

In the Matter of

EXCELLUS HEALTH PLAN, INC.

AOD # 12-041

**ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW
SECTION 63, SUBDIVISION 15**

Pursuant to the provisions of Executive Law ("EL") § 63(12) and Article 22-A of the General Business Law ("GBL"), Eric L. Schneiderman, Attorney General of the State of New York, caused an inquiry to be made into certain business practices of Excellus Health Plan, Inc. ("Excellus") relating to its accounting of subscriber deductibles and the consequences thereof in its claims adjudications.

1. Excellus is a non-profit health service corporation organized and licensed under Article 43 of the New York Insurance Law ("IL"). Excellus operates using assumed names for its Article 43 business, including Excellus BlueCross BlueShield, Univera HealthCare and Univera. The plan also holds a Certificate of Authority under Article 44 of the New York State Public Health Law. The assumed names for the Article 44 business are Upstate HMO and Univera Healthcare HMO.

2. Excellus's principal offices are located at 165 Court Street, Rochester, NY 14647.

3. In the regular course of business, Excellus offers and enrolls health plan members in various types of health plans and contracts with health care providers for the delivery of health care services to those members. Excellus provides health care coverage for approximately 1.8 million consumers in New York State.

I. OAG INVESTIGATION AND FINDINGS

4. The Office of the New York State Attorney General's Health Care Bureau ("OAG") conducted an investigation into Excellus's loading of subscribers' deductible and out-of-pocket maximum information into its automated claims system (the "Investigation") following the receipt of member complaints that claims for health care services were not being properly paid by Excellus after their required deductibles¹ had been met. Upon investigation, it was determined that Excellus's automated claims system was failing to properly account for payments towards the member deductible.

5. Excellus reportedly became aware of the claims system errors in early October 2011, when its Customer Service phone line received escalating numbers of complaints from members who asserted that they had met their deductibles such that Excellus should have been paying providers. Instead, providers were improperly billing members because Excellus's systems miscalculated members' deductibles and consequently had erroneously denied payment to those providers in whole or in part.

6. Excellus reported that its resulting internal investigation demonstrated that the implementation of a software change in one of its claims processing systems, on or about September 1, 2011, caused a reset of the data recording the total monies paid by members in satisfaction of their deductibles such that claims processed after September 1, 2011 were erroneously denied for failure to satisfy a deductible that had, in fact, already been met (the "accumulator error").

¹ A deductible is a fixed dollar amount - typically based on a calendar year - that is required to be paid by a subscriber before a health plan, such as Excellus, will begin to pay for covered medical services. Depending on the terms of the health plan contract, the deductible can be as low as a few hundred dollars or as high as several thousand dollars.

7. Excellus utilizes seven different automated claims systems to process claims. The accumulator error occurred in Excellus's "Facets claim system."

8. Excellus represents that it remedied the technical problem within weeks of discovery of the accumulator error and developed a computer program to run erroneously-applied deductible amounts against the correct deductible amounts in order to determine those members adversely affected by the accumulator error. Excellus represents that the correction required a period of months to review and remedy the claims of those members (most of whom are covered under Excellus's high deductible plans).

9. Excellus also reported that prior to September 1, 2011 there were a limited number of accumulator errors resulting from a variety of other causes, such as manual data entry and eligibility set up errors, that were addressed on a case by case basis.

10. Excellus asserts that, beginning in October 2011, it issued notices to its participating providers advising them that claims affected by the accumulator error would be adjusted to pay the outstanding amount that resulted from the accumulator error, and requesting that providers then refund the amounts their patients paid to the provider as a result of Excellus's miscalculation of their deductible.

11. Beginning January 24, 2012 and through May 2012, Excellus asserts that it sent a letter to each of the 7,472 subscribers who were impacted by the miscalculation of their deductible in an amount of \$250 or less, explaining the accumulator error. Excellus separately mailed reimbursement checks to all such subscribers, including 12% interest. Excellus represents that it paid out \$697,517.25 to these subscribers.

12. Beginning January 30, 2012 and through May 2012, Excellus represents that it sent letters to subscribers who were impacted by the miscalculation of their deductible in

amounts exceeding \$250 to advise them to: (i) expect reimbursements from their provider if they paid their provider directly; and (ii) call Excellus if they have questions.

13. Excellus reports that in October 2011, it began a manual review and adjustment of claims that were improperly adjudicated as a result of the accumulator error and began issuing payments to providers, pharmacies and subscribers. Excellus asserts that in May 2012, it completed its adjustment of approximately 15,615 claims for 5,347 members and issued payments totaling \$2,369,807.40.

14. The OAG finds that as a result of the accumulator error, Excellus failed to correctly process health care claims in violation of New York State law, including IL § 2601 and GBL § 349.

WHEREAS, Excellus neither admits nor denies the OAG's Findings set forth in paragraphs 4 - 14 above;

WHEREAS, the OAG is willing to accept the terms of this Assurance of Discontinuance pursuant to EL § 63(15) and to discontinue its Investigation; and

WHEREAS, the parties each believe that the obligations imposed by this Assurance of Discontinuance are prudent and appropriate;

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the parties that:

II. PROSPECTIVE RELIEF

15. Excellus shall process claims in accordance with all applicable law, including IL § 2601, members' certificates of coverage, and this Assurance of Discontinuance.

16. Within 30 days of the Effective Date of this Assurance of Discontinuance (as defined in paragraph 49 below), Excellus shall provide the OAG certification, subscribed to by an officer of Excellus authorized to bind Excellus, that the technical problem giving rise to the accumulator error has been resolved.

17. Excellus shall revise its policies and procedures as necessary to conform to the requirements of New York law and this Assurance of Discontinuance.

III. OUTREACH, ASSISTANCE AND RESTITUTION

18. Excellus shall: (i) provide outreach and assistance to those members who, as a result of the accumulator error, paid their provider in excess of any applicable deductible, coinsurance or co-payment; and (ii) ensure that all such members receive restitution, including 12% interest.

19. Within 7 days of the Effective Date of this Assurance of Discontinuance, Excellus shall submit to the OAG a form of notice. The notice's content, form and delivery mechanism shall be subject to OAG approval ("Notice") and shall include:

- a) a summary of the accumulator error and the actions taken by Excellus to remedy the problem;
- b) the claim number(s) of the affected claim(s);
- c) the dates of service of the affected claim(s);
- d) the names of the providers who submitted the affected claim(s);
- e) the specific amount, including 12% interest, paid to each provider for each affected claim;
- f) a statement that if any member paid a provider in an amount that exceeded the member's cost-sharing under their health insurance contracts for

claim(s) and the member has not received a refund from the provider, the member may contact Excellus through a designated call center in order to request assistance;

- g) the procedures for submitting reasonable proof to Excellus to secure refunds for overpayments made to providers. Such reasonable proof may include, but not be limited to, canceled checks, receipts, provider letters, paid invoices or other credible indicia of payment of all or part of the claim ("Proof of Payment");
- h) a dedicated toll-free helpline number for further information and assistance; and
- i) a statement that, if dissatisfied, a member may file a complaint with the OAG, including the OAG's website address where a complaint form may be downloaded,
www.ag.ny.gov/sites/default/files/pdfs/bureaus/health_care/complaint_form and the toll-free number (800) 428-9071.

20. Within 30 days of receiving OAG approval of the Notice (as defined in paragraph 19 above), Excellus shall send the Notice to all affected subscribers described in paragraph 13 above whose claims Excellus adjusted and then paid to subscribers' providers.

21. Excellus shall render assistance and support to all members who contact Excellus with complaints or requests in response to receipt of the Notice and shall document the same in accordance with paragraph 26 below.

22. If a member contacts Excellus for assistance because a provider has not refunded payments made on a claim(s) affected by the accumulator error and the member has provided Excellus with Proof of Payment of all or part of the affected claim(s), Excellus will, within 60 days of the date member contacts Excellus, secure a refund for the member either from the provider, or if unsuccessful, Excellus will provide the refund directly to the member plus 12% interest. In accordance with IL §3224-b, Excellus may recoup the amounts it pays to these members by reducing future payments to the providers who failed to refund their members as requested by Excellus..

IV. MONITORING

A. Monitoring by Excellus

23. Excellus shall monitor its adherence to the requirements of all applicable laws and this Assurance of Discontinuance over a six month period beginning one month after the Effective Date (the "Monitoring Period").

24. At the end of the Monitoring Period, Excellus shall manually analyze a statistically valid random sampling of claims submitted on behalf of members in high deductible plans that were impacted by the accumulator error to determine whether:

- a) the deductibles for such claims were accurately processed; and
- b) the explanation of benefit statements ("EOBs") accurately reflect members' accumulated deductibles and remaining liability.

25. If the analysis performed pursuant to paragraph 24 above reflects that the deductibles were erroneously determined or the deductible amounts were inaccurately reflected on EOBs below the accuracy rate of 95% (with +/- 2% confidence interval) for all

claims processed for such high deductible plans, Excellus shall develop and implement an appropriate remedial strategy, including additional monitoring.

Member Complaint/Assistance Report

26. From the Effective Date going forward, Excellus shall:
- a) log and track by date all disputes and complaints received from any members that arise out of the subject matter of this Assurance of Discontinuance including, but not limited to, alleged balance billing by providers; and
 - b) document how it handles each dispute, complaint, or request for assistance and how each was resolved (the "Member Complaint/Assistance Report"). In situations where Excellus assisted in securing member refunds or paid members directly, the Member Complaint/ Assistance Report shall include a unique identifier for each such member, provider's name, office address, affected claim numbers, date of services, refund and interest amounts and payment resolution date.

B. Independent Audit

27. Within six months of the Effective Date, Excellus shall submit to the OAG the names and addresses of three independent auditors with appropriate experience to conduct the audit set forth in paragraph 28 and their respective audit proposals for OAG approval. Excellus shall engage the services of the independent auditor whose audit proposal is among those approved by the OAG ("Auditor")

28. Excellus shall, no later than 12 months following the Effective Date of this Assurance of Discontinuance, undergo an audit by the Auditor. The Auditor shall examine Excellus's compliance with regard to the high deductible plans that were impacted by the accumulator error and all of the related elements set forth in Sections II, III and IV of this Assurance of Discontinuance. If the Auditor's findings reflect that deductibles were determined at or above the accuracy rate of 95% (with +/- 2% confidence level) and the deductible amounts reflected on EOBs were at or above the accuracy rate of 95% (with +/- 2% confidence level), Excellus shall be deemed compliant with this Assurance of Discontinuance.

29. The independent audit may be extended for an additional time period(s) if the OAG finds non-compliance by Excellus with this Assurance of Discontinuance.

V. REPORTS TO OAG

30. Within one month following the end of the Monitoring Period, Excellus shall submit to the OAG a report including:

- a) the Member/Complaint Assistance Report;
- b) all of the subscribers to whom the Notices were sent, including a unique identifier for each such subscriber, provider's name and office address and dates services were rendered; and
- c) a description and schedule of any corrective measures taken or planned by Excellus, pursuant to the obligation set forth in paragraph 25 of this Assurance of Discontinuance.

31. Excellus shall submit the Auditor's report to the OAG within 14 days of completion of the independent audit.

32. The OAG retains the right to access any documents or records from Excellus relating to the compliance of this Assurance of Discontinuance.

VI. AFFIDAVITS OF COMPLIANCE

33. Excellus shall submit to the OAG, within 12 months after the execution of this Assurance of Discontinuance, and subsequently 24 months after execution of this Assurance of Discontinuance, an affidavit, subscribed to by an officer of Excellus authorized to bind Excellus, setting forth Excellus's compliance with the provisions of this Assurance of Discontinuance.

VII. PAYMENT

34. Excellus shall pay \$125,000 to the New York State Department of Law, within 30 days of the Effective Date of this Assurance of Discontinuance.

35. The OAG may assess penalties in accordance with GBL § 350-d and require additional restitution based on the audit described in paragraphs 27-29 above.

VIII. MISCELLANEOUS

36. OAG has agreed to the terms of this Assurance of Discontinuance based on, among other things, the representations made to OAG by Excellus and their counsel and OAG's own factual investigation as set forth in Findings 4 - 14 above. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance of Discontinuance is voidable by the OAG in its sole discretion.

37. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance of Discontinuance has been made to or relied upon by Excellus in agreeing to this Assurance of Discontinuance.

38. Notwithstanding any provision of this Assurance of Discontinuance to the contrary, the OAG may, in its sole discretion, grant written extensions of time for Excellus to comply with any provision of this Assurance of Discontinuance.

39. Excellus represents and warrants, through the signatures below, that the terms and conditions of this Assurance of Discontinuance are duly approved, and execution of this Assurance of Discontinuance is duly authorized. Excellus shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance of Discontinuance or expressing the view that this Assurance of Discontinuance is without factual basis. Nothing in this paragraph affects Excellus's (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings to which OAG is not a party. This Assurance of Discontinuance is not intended for use by any third party in any other proceeding and is not intended, and should not be construed, as an admission of liability by Excellus.

40. This Assurance of Discontinuance may not be amended except by an instrument in writing signed on behalf of all the parties to this Assurance of Discontinuance.

41. This Assurance of Discontinuance shall be binding on and inure to the benefit of the parties to this Assurance of Discontinuance and their respective successors and assigns, provided that no party, other than OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance of Discontinuance without the prior written consent of OAG.

42. In the event that any one or more of the provisions contained in this Assurance of Discontinuance shall for any reason be held to be invalid, illegal, or

unenforceable in any respect, in the sole discretion of the OAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance of Discontinuance.

43. To the extent not already provided under this Assurance of Discontinuance, Excellus shall, upon request by OAG, provide all documentation and information necessary for OAG to verify compliance with this Assurance of Discontinuance. All notices, reports, requests, and other communications to any party pursuant to this Assurance of Discontinuance must reference “**AOD # 12-041**”, shall be in writing and shall be directed as follows:

If to Excellus to: Stephen Sloan
Senior VP, Chief Admin. Off., & General Counsel
Excellus BlueCross BlueShield
165 Court Street
Rochester, NY 14647

If to the OAG to: Dorothea Caldwell-Brown, Assistant Attorney General
Office of the Attorney General
Health Care Bureau
120 Broadway
New York, New York 10271

44. Acceptance of this Assurance of Discontinuance by OAG shall not be deemed approval by OAG of any of the practices or procedures referenced herein, and Excellus shall make no representation to the contrary.

45. Pursuant to EL § 63(15), evidence of a violation of this Assurance of Discontinuance shall constitute prima facie proof of violation of the applicable law in any action or proceeding thereafter commenced by OAG.

46. If a court of competent jurisdiction determines that Excellus has breached this Assurance of Discontinuance, Excellus shall pay to OAG the cost, if any, of such

determination and of enforcing this Assurance of Discontinuance, including without limitation legal fees, expenses, and court costs.

47. The OAG finds the relief and agreements contained in this Assurance of Discontinuance appropriate and in the public interest. The OAG is willing to accept this Assurance of Discontinuance pursuant to EL § 63(15), in lieu of commencing a statutory proceeding. This Assurance of Discontinuance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

48. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

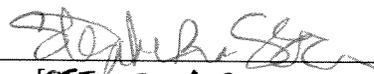
49. This Assurance of Discontinuance shall be effective on the date that it is signed by an authorized representative of the OAG (“Effective Date”).

50. Any failure by the OAG to enforce this entire Assurance of Discontinuance or any provision thereof with respect to any deadline or any other provision herein shall not be construed as a waiver of the OAG’s right to enforce other deadlines and provisions of this Assurance of Discontinuance.

IN WITNESS THEREOF, the undersigned subscribe their names:

Dated: New York, New York
NOVEMBER 27, 2012

EXCELLUS BLUECROSS BLUESHIELD

By: 
Name: [STEPHEN R SLOAN]
Title: [SENIOR VICEPRESIDENT,
CHIEF ADMINISTRATIVE OFFICER]

Dated: New York, New York
November 29, 2012

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

LISA LANDAU
Health Care Bureau Chief

By: 
DOROTHEA CALDWELL-BROWN
Assistant Attorney General
Health Care Bureau