

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

J.P. and M.K., individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

MEMORANDUM OF LAW & ORDER
Civil File No. 18-3472 (MJD/DTS)

BCBSM, Inc. d/b/a Blue Cross and
Blue Shield of Minnesota,

Defendant.

Charles N. Nauen, Susan E. Ellingstad, David W. Asp, and Jennifer L. M. Jacobs,
Lockridge Grindal Nauen P.L.L.P., and Jordan Lewis, Jordan Lewis, P.A.,
Counsel for Plaintiffs.

Joel Allan Mintzer and Doreen A. Mohs, Blue Cross and Blue Shield of
Minnesota, and David M. Wilk, Larson King, LLP, Counsel for Defendant.

I. INTRODUCTION

This matter is before the Court on Plaintiffs' Motion for Class Certification.

[Docket No. 74] The Court heard oral argument by telephone on January 13,
2021. The Court denies the motion because Plaintiffs cannot show commonality,
typicality, or adequacy sufficient to support certifying the proposed class. The
question of whether Blue Cross was entitled to offset is answered by the plan

documents, and the putative class members belong to 84 different ERISA plans, an unknown number of which have different controlling plan documents with different plan language that will need to be analyzed to determine the outcome of each class member's claims. Additionally, there is a substantial question whether Plaintiffs are members of the very class that they propose; there is a substantial and fact-intensive question regarding whether Plaintiffs exhausted their administrative remedies; and, due to the parallel L.P. Lawsuit, Plaintiffs' interests and injuries diverge from those of the proposed class.

II. BACKGROUND

A. Factual Background

1. Parties

Bolton & Menk, Inc. self-insures an ERISA health benefit plan that it offers to its employees and hired Defendant BCBSM, Inc. d/b/a Blue Cross and Blue Shield of Minnesota ("Blue Cross") to administer the plan. (Am. Compl. ¶¶ 5, 8.) Plaintiff J.P. is an employee of Bolton & Menk, Inc. and is covered under the plan as the subscriber or contract holder. (*Id.* ¶ 5; Bazzarre Decl. ¶ 4.) J.P.'s wife, M.K., and his daughter, L.P., are also covered under the plan as beneficiaries. (Am. Compl. ¶¶ 6, 9; Bazzarre Decl. ¶ 4.)

2. Plan Language

The plan's Summary Plan Description ("SPD") includes the following sentence, under the heading "Payments Made in Error:" "Payments made in error or overpayments may be recovered by the Claims Administrator as provided by law" ("Payments Made in Error Term"). (Mintzer Decl., Ex. 1, Bolton & Menk, Inc., 2018 Summary Plan Description at 47.)

Using its operating system, Blue Cross automates an offsetting process based on the Payments Made in Error Term. Once Blue Cross determines that it has overpaid a claim, a Blue Cross claims examiner codes the claim as overpaid in the system and keys in data that completes an otherwise prepared letter. The letter informs the participant that Blue Cross believes a claim has been overpaid. If the claim remains unpaid for 30 days, a follow-up letter is sent. If it is not paid by 60 days, the case is eligible for offset. When a subscriber has a new claim for which Blue Cross would issue a payment directly to the subscriber (rather than to a provider), the money will not be paid to the subscriber because, as an automatic feature of the software system, the amount is automatically applied to the collection case. (Lewis Decl., Ex. 2, Dressen 30(b)(6) Dep. 23, 25-26.)

3. Change Academy Treatment and Claims

In 2016 and 2017, J.P. enrolled his daughter at Change Academy at Lake of the Ozarks (“Change Academy”) in Missouri. (Am. Compl. ¶¶ 9–12.) Change Academy is a non-participating (“non-par”) provider, meaning that it does not have a contract with Blue Cross or any other licensee of the Blue Cross and Blue Shield Association. (Mintzer Decl. ¶¶ 4–5; Mintzer Decl., Ex. 1, SPD at AR2751.) J.P. personally paid \$189,477.74 for the services rendered at Change Academy and then sought coverage and reimbursement from Blue Cross for those services. (Am. Compl. ¶ 11.) When a member obtains services from a non-par provider, Blue Cross typically does not send a check directly to the provider. (Mintzer Decl., Ex. 1, at AR2711, AR2741.) Instead, Blue Cross sends payment to the subscriber, that is, the employee (unless certain exceptions apply). (*Id.* at AR2677, AR2737, AR2741; Bazzarre Decl. ¶¶ 4–5.)

Initially, Blue Cross determined that some of Change Academy’s services were covered and approved \$83,554.55 in payment to J.P. (Am. Compl. ¶ 12.) Because Change Academy is non-par, Blue Cross made the checks payable to J.P., and sent the checks to J.P. (*See, e.g.*, Mintzer Decl. Ex. 2, Administrative

Record¹ at AR0639, AR0651; Mintzer Decl., Exs. 5–6; see also Bazzarre Decl. ¶¶ 6–7.) However, Blue Cross later concluded that Change Academy’s services were not covered and that those payments had been improperly made. (Am. Compl. ¶ 12; see also, e.g., AR0735–42; Mintzer Decl. Ex 8.)

Blue Cross sent letters to J.P. requesting repayment. (See, e.g., Mintzer Decl. Ex. 7.) When J.P. did not respond, Blue Cross sent reminder letters. (See, e.g., AR0840–41.) When J.P. still did not respond, Blue Cross’s system noted that future claims would be subject to recoupment. (AR3251–53; Mintzer Decl. Ex. 17, Dressen 30(b)(6) Dep. 10, 15, 19, 23–24.)

J.P. contested Blue Cross’s failure to pay for Change Academy’s services, as well as Blue Cross’s decision to reprocess and deny the claims that it had previously paid. (AR0878–83.) After Blue Cross upheld its determination following an administrative appeal, J.P. sued Blue Cross on behalf of his daughter, L.P., in May 2018. L.P. v. BCBSM, Inc., Civil File No. 18-1241 (D. Minn.) (“L.P. Lawsuit”). Blue Cross counterclaimed, seeking a declaration that it had the right to recover any overpayment. ([L.P. Lawsuit Doc. 34] Def.’s Answer

¹ Citations to the administrative record, other than the plan documents, are within Mintzer Decl. Exhibit 2, and will be referred just by their “AR” Bates number.

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