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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RACHEL CONDRY, JANCE HOY, CHRISTINE ENDICOTT, LAURA BISHOP, FELICITY BARBER, and RACHEL CARROLL, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

UNITEDHEALTH GROUP INC., UNITEDHEALTHCARE, INC., UNITEDHEALTHCARE INSURANCE COMPANY, UNITED HEALTHCARE SERVICES, INC., and UMR, INC.,

Defendants.

Case No.: 3:17-cv-00183-VC

DEFENDANTS UNITEDHEALTH GROUP INC., UNITEDHEALTHCARE, INC., UNITEDHEALTHCARE INSURANCE COMPANY, UNITED HEALTHCARE SERVICES, INC., AND UMR, INC.'S REPLY IN FURTHER SUPPORT OF MOTION TO CERTIFY ORDER FOR IMMEDIATE APPEAL PURSUANT TO 28 U.S.C. § 1292(B)

Date: November 9, 2017
Time: 10:00 a.m.
Place: Courtroom 4

Compl. Filed: Jan. 13, 2017

Honorable Vincent Chhabria

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I. INTRODUCTION

In their opening brief, Defendants established that this Court's August 15, 2017 Order denying Defendants' motion to dismiss meets each of § 1292(b)'s criteria.[1] The Order involves a controlling question of law on which there is a substantial ground for difference of opinion, as evidenced by another district court's dramatically different interpretation of the same ACA provision in *York v. Wellmark, Inc. d/b/a Wellmark Blue Cross and Blue Shield of Iowa, and Wellmark Health Plan of Iowa, Inc.* Additionally, early appellate review will materially advance the ultimate termination of the litigation because this case will look very different – in discovery and at summary judgment, class certification, and trial – if the Ninth Circuit concludes that this Court's interpretation of ACA is wrong.

Plaintiffs' opposition does not call these conclusions into question. Instead, the opposition is filled with red herrings that misconstrue the inquiry under § 1292(b), mischaracterize Defendants' arguments, and attempt to avoid entirely the significance of the district court's decision in *York*, which expressly disagreed with this Court's order and, thus, demonstrates the need for immediate appellate review. In the end, however, and contrary to the arguments in Plaintiffs' opposition, there is a substantial and concrete legal dispute at the heart of this case: whether ACA should be construed expansively to require "meaningful coverage" for lactation counseling services (as this Court held) or more narrowly to prohibit only financial barriers to such services in the form of cost-shares, which include deductibles, coinsurance, and copayments (as ACA's text provides and the *York* court concluded). Because that legal question makes this Court's Order a bona fide candidate for appellate review, this Court should grant Defendants' motion and certify the Order for immediate appeal.

II. ARGUMENT

A. This Court's Order Presents A Controlling Question Of Law.

This Court's Order denying Defendants' motion to dismiss held that Defendants must provide "meaningful coverage" for ACA-mandated lactation counseling services that goes beyond anything set forth in ACA's plain text. (*See* Order at 3.) In doing so, the Court addressed a question

[1] Capitalized terms carry the meanings ascribed to them in Defendants' opening brief. (*See* Dkt. 81.)

of first impression, as no other court in the Ninth Circuit (or anywhere for that matter until *York*) had interpreted the ACA provision on which Plaintiffs' claims are based. As Defendants established in their opening brief, where a plaintiff's causes of action depend on the construction of a statute and raise a matter of first impression, interlocutory appellate review under § 1292(b) is warranted. Indeed, the Ninth Circuit regularly and routinely agrees to hear interlocutory appeals to address questions of statutory construction arising at the motion to dismiss stage, as well as appeals presenting novel questions of law. (*See* Opening Brief at 6 (citing cases)); *see also Joffe v. Google, Inc.*, 746 F.3d 920, 924 (9th Cir. 2013) ("On Google's request, the court certified its ruling for interlocutory appeal under 28 U.S.C. § 1292(b) because the district court resolved a novel question of statutory interpretation. We granted Google's petition ….").

Plaintiffs do not dispute that their case turns on the Court's interpretation of ACA. Instead, Plaintiffs attempt to avoid appellate review by arguing that the Order involved a mixed question of law and fact. (*See* Dkt. 83 ("Resp.") at 4–8.) Plaintiffs are wrong. The Order establishes the ***legal*** rules that will control this case going forward. While Defendants recognize that the question on a motion to dismiss is whether the plaintiff has pled facts sufficient to state a viable claim and that a district court's application of the law to the facts pled is rarely a candidate for interlocutory review, Defendants' motion does not seek certification of this Court's application of the law to the facts. Rather, Defendants' motion seeks review of this Court's ruling on ***what the law is*** – that is, this Court's interpretation of ACA. As Defendants have established, the issue is whether this Court's determination of the controlling legal standards is correct. *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1028 (9th Cir. 1982) (an issue is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court"); *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959) (a question need not be dispositive in order to be deemed controlling under § 1292(b)).

Plaintiffs also contend that framing the question raised by the Order as a choice between "meaningful coverage" and financial access "mischaracterizes the record and the Court's Order." (*See* Resp. at 4.) Not so. As noted above, the Order explicitly holds that Defendants must provide

"meaningful coverage" for ACA-mandated lactation counseling services and suggests that such "meaningful coverage" would encompass care guidelines concerning how long a provider must spend with a patient in providing breastfeeding support and counseling services that appear nowhere in ACA's text. (*See* Order at 3.) Equally unpersuasive is Plaintiffs' objection to Defendants' use of the term "financial access." (*See* Resp. at 10.) ACA requires coverage for preventive lactation counseling services without cost-sharing *(i.e.*, without deductibles, copayments, coinsurance, or similar charges). *See* 42 U.S.C. § 300gg-13(a)(4); 42 U.S.C. § 18022(c)(3)(A)(i). Defendants simply described ACA's prohibition of deductibles, copayments, and coinsurance as requiring "financial access" to lactation counseling. That was not a misnomer disingenuously crafted to create the appearance of a legal issue, as Plaintiffs contend; ACA's provision mandates coverage for certain preventive services and its prohibition on cost-sharing mandates financial access to that coverage.

In short, Plaintiffs' opposition does not call into doubt the obvious point that statutory interpretation is a purely legal exercise. *Boim v. Quranic Literacy Inst. and Holy Land Found. For Relief and Dev.*, 291 F.3d 1000, 1007 (7th Cir. 2002) (interpretation of a statute is a question of law); *Blackfeet Tribe v. United States Dep't of Labor*, 808 F.2d 1355, 1357 (9th Cir. 1987) ("To the extent this dispute involves issues of statutory interpretation, we review them de novo ….). For this reason and because Plaintiffs' claims rise and fall with the Court's interpretation of ACA, the Court's Order raises a controlling question of law, and § 1292(b)'s first criterion is met.

B. There Are Substantial Grounds For Differences Of Opinion On The Question Of Law Decided In The Order.

There is no doubt that there is a substantial ground for difference of opinion on whether the Order's interpretation of ACA is correct. Plaintiffs' efforts to argue otherwise do not withstand scrutiny. Indeed, their opposition proves Defendants' point with respect to § 1292(b)'s second criterion.

Plaintiffs' opposition spills considerable ink on the merits of the legal controversy by arguing that this Court correctly interpreted ACA, but that approach misses the point. (*See* Resp. at 8–12.) Under § 1292(b), the question is not whether the Order the movant seeks to appeal is correct, but whether a substantial ground for difference of opinion exists. *See Reese v. BP Exploration (Alaska)*

Inc., 643 F.3d 681, 688 (9th Cir. 2011) (a "substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution" or where "novel and difficult questions of first impression are presented" (internal quotation marks and citations omitted)). In other words, identification of a substantial legal controversy is the point of the exercise. *See id.* Plaintiffs' various merits arguments only serve to prove that there is a vast disparity in the parties' views on the correct interpretation of the ACA provision that is at the center of this case.

For instance, Plaintiffs contend that this Court's interpretation of ACA relies on and comports with the statute's "unambiguous provisions." (*See* Resp. at 1.) Defendants have a different and compelling view, contending that that this Court added a "meaningful coverage" requirement that does not appear in ACA's text. Indeed, as Defendants have argued, this Court's interpretation of the statute is inconsistent with ACA's definition of "coverage" – defined as "benefits consisting of medical care." *See* 42 U.S. C. § 300gg-91(b)(1).[2]

Plaintiffs likewise argue, without citation to supporting legal authority, that this Court correctly concluded that "meaningful coverage" is required because "inherent in an insurer's financial responsibility with respect to preventive care coverage, is the insured's ability to access the insurance coverage for such preventive care." (*See* Resp. at 10.) But, as Defendants have explained, there is no such "inherent" responsibility. Congress did not pack any directives into the plain language of ACA beyond the requirement that coverage be provided without cost-shares. *See* 42 U.S.C. § 300gg-13(a)(4). Indeed, as detailed in Defendants' opening brief, the provision of healthcare is so heavily regulated that Congress had no need to address those issues when drafting the preventive services provision of ACA. (*See* Opening Brief at 9–10.)

The district court's opinion in *York* confirms that a substantial ground for difference of opinion exists. Although Plaintiffs attempt to sidestep *York*'s significance, arguing that "Defendants' scant reliance on [*York*] does not amount to a demonstration of a substantial ground for difference of opinion," (*see* Resp. at 10), an extended discussion of that case was not needed for purposes of

[2] Plaintiffs' assertion that Defendants failed to raise ACA's definition of "coverage" in their motion to dismiss briefing is meritless. (*See* Resp. at 9.) Defendants had no occasion to do so, as Plaintiffs never suggested that the term "coverage" encompassed a multitude of requirements not grounded in ACA's text. (*See generally* Dkt. 59.)

showing that § 1292(b)'s criteria are met because the *York* decision speaks for itself. Indeed, the *York* court not only reached an entirely different conclusion on what ACA requires but also expressly stated that it had reviewed this Court's decision and "decline[d] to follow" it. *York*, Slip. Op. at 19 n.5.

Plaintiffs also contend that the Order and the *York* court's opinion differ only in terms of how the courts applied the law to the facts. (*See* Resp. at 10.) Not true. Indeed, the Order held that "meaningful coverage" is required to satisfy ACA's requirements:

> There is no "coverage" for a service if a patient can't find the service or isn't told that the service is available. Certainly there is no "coverage" if a patient is told that a service is *not* covered, which is a reasonable inference about what allegedly happened to at least some of the plaintiffs in this case. Nor is there "coverage" for a service … if a woman and her child live hundreds of miles from the nearest in-network provider. The service must be available in a meaningful way for the plan to comply with [ACA].

(*See* Order at 3 (emphasis in original).) By contrast, the *York* court rejected the expansive notion that such allegations could form the basis of an ACA violation:

> The Court finds Plaintiffs' arguments are not supported by the text of … ACA. Plaintiffs do not identify—and the Court is not aware of—any ACA provisions addressing "misleading and wrong guidance through [a health plan]'s customer care representatives and online provider search," the right of an insured "to receive care in a timely manner," or "major administrative barriers." … The text of ACA requires insurers to make available comprehensive lactation benefits without cost sharing. … This does not provide grounds to read into the statute procedural requirements Plaintiffs believe necessary to ensure easy access to those benefits, even if the effect would ultimately further the law's apparent objective.

York, Slip Op. at 18–19.

Contrary to the arguments raised in Plaintiffs' opposition, therefore, the differences between the Order and the *York* court's ruling do not boil down to the circumstantial application of settled law to disputed facts. Instead, both this Court and the *York* court resolved a central legal question in substantially similarly cases – namely, the scope of ACA's requirements.

C. An Immediate Appeal Will Materially Advance The Termination of The Litigation.

In their opening brief, Defendants established that immediate appellate review will materially advance the ultimate termination of this litigation because the Ninth Circuit's interpretation of the ACA preventive services provision will provide a definitive answer on the legal ground rules needed for an efficient and fair adjudication of this case. Plaintiffs argue in their opposition that § 1292(b)'s third element is not satisfied because the "litigation would not end" even if the Ninth Circuit adopted the *York* court's interpretation of ACA. (*See* Resp. at 13.) Plaintiffs' point is irrelevant. Immediate appeal of an interlocutory order is warranted ***even if*** the appeal will not end the case, provided that the "resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *See McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1259 (11th Cir. 2004) (citing Wright & Miller); *see also Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) (en banc), *cert. denied*, 419 U.S. 885 (1974) ("[O]n the practical level, saving of time of the district court and of expense to the litigants [is] . . . a highly relevant factor [in] determining if an interlocutory appeal is warranted."). That standard is met here.

A comparison of this Court's Order with the ruling in *York* illustrates how immediate appellate review would substantially narrow the issues at stake in the litigation and result in the saving of substantial public and private resources. This Court held that ACA-mandated lactation counseling services "must be available in a ***meaningful way*** for the plan to comply with the [ACA]." (Order at 3 (emphasis added); *see also id.* (holding that the "complaint adequately alleges that the defendants failed to provide ***meaningful coverage*** for these services").) While this Court left the "precise contours" of its "meaningful coverage" requirement for another day (*id.*), it found that "meaningful coverage" would require insurers and plans/plan administrators to have certain numbers of providers available to each of their members and that providers of the ACA-mandated services would spend a certain, undefined amount of time with each member/patient. (*Id.* (calling into question whether a "15-minute session" would be adequate for purposes of ACA, or if Defendants

could comply with the statute "if a woman and her child live hundreds of miles from the nearest in-network provider").)

This Court also found that Plaintiffs had alleged a plausible violation of ACA, stating that "plans must provide information to participants about the providers in their networks." (*Id.* at 2.) By contrast, the *York* court concluded that the plaintiffs' efforts to base a claim for violations of ACA on what Plaintiffs characterize as "administrative barriers" to access and "lack of information" were unsupported by the plain language of the statute. *York*, Slip. Op. at 18. The Court reasoned that the plaintiffs had not identified "any ACA provisions addressing 'misleading and wrong guidance through [a health plan]'s customer care representatives and online provider search,' the right of an insured to 'receive care in a timely manner,' or 'major administrative barriers.'" *Id.* The *York* court also rejected the theory the defendants had "violated … ACA by failing to construct a list of in-network providers of Comprehensive Lactation Benefits," explaining that, taken in context, the FAQ document upon which the plaintiffs relied (and upon which Plaintiffs rely here) "does not … require an insurer to create a separate list of lactation counseling providers." *Id.* at 22 (internal quotation marks omitted).

That difference of opinion is meaningful and important. When this case and the *York* case were filed, the parties were in the same position. Both sets of plaintiffs filed claims based on ACA, contending that the statute had been violated based on virtually identical allegations. Now, however, in light of the divergent interpretations of ACA, the two cases will proceed on markedly different paths because what amounts to an ACA violation is markedly different in the two cases. While this case will turn on a subjective question – is coverage "meaningful" – the *York* case will turn on an objective inquiry – whether the defendants had in-network providers at the time the plaintiffs sought services, such that the defendants did not violate ACA when they denied coverage for, or imposed cost-shares on, out-of-network services. That divergence will not only potentially impact the outcome of the cases (at summary judgment, class certification, or trial), but also will impact the course of the cases themselves. Here, for example, this Court's interpretation of ACA creates the possibility of expansive discovery aimed at answering the highly subjective question of whether

Defendants provide "meaningful coverage" for ACA-mandated lactation counseling services. Indeed, as explained in Defendants' opening brief, Plaintiffs have already served discovery requests asking for information regarding, for example, "the expertise of non-hospital-based, in-[n]etwork providers," including the "length of time to secure an appointment" and the "availability of emergency or in-home care." (*See* Dkt. 81-3 at Request No. 11; *see also* Request No. 12 (requesting "[a]ll [d]ocuments concerning the lactation expertise and availability of care provided by hospital-based, in-network [p]roviders").) By contrast, the *York* case will be far more confined, with the only relevant question being whether the defendants in that case have "failed to provide lactation counseling benefits by imposing cost-sharing on Plaintiffs for out-of-network counseling."[3] *York*, Slip. Op. at 25.

Thus, Plaintiffs are simply wrong when they argue that this Court's opinion does not meet § 1292(b)'s third criterion, as this Court's legal interpretation of ACA has profoundly shaped the arc of this case. Accordingly, certifying the Order for immediate appeal is the sensible option, and Defendants respectfully urge that their motion be granted.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court certify its Order denying Defendants' motion to dismiss for immediate appeal.

DATED: October 5, 2017

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[3] For this reason, Plaintiffs' assertion that a "meaningful coverage" requirement is entirely consistent with an interpretation that requires only financial access to ACA-mandated lactation counseling services is patently wrong. (*See* Resp. at 10.)