

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-cv-62610-BLOOM/Valle

A&M GERBER CHIROPRACTIC LLC, A/A/O
CONOR CARRUTHERS, ON BEHALF OF
ITSELF AND ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs,

v.

GEICO GENERAL INSURANCE COMPANY,

Defendant.

**DEFENDANT'S STATEMENT OF MATERIAL FACTS IN RESPONSE TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1, Defendant submits this Statement of Material Facts in response to Plaintiff's Motion for Partial Summary Judgment ECF No. [59]:

1. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 1.
2. GEICO agrees with Plaintiff's statement at ECF No. [59] at ¶ 2.
3. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 3 except that the complete copy of the policy is filed at ECF No. [67-1].
4. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 4 except that the relevant policy provisions are located at ECF No. [67-1] at 12-18, 29-39, 51-52.
5. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 5 except that the relevant policy provisions are located at ECF No. [67-1] at 12-18, 29-39, 51-52.
6. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 6 except that the relevant policy provision is located at ECF No. [67-1] at 31.

7. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 7.
8. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 8 except to the extent that the meaning of the disputed provision of the FL PIP (01-13) amendment becomes clearer when the policy is read as a whole, particularly the M608 (01-13) endorsement. See ECF No. [67-1] at 51-52.
9. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 9.
10. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 10.
11. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 11.
12. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 12.
13. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 13.
14. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 14.
15. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 15 except that Reason Code "BA," which stands for "Billed Amount," is not utilized to pay, limit, reduce, or calculate PIP and/or Medpay insurance claims. Rather, Reason Code "BA" is only an explanation code. "BA" is generated on Explanation of Review forms after a particular claim line meeting certain criteria is processed. For example, the FLPIP policy for medical benefits incorporates a 20% co-insurance amount applicable to all Personal Injury Protection benefits. (The co-insurance amount can be reduced by the insured's purchase of additional coverage.). Thus, where the co-insurance amount is not reduced by additional coverage (i.e. MedPay and/or Additional PIP) AND assuming that no other reasons for denying or reducing a particular claim line exist – for those charges received which are less than the schedule of maximum charges (as detailed in the FLPIP policy) and/or less than the maximum reimbursable allowance under the workers' compensation fee schedule (as detailed in the FLPIP policy) -- GEICO will issue a draft

(in this case directed to the medical provider) representing 80% of the billed amount. GEICO will then generate an Explanation of Review document containing the “BA” reason code for that particular line item charge. *See* Defendant’s Answers to Plaintiff’s Interrogatories at 1, 4.

16. GEICO agrees with Gerber’s statement at ECF No. [59] at ¶ 16.

17. GEICO agrees with Gerber’s statement at ECF No. [59] at ¶ 17 except that for charges exceeding the fee schedule, GEICO is only required to pay 80% of the fee schedule rate. This assumes that no other reasons exist for denying or reducing the claim. *See* ECF No. [67-1] at 12-18, 29-39, 51-52.

18. GEICO agrees with Gerber’s statement at ECF No. [59] at ¶ 18.

19. GEICO agrees with Gerber’s statement at ECF No. [59] at ¶ 19.

20. The 2012 amendment to section 627.736(5)(a)5., Florida Statutes, sated:

Effective July 1, 2012, an insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph. A policy form approved by the office satisfies this requirement.

Ch. 197 Laws of Fla. § 10 (2012) (HB 119).

21. Pursuant to this statutory requirement, the Florida Office of Insurance Regulation issued Informational Memorandum OIR-12-02M which directed insurers to submit endorsements for approval and included “Sample Fee Schedule Endorsement” language. *See* ECF No. [67-4] at 1.

22. All GEICO PIP policies issued after January 1, 2013 contain Fee Schedule Endorsement M608 (01-13) which states that GEICO “will limit reimbursement to 80 percent of a properly billed reasonable charge, but in no event will [GEICO] pay more than 80 percent of” the statutory fee schedules. ECF No. [67-3] at 1.

23. GEICO “issued or mailed the M608 (01-13) Endorsement to all policyholders for all new business effective on and after January 1, 2013 and renewal policies effective on and after January 1, 2013.” ECF No. [67-3] at 1.

24. GEICO’s M608 (01-13) Endorsement substantially adheres to the OIR-12-02M form language and was approved by the Office of Insurance Regulation. [67-1] at 51-52; [67-3] at 1-2; [67-4] at 1.

25. Gerber’s second amended complaint seeks class certification under Rule 23(b)(2) or alternatively Rule 23(b)(3) and also asks this Court to require notice to all class members. ECF No. [23] at ¶¶ 28-30 and p.12.

26. On June 7, 2017, this Court issued an order granting Gerber’s motion to certify the class under Rule 23(b)(2). *A&M Gerber Chiro., LLC v. GEICO Gen. Ins. Co.*, Case No. 16-cv-62610, 2017 U.S. Dist. LEXIS 87029 (S.D. Fla. June 7, 2017), ECF No. [65].

27. Pursuant to Rule 23(f), GEICO filed a petition for permission to appeal the class certification order. *See GEICO General Ins. Co. v. A&M Gerber Chiropractic, LLC*, Case No. 17-90015 (11th Cir.) which is pending at this time.

Respectfully submitted,

Counsel for Defendant

s/ Peter D. Weinstein
Peter D. Weinstein (FBN 0913502)
Gregory Willis (FBN 335371)
Omar Giraldo (FBN 92402)
Thomas Hunker (FBN 38325)
COLE, SCOTT & KISSANE PA
600 North Pine Island Road, Ste. 500
Plantation, Florida 33324
954-473-1112
Peter.Weinstein@csklegal.com
Gregory.Willis@csklegal.com
Omar.Giraldo@csklegal.com

Thomas.Hunker@csklegal.com

Karen.Henley@csklegal.com

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on **July 31, 2017**, a true and correct copy of the foregoing was served, via electronic mail, upon the persons on the attached service list.

/s Peter D. Weinstein, Esq.
Attorney for Defendant

SERVICE LIST

Counsel(s) for Plaintiff:

Edward H. Zebersky, Esq.
Fla. Bar No. 0908370
Michael T. Lewenz, Esq.
Fla. Bar No. 111604
ZEBERSKY PAYNE, LLP
110S.E. 6th Street, Ste. 2150
Fort Lauderdale, FL 33301
Telephone: (954) 989-6333
Facsimile: (954) 989-7781
ezebersky@zpllp.com
mlewenz@zpllp.com

Steven R. Jaffe, Esq.
Fla. Bar No. 390770
Mark. S. Fistos, Esq.
Fla. Bar No. 909191
FARMER, JAFFE, WEISSING, EDWARDS,
FISTOS & LEHRMAN, P.L.
425 North Andrews Avenue, Suite 2
Fort Lauderdale, FL 33301
Telephone: (954) 524-2820
Facsimile: (954) 524-2822
steve@pathtojustice.com
mark@pathtojustice.com