PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2085

SANDRA M. PETERS, on behalf of herself and all others similarly situated,

Plaintiff – Appellant,

v.

AETNA INC.; AETNA LIFE INSURANCE COMPANY; OPTUMHEALTH CARE SOLUTIONS, INC.,

Defendants – Appellees.

AMERICAN MEDICAL ASSOCIATION; MARYLAND STATE MEDICAL SOCIETY; MEDICAL SOCIETY OF VIRGINIA; NORTH CAROLINA MEDICAL SOCIETY; SOUTH CAROLINA MEDICAL ASSOCIATION,

Amici Supporting Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Martin K. Reidinger, District Judge. (1:15-cv-00109-MR)

Argued: October 26, 2020 Decided: June 22, 2021

Before AGEE, FLOYD and THACKER, Circuit Judges.

Affirmed in part, reversed in part, vacated in part, and remanded by published opinion. Judge Agee wrote the opinion, in which Judge Floyd and Judge Thacker joined.

ARGUED: D. Brian Hufford, ZUCKERMAN SPAEDER LLP, New York, New York, for Appellant. Earl B. Austin, III, BAKER BOTTS L.L.P., New York, New York; Brian D. Boone, ALSTON & BIRD, LLP, Charlotte, North Carolina, for Appellees. **ON BRIEF:** Jason M. Knott, Washington, D.C., Jason S. Cowart, Nell Z. Peyser, ZUCKERMAN SPAEDER LLP, New York, New York; Larry S. McDevitt, David Wilkerson, THE VAN WINKLE LAW FIRM, Asheville, North Carolina, for Appellant. Michael R. Hoernlein, Rebecca L. Gauthier, ALSTON & BIRD LLP, Charlotte, North Carolina; E. Thomison Holman, HOLMAN LAW, PLLC, Asheville, North Carolina; Jessica F. Rosenbaum, BAKER BOTTS L.L.P., New York, New York, for Appellees. Leonard A. Nelson, Kyle A. Palazzolo, AMERICAN MEDICAL ASSOCIATION, Chicago, Illinois, for Amici American Medical Association, North Carolina Medical Society, Maryland State Medical Society, South Carolina Medical Association, and Medical Society of Virginia.

AGEE, Circuit Judge:

Sandra Peters appeals the district court's grant of summary judgment in favor of Aetna Inc., Aetna Life Insurance Company, and Optumhealth Care Solutions, Inc. (individually, "Aetna" and "Optum"; collectively, "Appellees"), as well as the denial of her motion for class certification. For the reasons discussed below, we affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I.

Mars, Inc. ("Mars") operated a self-funded health care plan ("the Plan") and hired Aetna as a claims administrator of the Plan pursuant to a Master Services Agreement ("MSA").[1] Under the MSA, Aetna's obligations included processing the participants' claims for the Plan and providing a cost-effective network of health care providers. The MSA contained a "Service and Fee Schedule" ("the Fee Schedule"), explaining that "[a]ll Administrative Fees from this [Statement of Available Services] are summarized in the following Service and Fee Schedule." J.A. 6025. The Fee Schedule notes that [redacted] J.A. 6026, 6028. Aetna's compensation, in return for providing all of the agreed services under the MSA, was set at [redacted], meaning

[1] Mindful of the standard on summary judgment, we recite the facts herein in the light most favorable to the non-moving party, Peters. *Garofolo v. Donald B. Heslep Assocs., Inc.*, 405 F.3d 194, 198 (4th Cir. 2005).

that [redacted] J.A. 3142.

The Aetna-Optum Relationship

The MSA permitted Aetna to subcontract "[t]he work to be performed by Aetna" for the Plan. J.A. 5999. Aetna subsequently executed such subcontracts with Optum for Optum to provide chiropractic and physical therapy services to the Plan participants for more cost-effective prices than Aetna alone could provide. Optum's "downstream providers" offered in-network services to Aetna insureds (including the Plan participants) at competitive rates. In exchange for Optum's services, it was to be paid a fee.

Section 20(B) of the MSA specified that "Aetna shall be solely responsible for payments due such subcontractors." J.A. 5999. However, Aetna did not wish to pay Optum out of the fees it received from Mars through the Plan. Instead, Aetna requested that Optum "bury" its fee within the claims submitted by Optum's downstream providers. J.A. 2692. By doing so, the Plan and its participants effectively would pay part or all of Optum's administrative fee notwithstanding the contrary terms of the MSA.

As a result, the fee breakdown for health care services provided to Plan participants through Optum operated as follows: After treatment, the health care provider submitted its claim to Optum for the services rendered. Optum then added a "dummy code" to the claim from the Current Procedural Terminology ("CPT")[2] to reflect a bundled rate fee, consisting

[2] The CPT is "a uniform coding used in 'identifying, describing, and coding medical, surgical, and diagnostic services performed by practicing physicians.'" *Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 513 n.2 (4th Cir. 1991) (citation

of Optum's administrative fee and the cost of the health care provider's services. Optum would then forward the bundled rate fee claim to Aetna for its approval. In turn, this bundled rate fee would be paid based on the Plan's responsibility framework, depending on the coinsurance required and whether a patient-paid deductible had been reached.

Appellees sought to keep this fee breakdown from being known by Mars or the Plan participants. As one Aetna employee explained, "We need to ensure that the members are not being relayed this information about wrap or administration fees as they are feeling they are absorbing costs, which in turn makes most of them unhappy." J.A. 2699. Nonetheless, some Aetna and Optum employees exhibited concern over the fee "bumping" arrangement, stating, for instance:

> The scenario where the co-insurance amount is calculated based on Aetna's payment to us is very problematic – the essence of the [Department of Insurance ("DOI")] complaint on this will be patients are being forced to pay a % of our fee, this is not going to viewed favorably by the DOI.

J.A. 2647.

The Terms of the Plan

Plan Participants received a Summary Plan Description ("SPD"), which set out their rights and benefits under the Plan, including the charges for health care services and their participant responsibility. And in the circumstances of this case, the SPD represents the

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omitted). It is "the most widely accepted" system of coding "under government and private health insurance programs." *Id.* (citation omitted).

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