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IN THE SUPREME COURT OF FLORIDA

GALENCARE, INC., etc.,

Petitioner,

-vs-

JAMES E. BLANTON, and all others similarly situated --- the Class,

Respondent.

CASE NO: 83,659

DISTRICT COURT OF APPEAL, 2ND DISTRICT-NO. 93-02409

CLASS REPRESENTATION

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PARTIES AND REFERENCES TO PARTIES

The Defendant travels under many different designations. The action was originally brought against HUMHOSCO, INC., d/b/a HUMANA HOSPITAL BRANDON. Somewhere in the pilgrimage of this action the defendant unilaterally changed its name to GALEN CARE, INC., d/b/a HUMHOCO, INC. and began to style pleadings, briefs and other papers thereby. Throughout all of the name changes, the party defendant has remained the same, the HUMANA HOSPITAL BRANDON.

For ease of identification, clarity and convenience, the party defendant will continue to be referred to in this brief as it has throughout this cause, namely, "HUMANA", "the defendant hospital" or as the syntax may indicate.

JURISDICTIONAL STATEMENT

Humana applied to this Court for review of the same aggregation issue as was decided by this Court in Cases No. 82,237 and 82,238 (June 16, 1994) (Appendix Tab 4), ***reh. den.***, August 18, 1994 (App. Tab 5). That issue was decided adversely as to Humana's position. The same issue was raised and similarly decided adversely to Humana (under the name of Galen of Florida, Inc.) in Cases No. 82,966 and 82,896 (July 1, 1994). In these latter two cases Humana also sought to have the issue of class certification reviewed by this Court, which requests were denied (App. Tabs 6 & 7).

The Court has not accepted jurisdiction of the instant case for review, but has instructed counsel to brief the issues prior to such determination (May 25, 1994) (App. Tab 8). The Respondents' position as to this Court's jurisdiction was set forth in the class' July 20, 1994 Motion for Entry of Order Denying Petition for Review (App. Tab 9). That motion was denied by this Court on August 11, 1994 (App. Tab 10).

The Class maintains the legal position posited in its Motion of July 20, 1994 (App. Tab 9) and respectfully suggests to the Court that the exercise of its discretionary review jurisdiction to review only the issue of class certification ***vel non*** would be inappropriate. Subsequent to this Court's Order of May 25, 1994 regarding the briefing schedule, the only issue appropriate for discretionary review (aggregation of class claims) was decided June 16, 1994 in Cases No. 82,237 and 82,238 (App. Tabs 6 & 7).

The class certification issue in the instant case was decided below ***per curiam*** adverse to Humana (App. Tax 11).

Thus, while this Court properly exercised its discretionary review jurisdiction under the conflict provisions of Article V, Florida Constitution (1980), there is no conflict now remaining because of the Court's decisions in Cases No. 82,237 and 82,238. Humana's application for review of the Second District's ***per curiam*** affirmance of the class certification order is not provided for in Article V and would be improvident and contrary to its own authority.

/CLASSACTION/VARAON/APPEAL/SUPREME-COURT/contents.etc.

STATEMENT OF THE CASE AND FACTS

This is a representative action brought by former patients of the defendant hospital. The thrust of the case is that Humana Hospital Brandon has engaged in a continual, systematic and institutionalized course of business conduct directed to certain types of patients who constitute an identifiable class. The class as defined in the operative complaint and as certified by the trial judge (and affirmed *per curiam* by the Second District) is:

> All in-patients or out-patients who have been admitted or received treatment at the defendant hospital between January 1, 1988 and January 1, 1993, who have paid, or have had paid on their behalf or, who are obligated to pay either in their entirely or in part bills for:
>
> (1) Pharmaceuticals;
> (2) Laboratory tests; or
> (3) Medical supplies.
>
> The hospital charges as described above are those presented to the patient (class member) pursuant to standard form contracts signed by the patient (or on the patient's behalf) upon admission and which purport to guarantee payment of all hospital charges. These patients are charge-based self-payers and insured, charge-based payers held responsible by the hospital for payment of full charges as reflected on their itemized bills.

The class definition was further clarified by indication of those patients who are specifically <u>excluded</u>:

> The class is further defined to exclude:
>
> (a) All Medicare and Medicaid patients;
>
> (b) All indigent or poverty-line patients whose care has been paid by a governmental entity;

(c) Patients whose care has been paid for under the terms of a prospective payment arrangement between the defendant hospital and any third-party payor, which provides for the hospital to accept as payment in full some amount other than the total of patient's itemized bill; and

(d) Patients who, as a result of negotiation and/or agreement, have paid, or have become obligated to pay, less than the total of full charges on their itemized bill.

Order of the Trial Court certifying the Class on June 14, 1993 (App. Tab 3).

The theories of action asserted by the Class are based upon the law of "imposition" as enunciated by this Court in ***Southern States Power v. Ivey***, 118 Fla. 756, 160 So. 46 (1935); ***Moss v. Conduit***, 154 Fla. 153, 16 So.2d 921 (1944); and ***Cullen v. Seaboard Air Line R. Co.***, 63 Fla. 122, 58 So. 182 (1912). The Complaint upon which the Class received certification sounds in breach of contract, money had and received and unjust enrichment.

The underlying premise is that the contract by which a person is permitted to enter the defendant hospital as a patient contemplates that the patient will pay the charges reasonably assessed and that the hospital's assessment of such charges will be reasonable. The operative complaint alleges that, as to the defined class, Humana engages in a systematic and universal scheme to assess charges in excess of those that are reasonable and seeks redress for such overcharges. The Class, it is reasonably estimated, consists of more than 80,000 former patients over the limitation period, each of whom has suffered monetary damages in the range of $150-$400.

The course taken by this action through the court system is accurately described by Humana in the final paragraph of its Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

The purpose of the class action is the collective treatment of the 80,000 (plus) grievances of these patients as a single wrong -- and not the treatment of multiple wrongs individually. By the adjudication of multiple wrongs through a single action, Humana's jeopardy for overcharging patients $100 each becomes much greater. By overcharging patients $100 each on their respective bills over five years, and by having to answer for such conduct in a single action in court, a powerful incentive is created for Humana to refrain from just the sort of business conduct alleged in the instant complaint. Public policy supports this incentive and its application here.[1]

The use of a single action to adjudicate many small, individual claims (probably not worth pursuing individually) as a unitary claim is not new or revolutionary. That beneficial theory was recognized as having judicial and public value long ago.[2]

The economy of judicial labor and resources is a natural consequence of the class action device. Those benefits have met with favor and hospitality by this Court. The instant class, as

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[1]A class suit may be seen as a mass production remedy for mass production wrongs. Geoffrey C. Hazard, "*The Effect of the Class Action Device on Substantive Law*", 58 F.R.D. 307, 308 (1973).

[2]Joseph Story, "*Commentaries on Equity Pleading*" (2d Ed. Boston 1839). The Supreme Court later recognized the same in Equity Rule 48, 42 U.S. 1 (1 How.) (1843).

that in all consumer class actions, is comprised of individuals. In this case, private pay and "charge-based" patients of Humana. Each class member has a viable claim against Humana as a victim of the defendant hospital's systematic overcharging imposed upon them for pharmaceuticals, supplies and laboratory tests.

In a 1985 case the Supreme Court of the United States recognized the theory which underlies the opinions of all the trial and appellate courts (including this Court), that the class action rule contemplates many potential plaintiffs with small claims joining together to litigate their theory of redress.

> Modern plaintiff class actions follow the same goals, permitting litigation of a suit involving common questions when there are too many plaintiffs for proper joinder. *Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.* For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available. (Emphasis added.)

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810, 105 S.Ct. 2965, 2973 (1985).

Humana's arguments against certification of the instant class show a fundamental misunderstanding of the purpose of and the mechanisms available to the class action. The hospital's essential argument is that the instant matter is unmanageable as a class action because "individualized circumstances" affect each class member. The most apt refutation of this argument appears in ***In re Domestic Air Transportation Antitrust Litigation***, 137 F.R.D. 677 (N.D. Ga. 1991). In that case, the defendants had made a similar

argument that the case was unmanageable as a class action because of the many individualized circumstances extant in over 400 million airline ticket transactions involved in the suit. The court rejected this argument, held that calculation of individual damages for class members did not make the class unmanageable as a class action, and approved certification of the class. If a case involving over 400 million different transactions is manageable and appropriately certified as a class action, then the present case is manageable and appropriately certified as a class action. The many different transactions in the present case do not detract from commonality, adequacy or manageability, all of which were present in the ***Domestic Air Transportation*** case and the case at bar.

In the instant action, the trial court certified a class comprised of certain patients admitted to the defendant hospital within the applicable statute of limitation period. The Second District affirmed ***per curiam***. The allegations of the operative complaint describe a recurrent, systematic, designed and institutionalized system of imposing unreasonable charges, amounting to gross overcharges for tangible products and laboratory services sold to patients by the hospital. Irrespective of the individual products sold to each patient or the specific laboratory services for which any given patient was charged, the nature of the contractual breach of implied reasonableness is the same for each patient/class member.

The trial court's certification of the patient class was proper. The hospital's argument that commonality and typicality

are destroyed by the nature of the class and the defendant's delivery of hospital services is without merit. Commonality among the class of patients as to the effect of Humana's wrongful conduct and the typicality of their individual claims (if pursued separately) validates the actions of the trial and appellate courts.

Humana's assaults on the commonality, typicality and manageability of this class action are those employed by every defendant in every class case.

ARGUMENT

I. *THE ISSUE OF JURISDICTION BEING BASED UPON THE TOTAL CLAIM OF THE CLASS HAS BEEN AUTHORITATIVELY DECIDED BY THIS COURT IN FAVOR OF PERMITTING AGGREGATION OF CLASS CLAIMS IN ORDER TO MEET THE CIRCUIT COURT'S JURISDICTIONAL THRESHOLD*

Humana no doubt disagrees with this Court's decision and Opinion in ***Plantation General Hospital v. Johnson***, Case No. 82,237, and its companion case of ***NME Hospitals, Inc. v. Johnson***, Case No. 82,238, June 16, 1994 (App. Tab 4), ***reh. den.***, August 11, 1994 (App. Tab 5). That notwithstanding, the issue upon which those cases found its way to the Supreme Court (aggregation of class claims) has been resolved and is the governing law in Florida.

Thus, class counsel simply cites to this Court's opinion of June 16, 1994 as the authority adverse to Humana's contrary assertions regarding circuit court jurisdiction.

II. ***THE DEFENSE OF VOLUNTARY PAYMENT IS NOT APPLICABLE TO THE CLASS CLAIMS AND CAUSES OF ACTION***

Maintaining its consistency of thesis (that is, obliviousness to all the known facts and applicable law), Humana recurrently raises the flag of voluntary payment to this Court as it has to every court below. Just as consistently that flag has been saluted by no court and rejected by all.[3]

The doctrine of voluntary payment has no application to the present case. It is well established that a suit for money had and received lies whenever money has been paid which, in justice and fairness, the defendant ought to refund. ***See, Moss v. Conduit, supra***; ***see also, Deco Purchasing & Distribution Co. v. Panzirer***, 450 So.2d 1274 (Fla. 5th DCA 1984) (wherein the court equates an action for "money had and received" with "restitution" and confirms that such an action may be maintained whenever one has money in his hands he received from another which in equity and good conscience he ought to pay over to that other). It is likewise well established that an action on a contract implied by law may be maintained when there has been "imposition" or "an unfair advantage" taken of the payor's situation that is contrary to law and good conscience. ***See, e.g., Cullen v. Seaboard Air Line R. Co., supra*** at 184. In ***Cullen***, a case involving excess freight charges collected by the defendant freight company, the Florida

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[3]Humana raised this same "voluntary payment" argument to this Court in ***Galen of Florida, Inc., etc. v. Ansell R. Arscott, et al., etc.***, Supreme Court case No. 82,966, ***rev. denied***, July 1, 1994 (***see also***, Case No. 82,896) (App. Tabs 6 & 7). A similar summary rejection is appropriate in the instant case.

Supreme Court recited the elements of the common law count for money had and received:

> A common count for money payable to the plaintiff for money had and received by the defendant for the use of the plaintiff is applicable in all cases where the defendant has obtained money which ***ex aequo et bono*** he ought to refund. This action to recover money which ought not in justice to be kept lies for money paid by mistake or upon consideration which has failed, ***or for money obtained through imposition, express or implied, or extortion or oppression, or an unfair advantage taken of the plaintiff's situation,*** contrary to laws made for the protection of persons under these circumstances. The gist of the action is that the defendant upon the circumstances of the case is obligated by the ties of natural justice to refund the money.

Id. (citations omitted) (emphasis added).

The ***Cullen*** court also expressly stated that, in an action for money had and received, it is not necessary to allege that the plaintiff paid the charges involuntarily. Since the very essence of the action is to recover money that has been paid, ***Cullen*** illustrates that the initial payment of the money cannot constitute a defense.

The Florida Supreme Court has made it clear, moreover, that charging an unreasonable price constitutes an "imposition" for purposes of an action on an implied contract to recover money. In ***Southern States Power Co. v. Ivey, supra***, this Court stated:

> Where a person taking advantage of his position, or the circumstances in which another is placed, exacts a greater price for services rendered than is fair and reasonable, where such a compensation only is allowable, the exaction of the unreasonable price for the service rendered may be said to be an imposition.... Such an imposition would

> support an action of assumpsit for money received.... ***Southern States Power Co. v. Ivey***, 118 Fla. 756, 160 So. 46, 50 (1935).

See also, 11 Fla. Jur. 2d ***Contracts*** §246 (1979) (although action of assumpsit has been abolished, an action upon a contract implied in law is equitable in nature and as such is favored by the courts), citing, ***e.g., Hawkins v. Garrison***, 97 Fla. 156, 120 So. 309 (1929).

The Florida Supreme Court has recognized that "imposition" or "undue advantage" exists when the defendant has exacted a greater price from the plaintiff than that which is fair and reasonable. In such situations, as alleged in the present case, an action on an implied contract is appropriate. Accordingly, the rule barring recovery of payments which were voluntarily made does not apply.

Humana's focus upon what the class members did (pay their hospital bill) is an interesting attempt at a feat of legal legerdemain. It is clear, indeed axiomatic, that payments by class members of their hospital bills were "voluntary". This is <u>not</u> an action based upon fraud, duress or coercion, where the voluntary nature of a payment may rise to the level of a defense. This, like all of the companion class cases now pending, is based upon the rule of "imposition" long ago enunciated and sustained by this Court in ***Cullen, Moss*** and ***Southern States Power, supra***. Thus, while class members' payments were voluntary, that fact is a classic ***non sequitur***.

It is inconsistent with law and logic that voluntary payment should be a criterion in an action specifically premised on

overcharges resulting in overpayments. Humana's raising of voluntary payment as an affirmative defense would properly be subject to a motion to strike based on its inapplicability to a claim based on implied contract and the cited case law authorities.

III. *THE TRIAL COURT PROPERLY CERTIFIED THE CLASS AND THE SECOND DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED PER CURIAM THE TRIAL COURT'S GRANTING OF THE CLASS' MOTION FOR* CERTIFICATION

THE PURPOSE AND NATURE OF THE CLASS ACTION

The very purpose of a class action suit is

> to save a multiplicity of suits, to reduce the expenses of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist.

Tenney v. City of Miami Beach, 152 Fla. 126, 11 So.2d 188 (1942).

The requirements for class action complaints are set forth in Rule 1.220 of the Florida Rules of Civil Procedure. In 1980, Rule 1.220 was completely revised, based on Rule 23 of the Federal Rules of Civil Procedure. ***See, Powell v. River Ranch Property Owners Association, Inc.***, 522 So.2d 69, 70 (Fla. 2d DCA 1988), ***cert. den.***, 531 So.2d 1354 (Fla. 1988). Florida courts generally follow the federal construction and application of this rule. ***See, also, Lance v. Wade***, 457 So.2d 1008, 1011, n.2 (Fla. 1984) (reasserting that Florida's class action rule is based on federal class actions and cases).

Recently, the Florida Second District Court of Appeal reviewed the requirements for a class action complaint in ***Estate of Bobinger***

v. Deltona Corp., 563 So.2d 739 (Fla. 2d DCA 1990). The court stated:

> Generally, the plaintiff must allege the existence of a class, demonstrate that the four prerequisites specified in Rule 1.220(a) are satisfied and that the action meets the criteria for one of the three types of class actions defined in Rule. 1.220(b). The rule also requires the pleader to define the alleged class and specify the approximate number of class members. The four prerequisites of subsection (a) of the rule are usually referred to as the principles of numerosity, commonality, typicality and adequacy.

See, id. at 742 (citations omitted).

A complaint in a class action suit must allege the existence of a class, which must be described with some degree of certainty. ***See, Harrell v. Hess Oil & Chemical Corp.***, 287 So.2d 291, 294 (Fla. 1973). Judge Lazzara found that there exists a distinct class of persons who can be clearly and certainly identified.

The specific class established at the certification hearing consists of all persons who were in-patients at the defendant hospital, or treated by the hospital as out-patients, during the applicable period; and who have signed agreements to pay or guarantee payment, and who have been presented with a bill upon discharge containing charges for items of medical supplies, laboratory services and pharmaceuticals incident to that treatment or hospitalization. The patient charges material to this action relate to those for medical supplies, laboratory services and pharmaceuticals based upon any standard schedule or price list which was used for the purpose of billing members of the class.

The members of this class are those who have either paid or caused to be paid in full or in part the amount set forth on their bills, or who are alleged by the defendant to be obligated to pay some or all of the outstanding balance of their bills.

EXCLUDED FROM THE CLASS ARE THE FOLLOWING:

(a) Medicaid patients;

(b) Indigent or poverty-line patients whose care has been or will be paid for in full by a governmental entity, and who neither paid nor owe anything further;

(c) Patients whose care will be or has been paid for under the terms of hospital and insurer, or other third-party payor, negotiated prospective payment agreements pursuant to Chapter 407, Florida Statutes, and the patients neither paid nor owe anything more than their insurance policy-stated percentage (co-payment), or percentage by agreement with another third-party payor, of the prospective payment agreement amounts pursuant to Florida Statutes, Chapter 407; and

(d) Medicare patients whose care has or would be fully paid for with amounts that are within governmental authorized allowances for the respective diagnostic-related group ("DRG") treatments.

THE CLASS, AS CERTIFIED, CONSISTS OF:

(a) Those patients who have paid or caused to be paid in full or in part the amount set forth on their bills; and

(b) Those patients who have not paid or caused to be paid the full amount set forth on their bills and who are alleged

by the Defendant to be obligated to pay the outstanding balance of their bills, and who thus have a cause of action in declaratory relief.

Those class members whose bills have been only partially paid and are alleged to be obligated to pay additional amounts are within the class and have available to them all causes of action alleged herein. The class representatives have at least one of these causes of action in common with all class members. Judge Lazzara's Order certifying the class describes with certainty a distinct class of similarly situated persons for whom class representation is appropriate. ***See also, Gomez v. Illinois State Board of Education***, 117 F.R.D. 394 (N.D. Ill. 1987) (under federal rule an identifiable class also exists if its members can be ascertained by reference to objective criteria).

NUMEROSITY

The first prerequisite to a class action is that the members of a class must be so numerous that separate joinder of each member is impracticable. Fla.R.Civ.P. 1.220(a)(1). Humana does not contest the fulfillment of the numerosity requirement in the case at bar.

COMMONALITY AND TYPICALITY

The second prerequisite to a class action is that the claim of the representative party must raise questions of law or fact common to the questions of law or fact raised by the claim of each member of the class. ***See,*** Fla.R.Civ.P. 1.220(a)(2). Florida courts have experienced a period of confusion in interpreting this

provision. The basis for the confusion was that many courts misapplied the theory of fraud class actions to non-fraud cases. In ***Frankel v. City of Miami Beach***, 340 So.2d 463 (Fla. 1976), however, the Florida Supreme Court explained the misconception and overruled all those cases that had misapplied and misinterpreted the class action rule by confusing the criteria with fraud allegations. ***See, id.*** at 466-69.

In fraud cases, class actions are generally inappropriate because there is usually a choice of remedies and options available to each prospective plaintiff. ***See, id.*** at 467.

In cases not involving fraud (such as the instant case), however, disparity in choice of remedies and options is generally not a consideration. When, as here, fraud is not an issue, a class action is proper even though there is not a common right of recovery based on the same identical facts, so long as a question of law or fact is common to the class. ***See, id.*** at 466. In ***City of Miami v. Keton***, 115 So.2d 547 (Fla. 1959), for example, the Florida Supreme Court affirmed the circuit court's decision to allow a class action consisting of 240,000 persons in challenging the authority of the City of Miami to impose fines under its traffic ordinance. ***See, id.*** at 552. The Florida Supreme Court held that, although each person had a separate fine and there was no common or joint right, a class action was proper because the question of law was common to the class. ***See, id.***, cited in ***Frankel, supra***; ***see also, Powell v. River Ranch Property Owners Association, Inc., supra*** (rule does not permit denial of class

certification "merely because the claim of one or more class representatives arises in a factual context that varies somewhat from that of other plaintiffs"). A more recent application of this principle appears in ***Maner Properties, Inc. v. Siksay***, 489 So. 2d 842 (Fla. 4th DCA 1986). In ***Siksay***, owners and residents of lots in a mobile home park contested the validity of a maintenance fee assessment. Although the plaintiff and the class members were subject to varying amounts of assessments, the court held that their claim met the commonality requirement because they were uniformly liable for the assessment. Similarly, under the federal rule, either common questions of law or common questions of fact presented by the class will be sufficient. ***See***, 5 F. Pro. Forms L. Ed., §11:10 (1990) [citing, e.g., ***Steiner v. Equimark Corp.***, 96 F.R.D. 603 (W.D. Pa. 1983); ***Brown v. Cameron-Brown Co.***, 92 F.R.D. 32 (E.D. Va. 1981)]. Also, under the federal rule, the commonality requirement is satisfied when common questions predominate over any factual disparities among the class members. ***See, id.*** [citing ***Percy v. Brennan***, 384 F. Supp. 800 (S.D. N.Y. 1974)].

Florida follows the federal rule which requires that there be only some "questions or law or fact common to the class." "The rule does not require that every question or law or fact be common to every member of the class...." ***Paxton v. Union National Bank***, 688 F.2d 552, 651 (8th Cir. 1982), ***cert. den.***, 460 U.S. 1083 (1983). Numerous courts have held that cases involving many different consumers over periods of time raise common factual and legal questions, and thus satisfy the requirements of the class

action rule. ***See, e.g., Shelter Realty Corp. v. Allied Maintenance Corp.***, 75 F.R.D. 34 (S.D. N.Y. 1977), ***app. dis.***, 574 F.2d 656, 660 (2d Cir. 1978); ***Davis v. Northside Realty Associates, Inc.***, 95 F.R.D. 39, 43 (N.D. Ga. 1982); ***In re Corrugated Container Antitrust Litigation***, 80 F.R.D. 244 (S.D. Tex. 1978); ***In re Industrial Gas Antitrust Litigation***, 100 F.R.D. 280 (N.D. Ill. 1983); and ***Hi-Co Enterprises, Inc. v. Conagra***, 75 F.R.D. 628 (S.D. Ga. 1976).

Recently, the U.S. Fifth Circuit reaffirmed this principle in a class action involving the claims of over 18,000 plaintiffs who were injured in an explosion at an oil refinery. ***See, Watson v. Shell Oil Co.***, 979 F.2d 1014, 1022 (5th Cir. 1992). Although not all issues were common to all the parties, the court focused on the common issues of the refinery owner's liability for punitive damages and of liability for negligence by the manufacturer of a defective pipe. ***See, id.*** Because all the plaintiffs shared these common questions, the court found that the requirement of commonality was satisfied. ***See, Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd.***, 541 So.2d 1121 (Fla. 1988), ***cert. den.***, 493 U.S. 964, 110 S.Ct. 405, 107 L.Ed 2d 371 (1989).

In the present case, the common question of fact is:

> whether the defendant hospital has engaged in a common course of conduct in imposing unreasonable charges upon patients who have been admitted or treated at the hospital.

A common question of law is also presented as to whether the class members are only obligated to pay a <u>reasonable</u> charge arising from the express language of the admission papers or from the implied contract arising from their admission to the Humana hospital. Like

the class members in ***Siksay***, each of the proposed class members at bar has been uniformly subject to the same specie of overcharge. Each member of the class could raise each of the common questions. Therefore, the proposed class has satisfied the commonality requirement.

The methodical and consistent overcharging by Humana of patients within the class is axiomatic of the common nature of the injury alleged. This being so, Humana now seeks to misdirect the Court by stating the obvious: that class member patients were in the hospital for different illnesses and conditions; each was admitted separately; each was billed separately; and some have paid their bill, and some have not. From that simple truism, Humana, in a gigantic leap of faith, then concludes that the claims of the more than 80,000 class members are not typical, and are thus not susceptible to class action treatment. The conclusion is appealing only when we focus on the victims instead of the wrongdoer.

The trial court and the Second District Court had the issue of typicality before them and considered the governing and authoritative case law also offered to this Court.

Pursuant to Fla. R.Civ. P. 1.220(a)(3), the claims or defenses of the representative parties must be "typical of the claims or defenses of the class."

> Since the representative parties need prove [their claim] its effectuation, and damages therefrom -- precisely what the absentees must prove to recover -- the representative claims can hardly be considered atypical.

State of Minnesota v. U.S. Steel Corp., 44 F.R.D. 559, 567 (D.

Minn. 1968). The class claims are typical if they stem from the same event, practice or course of conduct and are based upon the same legal or remedial theory. 7 Wright & Miller, ***Federal Practice and Procedure***, §1764 at 610 (1972 ed.); ***Davis v. Northside Realty Associates, Inc., supra***; ***In re Sugar Industry Antitrust Litigation***, 1977-1 CCH Trade Cases, par. 61,373 (N.D. Cal. 1976).[4]

In this action, the class claims stem from the same practice and course of conduct of Humana, which is applicable to all class members. The claims are based on the same legal theory, namely, injury from a common and consistent course of business conduct which extracts and imposes unreasonable charges for those items alleged in the complaint upon all class members. ***It does not matter that a patient's claim arises in a factual context that varies somewhat from that of others. The requirement is that each claim arise from the same practice or course of conduct that gave rise to the remaining claims, and that the claims are all based on the same legal theory.***

Even in cases where certain products material to a claim are non-standard or dissimilar, courts have consistently recognized that the claims possessed by class members need not be identical, but only that the injuries were caused by the common conduct of the defendant.

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[4]"The claims in this action will turn largely on the activities of the Defendant (Humana), rather than the individual circumstances of the members of the plaintiff class. As a result, the Court finds the commonality and typicality requirements of [the class action rule] are met." Order of the Honorable Phillip M. Pro, United States District Judge, September 29, 1989, ***Forsyth v. Humana, Inc.***, Case No. CV-S-89-249 (D. Nevada).

> ... [the] defendants' argument that [the plaintiffs'] claims are not typical of those purchasers of large volumes of non-standard products is not convincing. Typicality is not destroyed because a representative's claim presents a somewhat different factual pattern. The mere fact that a representative plaintiff stands in a different factual posture is not sufficient to refuse certification ... the atypicality or conflict must be clear and must be such that the interests of the class are placed in significant jeopardy.
>
> Plaintiffs have a significant interest in establishing the [wrongful conduct] which affected the sale of [the product], and this interest does not seem divergent from an interest in establishing [the wrongful conduct] which affected the sale of [other products].

In re Glassine & Greaseproof Paper Antitrust Litigation, 88 F.R.D. 302, 304-05 (E.D.Pa. 1980).

Prior to the 1980 amendment, Florida courts interpreted the class action rule as requiring the representative of a class to have a right or interest in common or co-extensive with all persons represented. *Town of Davenport v. Hughes*, 147 Fla. 228, 2 So.2d 851, *cert. den.*, 314 U.S. 681, 62 S.Ct. 183, 86 L.Ed. 545 (1941). *That is not now the rule in Florida or anywhere else.* In a recent case, the Second District Court of Florida also equated typicality with commonality.

> The court's primary concern in considering the typicality and commonality of claims should be whether the representative's claim arises from the *same practice or course of conduct* that gave rise to the remaining claims and whether the claims are based on the same legal theory (emphasis added).

Powell v. River Ranch Property Owners Association, Inc., supra (citations omitted). Many other courts equate the typicality

requirement with various other requirements for the rule (such as commonality and adequacy). See, 3B J. Moore & J. Kennedy, ***Moore's Federal Practice***, par. 23.06-2 (2d ed. 1990).

Like the requirement of commonality, the typicality requirement for the purpose of class certification is not affected by factual variations or differences in the amount of damages between and among class members. ***See, Kornberg v. Carnival Cruise Lines, Inc.***, 741 F.2d 1332, 1337 (11th Cir. 1984).

The allegations in the present complaint and the proof at certification hearing clearly satisfy the typicality requirement. It is clear that the representative claims arise from the same course of conduct of Humana that gave rise to the claims of the class, and that all the claims are based on the same legal theories. ***See, Powell, supra*** at 70. Hence, the class representatives' claims are typical of the claims of the other class members.

It is fundamental "black letter" hornbook law that when the dollar amount of an obligation arises from a contract that does not articulate a liquidated sum to be paid, the law imposes upon the parties a requirement that the amount to be paid must be a reasonable one. In the instant cause, each member of the class became a patient at the defendant Humana hospital. In conjunction with that treatment or admission, each patient (or some other responsible person) signed a form by which it was agreed that the hospital would be paid for the services and supplies used by the patient.

It is elementary that the patient has no advance (or even

contemporaneous) knowledge of the charges to be imposed for every item or service that eventually shows up on the final hospital bill. Similarly, the patient has no say in which items or services will be "sold" to him or her. Thus, the law in Florida mandates that the patient has an obligation to pay a reasonable charge for each such item or service. Of course, the correlative to the above mandate is that the charges imposed by the hospital be similarly reasonable. It is that concept of reasonableness that is the heart of this action. ***Every single patient member of the class was subjected to the exact same type of overcharging by Humana.***

The allegations of Humana's common conduct resulting in each class member becoming a victim is not the same as saying that each class member was injured in the exact same amount or with respect to the exact same items or services. Each victim's precise overcharge is a function of later calculation. This is a ministerial function, and has no role to play in the determination that a commonly aggrieved class of persons does indeed exist.

The determination of what is "reasonable" is a natural consequence of the authoritative case law teaching that a party does not have to be bound to the charges arising from an implied contract term founded on a writing when the alleged obligor challenges the reasonableness of the amount claimed to be owing. Each and every patient (class member) has been affected in exactly the same manner - he or she has been overcharged by the hospital's imposition of unreasonably high mark-ups. The amount of each such overcharge is at least a couple of steps removed from that point.

The commonality and typicality of the affected class are clear beyond legitimate question. ***The fundamental question is whether the class seeks to remedy a common legal grievance.*** ***See,*** 3B J. Moore & J. Kennedy, ***Moore's Federal Practice***, par. 23.34-2 (2d ed. 1990) (citations omitted); 7A Charles Wright, A. Miller and M. Kane, ***Federal Practice and Procedure***, §1781 at 4; ***Developments in the Law: Class Actions***, 89 Harvard L. Rev. 1318 (1976).

This case involves commonly consumed products or commonly provided services associated with stays or treatment in the hospital. It is a case in which the hospital's conduct (***i.e.***, overcharge by imposition) impacts on all class members. In turn, that universal impact results in some measure of money damage to each of the class members.[5]

The existence of varying amounts of hospital charges or excessive charges for items consumed or laboratory tests provided does nothing to lessen the predominance of common issues. When confronted by cases involving similar types of claims and defenses, the courts uniformly have held that if the issue of price is the starting point for consideration, then the common question relating to price as to all class members predominates for the purpose of

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[5]Damages are a common issue because the damages sustained by each class member may be readily ascertained by computing the difference between the charges that would have resulted from reasonable conduct ***vis-a-vis*** the excessive charge fixed by the defendant. Damages will be calculated on a class-wide basis using expert economic testimony and commonly used formulas. ***See, e.g., Greenhaw v. Lubbock County Beverage Association***, 721 F.2d 1019 (5th Cir. 1983), ***reh. den.***, 726 F.2d 752 (5th Cir. 1984), ***overruled on other grounds***, 790 F.2d 1074, 1181 (5th Cir. 1986).

certification.[6]

The examination of prices or costs uniformly imposed upon an appropriate plaintiff class is frequently seen in the price-fixing antitrust cases. The rationale of those cases is clearly applicable to the instant case. ***See, e.g., Fisher Bros. v. Mueller Brass Co.***, 102 F.R.D. 570, 578 (E.D. Pa. 1984); ***In re South Central Bakery Products Antitrust Litigation***, 86 F.R.D. 407 (M.D. La. 1980); ***Hedges Enterprises, Inc. v. Continental Group, Inc.***, 81 F.R.D. 461 (E.D. Pa. 1979); ***Shelter Realty Corp. v. Allied Maintenance Corp., supra***, at 37.

The issues associated with markets, impact on competition, public policy relating to industrial organization, restraints on trade and nationwide distribution patterns are far more complex than the hospital/patient, seller/purchaser relationship involved in the instant case. Nonetheless, courts uniformly and consistently have been able to readily describe methods and procedures for handling, managing and processing damage assessments for large classes in those types of cases. The recent airline price-fixing class action concerned more than 400 million transactions and a class of several million purchasers. The court found no difficulty in certifying the class and processing damage claims in excess of hundreds of millions of dollars.

Most cases involving unlawful overcharges are suitable for class action treatment. This is especially true with respect to

[6]The allegations and proof reveal a common nucleus of operative facts relating to the nature and effect of the defendant's overcharges.

homogeneous and easily defined business relationships such as that of patients and the hospital in which they are treated or confined. Once the basic fact of overcharge has been established, it is reasonable to assume individual injury and impact on the class of a patient defined in the class definition based upon a simple showing of having been admitted to or treated by the defendant hospital. ***See, Transamerican Refining Corp. v. Dravo Corp.***, 130 F.R.D. 70 (S.D. Tex. 1990).

Defendants in class cases ***always*** argue that the complexity of their business or the industry makes it impossible for common issues of law or fact to predominate. Just as consistently, courts have rejected those protestations. Courts have found it a relatively simple analysis to observe the nature of the defendant's challenged behavior or what the defendant did. ***See, In re Domestic Air Transportation Antitrust Litigation, supra***; ***In re Fine Paper Antitrust Litigation***, 82 F.R.D. 143, 153 (E.D. Pa. 1979); ***In re Corrugated Container Antitrust Litigation, supra***.

All class members are victims of the same specie of Humana's egregious conduct. All sustained economic damage, virtually all of them in amounts that are too small to justify individual actions against a defendant (Humana) which is the largest for-profit hospital chain in America, and which possesses vast financial and legal resources. Under similar circumstances, courts have regularly found that a class action is the appropriate method of adjudicating the controversy. ***See, Steiner v. Equimark Corp., supra*** at 613; ***In re Folding Carton Antitrust Litigation***, 88 F.R.D.

211 (N.D. Ill. 1980); *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972); *see, generally, Brown v. Cameron-Brown Co., supra* at 49-50; *Davis v. Northside Realty Associates, Inc., supra* at 48; *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981); *Shelter Realty Corp. v. Allied Maintenance Corp., supra; In re Corrugated Container Antitrust Litigation, supra; In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976); *National Super Spuds, Inc. v. New York Mercantile Exchange*, 77 F.R.D. 361, 363 (S.D. N.Y. 1977); and *Barlow v. Marion County Hospital District*, 88 F.R.D. 619 (M.D. Fla. 1980) (Sr. District Judge Charles R. Scott).

Notwithstanding his personal impulse and hostility to the class' claim of predominance of common questions, Judge Lazzara, as a scholar of authoritative case law, observed and held that the facts established at the evidentiary hearing on class certification required that he certify the class. Judge Lazzara's legal decision that *Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd., supra*, mandated his order certifying this class predated this Court's orders earlier this year in Cases No. 82,896 and 82,966, in which the *exact* same class certification issues were raised by Humana, and for which review was denied by this Court. Two District Courts of Appeal, two trial judges and this Court (by denying review in Cases No. 82,896 and 82,966) separately and independently saw the applicability of *Lanca* and its binding *stare decisis* effect.

In the face of Judge Lazzara's sagacious ruling and the *per*

curiam affirmation by the Second District, Humana's protestations (the same having been made to both courts) should be seen as simply zealous advocacy for the sake of defense at any cost, even if reasoned analysis is sacrificed in the process.

It is not appropriate for Humana nor the function of the court to weigh or consider the relative merits of the class' claims. Whether the challenged charges to patients are reasonable or not is for determination at another stage in this litigation. It is not material to whether the class should be permitted to go forward with its proof.

Judge Lazzara, as many of us in the real world of public or military service, had to adhere to authoritative guidelines that may have been squarely opposite his own intuitive response. That such a personal dilemma existed within the trial judge is manifested by the following excerpts from the trial court's comments at the close of the certification hearing:

> Here, based on the pleadings and the evidence, it seems to me the key is the same, the relationship of the parties and whether the defendant hospital took advantage of that relationship by charging unreasonable prices for drugs, lab tests, and supplies.
>
> Therefore - and it's clear that the reasoning of the Fifth District in ***Thomas v. Jones*** about individualized, personalized within the context, procedural unconscionability has been rejected by the Florida Supreme Court.
>
> And therefore I'm compelled to conclude that based on the reasoning of the ***Lanka*** (sic) opinion as applied by analogy to this case, I'm compelled to grant the motion for class certification. Although I do so, and I'll say for this record, with much trepidation.

> But I would observe, and it's already been alluded to by Mr. Schwartz, that I continue to have the authority in appropriate circumstances to decertify the class, make smaller classes, things of that nature.
>
> But again, I do so with great trepidation. And I've taken the time to lay out my concerns. So if Humana wants to go to the Second District, which I urge them to do, maybe they'll agree with my analogy to ***Lanka (sic)***, maybe they won't. I don't know. Maybe they will disagree with all of my concerns. I don't know.
>
> But I only have to be taught one time that I don't create precedent. You don't have to tell me - the Second District won't have to tell me again. I always like to think I learn from my mistakes.
>
> So therefore for those reasons I'm going to grant the motion to certify this class, as I understand the class to be, self-pay patients or patients who had insurance but the charges imposed were charge based; correct?

(Transcript of testimony and proceedings taken before Honorable Richard Lazzara, Circuit Judge, on June 2, 1993) (App. Tab 2).

The honorable trial judge in this action epitomized the wisdom of our lodestar rule of law - ***stare decisis***. It is unmistakable from Judge Lazzara's monologue at the close of the certification hearing that if he had unbridled discretion he would not be inclined to certify the instant class. Yet, faithful to his obligation as a trial judge to decide cases on the law as established by appellate courts or the legislature, Judge Lazzara recognized that he had no discretion to overlook binding, authoritative Florida case law. Judges, like everyone else, have predispositions, biases and interpretive ideas at variance with others. It is those personal variations that have illustrated the

wisdom of our jurisprudential premise that a question once considered and decided by appellate courts form the governing rule for lawyers and judges. And, it is because of personal perspectives and biases that those who created and shaped our common law and appellate decision-making process over 400 years of Anglo-American development adopted ***stare decisis*** as a guiding principle.[7]

In the instant case, it need only be shown that Humana engaged in a consistent course of business conduct that, through the same mechanism of unreasonable mark-ups, imposed overcharges on patients (class members) described in the complaint.

An appropriate standard for typicality may be thusly stated:

> If the representative must prove [the wrongful conduct], its effectuation, and damages therefrom ... precisely what the absentees must prove to recover ... the representative claims can hardly be considered atypical. ***In re Workers' Compensation,*** 130 F.R.D. 99, 106 (D. Minn. 1990), ***citing favorably to State of Minnesota,*** 44 F.R.D. at 567; ***In re Wirebound Boxes Antitrust Litigation,*** 129 F.R.D. 534 (D. Minn. 1990); ***Butt v. Allegheny Pepsi-Cola Bottling Co.,*** 116 F.R.D. 486 (E.D. Va. 1987).

It is clear that Humana engaged in the same course of conduct to all class members, and it is that course of similar conduct that gives rise to the class claims and the legal theories asserted. ***See, Powell v. River Ranch Property Owners Association, Inc., supra***

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[7]Courts are bound to adhere not only to results of cases, but also to their explications of the governing rules of law. Our system of precedent or ***stare decisis*** is thus based on adherence to both the reasoning and result of a case, and not simply to the result alone. ***Piazza v. Major League Baseball,*** 1993 U.S. Dist. Lexis 10552 (E.D. Pa., August 4, 1993).

at 70. The representative plaintiffs' claims are typical of the claims of the other class members and all class members' claims are typical of each other.

In *In re Folding Carton Antitrust Litigation, supra*, the court stated:

> We are likewise unpersuaded by defendant's argument that the nature of the folding carton industry makes it impossible for common issues to predominate. First, contentions of infinite diversity of product, marketing practice, and pricing have been made in numerous cases and rejected. Courts have consistently found the [wrongful conduct] issue the overriding, predominant question.... Contrary to defendants' position, a liability determination is not contingent upon a carton-by-carton analysis of every sale made under the alleged conspiracy to fix prices. Such an analysis, at best, goes to the damages to be awarded once liability has been demonstrated.

In re Folding Carton Antitrust Litigation, 77 F.R.D. 727, 734 (N.D. Ill. 1977). The same applies with equal force to Humana's hue and cry regarding typicality. Often commonality and typicality are indistinguishable for the purpose at issue here.[8]

Florida follows the well-established federal rule that

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[8]In *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988), the court reiterated the conventional rule applicable in the instant case:

> Almost identical evidence would be required to establish [the injury]. The single major issue distinguishing the class members is the nature and amount of damages, if any, that each sustained. To this extent, a class action in the instant case avoided duplication of judicial effort and prevented separate actions from reaching inconsistent results with similar, if not identical, facts.... However, individual members of the class still will be required to submit evidence concerning their particularized damage claims in subsequent proceedings. *See id.* at 1197.

requires there be only ***some*** "questions of law or fact common to the class". "The rule does not require that every question of law or fact be common to every member of the class...." ***Paxton v. Union National Bank, supra*** at 651. Numerous courts have held that cases involving many different consumers over periods of time raise common factual and legal questions, and thus satisfy the requirements of the class action rule. ***See, e.g., Shelter Realty Corp. v. Allied Maintenance Corp., supra*** at 660; ***Davis v. Northside Realty Associates, Inc., supra*** at 43; ***In re Corrugated Container Antitrust Litigation, supra; In re Industrial Gas Antitrust Litigation, supra***; and ***Hi-Co Enterprises, Inc. v. Conagra, supra.***

Humana has raised extensive and laborious arguments in its protestations to the Court that the class cannot satisfy the requirements of commonality and typicality. Such an effort is not unusual; **every** defendant in **every** class action does exactly the same thing. Indeed, such defensive techniques are not unknown to opposing counsel in this cause. The same Humana team as is now before the Court served as defense counsel in the noted case of ***Zimmerman v. Home Shopping Network, Inc.***, 1990 Federal Securities Law Reports (CCH), par. 95,435 (Del. Chancery Court).

The Chancellor in ***Zimmerman*** perceived clearly the precise defensive technique with which this Court is confronted: namely, the creation of generous amounts of heat generating very little light.

> Specifically, HSN argues that class certification should be denied, because ... the plaintiffs cannot satisfy any of the requirements of [the class action rule]. By

> advancing this plethora of arguments, HSN presumably hopes to persuade the Court that where there is so much smoke, there must be fire. In reality, however, if there is any smoke it comes from a far less sinister source: a smoke machine.

Id. at par. 97,222.

Despite all of the storm and fury and Humana's attenuated view of the facts extant in this cause, even these energetic and innovation adverse counsel cannot controvert the viability of the class as a favored judicial policy:

> It is by now a truism that the class-action lawsuit has become a vehicle of citizen and consumer control over the vagaries of political or market forces.
>
> ****
>
> Sometimes a class-action lawsuit is the only way in which consumers would know of their rights at all, let alone have a forum for their vindication. This is the position for which the plaintiffs implicitly contend. The court believes that this expresses the best-reasoned view of the courts, as well, dictating that any doubts are to be resolved in favor of granting certification where the class' interests coincide with the public interest.

Coleman v. Cannon Oil Co., 141 F.R.D. 516, 520 (M.D. Ala. 1992).

The common nucleus of facts relating to the business behavior of Humana in overcharging patients through "imposition" of unreasonable mark-ups is the <u>only</u> issue of liability. All of Humana's protestations to the contrary will not change that simple fact.[9]

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[9]That concept of imposition as previously found by this Court permeates every count of the instant complaint. Without "imposition", Humana could not have charged the unreasonable amounts alleged in this cause. It is that fact of imposition that suffices as the common basis for Humana's breaches and overcharges.

In ***Coleman v. Cannon Oil Co., supra***, the defendants were alleged to have engaged in conspiratorial price-fixing of retail gasoline prices. Similar to Humana, the defendants cried aloud that the thousands of different sales to thousands of motorists criss-crossing the state would necessarily destroy the commonality component of the class action case. After all, there were multiple grades of gasoline, each with different prices at many retail outlets. How, the challenge was posed, could there possibly be commonality among the several thousand purchasers of gasoline given the myriad of reasons why any individual motorist would stop and purchase gasoline at any particular retail station? Like Humana, the several defendants in ***Coleman*** asserted that each sale must be analyzed and dissected to determine whether the purchaser was a class member or suffered injury. This same argument was advanced by the airline industry with respect to the 400 million airline tickets sold. In each case the court soundly rejected such arguments. The common course of business conduct and the common manner of Humana's imposition of overcharges is of the same nature as that of the ***Coleman*** defendants and the several offending airlines. ***In re Domestic Air Transportation Antitrust Litigation, supra***. Thus, the focus properly must be placed on the defendant's conduct rather than what the class did.

The commonality and typicality hurdles leaped by the plaintiffs in both ***Coleman*** and the airline case were significantly more complex than those involved with Humana. Proving a price-fixing conspiracy having a common nucleus of liability is far more

sophisticated than proving the unilateral, everyday business practice of a single defendant hospital engaged in recurrent overcharging. The pleading challenges previously (and repeatedly) raised by Humana to the theories of action asserted in the instant case have each been rejected by every court which considered them (including this Court earlier this year in Case Nos. 82,896 and 82,966). Those same arguments now addressed to this Court's consideration of class certification are certainly no more persuasive.

> The commonality requirement of Rule 23(a) does not require that identical questions of law or fact are common to the class, only that the issue of liability is common. As one court has expressed the requirements of commonality under the Rule:
>
> Rule 23(a)(2) requires that plaintiffs show that 'there are questions of law or fact common to the class'. Yet not every question of law or fact must be common to every member of the class. The requirement is met if the questions linking the class members are 'substantially related to the resolution of the litigation even though the individuals are not identically situated'. Identical questions are not necessary and factual discrepancies are not fatal to certification. Rule 23(a)(2) may be satisfied if common questions of liability are present despite individual differences in damages. ***In re Workers' Compensation***, 130 F.R.D. 99, 104 (D. Minn. 1990).

Coleman, supra at 521.

Notwithstanding Humana's fervent wish to the contrary, if members of the instant class were to proceed individually, each would have to prove the existence, extent and effect of the identical unreasonable overcharges as to the categories of items and services alleged (***i.e., each would prove the same thing***).

Therefore, common questions of law and fact exist, and the requirements of commonality and typicality are met.

THE CASE IS MANAGEABLE AS A CLASS ACTION

As with the issues of typicality and its generic twin, commonality, Humana's assertions regarding the manageability of this action are equally specious. Manageability problems are significant only if they create a situation that makes a class action less fair and efficient than other available techniques for resolving the class members' claims.

> ... If management problems are only speculative not evident in problems already experienced in the litigation, the class should be certified. In fact, dismissal for management reasons, in view of the public interest involved in class actions, should be the exception, rather than the rule.

In re Folding Carton Antitrust Litigation, 77 F.R.D. 727, 734 (N.D. Ill. 1977).

This case is manageable as a class action. Computer technology makes the management of such a class not only possible, but fairly straightforward as well. One court has concluded that:

> experience under ... [the class action rule] shows that visions of unmanageability soon disappear, because courts, together with counsel, have been able to manage litigation of constantly increasing complexity and magnitude.

In re Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 356-57 (E.D. Pa. 1976).

Humana's assertion that the class is unmanageable is similar to that frequently raised by other class action defendants. It essentially goes like this:

> If we imposed egregious overcharges over a sufficient period of time upon all of our self-pay and charge-based patients, the number of patients who would be potential class members at some point in time would become so large, and the amount of damages of each class member would be so varied, that no class action claim would be able to meet the manageability criterion.

That sort of "the sky is falling" defense was asserted by several defendant insurance companies in ***In re Workers' Compensation***, 130 F.R.D. 99 (D. Minn. 1990), where the court dispatched the "unmanageability" argument thusly:

> But defendants' parade of horrors is chimerical. They know, as does this Court, that this case can be managed. It does not take a battalion of rocket scientists to handle a large case -- although each side clearly have talented and competent counsel. If the plaintiffs' claims are substantiated, a question as to which the Court presently has no opinion, the class action mechanism is clearly the most efficient means of resolving the many claims which may be asserted. The Court is confident that stated classes or subclasses will make the case comfortably if not easily manageable. If the case were not handled as a class, thousands of small claims would be either brought or unjustly abandoned. The first possibility would be a flood of cases, the second would involve individual claims abandoned because of cost.
>
> The court is mindful that dismissal for management reasons is never favored. The vehicle of class action is meant to permit plaintiffs with small claims and little money to pursue a claim otherwise unavailable. A contrary rule would "essentially preclude class treatment whenever separate issues had to be tried." ***Siner v. Rio***, 661 F.2d 655, 672, n. 29 (7th Cir. 1981), ***cert. denied***, 456 U.S. 917 (1982). If, as this case develops, class treatment proves to be inappropriate, the Court may exercise its discretionary powers ... and adjust the action accordingly. ***Id***. at 110 (F.R.D. citations omitted).

The Honorable Jack Weinstein, United States District Judge, analyzed the matter succinctly:

> The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.
>
> The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens -- including those deprived of human rights, consumers who overpay for products because of antitrust violations and investors who are victimized by insider trading or misleading information -- or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefitted, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.
>
> When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy -- or at least to deter -- that conduct. ***New York Law Journal***, May 2, 1972 as favorably cited by Justices Douglas, Brennan and Marshall in ***Eisen v. Carlisle and Jacquelin***, 417 U.S. 154, 185, 94 S.Ct. 2140 (1974).

Class action defendants ***always*** insist that any given case will be unmanageable because of the need to deal with damages of hundreds, thousands or even millions of class members. Courts have consistently seen through that smokescreen in granting certification. In perhaps the clearest and most recent opinion on that matter, Judge Schoob stated:

> Defendants insist that this case will be unmanageable as a class action because the proposed class will number in the millions and will involve over 400 million transactions, requiring "mini-trials" for millions of purchasers. The court cannot deny certification, however, merely because the number of plaintiffs makes the proceeding complex or difficult. ***See 3 Newberg*** at §18.37. The Court admits that it has been most concerned about the manageability of this action; however, "difficulties in management are of significance only if they make the class action a less 'fair and efficient' method of adjudication than other available techniques." ***In re Antibiotic Actions***, 222 F. Supp. 278, 282 (S.D. N.Y. 1971) (emphasis in original). ***In re Domestic Air Transportation Antitrust Litigation***, 137 F.R.D. 677 (N.D. Ga. 1991).[10]

SUPERIORITY

In making its determination, the court must find that the difficulties in management will not render this action improper for certification.

Similar to Humana's recurring assertion that the complexities of its business make it impossible to find that common issues predominate, so too, do all class action defendants always insist that any given case will be unmanageable because of the need to deal with damages of hundreds, thousands or even millions of class members. Courts have consistently seen through that shrill cry and

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[10]In support of the same manageability proposition, ***see generally, Steiner v. Equimark Corp., supra*** at 613; ***In re Folding Carton Antitrust Litigation, supra***; ***In re Ampicillin Antitrust Litigation, supra*** at 275-77; ***Brown v. Cameron-Brown Co., supra*** at 49-50; ***Davis v. Northside Realty Associates, Inc., supra*** at 48; ***In re Corrugated Container Antitrust Litigation, supra***, at 253; ***In re Sugar Industry Antitrust Litigation***, 73 F.R.D. 322, 356-57; ***National Super Spuds, Inc. v. New York Mercantile Exchange, supra*** at 363; ***Barlow v. Marion County Hospital District, supra***.

teeth-gnashing, and granted certification. The clearest opinion on that matter is expressed by the Honorable Marvin H. Shoob, Senior Judge, Northern District of Georgia, in his lengthy and articulate opinion in ***In re Domestic Air Transportation Antitrust Litigation, supra***. The court stated:

> The Court finds a class action the only fair method of adjudication for plaintiffs. The individual claims of many class members are so small that the cost of individual litigation would be far greater than the value of those claims. ***See Du Pont Glore Forgan, Inc. v. American Tel. & Tel. Co.***, 69 F.R.D. 481, 487 (S.D. N.Y. 1975). Thus, if this case is not certified as a class action, a majority of class members would likely abandon their claims even if it can be proven that defendants have conspired to fix prices of domestic air transportation. Justice Douglas, concurring in ***Eisen***, recognized the necessity of a class action in a case such as this:
>
> [A] class action serves not only the convenience of the parties but also prompt, efficient judicial administration.... [Plaintiffs may be] consumers whose claims may seem ***de minimis*** but who alone have no practical recourse for either remuneration or injunctive relief.... The class action is one of the few legal remedies the small claimant has against those who command the status quo.
>
> 417 U.S. at 185, 94 S.Ct. at 2156.
>
> Either the case proceeds as a class action or it is over. While the action involves an enormous class of claimants, the Court will not preclude plaintiffs from pursuing their remedies under the civil antitrust laws unless the only conclusion the Court is able to reach is that the action is unmanageable.

In re Domestic Air Transportation Antitrust Litigation, supra at 694 (emphasis added).

As in the ***Domestic Air Transportation*** case, the instant class

representatives' counsel and their experts evidence a keen understanding of several methodologies under which to process and determine the damage claims that will eventually arise in this case once liability is established. Following Judge Shoob's reasoning, Humana should not be permitted to avoid responsibility for its conduct because of the magnitude of the loss it has caused the class. The illogic of that and its inherent unfairness is elementary and obvious.

Chief Judge John V. Singleton, Jr. of the Southern District of Texas recognized the strong preference for certification, rather than dismissal for management reasons, in certifying the class in ***In re Corrugated Container Antitrust Litigation, supra*** at 253. Recognizing the ability of the court and the parties to resolve any management problems, the court concluded that:

> [With] the extensive armory of tools provided by the Federal Rules of Civil Procedure and developed by federal courts throughout the country, and with the aid of imaginative and efficient counsel, this court has concluded that this problem does not warrant refusal to certify.

See, id. Similarly, in ***Transamerican Refining Corp. v. Dravo Corp., supra,*** Judge Norman Black, of the Southern District of Texas, concluded:

> If the class is not certified it is possible that many claims will not be pursued because litigation costs will exceed the claim for damages. Both sides are well organized and although there are obvious areas of concern, the Court believes that problems can be handled. Even if it is eventually decided that damages must be determined on an individual basis, there are many avenues available. It may be possible to establish a

> formula for computing damages, or the damage issue could be referred to a Special Master. In neither case would it be necessary to conduct numerous mini-trials on the issue of damages. "Dismissal for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule." ***Manual for Complex Litigation***, Part I §1.43, n. 72 (1977).

Transamerican Refining, supra at 76. The court certified a nationwide class with claims spanning a twenty-year period.

Another recent example of manageability of a complex case appears in ***Watson v. Shell Oil Co., supra.*** In ***Watson***, which involved 18,000 plaintiffs who had been injured in an explosion at a refinery, the U.S. Fifth Circuit Court of Appeals commended the trial judge's four-phased plan for trial. ***Id.***, at 1018, 1023.

The instant case is manageable as a class action. Although the size of the proposed class is large, computer technology makes the management of such a class possible. One court has concluded that "experience under ... [the class action rule] shows that visions of unmanageability soon disappear, because courts, together with counsel have been able to manage litigation of constantly increasing complexity and magnitude." ***In re Sugar Industry Antitrust Litigation***, 73 F.R.D. 322, 356-57.[11]

In an essentially identical case (only the named plaintiffs and the named defendant hospitals were different), the issues of

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[11][The] consumer is ordinarily the person who has the least means and motive to engage in and vigorously prosecute complex litigation. So the court must be particularly sensitive to the need of the consumer class for reliable economic data to protect its interest." ***In re Sugar Industry Antitrust Litigation***, 73 F.R.D. at 354.

manageability, superiority and notice were dealt with without difficulty. *See, Stone v. American Medical Int'l., Inc.*, Case No. CL 91-9058-AN (Fla. 15th Jud. Cir., Palm Beach County).

The superiority element of subsection (b) of the class action rule has two aspects: whether it would be worthwhile to devote the time and attention necessary to formulate workable methods for disposing of the group claims within one representative action; and whether the ends of justice would be properly served even if it would be convenient. The superiority requirement calls for a determination that a class suit would be the best way of channeling and adjudicating the claims of the class members.

The superiority of the representative action is often found in the fact that it is the only practical means for class members to receive judicial consideration of their grievance. Thus, superiority may be fulfilled when the common-question class suit enables persons whose individual injuries may have been small to pool their resources and claims in order to wage an effective legal fight for vindication of their rights. These considerations apply to the present case, where it might be difficult or impossible for each of the approximately 80,000 individuals to fight against an opponent with the resources available to Humana. Because those individuals share a common grievance, however, the class action suit becomes a superior vehicle for vindicating their rights.

The cause at bar relates to the imposition of unreasonable hospital charges which are in violation of the implied contractual covenant of reasonableness of hospital charges that is mandated by

contract law. The agreement required to be signed by some "responsible" person prior to a patient's admission into or treatment by the hospital imposes upon that person the obligation to pay "reasonable" charges, and a concomitant obligation is placed upon the hospital only to impose "reasonable" charges upon that person.

The contract material to this cause is only one of many papers signed by a patient (or a patient's family) prior to hospital treatment or admission. The contract is one whereby the patient agrees to pay (or be otherwise responsible for the payment of) the charges incident to such hospitalization or treatment. Such a contract also may be implied under the law. In either event, the "reasonableness" of charges imposed thereunder is implied and required by law.

The present factual setting presents the quintessential justification for class action treatment being accorded these claims. Notwithstanding the breast-beating and teeth-gnashing of Humana, notwithstanding the fact that every class member was an individual patient for a specific individual time, and notwithstanding the obvious truism that each patient's hospital bill contains charges for many different items, the fact remains that each patient/class member was subjected to the same type of improper conduct by Humana: namely, a calculated scheme, plan and design to impose overcharges for items and services in those challenged categories over which no patient or class member, not the first one, had any degree of control. Cases are cited below

for this Court's assistance to illustrate the authority for the trial court having granted the motion to certify the patient class.

In ***Goldwater v. Alston & Bird***, 664 F. Supp. 403 (S.D. Ill. 1986), a class action was maintained in a securities case against fifty-one defendants. The named plaintiff represented a class of all purchasers of revenue bonds from a health facilities authority. The suit contained counts for violations of various federal statutes as well as pendent state claims against various defendants for negligence and breach of contract. The many factual differences among the various transactions, however, were no bar to the maintenance of a class action.

Another example is ***Chutich v. Green Tree Acceptance, Inc.***, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH), par. 95,237 (D. Minn. Feb. 22, 1990). The ***Chutich*** defendants argued that the case should not be certified as a class action on the grounds that the many separate and distinct events alleged were separate and unrelated. The court rejected this argument and found instead that the plaintiffs were "connected by their reliance on the 'common nucleus' of allegedly misleading and fraudulent statements." This is similar to the instant case, where the class' connection is the common pattern of misconduct by Humana.

The ***Chutich*** court also found that the typicality requirement was satisfied even though the individual plaintiffs relied on varying fact patterns. The court stated that the typicality requirement is met if the plaintiffs' claims arise from the same event, practice, or course of conduct, all and each of which are

alleged in the complaint against Humana. ***See, id.*** [citing ***Dirks v. Clayton Brokerage Co. of St. Louis, Inc.***, 105 F.R.D. 125, 132-33 (D. Minn. 1985)].

Yet another illustration of a class action in which the plaintiffs suffered individualized, yet common, types of injuries is found in ***Transamerican Refining Corp. v. Dravo Corp., supra***, where buyers of specialty steel piping materials on a cost-plus basis sought class certification in their suit which alleged a conspiracy to manipulate the price of those materials.

The ***Transamerican Refining*** defendants argued that common issues would not predominate because the plaintiffs had alleged separate, multiple conspiracies between individual fabricators and a supplier. The defendants further argued that the separate transactions required individual proof of injury and damages, thus rendering the case inappropriate for class treatment.

The court rejected the defendants' arguments and reasoned that the plaintiffs could offer generalized proof that a common course of conduct had caused artificially higher price levels in the specialized steel piping industry. Once the wrongful conduct was established, the trial court could then establish the measure of damages on a class-wide basis. ***Transamerican Refining Corp. v. Dravo Corp., supra*** at 75.[12]

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[12]"While the effective distribution of monetary damages directly to class members remains to be explored, it is neither necessary nor appropriate to decide at this juncture the method ... that will be most beneficial to members of any class.... If the plaintiffs prevail in the liability phase of the case, then the court would direct the plaintiffs to submit proposals for the expeditious resolution of the damage issues.... Also, plaintiffs

Another federal district court recently reached a similar conclusion in ***Town of New Castle v. Yonkers Contracting Co.***, 131 F.R.D. 38 (S.D. N.Y. 1990). In ***New Castle***, various local governmental entities that had purchased asphalt from one or more of the defendants alleged that the defendants had conspired to restrain trade and competition in the sale of the asphalt. The defendants argued that the various governmental entities should not constitute a class because there would be individual issues of damage as to each municipality. The court held, however, that the plaintiffs had met the requirements for class certification. ***Id.*** at 43-44. ***THAT IS PRECISELY ANALOGOUS TO THE INSTANT CASE.***

In considering the predominance requirement, the Southern District of New York district court stated that "the fact that each class member's damages will be different and, thus, will require individualized treatment does not prevent one from concluding that common questions predominate." ***Id.***, at 42 [quoting ***In re Alcoholic Beverages Litigation***, 95 F.R.D. 321, 327 (E.D. N.Y. 1982)].

In a recent Florida case, the Third District Court of Appeal recognized a similar procedure. In ***Conley v. Morley Realty Corp.***, 575 So.2d 253 (3d DCA Fla. 1991) the plaintiff brought a class action for declaratory relief on behalf of persons who had entered into agreements for deed for the purchase of Florida homesites from the defendant realty corporation. The court held that the trial

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may be able to utilize expert testimony, statistical computation and computer analysis to simplify proof of damages." ***In re Sugar Industry Antitrust Litigation***, 73 F.R.D. 322, 355. (See testimony of Ronald Bennett, CPA, Transcript at ____).

court erred in ruling that the class be limited to persons whose situation was identical to that of the plaintiff. ***See, id.*** at 258 [citing ***Love v. General Development Corp.***, 555 So. 2d 397 (Fla. 3d DCA 1989)]. (The predominance of common issues may not be interpreted as being or requiring identical issues or facts.) ***It is the similarity of Humana's course of conduct in dealing with the plaintiffs and all other class members, and the resulting similar type of injury thus caused to all class members, which should be the Court's polestar.***

The above cases illustrate the propriety of class certification despite different fact patterns and different damages among the members of the class. These cases demonstrate that class certification is appropriate in the instant cause despite the separate contracts between the Humana and the class members. In the instant case, common questions of law and fact exist as to whether Humana engaged in a common course of imposing overcharges so as to constitute a breach of an implied contract provision. These common questions predominate over any questions affecting only individual members of the class. The trial court may easily deal with varying dollar amounts of claims or damages by establishing a single percentage rate of overcharge to be applied to all plaintiffs. ***See, Transamerican Refining Corp. v. Dravo Corp., supra*** at 76. As the ***New Castle*** court concluded, in cases involving differing fact patterns, a class action is superior to other available methods for the fair and efficient adjudication of controversies involving factual scenarios like the one now before

this Court. *Town of New Castle v. Yonkers Contracting Co., supra* at 43.

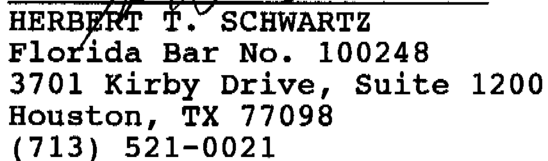
CONCLUSION

The trial judge heard and considered three full days of evidence and legal argument prior to entering his order certifying this consumer class. He agonized between his personal impulse and the requirements of governing case law authority by which he was bound. He saw the correct legal standard applicable to the instant case, and properly applied it. All of the zealous trial and appellate advocacy of Humana cannot change this. The instant class of patients/consumers has well stated its claims relating to the gross overcharges imposed upon it at the hands of Humana. The criteria of the class certification rule have been fully met.

Humana fervently wishes to avoid trying to prove to a local jury the reasonableness of its outrageous charges for the items and services described in the operative complaint. That would leave more than 80,000 patients to their own individual resources to bring and prove their separate cases against Humana's overwhelming and superior economic and legal firepower. What that really would mean is that Humana would continue to get away with its egregious business conduct, as no individual reasonable consumer would engage in an expensive battle over a $300 excessive charge on his or her hospital bill.

The class action vehicle is a method of providing access to justice long favored by Florida courts. This action meets each and every standard for such treatment. Judge Lazzara noted this in

his order granting the motion to certify the class. The Second District recognized the correctness of his order (irrespective of his purely personal impulses) through its *per curiam* affirmation. This Court has previously recognized the inappropriateness of Humana's arguments when it declined to review Cases No. 82,896 and 82,966, which involved the same arguments made by the same attorneys based upon essentially the same facts and case (in another circuit and district). It would be proper and appropriate for this Court to reject once again Humana's hue and cry by entering an order denying review in this case as well.



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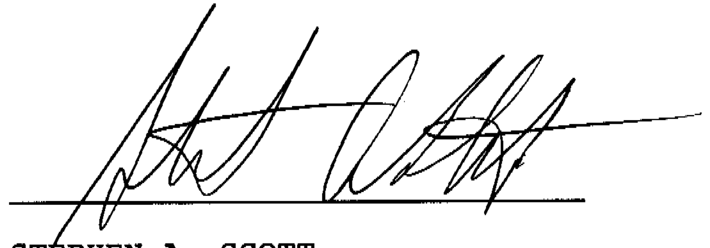
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to EDWARD M. WALLER, JR., Esq., and CHARLES WACHTER, Esq., Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Attorneys for Petitioner, 501 East Kennedy Blvd., Tampa, FL 33601, by U.S. Mail, postage prepaid, this 30th day of August, 1994.



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