IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Kristen S. McDermott, individually And Kimberly P. Johnson, personal Representative of the estate of Sandra S. Lobb , deceased Plaintiffs,	:	
v.	:	CIVIL ACTION: 05-cv-02536
Diane Koken, individually and as Insurance Commissioner Dr. Calvin B. Johnson, individually, and as Secretary of Health, and Independence Blue Cross and The Chester County Hospital, Jointly and severally, Defendants	:	**JURY TRIAL DEMANDED**

SECOND AMENDED COMPLAINT

INTRODUCTION

This is a simple matter concerning the right of an individual to freely and independently contract with their personal physician. It involves the regulations promulgated by the Secretary Of Health and Insurance Commissioner and practices of the Commonwealth of Pennsylvania's Department of Health and the Insurance Department as applied to Plaintiffs and other persons insured by Independence Blue Cross (hereinafter IBC) through IBC provider contracts with The Chester County Hospital (hereinafter "Hospital") and other hospitals that have elected to contract with IBC. IBC's secret state approved contracts contain state mandated language

that unconstitutionally interferes with the insured's right of contract with their personal physician and rewards the Hospital for facilitating that interference. IBC, acting under the color of state law, the mandated regulatory language and policy, severs the doctor patient relationship of the Plaintiffs and other subscribers and rewards the Hospital and other similarly contracted providers for accepting IBC's determination of medical need, a determination the Plaintiffs and other subscribers have every right to believe is a duty owed exclusively to them within the sanctity of their doctor patient relationship as well as a determination reserved solely for the practice of medicine by a properly licensed physician and one to be held separate from any determination for insurance purposes. IBC, practicing medicine without a license and with the active support of the Hospital, made the medical determination that additional treatment for Mrs. Lobb was not appropriate over the vehement objections of her treating physician. Mrs. Lobb and her family (hereinafter the Lobbs) and Kristine McDermott, as well as any other similarly insured patients, are placed in the incongruous situation of being denied both the services of their personal physician and the care their doctor believes is appropriate. Even worse, the basis for these denials is an unconstitutional state regulation placed in IBC's provider contract which is deliberately cloaked in state approved secrecy. Amazingly, had Mrs. Lobb or Ms. McDermott been uninsured, the Plaintiffs would have been outside these constraints and free to contract with their doctor as well as have their

doctor's determination of appropriate care binding upon the Hospital and other similar providers. Unfortunately, such was not the case. Because Mrs. Lobb had and Ms. McDermott currently has health care insurance with IBC, the Plaintiffs relationship with her personal physician was irreparably severed without her or her family's knowledge or due process. Moreover Mrs. Lobb was denied the care the Lobbs and her doctor sought to provide and pay for outside any participation by IBC. This wrongful denial of contract, care and treatment lead to Mrs. Lobb's untimely death. Ms. McDermott was forced to watch helplessly as her mother died from lack of care all the time knowing that she, Ms. McDermott, and her family were exposed to this very same fate. As a teacher in the same school district and with the same IBC insurance as Mrs. Lobb, Ms. McDermott continues to suffer from IBC's unconstitutional impairment of her right of contract with her and her family's doctor and all the related barriers to obtaining appropriate health care. Succinctly put, the case brings before this honorable court the simple question of whether the Commonwealth and IBC with the assistance of the Hospital can arbitrarily, secretly and without due process sever the contractual relationship the Plaintiffs every reason to believe they had established, have established, or may choose to establish in the future with their personal or attending physician. It is a question that literally affects the health, wellbeing and the very freedom of millions of IBC subscribers.

JURISDICTION

1. This Honorable Court has jurisdiction founded on 28 U. S. C. Section 1983 and 28 U. S. C. Section 1331 involving Article 1, Section 10 and the Fourteenth Amendments to the United States Constitution and related state claims under 28 U. S. C. Section 1367 (a).

VENUE

2. All acts and omissions given rise to the claims stated herein occurred in the Eastern District of Pennsylvania. Plaintiffs and defendants reside within the Eastern District of Pennsylvania. Venue is proper in the Eastern District of Pennsylvania pursuant to 28 U. S. C. Section 1391 (b) (1 & 2) and (c).

PARTIES

3. Plaintiff, Kristen S. McDermott, is an individual IBC subscriber who is employed by the Oxford Area School District as a teacher and is a beneficiary of the Estate of Sandra S. Lobb. Plaintiff, Kimberly P. Johnson, is an adult individual residing at 120 Iron Stone Road, Nottingham, Pennsylvania, and is the personal representative of Sandra S. Lobb, deceased.

4. Defendant, Independence Blue Cross, is a Pennsylvania hospital plan corporation with its principal place of business at 1901 Market Street, Philadelphia, PA, 19103-1480. Defendant is licensed to engage in the business of insurance in Pennsylvania and regularly transacts such business in the Eastern District of Pennsylvania.

5. Defendant Dr. Calvin B. Johnson is an individual citizen of the Commonwealth and is the Secretary of Health in the Pennsylvania Department of Health, an executive agency of the Commonwealth of Pennsylvania with offices located in Philadelphia.

6. Defendant Diane Koken is an individual citizen of the Commonwealth and the Insurance Commissioner of the Pennsylvania Insurance Department, an executive agency of the Commonwealth of Pennsylvania with offices located in Philadelphia.

7. The Chester County Hospital is a hospital corporation licensed by the Commonwealth of Pennsylvania to provide inpatient medical services. It is located at 701 East Marshall Street, West Chester, Pennsylvania.

FACTS

8. On July 25, 1997, Plaintiffs' decedent, Sandra S. Lobb, (hereinafter "Mrs. Lobb"), was a 57-year-old schoolteacher preparing to start a new year of teaching at Oxford Area High School, Oxford, Pennsylvania.

9. Mrs. Lobb was an alcoholic living in denial.

10. Mrs. Lobb was insured through the Oxford Area School system for inpatient quality health care and treatment under a group health insurance plan ("the plan") issued by Independence Blue Cross and regulated and approved by the Secretary of Health and Insurance Commissioner. A copy of the plan is attached as Exhibit 1.

11. The plan expressly provided coverage for the treatment of alcohol abuse. Specifically, the plan stated:

> You will be eligible for Inpatient covered services for Detoxification, for a maximum lifetime limit of four admissions, each admission not to exceed seven (7) days of treatment.
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> . . . .
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> You will be eligible for covered services for Hospital and Non-Hospital Residential Treatment, for a maximum of thirty days per calendar year of Residential Treatment subject to a lifetime maximum of ninety (90) days. You may trade off, on a two for one basis, 30 separate additional outpatient visits or partial hospitalization services to obtain up to 15 additional Residential Treatment days.
>
> . . . .
>
> You will be eligible for Outpatient alcohol services for a maximum of thirty (30) outpatient, full session visits or equivalent partial hospitalization services per calendar year. There is a lifetime limit of 120 outpatient full-session visits or partial hospitalization services. You may trade off, on a two-for-one basis, 30 separate additional outpatient visits or partial hospitalization services to obtain up to 15 additional Residential Treatment days.

(Exhibit 1 at 14-17).

This coverage was mandated by **40 Pa. C.S.A. §908-1**, which provides in relevant part:

> Section 603-A. Inpatient Detoxification. ----(a) Inpatient detoxification as a covered benefit under this article shall be provided either in a hospital or in an inpatient non-hospital facility which has a written affiliation agreement with a hospital for emergency, medical and psychiatric or psychological support services, meets minimum standards for client-to-staff ratios and staff qualifications which shall be established by the Department of Health and is licensed as an

alcoholism and/or drug addiction treatment program.

(b) The following services shall be covered under inpatient detoxification:

(1) Lodging and dietary services.

(2) Physician, psychologist, nurse, certified addictions counselor and trained staff services.

(3) Diagnostic X-ray.

(4) Psychiatric, psychological and medical laboratory testing.

(5) Drugs, medicines, equipment use and supplies.

(c) Treatment under this section may be subject to a lifetime limit, for any covered individual, of four admissions for detoxification and reimbursement per admission may be limited to (7) days of treatment or an equivalent amount.

Section 604-A. Non-hospital Residential Alcohol or Other Drug Services. –(a) Minimal additional treatment as a covered benefit under this article shall be provided in a facility which meets minimum standards for client-to-staff ratios and staff qualifications which shall be established by the Office of Drug and Alcohol Programs and is appropriately licensed by the Department of Health as an alcoholism or drug addiction treatment program. Before an insured may qualify to receive benefits under this section, a licensed physician or licensed psychologist must certify the insured as a person suffering from alcohol or other drug abuse or dependency and refer the insured to the appropriate treatment.

(b) The following services shall be covered under this section:

(1) Lodging and dietary services.

(2) Physician, psychologist, nurse, certified addictions counselor and trained staff services.

(3) Rehabilitation therapy and counseling

(4) Family counseling and intervention.

(5) Psychiatric, psychological and medical laboratory tests.

(6) Drugs, medicines, equipment use and supplies.

(b) The treatment under this section shall be covered, as required by this act, for a minimum of thirty (30) days per year for residential care. Additional days shall be available as provided in section 605-A(d). Treatment may be subject to a lifetime limit, for any covered individual, of ninety (90) days.

Section 605-A. Outpatient Alcohol or Other Drug Services.-(a) Minimal additional treatment as a covered benefits under this article shall be provided in a facility appropriately licensed by the Department of Health as an alcoholism or drug addiction treatment program. Before an insured may qualify to receive benefits under this section, a licensed physician or licensed psychologist must certify the insured as a person suffering from alcohol or other drug abuse or dependency and refer the insured for the appropriate treatment.

(b) The following services shall be covered under this section:

(1) Physician, psychologist, nurse, certified addictions counselor and trained staff services.

(2) Rehabilitation therapy and counseling.

(3) Family counseling and intervention.

(4) Psychiatric, psychological and medical laboratory tests.

(5) Drugs, medicines, equipment use and supplies.

(c) Treatment under this section shall be covered as required by this act for a minimum of thirty outpatient, full-session visits or equivalent partial visits per year. Treatment may be subject to a lifetime limit, for any covered individual, of one hundred and twenty outpatient, full-session visits or equivalent partial visits.

(d) In addition, treatment under this section shall be covered as required under this act for a minimum of thirty separate sessions of outpatient or partial hospitalization services per year, which may be exchanged on a two-to-one basis to secure up to fifteen additional non-hospital, residential alcohol treatment days.

12. On July 26,1997 Mrs. Lobb was found near death from alcoholism and taken to the Chester County Hospital and admitted on an emergency basis. Her treating physician, Dr. Cecile M. Pileggi, diagnosed her as suffering from "alcohol pancreatitis and heapititis [sic] alcohol ketoacidosis." A copy of the admission summary is attached as Exhibit 2.

13. Dr. Pileggi was retained by Mrs. Lobb well prior to her admittance to the Hospital and without the participation of IBC. Dr. Pileggi was retained to serve as Mrs. Lobb's personal physician and assist Mrs. Lobb with both the physical problems she was experiencing because of her alcoholism and the alcoholism itself. Plaintiffs only learned of IBC's contract with Dr. Pileggi during the discovery phase of other litigation following the death of Mrs. Lobb. Dr, Pileggi had a valid and current license to practice medicine in the Commonwealth and maintained that license throughout the time in question.

14. As required by **40 Pa. C.S.A. §908-1** and the plan's provisions, Dr. Pileggi certified that Mrs. Lobb was suffering from alcoholism and required inpatient or residential treatment. The Plaintiffs believed that this certification triggered IBC's obligation to pay for Mrs. Lobb care at Chester County Hospital as well as the treatment mandated by §908-1 and covered under the plan document.

15. The inpatient skilled care/treatment (hereafter "inpatient skilled care") that Dr. Pileggi certified for Mrs. Lobb was a **"covered service"** under Mrs. Lobb's plan, IBC's contract with the hospital, which defined "covered

services" as "services and supplies furnished by Hospital for which a Subscriber has coverage" and the applicable regulations of the Commonwealth. Neither IBC nor the hospital has ever contested that the skilled care the Plaintiffs and their doctor were seeking for Mrs. Lobb was a **"covered service".**

16. Despite this, after approximately one week of hospitalization, IBC denied Mrs. Lobb any further inpatient skilled care because IBC, through their Patient Care Management program, had determined that additional inpatient skilled care was not medically necessary/appropriate (hereinafter "medically necessary"). IBC thus directed that Mrs. Lobb be discharged to custodial care/confinement (hereinafter "custodial confinement), which could not provide inpatient skilled care vigorously advocated by her personal physician Dr. Pileggi.

17. Under **40 Pa. C.S.A. §908-1**, IBC was not permitted to deny coverage for treatment of Mrs. Lobb's alcoholism when her treating physician had certified that such treatment was medically necessary. The Plaintiffs' also believed that the "certification" required under §908-1 is that of the treating physician, and not an insurance company or their review panel. Plaintiffs further believed that IBC's denial of coverage on the basis of IBC's determination that additional inpatient skilled care was not medically necessary was thus a violation of 40 Pa. C.S.A. §908.1 and of no relevance to the Plaintiffs' right to independently pursue the care Mrs. Lobb required.

18. Dr. Pileggi repeatedly appealed IBC's decision, explaining that Mrs. Lobb required additional skilled level of care to fully recover (Exhibit 3, Pileggi letter of August 13, 1997 and Exhibit 3b, Pileggi letter of August 14, 1997), but IBC stood on its decision/denial. (Exhibit 4, Hatam letter of August 25, 1997).

19. Mrs. Lobb's medical condition at that time was such that she was unable to manage her affairs or make medical decisions. Plaintiff, Kimberly P. Johnson, with a durable power of attorney, and Mrs. Lobb's two other children, Kristen S. McDermott, Plaintiff herein, and Jeffrey G. Lobb, along with Mrs. Lobb's former husband, Frank H. Lobb, III, hereafter referred to jointly as "the Lobbs," represented Mrs. Lobb's interests.

20. The Hospital informed the Lobbs of IBC's decision and asked the Lobbs to remove Mrs. Lobb from the Hospital.

21. The Lobbs refused to remove Mrs. Lobb without her physician's signature certifying Mrs. Lobb's readiness for discharge, and asked the Hospital and Dr. Pileggi to explain the decision to discharge, given that it was clinically and personally obvious that Mrs. Lobb needed additional inpatient skilled care.

22. Both Dr. Pileggi and the hospital expressed agreement with the Lobbs and Mrs. Lobb remained in the hospital. However, the pressure to discharge Mrs. Lobb continued to grow and it became increasingly clear that Mrs. Lobb

was no longer receiving any treatment at the Hospital beyond that required for maintenance.

23. The Lobbs requested a meeting with Dr. Pileggi, the Hospital and IBC to resolve the inconsistency between Mrs. Lobb's obvious need for additional skilled care and the growing pressure to discharge her into custodial confinement. That meeting was held on August 11, 1997, but only Dr. Pileggi and Curt Quemore, representing the Hospital, attended. IBC declined to attend.

24. At the meeting, Dr. Pileggi and Mr. Quemore expressed strong disagreement with the actions of IBC in terminating Mrs. Lobb's coverage for inpatient skilled care, as well as frustration over their inability to get IBC to respond to Dr. Pileggi's appeals for authorization of additional inpatient skilled care for Mrs. Lobb's diminished physical and mental condition and alcoholism.

25. The Lobbs informed Dr. Pileggi and Mr. Quemore that they would personally pay for all additional skilled care, but Mr. Quemore said that IBC's contract with the hospital barred the hospital from accepting any form of payment from the Lobbs. When The Lobbs insisted that they had the funds, the right and the resolve to pay for Mrs. Lobb's additional skilled care, Mr. Quemore again stated that the hospital was contractually barred from accepting any payments from the Lobbs. Dr. Pileggi and Mr. Quemore described themselves as powerless to help, said that Dr. Pileggi had

repeatedly appealed IBC's decision in the matter, and said that IBC **had left them no other option but to discharge Mrs. Lobb to custodial confinement**. As the affidavit of Dr. Pileggi, attached as Exhibit 5, states, **"the actions of Independence Blue Cross left Sandra S. Lobb without an effective therapeutic health care plan."**

26. Dr. Pileggi and the hospital were barred from accepting payment from the Lobbs because their contracts with IBC prohibited them from charging a plan member or anyone acting on behalf of that plan member for any "covered services" that IBC determined not medically necessary. IBC's contract with Dr. Pileggi provided:

> Neither a Beneficiary, nor Independence shall be liable to pay Provider for any contracted service rendered by Provider to a Beneficiary which is determined under a Utilization Management Program not to be Medically Necessary. (Exhibit 6 at ¶3.7. A copy of IBC's agreement with Dr. Pileggi is attached at Exhibit 6).

27. Similarly, IBC's contract with the hospital provided:

> Covered services furnished by Hospital shall not be eligible for payment hereunder unless they have been determined by IBC to be Medically Necessary. Without limiting the generality of the foregoing, Hospital shall provide Inpatient, Same Day Surgery and Outpatient Services to a Subscriber only when Hospital has received Preapproval from IBC, as may be applicable. Services which have not been so preapproved shall be the sole financial responsibility of Hospital. (Exhibit 7 at ¶3.2)

> Where an admission, Inpatient Day or Outpatient Service is denied as not preapproved or Medically Necessary by IBC, the Hospital shall not charge either IBC or Subscriber for any health care service rendered or furnished with respect to such admission. (Exhibit 7 at ¶5.5).

(A copy of IBC's "Member Hospital Agreement" is attached as Exhibit 7.

28. The provider contracts also contained a "confidentiality" clause that prohibited both Dr. Pileggi and the Hospital from disclosing the terms of its contract with IBC to plan subscribers such as Mrs. Lobb or her family. The contract with Dr. Pileggi provided:

> Independence and provider agree to hold all of each other's confidential or proprietary information or trade secrets in trust and confidence and agree that such information shall be used only for the purposes contemplated herein, and not for any other purpose.

(Exhibit 6, Professional Provider Agreement at ¶6.4).

29. Similarly, the contract with the Hospital provided:

> All non-public information pertaining to business conducted by IBC or Hospital, including, but not limited to, the financial arrangements between the parties, shall be considered confidential and proprietary and unless required by applicable law, shall not be disclosed by either party, except as otherwise provided in this Agreement or, upon the prior written consent of both parties.

(Exhibit 7, Member Hospital Agreement at ¶13.1).

30. The plan document that was given to subscribers such as Mrs. Lobb and Ms McDermott, however, said exactly the <u>opposite</u> of what the provider

contracts between IBC and Dr. Pileggi and IBC and the Hospital said. The plan document misled subscribers to believe that they would be permitted to pay personally for any treatment that IBC refused to cover, so long as the hospital informed them that the treatment would not be covered by IBC.

> [T]he subscriber will not be financially responsible for admissions which fail to conform to the previously stated precertification requirements unless the hospital informs the subscriber that the proposed admission does not meet the requirements and will not be covered by Independence Blue Cross.

(Exhibit 1, Plan document at 11).

31. IBC never informed Mrs. Lobb that by accepting and retaining IBC's insurance, she surrendered her right to contract with her own physician or other health care providers. IBC instead represented to Mrs. Lobb and other subscribers that they would be permitted to pay personally for any medical treatment that IBC refused to cover. And as recently as December 7, 2004, IBC told the Superior Court of Pennsylvania that IBC "would simply allow the Plaintiffs to Pay" if asked to do so. This is patently false. It is even more egregious when one considers IBC's choice of words. They told the court they would "simply allow them to pay" while knowing the clear and unambiguous language in IBC's provider contracts which mirror state regulations and bars providers from accepting any such direct payment. These contracts, regulations and misrepresentations still continue. IBC is an agent of the state for the purposes of the enforcement of certain Department of Health

and Insurance Department regulations which must be in all state approved provider contracts between IBC and stated licensed health care practitioners.

32. On August 12, 1997, Frank H. Lobb, III ("Mr. Lobb") called IBC to appeal its denial of additional inpatient skilled care for Mrs. Lobb and to seek IBC's help in obtaining the additional inpatient skilled care for Mrs. Lobb. An employee of IBC told Mr. Lobb that Dr. Pileggi had appealed IBC's decision to terminate hospitalization for Mrs. Lobb and a "mistake" had been made in communicating Defendant's willingness to support additional hospitalization. However, when Mr. Lobb asked what additional treatment IBC would support, he was told that IBC would have to call him back.

33. The return call was made by IBC's manager, Carol Highman, and two supervisors on a speakerphone, who said that IBC's records showed that Dr. Pileggi "fully agreed" with Defendant's decision to terminate inpatient skilled care for Mrs. Lobb and that Dr. Pileggi had never appealed that decision. They further stated that while Dr. Pileggi had called IBC's appeals desk on Defendant's special line, Dr. Pileggi had done so only to state support for IBC's decision to terminate hospitalization and transfer Mrs. Lobb to custodial confinement. This was a direct misrepresentation of the position actually taken by Dr. Pileggi.

34. Mr. Lobb documented this conversation in a letter to IBC seeking both an explanation and help. Attached hereto as Exhibit 8. IBC did not reply.

35. Because IBC refused to pay for additional inpatient skilled care for Mrs. Lobb, and because the hospital was claiming it was prohibited from accepting payment from the Lobbs, the Lobbs concluded they were barred from paying for the care they and their doctor were seeking for Mrs. Lobb and they had no choice but to transfer Mrs. Lobb to custodial confinement at Pembrooke Health and Rehabilitation Residence in West Chester (hereafter "Pembrooke"), where she could not receive the inpatient skilled care that she needed for her rehabilitation and alcoholism.

36. Dr. Pileggi thereafter stopped treating Mrs. Lobb, because Dr. Pileggi lacked the ability to attend Mrs. Lobb in Pembrooke and Dr. Pileggi's contract with IBC required her to "participate in, cooperate, and comply with all decisions rendered in connection with Independence's Utilization Management Program" (Exhibit 6, Professional Provider Agreement at ¶2.7).

37. On September 1, 1997, Dr. S. Diwan, Mrs. Lobb's personal physician at Pembrooke, certified the need for Mrs. Lobb to be admitted to Miramont Alcohol Rehabilitation Hospital (hereafter "Miramont"), an inpatient quality health care facility for the treatment of alcoholism.

38. The Lobbs believed they had every right to, on their own and without the participation of IBC, pursue and pay for the inpatient skilled care Dr. Diwan had certified at Miramont. Plaintiff McDermott believes she has every right to pay for her own and her family's health care treatment by a licensed practitioner that is deemed medically necessary by her treating doctor in the

face of the opposite conclusion by IBC. The Lobbs further believed that Dr. Diwan's certification was sufficient to require hospitals to admit Mrs. Lobb assuming they had available space and the Plaintiffs had the ability to pay. However, Miramont refused to admit Mrs. Lobb even after the Lobbs said they would pay for Mrs. Lobb's treatment and IBC was not a participant in the matter. The Lobbs were again told that IBC's contract with Miramont barred Miramont from accepting any payment from the Lobbs.

39. Having been refused admission by Miramont, the Lobbs used the Yellow Pages to phone other similar institutions in the area in pursuit of inpatient skilled care for Mrs. Lobb. The calls were made by Ms. McDermott. All said they could not admit Mrs. Lobb if IBC denied coverage. More specifically, they refused to contract with the Lobbs to treat Mrs. Lobb. Thus, Mrs. Lobb was again denied the inpatient skilled care needed to treat her alcoholism and diminished physical and mental condition that both the Lobbs and Mrs. Lobb's doctor believed was necessary, even though her family had offered personally to pay for the care. Having been so denied treatment, the Lobbs found themselves with no option but to remove Mrs. Lobb from Pembrooke, return her to managing her own affairs and watch helplessly as she resumed her alcoholism. Ms McDermott witnessed all these events.

40. On February 1, 1999, Mrs. Lobb died from of hepatorenal failure, i.e., kidney failure caused by alcoholic cirrhosis of the liver. A copy of the death certificate is attached as Exhibit 9.

41. Mrs. Lobb died because IBC had wrongfully denied the care Mrs. Lobb so desperately needed and the Plaintiffs sought to provide. Ms. McDermott who was forced to watch helplessly as her mother died from the family's inability to obtain necessary health care.

42. In January,2001, the Lobbs filed a pro se complaint in the Chester County Court of Common Pleas charging IBC with multiple causes of action stemming from, 1.) IBC's denial of the Lobbs ability to pay for the skilled care they and their doctors had sought to provide for Mrs. Lobb at the Lobb's own expense, 2.) IBC's refusal to provide treatment for alcoholism as mandated by Pennsylvania statute and 3.) IBC's misrepresentation of critical facts in Mrs. Lobb's insurance concerning her ability to pay for care that IBC refused to provide as an insurance benefit. The Lobbs believed IBC was solely responsible for this denial of care and that the fault fell squarely on the secret terms of IBC's provider contracts barring the Lobb's from paying for the care.

43. The Lobbs' suit has continued through the state court system and is currently on appeal at the Superior Court. However, in September 2004, the Plaintiffs had occasion to attend oral arguments in the case of **The Insurance Federation of Pennsylvania, Inc. , et al vs. Commonwealth of Pennsylvania, Insurance Department, Commonwealth Court of Pennsylvania, Docket No. 10 M.D. 2004**. The whole purpose of IBC's filing a Petition in Commonwealth Court was to insist that its authority to overrule the Plaintiff's doctor, or any policyholder's doctor, in determining whether alcohol rehabilitation is

medically necessary is so firmly established in the Commonwealth that it cannot now be terminated by the Commonwealth. IBC's averred in Petition for Review that health services are to be "proposed by the provider and then evaluated for medical necessity and appropriateness" by IBC, (Petition for Review, page 9, paragraph 38). In its Application for Judgment on the Pleadings IBC said requiring IBC "to abide by the initial certification and referral for appropriate treatment by a licensed physician" --- "leads to absurd or unreasonable results", (Petitioners' Application for Judgment On The Pleadings, page 4, paragraph 15). What the Plaintiffs then heard for the first time shocked them. Attorneys for both the Insurance Federation and the Commonwealth repeatedly acknowledge that it had long been the accepted practice of the Commonwealth to allow health care insurance companies (including IBC) to overrule a personal or attending physician in determining appropriate medical care for a patient. In short, IBC, was authorized by the Commonwealth to overrule an attending physician and make the actual medical determination of appropriate medical care for a patient. Even more shocking, the Commonwealth argued that while they had allowed IBC to make these determinations and would continue to allow IBC to exercise this authority in all areas of care other than alcohol rehabilitation, the authority, within the context of the litigation over Act 106, **40 Pa. C.S.A. §908-1,** is "unconstitutional" under both the Pennsylvania and United States Constitutions.

44. At no time during the oral arguments did the Commonwealth draw any distinction between a determination of appropriate care for insurance

purposes and one for medical purposes. The two purposes were treated as a single determination under state regulation and policy. Moreover, the Commonwealth was only seeking to change its policy for alcoholism. Insurance companies were to retain their ability to "overrule" an attending physician's determination of appropriate medical care for essentially all other areas of care in Pennsylvania. Furthermore, the Commonwealth and the insurance companies acknowledged that at the time the Plaintiffs were attempting to treat Mrs. Lobb, IBC, not Mrs. Lobb's personal physician, was empowered by the Commonwealth to certify what, if any, medical care Mrs. Lobb required, and in so doing, what, if any, care she would be allowed to receive under applicable state regulations.

45, Commonwealth statute and regulation as well as IBC's provider contracts with health care providers dictate that a provider can only provide treatment that has been certified as medically necessary: a certification that, outside any knowledge of the Plaintiffs, only IBC was empowered to make in the case of Mrs. Lobb.

46. Applying their discovery, the Plaintiffs reread IBC's contract with Mrs. Lobb's personal physician. Under Section 9.1 of that contract, they found the following language: **"The Provider further agrees that (1) this provision shall survive the termination of this Agreement regardless of the cause giving rise to the termination and shall be construed to be for the benefit of the Subscribers, and that (2) *this provision supersedes***

any oral or written agreement now existing or hereafter enter into between the Provider and Subscribers or person acting on their behalf, Provider may not change, amend or waive this provision without the prior written consent of IBC. Any attempt to change, amend or waive this provision is void. **(Emphasis added)**. This language tracks, and in particular instance is identical to, Pennsylvania state regulations found at **28 Pa. Code Section 9.722(e)(i),(ii) and (iii) and 31 Pa. Code § 301.122,** the so called "hold harmless" clause**.** Johnson and Koken, together with IBC, and with the assistance of the Hospital has set aside the contractual relationship the Plaintiffs always believed they had established with Mrs. Lobb's personal physician and empowered IBC to make the medical determination on what, if any, medical care Mrs. Lobb required and would be allowed to receive. Plaintiff McDermott, a **current IBC policy** holder in exactly the same position as her mother and having witnessed first hand all that is described above, has every reason to fear this same impairment of her right of contract with a doctor for her and her own family.

47. While the Plaintiffs had earlier read Section 9.1 in IBC's provider contract, the Plaintiffs had been informed and had believed the provision was to be interpreted solely for protection of a subscriber from double billing or balance billing. In other words, should IBC agree to pay for a particular covered service, the provider would be prevented from billing the subscriber. The Plaintiffs also had an implicit belief the Commonwealth would never

allow an insurance company to practice medicine or sanction the severing of what the Plaintiffs saw as a core Constitutional right, i.e., the sanctity of their doctor patient contractual relationship.

48. What had been unthinkable was now undeniably clear by way of IBC's and the Commonwealth's aadmission before Commonwealth Court and the understanding this brought to the related provisions in Pennsylvania regulations and IBC's provider contracts. Moreover, the entire thrust of the Insurance Federation's (IBC's) argument before Commonwealth Court had been that the Commonwealth's policy of empowering insurance companies to overrule doctors in certifying medically necessary care was so long standing and firmly established that the policy could not be challenged.

49. Now in September 2004 for the first time, all the facts related to the Plaintiffs inability to provide appropriate care for Mrs. Lobb made sense. The Plaintiffs believed the written statements of their personal physician provided that certification and IBC's role was limited to deciding whether they would pay for the care under the terms of Mrs. Lobb's health care insurance.

50. Had the Hospital been willing to honor Dr. Pileggi's certification of medically necessary care as required by applicable statute and regulation, the Hospital would have been barred from discharging Mrs. Lobb to custodial confinement (See **28 Pa. Code, Sec.105.11 (a) and 105.24**). However, by accepting IBC's determination of medically necessary care for Mrs. Lobb, a

determination made by an entity not licensed to practice medicine in the Commonwealth of Pennsylvania, the Hospital put itself out of compliance with state regulations, [See: 28 PA Code Sections 107.61, 107.62 and 107.64 (relating to written orders; oral orders; and administration of drugs) and other sections of the hospital regulations limiting the performance of certain functions including the writing or countersigning of orders to practitioners, defined as licensed physicians, dentists or podiatrists.] and turned its back on the medical needs of Mrs. Lobb and in full support of IBC's agenda.

51. Had Mrs. Lobb not had health care insurance, none of the above constraints on the Plaintiffs' ability to contract with Mrs. Lobb's doctor or other healthcare providers would have applied. Doctor Pileggi would have been free to make the determinative decision on medically necessary care and the Hospital would have had no recourse under applicable Pennsylvania regulation but to accept that determination and care for Mrs. Lobb.

52. At no time during the many months of litigation with IBC did IBC ever divulge they were empowered to make the medical determination of medically necessary care for Mrs. Lobb or that they had used this authority to overrule the Plaintiffs' doctors. IBC simply argued the Plaintiff's doctors had failed to properly certify a need for additional care. Likewise, at no time has IBC ever informed Plaintiff McDermott that she and her family have surrendered their right of contract with their doctor as well as their right to pay for care that is a covered service but that IBC, for whatever reason, decides is not medically appropriate/necessary.

53. But for their fortuitous presence at oral argument before the Commonwealth Court, the Plaintiffs, most likely, would never have discovered the severing of their contractual relationship with their doctor. Prior to the Commonwealth's acknowledgement that their policy had long been to allow IBC to overrule the Plaintiff's doctor for determining medically necessary care for Mrs. Lobb, there was no way the Plaintiffs could have been expected to have recognized the loss of the contractual relationship with their doctor.

54. No earlier than September 2004, the date of oral arguments before Commonwealth Court, did or could the Plaintiffs have reasonably discovered the real cause of their inability to obtain the care they and their doctor had sought for Mrs. Lobb. No earlier than September 2004, the date of oral arguments before Commonwealth Court, did or could Plaintiff McDermott have reasonable known of IBC's impairment to her and her family's right of contract with their doctor as well as the loss of their ability to pay for a covered service IBC alone determines to be not medically appropriate/necessary.

Count I – State Impairment of Plaintiffs' Right of Contract

55. Plaintiffs incorporate paragraphs 1 to 54 as though fully set forth herein.

56. The Secretary of Health has given IBC the authority to "provide or arrange for the provision of and cover the following basic health services **as the HMO determines to be medically necessary and appropriate according to its definition of medical necessity**." (**28 Pa Code Sec. 9.651 (c)).**

57. Both IBC's provider contract with the Plaintiff's doctor, inescapably entangled with state regulatory language, and the state regulations, **28 Pa. Code Section 9.722(e)(i),(ii) [Department of Health] and (iii) and 31 Pa. Code § 301.122 [Insurance Department]** in clear and unambiguous language, irreparably severs any and all contractual relationship the Plaintiffs believed they have or had with their doctor and requires the doctor to accept IBC's determination of medically necessary care. These contractual provisions were mandated, reviewed, approved and authorized by the Commonwealth and consistent with **28 Pa Code Sec. 9.651 (c).** IBC is an agent of the state for the purposes of the enforcement of certain Department of Health and Insurance Department regulations which must be in all state approved provider contracts between IBC and stated licensed health care practitioners.

58. Both IBC's provider contract with the Hospital, inescapably entangled with state regulatory language, and state regulations, **28 Pa. Code Section 9.722(e)(i),(ii) and (iii) and 31 Pa. Code § 301.122,** in clear and unambiguous language, irreparably severs any and all contractual relationship the

Plaintiffs believed they had with the Hospital and requires the Hospital to accept IBC's determination of medically necessary care. These contractual provisions were mandated, reviewed, approved and authorized by the Commonwealth and consistent with **28 Pa Code sec. 9.651 (c).** IBC is an agent of the state for the purposes of the enforcement of certain Department of Health and Insurance Department regulations which must be in all state approved provider contracts between IBC and stated licensed health care practitioners.

59. The severing of the Plaintiffs' contractual relationship with their doctor involves state action by and through the regulatory power of the Commonwealth and its agencies and the state approved contracts between IBC and the hospital and requires the active support of all three defendants. IBC is an agent of the state for the purposes of the enforcement of certain Department of Health and Insurance Department regulations which must be in all state approved provider contracts between IBC and stated licensed health care practitioners. Absent the support of any one of the defendants, the severing of the Plaintiffs' relationship with their doctor would have been visible to the Plaintiffs, as well as a clear breach of accepted medical policy and practice and the licensing requirements of the Commonwealth of Pennsylvania.

60. Each defendant bore a heavy responsibility to inform the Plaintiffs of IBC's role in making the medical determination of medically necessary care for Mrs. Lobb.

61. Each defendant had ample opportunity to independently disclose the facts in the matter to the Plaintiffs. The fact that each of the defendants remained silent while the Plaintiffs literally floundered in their attempts to help Mrs. Lobb and understand why Mrs. Lobb was being and had been denied appropriate care, shows the Defendants' intension to keep the impairment of the Plaintiffs' contractual relationship with their doctor secret. as opposed to determining what IBC would or would not pay for as an appropriate insurance benefit.

62. All Defendants are inescapably entangled and their actions rise to the level of state action in a constitutional sense in severing the Plaintiffs from or, at a minimum, impairing the duties the Plaintiffs had and have every right to believe was and is owed them by their doctor and irrevocably severing or, at a minimum, impairing their doctor patient relationship are joint and indistinguishable as separate and independent acts.

63. Defendants' egregious impairment of the Plaintiffs' relationship with their personal physician is a violation of their rights to due process and equal protection under the **Fourteenth Amendments** and impermissibly impairs their right of contract under **Article 1 Section 10 of United States Constitution.**

64. Defendants know or should have known their actions and omissions violated the Plaintiffs' civil and constitutional rights as guaranteed by the Fourteenth Amendments and impermissibly impaired their right of contract under Article 1 Section 10 of United States Constitution.

65. As a direct and proximate result of Defendants' unauthorized infringement of the Plaintiffs' constitutional rights, Mrs. Lobb suffered the loss of her doctor patient relationship, the loss of her ability to contract with the Hospital and other similar providers, a denial of treatment to which she was entitled, and the ultimate loss of her life. Furthermore, Plaintiff McDermott is currently placed in the same incongruous situation as was her mother, Sandra S. Lobb, when it comes to exercising her health care options for herself and her family for covered services under the same health care insurance policy that covered her mother.

66. Defendants' conduct was outrageous, willful, wanton, and in reckless disregard of Mrs. Lobb's civil and constitutional rights, wellbeing and life. Defendants' conduct is similarly outrageous, willful, and reckless as to the Constitutional rights of Plaintiff McDermott.

WHEREFORE, Plaintiffs request that this Court:

a. Declare that the Pennsylvania Insurance and Health regulations and the IBC provider agreements unconstitutionally interfere with Plaintiff's right of

contract with their personal or attending physician for health care services;

b. Declare that the Pennsylvania Insurance and Health regulations and the IBC provider agreements unconstitutionally deny due process and equal protection of the law to Plaintiff and other citizens and unconstitutionally impair a policyholder's right of contract with their doctor including the Plaintiffs herein and other citizens insured by IBC; and

c. Award costs of this action to plaintiffs

d. Award reasonable attorney fees and costs to plaintiffs;

e. Award such other and further relief that this Court may deem appropriate.

COUNT II - Unauthorized Practice of Medicine

67. Plaintiffs incorporate paragraphs 1 - 66 as though fully set herein.

68. IBC is licensed by the Commonwealth to engage in the business of insurance in the Commonwealth. IBC is not, nor has it ever been, licensed to practice medicine in the Commonwealth.

69. The diagnosis and certification of medically necessary care for a patient is reserved for the practice of medicine by a physician having a valid

and current state license in the Commonwealth of Pennsylvania. **See: 28 Pa Code sec. 107.61; 107.62; 107.64; 109.61**. 70. No element within the practice of medicine is more important to both the practice of medicine and the duty a physician owes to his or her patient than the diagnosis and certification of medically necessary care. **See: 28 PA Code Section 9.77(a)(3).**

71. The Commonwealth and Hospital Defendants empowered IBC to overrule the medical judgment of Mrs. Lobb's personal physician and alone determine what if any medical care/treatment was appropriate for Mrs. Lobb.

72. The Commonwealth and Hospital Defendants acted in concert with IBC to secretly override the medical judgment of the Plaintiffs' doctor and apply IBC's own medical judgment in the matter. Moreover, IBC, with the assistance of the Commonwealth and Hospital Defendants, made no distinction between any IBC authority to decide what it would or would not pay for as an insurance benefit and IBC's medical determination of appropriate care that IBC contractually forced the Lobbs' doctor to accept. IBC, with the assistance of the Commonwealth and Hospital Defendants, made these two very separate and distinctly different determinations one for its own benefit. As such, IBC made and then enforced the medical determination of appropriate care for Mrs. Lobb and thus engaged in the practice of medicine without a license with, at a minimum, the Commonwealth and the Hospital knowingly facilitating this practice of medicine without a license.

73. IBC made and enforced the medical determination that ALL additional inpatient skilled care be denied Mrs. Lobb and that she be transferred to a locked facility where her doctor could not follow and she could receive no additional treatment even though IBC knew at the time that "she was in poor condition with many medical problems." Deposition of Doctor Catherine Dratman, page 18 lines 21-23. IBC made this medical determination over the vehement objections of Mrs. Lobb's personal and attending physician. IBC both hid and blatantly misrepresented its practice of medicine. "We do not make medical decisions. We make coverage decisions." Deposition of Doctor Catherine Dratman, page 26 lines 13 & 14.

The Pennsylvania Secretary of Health and Hospital Defendants knew of this unauthorized practice of medicine by IBC or recklessly disregarded their duties in allowing this unauthorized practice of medicine.

74. As a direct and proximate result of Defendant IBC's unauthorized practice of medicine, Mrs. Lobb suffered the loss of her right of contract with her doctor, a denial of treatment to which she was entitled under applicable law and the ultimate loss of her life.

75. Defendants' conduct was outrageous, willful, wanton, fraudulent and in reckless disregard of Mrs. Lobb's rights, wellbeing and life.

WHEREFORE, Plaintiffs request that this Court:

a. enter judgment in their favor and against Defendants, Independence Blue Cross and the Chester

County Hospital;

b. Award compensatory damages to plaintiffs against these two defendants, jointly and severally;

c. Award costs of this action to plaintiffs;

d. Award reasonable attorney fees and costs to plaintiffs;

e. Award punitive damages to plaintiffs against these two defendants, jointly and severally; and

f. Award such other and further relief that this Court may deem appropriate.

TORTIOUS INTERFERENCE WITH CONTRACT

76. Plaintiffs incorporate paragraphs 1 - 75 as though fully set herein.

77. The Lobbs independently sought out Dr. Pileggi to become Mrs. Lobb's personal physician for the purpose of treating Mrs. Lobb for physical problems she was experiencing from alcoholism and the alcoholism itself. The pursuit and request were outside and absent any participation by IBC or the Defendants. See Affidavit of Dr. Rooney

78. Dr. Pileggi had a current and valid license to practice medicine in the state of Pennsylvania and maintained that license throughout the time in question.

79. Doctor Pileggi accepted Mrs. Lobb as a patient and began treating her well before her admission to the Hospital on July 26, 1997. The relationship

was a contract involving fee for service and carried with it all the duties a personal physician owes a patient. Furthermore, when Mrs. Lobb's was admitted to the Hospital, Dr. Pileggi was Mrs. Lobb's personal physician as well as both the admitting physician and the attending physician of record.

80. Within the sanctity of the doctor patient relationship Mrs. Lobb established with Dr. Pileggi, Dr. Pileggi owed the Mrs. Lobb a duty that included, among other things, the prescribing of appropriate care for Mrs. Lobb, certifying that care and overseeing the delivery of that care so long as Mrs. Lobb or her family gave their consent.

81. The Lobbs relied on Mrs. Lobb's doctor patient relationship and related duties to provide the care Mrs. Lobb required. Furthermore, The Lobbs believe Dr. Pileggi's repeated insistence that Mrs. Lobb required additional inpatient treatment qualified as a certification of appropriate care by a properly licensed physician that the Hospital was, at a minimum, obligated to honor.

82. The Lobbs relied on their doctor patient relationship and related duties in demanding the Hospital and other similar providers accept Dr. Pileggi's certification of appropriate care and allow the Plaintiffs to pay for that care.

83. Plaintiffs only recently discovered that the Defendant IBC and the Commonwealth of Pennsylvania, inseparably entangled and acting under color of state law, irreparably severed the Plaintiffs' doctor patient relationship without notice or due process. The Commonwealth has given

IBC the authority to "provide or arrange for the provision of and cover the following basic health services **as the HMO determines to be medically necessary and appropriate according to its definition of medical necessity**." (**Emphasis added) 28 Pa Code Sec. 9.651 (c).**

84. IBC's provider contract with the Plaintiff's doctor and state regulations, in clear and unambiguous language, irreparably severs any and all contractual relationship the Plaintiffs had with their doctor and requires the doctor to accept IBC's determination of medically appropriate care. These contractual provisions were mandated, reviewed, approved and authorized by the Commonwealth and consistent with **28 Pa Code sec. 9.651 (c)**.

85. IBC's provider contract with the Hospital and state regulations, in clear and unambiguous language, irreparably severs any and all contractual relationship the Plaintiffs believed they had with the Hospital and requires the Hospital to accept IBC's determination of medically necessary care. These contractual provisions were mandated, reviewed, approved and authorized by the Commonwealth and consistent with **28 Pa Code sec 9.651 (c).**

86. The severing of Mrs. Lobb's right of contract with her doctor required the active support of all defendants. Absent the support of any one of the defendants, the severing of Mrs. Lobb's relationship with her doctor would have been visible to the Plaintiffs as well as a clear breach of accepted medical policy and practice and the licensing requirements of the

Commonwealth of Pennsylvania. Moreover, each of the defendants bore a heavy responsibility to inform the Plaintiffs of IBC's role in making the medical determination of medically necessary care for Mrs. Lobb.

87. Each defendant had ample opportunity to independently disclose the facts in the matter to the Plaintiffs. The fact that each of the defendants remained silent while the Plaintiffs literally flounder in their attempts to help Mrs. Lobb and understand why Mrs. Lobb was being and had been denied appropriate care, shows the Defendants' intension to keep the impairment of Mrs. Lobb's right of contract and related relationship with her doctor secret.

88. The Defendants are entangled and their actions in severing the Plaintiffs from the duties the Plaintiffs had every right to believe was owed them through Mrs. Lobb's right of contract with her doctor and irrevocably are joint and indistinguishable as separate and independent acts. The Defendants' impairment of the Mrs. Lobb's doctor patient relationship is state action.

89. The Defendants' secret and irreparable severing of the Mrs. Lobb's relationship with her personal physician interfered with her right of contract with her doctor.

90. Had Mrs. Lobb not had health care insurance, Mrs. Lobb's relationship with her personal physician would have remained intact and Doctor Pileggi would have been free to determine appropriate care for Mrs. Lobb which the

Hospital and other similar providers would have been required to accept under applicable Pennsylvania regulations.

91. Defendants knew or should have known or recklessly disregarded Mrs. Lobb's right of contract with her doctor. Mrs. Lobb "was in poor condition with many medical problems." Deposition of Doctor Catherine Dratman, page 18 lines 21 through 23. While Defendants are all culpable, IBC's conduct in this matter is uniquely egregious given their numerous and repeated attempts to obfuscate the severing of the Plaintiffs' right of contract with their doctor as well as statements that can only be intended to deliberately mislead the Plaintiffs, their policyholders and the courts

92. As a direct and proximate result of Defendants' tortious interference with Mrs. Lobb's right of contract with her personal physician, Mrs. Lobb suffered the loss of her doctor patient relationship, a denial of treatment to which she was entitled and the ultimate loss of her life.

93. IBC and the Chester County Hospital have no justification or privilege for interfering or impairing Plaintiff's contract with their treating physician.

94. While Defendants are all culpable, IBC's conduct in this matter is uniquely egregious given their numerous and repeated attempts to obfuscate the severing of the Plaintiffs' right of contract with their doctor as well as statements that can only be intended to deliberately mislead the Plaintiffs, other policyholders and the courts. Furthermore, IBC's insistence its provider contracts remain secret, their repeated inference that a "denial of coverage"

equates to an “uncovered service” and the ability to self-pay, their requiring the doctor to “accept” their decision on medically necessary care and their equating of medically “necessary” with medically “appropriate” (uniquely different standards) provide strong and convincing evidence of IBC’s deliberate actions to mislead and defraud the Lobbs, its policyholders, the public, its own attorneys and the courts.

95. Defendants’ conduct was outrageous, willful, wanton, fraudulent and in reckless disregard of Mrs. Lobb's rights, wellbeing and life.

WHEREFORE, Plaintiffs request that this Court:

a. enter judgment in their favor and against Defendants IBC and The Chester County Hospital;

b. Award compensatory damages to plaintiffs against the defendants, jointly and severally;

c. Award costs of this action to plaintiffs;

d. Award reasonable attorney fees and costs to plaintiffs;

e. Award punitive damages to plaintiffs against the defendants, jointly and severally; and

f. Award such other and further relief that this Court may deem appropriate.

Respectfully submitted,

_____

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Kristen S. McDermott, individually	:	
And Kimberly P. Johnson, personal	:	
Representative of the estate	:	
of Sandra S. Lobb , deceased	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION: 05-cv-02536
Diane Koken, individually and as	:	
Insurance Commissioner	:	
Dr. Calvin B. Johnson, individually,	:	
and as Secretary of Health,	:	
and Independence Blue Cross	:	
and The Chester County	:	
Hospital, Jointly and severally,	:	
Defendants	:	

SECOND AMENDED COMPLAINT

CERTIFICATE OF SERVICE

Lawrence M. Otter, Esquire, counsel for Plaintiffs, hereby certifies that a true and correct copy of the within Second Amended Complaint was duly served by first class mail, postage prepaid on August 30, 2005 and by email or as otherwise noted on the following:

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