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newsletter


A report to clients and friends of the firm

**Edited by Stacey C.S. Cerrone and Russell L. Hirschhorn**

October 2015
**in this issue**

*For the latest insights on developments in the world of employee benefits, executive compensation & ERISA litigation, visit our blog at www.erisapractice center.com.*



## Editor's Overview

This month, we review the Second Circuit's ruling in *New York State Psychiatric Ass'n, Inc. v. UnitedHealth Grp*. wherein the Second Circuit ruled that: (i) a provider association has associational standing to bring suit under the Mental Health Parity and Addiction Equity Act of 2008 for declaratory and injunctive relief on behalf of its members, and (ii) a third-party plan administrator can be sued under ERISA Section 502(a)(1)(B) and 502(a)(3) for violations of the Parity Act. 2015 WL 4940352 (2d Cir. Aug. 20, 2015). The Second Circuit's decision could lead to an increase in litigation between mental health care providers and plan administrators, and increased enforcement of the Parity Act because it opens the door to provider associations seeking to enforce the Act against plan administrators. However, as discussed below, several important issues remain undecided.

As always, please be sure to review the Rulings, Filings, and Settlements where we review issues under the Multiemployer Pension Reform Act, preemption of state law claims for short-term disability benefits, and jurisdictional issues.

## Second Circuit Finds Associational Standing for Provider Association to Sue Claims Administrator for Violations of the Mental Health Parity Act: A Look at *New York State Psychiatric Association v. United Health Group*[*]

By Benjamin Saper

Plan sponsors and plan administrators should pay close attention to a recent Second Circuit decision that may have important implications for future litigation among mental health care providers, plan administrators and third-party claims administrators under the Mental Health Parity and Addiction Equity Act of 2008 (the "Parity Act"). The Parity Act requires group health insurance issuers to ensure that financial requirements (e.g., copayments, coinsurance, or deductibles) and treatment limitations (e.g., limitations on the frequency of treatment, number of outpatient visits, or amount of days covered for

[*] Originally published in Bloomberg, BNA. Reprinted with permission.

inpatient stays) applicable to mental health benefits be no more restrictive than the requirements and limitations applied to non-mental health medical and surgical benefits covered by the plan or insurance.[1] The ruling in *New York State Psychiatric Ass'n, Inc. v. UnitedHealth Grp.*, No. 14-20-CV, 2015 WL 4940352 (2d Cir. Aug. 20, 2015), is noteworthy because it establishes that 1) a provider association has associational standing to bring suit under the Parity Act for declaratory and injunctive relief on behalf of its members because individual proof is not necessarily required; and 2) a third-party plan administrator can be sued under ERISA Section 502(a)(1)(B) and 502(a)(3) for violations of the Parity Act.

This class action was brought by the New York State Psychiatric Association ("NYSPA"); Jonathon Denbo ("Denbo"), an individual health plan participant; and Dr. Shelly Menolascino, an individual mental health care provider. The individual plaintiff, Denbo, sought damages but NYSPA only sought injunctive and declaratory relief. NYSPA is a professional association of psychiatrists practicing in New York, many of whom provided services to patients insured by United Healthcare Group ("United") and were assigned rights by participants in the plan. Plaintiffs sued under ERISA Sections 502(a)(1)(B) and 502(a)(3), alleging that United, as the third-party plan administrator, violated the Parity Act, breached its fiduciary duties under ERISA, and violated the terms of ERISA health insurance plans administered by United by treating mental health claims less favorably than claims for medical or surgical care. The suit was brought on behalf of classes consisting of United-insured patients and their psychiatrists who submitted health insurance claims which were subjected to United's allegedly illegal disparate treatment of mental health claims.

Plaintiffs' allegations centered on United's decision to deny Mr. Denbo's benefits claims for outpatient psychotherapy sessions after United conducted a concurrent review and determined that his treatment plan was not medically necessary. Plaintiffs claimed that United subjected only mental health claims, and not medical or surgical claims, to concurrent review or preauthorization, and applied more restrictive review standards to mental health claims than generally accepted mental health standards and the standards United applied to medical claims under the plan. Plaintiffs' alleged that these practices violated the Parity Act and the terms of the plan itself because they favored medical and surgical claims over mental health claims.

In the District Court, United successfully moved to dismiss the complaint, based principally on the argument that United, as claims administrator, could not be sued for violations of the Parity Act under ERISA Section 502(a)(1)(B). United argued that only a "plan administrator" could be sued under Section 502(a)(1)(B), and as a "claims administrator," United was not a proper defendant. The District Court agreed with United and found that only ERISA plans, ERISA plan trustees, and ERISA plan administrators could be sued under ERISA Section 502(a)(1)(B).[2] The District Court also dismissed Denbo's Section 502(a)(3) claim because adequate remedies were available under Section 502(a)(1)(B)-albeit not against this defendant. The District Court dismissed Dr. Menolascino's claims for the same reasons while also noting that she failed to meet the

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1 *See* 29 U.S.C. § 1185a(a)(3)(A).

2 980 F. Supp. 2d at 538 (citing *Chapman v. ChoiceCare Long Island Disability Plan*, 288 F.3d 506, 509 (2d Cir.2002); *Crocco v. Xerox Corp.*, 137 F.3d 105, 107–08 (2d Cir.1998); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir.1993)).

*Twombly* pleading standard. The NYSPA was dismissed both because it was found to lack associational standing and because United, as a claims administrator, was deemed an improper defendant. An appeal followed and the Second Circuit reversed on both of those issues and remanded for further consideration.[3]

**Associational Standing Claims**

The Second Circuit first considered whether NYSPA had associational standing. The Supreme Court established the standard for associational standing in *Hunt v. Wash. State Apple Advert. Comm'n*, [4] holding an association has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." An association "lacks standing to assert claims of injunctive relief on behalf of its members where the fact and extent of the injury that gives rise to the claims for injunctive relief would require individualized proof." *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.,* 651 F.3d 218, 229–30 (2d Cir.2011), *aff'd*, ——– U.S. ——, 133 S.Ct. 2321, 186 L.Ed.2d 398 (2013).

The parties did not dispute that NYSPA met the first two requirements for associational standing: 1) NYSPA's members had standing to sue United in their capacity as assignees of ERISA benefits and to prevent interference with their provision of mental health treatment, and 2) the action implicated rights germane to NYSPA. The only question at issue, then, was whether "the claim asserted [or] the relief requested requires the participation of individual members in the lawsuit." The Second Circuit held that NYSPA had adequately pleaded that its claims did not require individualized proof. The Court noted that NYSPA's claims sought only injunctive and declaratory relief, such that individualized proof was not necessarily required. The Court stated that at the pleading stage of the litigation, "it remains plausible that the participation of a limited number of NYSPA members will allow NYSPA to prove that United's practices violate the relevant statutes." The Court did include the important caveat that the District Court could still dismiss the NYSPA for lack of standing "if at summary judgment or at trial, NYSPA's claims require significant individual participation or proof."

The Court also reversed the District Court's dismissal of Denbo's Section 502(a)(3) claims. It held that although the Parity Act did not directly impose a fiduciary duty, ERISA's "catchall" provision, Section 502(a)(3), could impose a fiduciary duty arising indirectly from the Parity Act. The Court also ruled that the District Court acted prematurely in dismissing the Section 502(a)(3) "catchall" claim at the pleading stage on the grounds that the Section 502(a)(1)(B) provided adequate relief.

Having determined that NYSPA had associational standing, the Second Circuit remanded to the District Court to determine whether NYSPA had met the *Twombly* pleading standard.

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[3] The Second Circuit affirmed the dismissal of Dr. Menolascino's claims for failure to satisfy the *Twombly* pleading standard, *inter alia,* because the complaint failed identify the health insurance plans of Dr. Menolascino's patients.

[4] 432 U.S. 333, 343, 97 S. Ct. 2434 (1997)

### Claims Administrator Can be Sued Under Section 502(a)(1)(B)

The Second Circuit Court also reversed the District Court's ruling that United, as a claims administrator, could not be sued under Section 502 of ERISA based on violations of the Parity Act. In so ruling, the Court joined the rulings of six other circuits that an administrator could be sued under Section 502.[5]

The Court first addressed the claim under Section 502(a)(1)(B), which states that "[a] civil action may be brought ... by a participant or beneficiary ... to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." The Second Circuit rejected the argument advanced by United, and endorsed by the district court, that only ERISA plans, ERISA plan trustees, and ERISA plan administrators could be sued under ERISA Section 502(a)(1)(B), and as a "claims administrator," United was not a proper defendant. In so ruling, the Second Circuit noted that by its terms, Section 502(a)(1)(B) does not preclude suits against claims administrators and when it exercises total control over claims for benefits under a plan, the claims administrator is in fact a logical defendant. The Court then found that United was alleged to have exercised total control over the health plan's benefits denial process in that it "enjoyed sole discretion to deny benefits and make final and binding decisions as to the appeals of those denials." Thus, United was the "logical defendant" in a suit to recover benefits, enforce rights, or clarify rights to future benefits under ERISA.

The Court noted that its holding that claims administrators are proper defendants in suits under Section 502(a)(1)(B) is in accord with five other circuits on the same grounds: the Fifth, Sixth, Seventh, Ninth and Eleventh.[6] The Eighth Circuit has also held claims administrators are proper defendants without discussing the issue in detail.[7] In this case, the U.S. Department of Labor had supported reversal on this issue through an amicus brief. Guidance on the issue is not forthcoming from the Supreme Court as it recently declined to hear an appeal of a Ninth Circuit case regarding whether claims administrators are proper defendants in ERISA actions for benefits. *UnitedHealthcare of Ariz., Inc. v. Spinedex Physical Therapy, USA, Inc.*, U.S., No. 14-1286, cert. denied October 13, 2015.

### Proskauer's Perspective

The Second Circuit's decision could lead to an increase in litigation between mental health care providers and plan administrators, and increased enforcement of the Parity Act because it opens the door to provider associations seeking to enforce the Act against plan administrators. However, several important issues remain undecided.

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[5] *See Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 913–16 (7th Cir.2013); *LifeCare Mgmt. Servs. LLC v. Ins. Mgmt. Adm'rs Inc.*, 703 F.3d 835, 843–46 (5th Cir.2013); *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1205–07 (9th Cir.2011) (en banc).; *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 438 (6th Cir.2006); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1333–34 (11th Cir.2006); *Brown v. J.B. Hunt Transp. Servs., Inc.*, 586 F.3d 1079, 1081, 1088 (8th Cir.2009).

[6] *See Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 913–16 (7th Cir.2013); *LifeCare Mgmt. Servs. LLC v. Ins. Mgmt. Adm'rs Inc.*, 703 F.3d 835, 843–46 (5th Cir.2013); *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1205–07 (9th Cir.2011) (en banc).; *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 438 (6th Cir.2006); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1333–34 (11th Cir.2006).

[7] *See Brown v. J.B. Hunt Transp. Servs., Inc.*, 586 F.3d 1079, 1081, 1088 (8th Cir.2009).

For one, the ruling does not answer the questions of whether provider associations can pursue fiduciary breach claims when those claims are not tied to individual members' claims for benefits or whether a class would be appropriate. It is thus unclear whether, or under what circumstances, a provider association can sue for systematic changes in how claims are administered or whether such claims require detailed proof of how individual benefits are handled. A California district court dealt with related issues when it declined to certify a class of plaintiffs who were denied coverage for residential treatment services for severe mental health conditions. *Daniel F. v. Blue Shield of California*, 305 F.R.D. 115, 124 (N.D. Cal. 2014). The *Daniel F.* Court determined that the putative class was far too broad in that it sought to cover "every participant/beneficiary in a Blue Shield ERISA plan who was denied coverage, based on a policy exclusion, for any form of 'residential treatment' for any form of mental illness or behavioral disorder." Other courts may raise similar concerns when addressing suits brought by provider associations that seek global relief without allowing for individualized inquiries into specific benefit denials.

The Second Circuit also left undecided the question of whether a claims administrator is a proper defendant when it exercises less than total control over the benefits denial process. The Court found that United exercised total control because it "enjoyed sole and absolute discretion to deny benefits and make final and binding decisions as to appeals of those denials," and because United would be the only entity capable of providing direct relief if a participant's rights were violated. In a case where the claims administrator lacked similarly complete discretion in granting or denying benefits, this ruling could easily be distinguished.

Finally, a related issue surrounding who can sue to enforce the Parity Act, which was not addressed by the Second Circuit in the instant case, is pending before the Second Circuit in an appeal of *Am. Psychiatric Assoc. v. Anthem Health Plans*, 50 F. Supp. 3d 157 (D. Conn. 2014). In that case, the district court held that a provider could not bring a claim for breach of fiduciary duty under ERISA or the Parity Act based on an assignment of rights by a plan participant to a particular provider.[8] The Second Circuit's decision in that case will likely shed greater light on the ability of providers and provider associations to enforce the Parity Act against plan administrators by bringing ERISA claims.

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[8] See the March 2015 edition of the ERISA Litigation Newsletter for an in depth discussion of assignments of claims to providers and anti-assignment clauses. http://www.proskauer.com/news/detail.aspx?news=13987

## Rulings, Filings, and Settlements of Interest

### Plan Administrator’s ERISA Declaratory Judgment Action Dismissed for Lack of Jurisdiction

By Joseph Clark

> After a top-hat plan and pension plan denied a participant’s claims and appeals for additional benefits, the plan administrators preemptively filed a declaratory judgment action, seeking a declaration that: (i) termination of defendant’s employment was not for the purpose of interfering with his ability to attain rights under the plans or ERISA; (ii) the top-hat plan is exempt from certain ERISA requirements; and (iii) the pension plan correctly denied defendant’s claim and appeal.

The district court dismissed the action for want of personal jurisdiction. It concluded that it would have personal jurisdiction over defendant, a Florida resident, only if plaintiff could take advantage of ERISA’s nationwide service of process provision to sue defendant in North Carolina. Because a plaintiff may avail itself of the nationwide service of process provision only if the court has subject matter jurisdiction over the action, the court focused on deciding whether it could exercise subject matter jurisdiction in this case. In concluding that it could not, the court observed that in order for it to have subject matter jurisdiction, the action must have been brought to (i) “enforce any provisions” of ERISA or the plan, or (ii) obtain “appropriate equitable relief.” Here, the action was not brought to “enforce any provisions” of ERISA because, among other reasons, “a fiduciary’s declaratory judgment action to determine the extent of its liability is not an action that enforces ERISA.” Moreover, the action was not brought to obtain “appropriate equitable relief,” because in the court’s view, to allow the action to proceed would “open[] the door to procedural fencing and circumventing a plaintiff’s chosen forum.” The case is *Exec. Ret. Plan of Thermal Ceramics Latin Am., Ret. Comm. v. Magasrevy*, 2015 U.S. Dist. LEXIS 113197 (E.D.N.C. Aug. 26, 2015).

### State Law Claims for Short-Term Disability Benefits Not Preempted By ERISA

By Benjamin Saper

> A federal district court in Tennessee ruled that ERISA did not preempt state law claims for short-term disability benefits because the short-term disability plan fell under the “payroll practice” exception of ERISA. *LeBlanc v. SunTrust Bank*, No. 3:15-cv-00630 (M.D. Tenn. Aug. 24, 2015). SunTrust provided employees with short-term disability benefits for up to 25 weeks per injury or illness and required employees to be approved for the full 25-week period before they qualified for long-term disability benefits. In 2014, Plaintiff, a former employee of SunTrust, was approved for short-term disability benefits of less than 25 weeks and was subsequently denied an extension. SunTrust terminated Plaintiff after she failed to return to work. Plaintiff sued SunTrust and the administrator of SunTrust’s employee benefits plan alleging breach of contract and other causes of action under Tennessee law based on the denial of the balance of the 25 weeks of short-term disability benefits.

Defendants argued that Plaintiff's state law claims should be preempted (and thus her motion to remand to state court denied) because her complaint alleged as part of her damages the potential loss of long-term disability benefits. The Court rejected Defendants' argument and held that the Complaint's mere mention of long-term disability benefits, which are governed by ERISA, did not trigger preemption where Plaintiff did not apply for or receive a denial of long-term benefits or seek damages from the long-term disability plan's assets.

### Ninth Circuit Applies "Successorship Doctrine" to Claim for MPPAA Withdrawal Liability

By Brian DeShannon

> The Ninth Circuit concluded in a case of first impression that an employer could be held liable for its predecessor's withdrawal liability to a multiemployer pension fund pursuant to the "successorship doctrine." The Court ruled that "the most important factor in assessing whether an employer is a successor for purposes of imposing MPPAA withdrawal liability is whether there is substantial continuity in the business operations between the predecessor and the successor, as determined in large part by whether the new employer has taken over the economically critical bulk of the prior employer's customer base." The Ninth Circuit concluded that the district court failed to weigh whether the alleged successor had retained a significant portion of its predecessor's customer base, or "market share." In addition, the lower court miscalculated the "continuity of workforce" factor by failing to limit the test to employees in the "bargaining unit," which could have led to a finding that there was in fact workforce continuity between the employers. The Court reversed and remanded the case for further consideration. The case is *Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael's Floor Covering, Inc.*, No. 12-17675, 2015 WL 5295091 (9th Cir. Sept. 11, 2015).

### "Highest Contribution Rate" Means Highest of Any CBA for ERISA Withdrawal Liability Payments

By Brian DeShannon

> The Third Circuit held that where an employer has been party to multiple collective bargaining agreements ("CBAs") with a multiemployer fund, an employer's withdrawal liability should be based on "the single highest contribution rate" established under the CBAs. In so ruling, the Court observed that ERISA requires annual withdrawal liability payments to be based on "the highest contribution rate at which the employer had an obligation to contribute under the plan," and rejected the employer's argument that a "weighted average" of the contribution rates should apply.

The parties also disagreed about whether the annual payment should include a ten percent surcharge the employer had been paying to the fund, as required by the Pension Protection Act of 2006 for plans in "critical status." Consistent with the Multiemployer Pension Reform Act of 2014, the Third Circuit concluded that the surcharge should not factor into the employer's withdrawal liability payment, since surcharges are not part of contribution rates used to calculate the payment. The case is *Bd. of Trustees of IBT Local 863 Pension Fund v. C & S Wholesale Grocers, Inc.*, No. 14-1956, 2015 WL 5438539 (3d Cir. Sept. 16, 2015).

Our ERISA Litigation practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation practice defends complex and class action employee benefits litigation.

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