settlement was fair, reasonable, adequate, proper, and in the best

interest of the class.

¶ 15 First Health served the Madison County circuit court's December 11, 2008, orders on Roche's counsel. On December 19, 2008, Roche counsel filed a motion to vacate the injunction in this case. The circuit court conducted a hearing on Roche's motion on December 22, 2008. At this hearing, First Health and plaintiffs objected to Roche's motion to vacate because, among other reasons, she was not a party to this case and had not sought leave to intervene. Roche countered that the St. Clair County circuit court had certified a class in her case and had named Roche's counsel as class counsel. The circuit court inquired of Roche's counsel regarding the December 8, 2008, order:

"Court: Show me in the order where it says he certified the class.

Roche [*sic*] Counsel: Okay. If you look at the interim class order, he finds, Part A, 'The class as defined in plaintiff's motion for class is ascertainable through objective criteria and is cohesive.' So he has found a class. Okay?

Court: No. He says – That's not what you said.

Roche [*sic*] Counsel: We have the order. It says what it says.

Court: He said that the class as defined in your motion is ascertainable through objective criteria and it is cohesive. It doesn't say that he found a class. He says it is ascertainable. Okay?

Roche [*sic*] Counsel: He also finds – And we've attached everything to the motion. He also finds – He makes the appointment, that the plaintiff and counsel will fairly and adequately represent. He then finds, quote, 'The court finds that this interim appointment order is necessary to protect the interests of the class.' That is a finding. We also –

Court: What class?

Roche [*sic*] Counsel: The class as defined. But let me –

Court: The class as defined but not certified.

Roche [*sic*] Counsel: Okay, Judge.

Court: Are you telling me that is a certification order?

Roche [*sic*] Counsel: I'm telling you that –

Court: Is that a certification order?

Roche [*sic*] Counsel: No, it is not a certification order."

On January 8, 2009, the circuit court denied Roche's motion to vacate the injunction.

¶ 16 On January 12, 2009, the parties submitted formal settlement documents to the circuit court, including proposed mail and print notices of the settlement, as required by the December 11, 2008, order. On January 14, 2009, the court entered an order approving the form of the settlement documents and set a fairness hearing for May 26, 2009.

¶ 17 The parties selected an outside consulting firm to notify the plaintiff class. On March 23, 2009, class notices, totaling 22,912, were mailed to those providers identified by First Health. On March 20, 2009, a summary notice was published in four Illinois newspapers. Both the mailed notices and the published notices outlined the settlement benefits in detail and advised class members how to opt out of the class or object to the settlement. The consulting firm reported that 20,897 current and former First Health providers received its mailing. As of May 1, 2009, the firm had received three requests for exclusion, or 0.014% of the total delivered notices. As of May 1, 2009, only one person (Roche) objected to the settlement, representing just 0.0047% of the total delivered notices.

¶ 18 On April 8, 2009, Roche filed an objection to the settlement. Roche's objection asserted, among other things, that the settlement was unfair for the following reasons: (1) the relief was inadequate, (2) the settlement was collusive, (3) the settlement created conflicts among the class members, (4) the notice was inadequate, (5) class counsel and class plaintiff were inadequate, and (6) the process for filing objections was unreasonably difficult.

¶ 19 On April 15, 2009, Roche filed a motion to intervene for the purposes of her objection and to conduct expedited discovery. Roche sought discovery and requested the depositions of First Health witnesses. At the May 5, 2009, hearing on Roche's motion to intervene, the circuit court found that Roche had not shown a basis to warrant her intervention.

¶ 20 On May 26, 2009, as provided by the notice sent to class members, the circuit court conducted a fairness hearing. Besides the parties, only Roche's counsel appeared at the hearing. The fairness hearing was continued until July 15, 2009, and then rescheduled for August 25, 2009. On January 4, 2010, the circuit court entered its order. The circuit court found that only three class members opted out of the settlement, the requirements for the certification of a settlement class were satisfied, and proper notice had been given to the class. The court reaffirmed its prior findings that the parties had engaged in "arms-length negotiations and acted properly throughout the settlement negotiations." After noting that the case was settling after "substantial discovery had been taken," the court expressly rejected the accusation of collusion asserted by Roche as being "without any support." See *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 971-72, 565 N.E.2d 68, 70-71 (1990). The court concluded that a presumption of fairness applied to the settlement.

¶ 21 The court further referenced its experience with cases involving PPO-related issues, including cases against First Health payors. Based on the court's review of the submissions made to it in this case, the court found that the balance between the class benefit from the settlement and the strength of the case weighed in favor of the approval of the settlement. The court noted that the settlement did not release claims against payors, which the court concluded could be liable if discounts were improperly taken by them. The court noted various contract impediments any plaintiff would have to overcome against First Health. The court further noted the precedent for what the court characterized as a "non-cash" settlement where, as here, "the class faces substantial obstacles to any recovery." The court compared

the settlement under review with the settlement in *First State Orthopaedics v. Concentra, Inc.*, 534 F. Supp. 2d 500 (E.D. Pa. 2007), and determined that the present settlement had greater value to the settlement class on a weaker case, relative to *Concentra, Inc.* Finally, the court specifically considered and overruled Roche's objection in its entirety. The court analyzed Roche's theory that First Health somehow breached its contracts with providers by failing to require payors to "utilize the services of providers." The court noted that Roche failed to articulate how that would occur or how this contract theory could overcome the various contract defenses available to First Health. Roche's "utilization" theory did not justify the rejection of the pending settlement. Based on the foregoing, the court concluded that the settlement was "fair, reasonable and adequate and was entered into and made in good faith."

¶ 22 Roche appealed, contending the circuit court abused its discretion in approving the class action settlement and that the circuit court erred in nullifying an order of a sister court. Plaintiffs cross-appealed, arguing that Roche's counsel should not have been allowed to represent an objector against his former clients.

¶ 23

#### ANALYSIS

¶ 24 A trial court's decision evaluating a settlement will stand unless the court abused its discretion. *Steinberg v. System Software Associates, Inc.*, 306 Ill. App. 3d 157, 169, 713 N.E.2d 709, 717 (1999). This means that the actions of the court will not be disturbed on appeal unless they are "clearly against logic." *State Farm Fire & Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083, 732 N.E.2d 1094, 1096 (2000). In such a case, the question is not whether the reviewing court agrees with the action taken by the court but whether the trial court "acted arbitrarily, without employing conscientious judgment, or whether, in view of all the circumstances, the court exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted." *State Farm Fire & Casualty Co.*,

314 Ill. App. 3d at 1083, 732 N.E.2d at 1096.

¶ 25 The record reflects that the court here was well advised of the benefits of the settlement and the risks if the litigation continued. The court's order reflects a careful review of the process that led to the settlement and a consideration of the relevant factors showing the fairness of the settlement. Given that a settlement is a compromise, the court was not to judge the legal and factual questions by the criteria of a trial on the merits. See *GMAC Mortgage Corp. of Pennsylvania v. Stapleton*, 236 Ill. App. 3d 486, 493, 603 N.E.2d 767, 773 (1992). Turning the settlement approval hearing into a trial would defeat the purposes of a compromise, such as avoiding a determination of sharply contested issues and dispensing with expensive and wasteful litigation. Here, the circuit court properly balanced the merits of settling the case in the manner proposed against the potential benefits and burdens of proceeding with the litigation. See *Korshak*, 206 Ill. App. 3d at 972, 565 N.E.2d at 70-71. Roche contends, however, that the court failed to properly value the case compared to the value of the settlement. Roche also maintains that the court abused its discretion in finding that there was no collusion among the parties.

¶ 26 The court's determination of the weakness of plaintiffs' case is supported by our recent decision in a "payor" case, *Coy Chiropractic Health Center, Inc. v. Travelers Casualty & Surety Co.*, 409 Ill. App. 3d 1114, \_\_\_ N.E.2d \_\_\_ (2011) (hereinafter *Coy*). In *Coy*, plaintiffs entered into contracts with First Health and its predecessor, Community Care Network (CCN), in which they agreed to participate in a PPO. In these preferred provider agreements, the plaintiffs agreed to accept discounted reimbursements from payor insurance companies, health care plans, or claims administrators with whom First Health and CCN had contracted. According to the plaintiffs, Travelers discounted bills from the plaintiffs without steering patients to the plaintiffs by offering financial incentives to their insureds for utilizing the plaintiffs as their provider.

¶ 27 After analyzing the preferred provider agreement, the court concluded there were no promises of steerage or financial incentives. *Coy*, 409 Ill. App. 3d at 1119, \_\_\_ N.E.2d at \_\_\_ ("Neither Bemis's preferred provider agreement with CCN nor Coy's preferred provider agreement with First Health contained provisions promising any particular steerage or financial incentive to the plaintiffs."). The *Concentra, Inc.* court also came to the same conclusion when it found as follows: "With regard to the PPO steerage claims, plaintiffs would have to show a contractual obligation by Concentra to guarantee a certain amount of steerage to the preferred provider class. Not only were there no such guarantees in the PPO contracts, the contracts imposed no requirements of Concentra whatsoever with regard to steerage." *Concentra, Inc.*, 534 F. Supp. 2d at 518. As a result, any theory of recovery based on First Health's failure to steer patients to plaintiffs has little merit. The court therefore did not abuse its discretion in finding that contract defenses would significantly impede plaintiffs' likelihood of success.

¶ 28 Roche next argues that the circuit court erred in discounting her "utilization" theory as an alternative basis of recovery against First Health. Roche in her first amended complaint described her breach-of-contract theory as follows:

"Contrary to the contractual obligations made by First Health, it did not enter into Payor Agreements to utilize the services of network providers \*\*\*. These Payor agreements did not require covered beneficiaries to use the services of network providers; did not require Payors to establish preferred, exclusive provider programs, nor Physicians Panels \*\*\*."

¶ 29 In her brief, Roche did little to explain her breach-of-contract theory. It is unclear what section of the contract she contends was breached. The participating provider agreement Roche signed with First Health on November 1, 1999, states in section 1.5 (Preferred Provider Panel) as follows:

"Provider understands that by execution of this Agreement, Provider agrees to participate in a Preferred Provider Panel (PPO Plan) being created by First Health. Provider further understands that First Health will offer to certain Payors the opportunity to contract with First Health to utilize the services of the health care providers participating in the Preferred Provider Panel. *Payors may elect to use some or all of the providers participating in First Health's PPO Plan.*" (Emphasis added.)

The same provision is contained in Coy's provider agreement, but it is not in Shipley's agreement.

¶ 30 In rejecting Roche's theory, the circuit court stated as follows: "Objector's counsel argue[s] that First Health breached the provider agreement by failing to require its payors to 'utilize the services of network providers.' Objector failed to articulate how exactly that occurs. Theoretically, every time the PPO discount is not 'utilized' and a breach occurs, there is no PPO discount, and hence, no damages." We also question whether First Health breached the provider agreement by not requiring the payors to utilize the preferred provider panel, because the agreement, signed by Roche and Coy, allows the payors to "elect to use some or all of the providers participating in First Health's PPO Plan." In addition, the section the utilization theory is based on is not included in Shipley's agreement. The circuit court did not abuse its discretion in discounting Roche's utilization theory of recovery.

¶ 31 Roche also argues on appeal that there was collusion between plaintiffs and defendants. The court considered her position and rejected it: "[T]his court remains convinced that there was no collusion." The record shows an arms-length negotiation between plaintiffs and defendants, entered into after years of litigation and discovery, resulting in a settlement with the aid of an experienced mediator. The court's findings were not an abuse of discretion.

¶ 32 Finally, Roche contends that the settlement approval was improper because it

purportedly violated the order entered in the Roche case on December 8, 2008. We agree that the St. Clair County court's December 8, 2008, order did not certify a plaintiff class. The St. Clair County court stated that its order did not impair First Health from settling this case. The Madison County court's orders entered December 11, 2008, and the Madison County court's actions thereafter did not nullify an order issued by a sister court.

¶ 33 Considering the fact we are affirming the circuit court's approval of the class settlement, we will not decide plaintiffs' cross-appeal regarding whether the circuit court erred in refusing to discharge Roche's counsel after he previously had been a member of the law firm representing the class representatives.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 35 Affirmed.