FILED
SUPREME COURT
STATE OF WASHINGTON
2/2/2023 12:53 PM
BY ERIN L. LENNON
CLERK

No. 101561-5

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 82800-2
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

P.E.L., a minor, and P.L. and J.L., a married couple and guardians of P.E.L.,

Plaintiffs–Respondents,

v.

PREMERA BLUE CROSS, a Washington health carrier,

Defendant–Petitioner.

RESPONDENTS' ANSWER TO PREMERA BLUE CROSS'S PETITION FOR REVIEW

Eleanor Hamburger, WSBA #26478
Daniel S. Gross, WSBA #23992
SIRIANNI YOUTZ SPOONEMORE HAMBURGER PLLC
3101 Western Ave., Ste. 350
Seattle, WA 98121
Tel. (206) 223-0303
ehamburger@sylaw.com
dgross@sylaw.com

Marlena Grundy, WSBA #47026
PNW STRATEGIC LEGAL SOLUTIONS, PLLC
1408 140th Pl. NE, Ste. 170
Bellevue, WA 98007
Tel. (425) 223-5710
marlena@pnwsls.com

Attorneys for Plaintiffs–Respondents

Table of Contents

I. INTRODUCTION 1

II. IDENTITY OF RESPONDENT 4

III. STATEMENT OF THE CASE 5

A. PREMERA'S CONTRACT PROVIDES COVERAGE FOR RESIDENTIAL MENTAL HEALTH TREATMENT. 5

B. PREMERA'S ADOPTION OF THE EXCLUSION DEVIATED SUBSTANTIALLY FROM ITS STANDARD PRACTICES. 6

C. P.E.L. REQUIRED MENTAL HEALTH TREATMENT AT EVOKE, A LICENSED WILDERNESS FACILITY. 12

D. P.E.L.'S TREATMENT AT EVOKE WAS MEDICALLY NECESSARY. 13

E. PROCEDURAL BACKGROUND 14

IV. ARGUMENT 15

A. PREMERA'S PETITION DOES NOT DEMONSTRATE ANY RAP 13.4 FACTORS. 15

1. Insureds May Enforce Premera's Promise to Comply with the ACA Parity Requirements. 15

B. INSURANCE BAD FAITH CLAIMS MAY BE PURSUED WITHOUT EVIDENCE OF OBJECTIVE SYMPTOMOLOGY. 22

C. IF PREMERA'S PETITION IS ACCEPTED, THE COURT SHOULD CONSIDER ADDITIONAL ISSUES, PURSUANT TO RAP 13.4 24

1. Premera's Policy Facially Violated the ACA's Parity Requirements. 24

2. Premera Violated WAC 284-43-7080(2) When It Administered its Wilderness Exclusion........ 26

3. A Reasonable Jury Could Find That Premera Violated the ACA's Parity Law when it failed to conduct a formal medical necessity review or Parity Act analysis of Wilderness programs. 29

V. CONCLUSION 31

VI. CERTIFICATE OF COMPLIANCE 31

CERTIFICATE OF SERVICE........ 33

Table of Authorities

Cases

A.F. v. Providence Health Plan,
35 F. Supp. 3d 1298 (D. Or. 2014) 26

A.Z. v. Regence Blueshield,
333 F. Supp. 3d 1069 (W.D. Wash. 2018).................... 26, 29

Anderson v. State Farm Mut. Ins. Co.,
101 Wn. App. 323 (2000) 28

Briscoe v. Health Care Serv. Corp., 2020
U.S. Dist. LEXIS 9447 (N.D. Ill. Jan. 21,
2020).. 24

Briscoe v. Health Care Service Corp.,
281 F. Supp. 3d 725 (N.D. Ill. 2017) 3, 22, 23, 24

Condry v. UnitedHealth Grp., Inc.,
No. 17-cv-00183-VC, 2017 U.S. Dist.
LEXIS 130089 (N.D. Cal. Aug. 15, 2017) 19

Coventry v. Am. States Ins. Co.,
136 Wn.2d 269 (1998) 28

Danny P. v. Catholic Health Initiatives,
891 F.3d 1155 (9th Cir. 2018)...................................... 26, 30

Doe v. United Behavioral Health,
523 F. Supp. 3d 1119 (N.D. Cal. 2021) 30

Dombrosky v. Farmers Ins. Co.,
84 Wn. App. 245 (1996) 27

Drollinger v. Safeco Ins. Co.,
59 Wn. App. 383 (1990) 10

Durant v. State Farm Mut. Auto. Ins. Co.,
191 Wn.2d 1, 11 (2018) 17, 18

Etcheverry v. Tri-Ag Serv., Inc.,
993 P.2d 366 (Cal. 2000) 20

Gallagher v. Empire HealthChoice Assurance, Inc.,
339 F. Supp. 3d 248 (S.D.N.Y. 2018)........................... 26, 31

Hallauer v. Spectrum Properties, Inc.,
143 Wn.2d 126 (2001) 33

Heston v. Int'l Med. Grp.,
528 F. Supp. 3d 963 (S.D. Ind. 2021) 19

J.G. v. Boeing Co. Master Welfare Plan,
No. C20-1510RSL, 2023 U.S. Dist. LEXIS 11308 (W.D. Wash. Jan. 23, 2023) 13, 15

Kyrkos v. State Farm Mut. Auto. Ins. Co.,
121 Wn.2d 669 (1993) 18

Liberty Mut. Ins. Co. v. Tripp,
144 Wn.2d 1 (2001) 18

Marlena Mills v. BlueCross Blueshield of Tenn., Inc.,
2017 U.S. Dist. LEXIS 2730 (E.D. Tenn. Jan. 9, 2017) 21

Michael D. v. Anthem Health Plan of Ky. Inc.,
369 F. Supp. 3d 1159 (D. Utah 2019)................................. 31

Mingus v. Blue Cross & Blue Shield of Kan., Inc.,

2017 U.S. Dist. LEXIS 179159 (D. Kan. Oct. 30, 2017) 24

N.R. v. Raytheon Co., 24 F.4th 740 (1st Cir. 2022) 26, 29

O.S.T. v. Regence BlueShield, 181 Wn.2d 691 (2014) 32, 33

S.L. v. Premera Blue Cross, 2020 U.S. Dist. LEXIS 149764 (W.D. Wash. Aug. 17, 2020) 14

Unitedhealthcare of N.Y., Inc. v. Lacewell, 967 F.3d 82 (2d Cir. 2020) 33

UNUM Life Ins. v. Ward, 526 U.S. 358, 119 S. Ct. 1380 (1999) 18

Vorpahl v. Harvard Pilgrim Health Ins. Co., 2018 U.S. Dist. LEXIS 121316 (D. Mass. July 20, 2018) 26, 31

Woo v. Fireman's Fund, 161 Wn.2d 43 (2007) 3, 28

York v. Wellmark, Inc., 2017 U.S. Dist. LEXIS 199888 (S.D. Iowa Sep. 6, 2017), *affirmed,* 965 F.3d 633 (8th Cir. 2020) 3, 22, 23, 26

Statutes

15 U.S.C. §1011 22

15 U.S.C. §1012 22

15 U.S.C. §1101 21

29 U.S.C. §1132(a) 23
29 U.S.C. §1185a(a)(4) 7
42 U.S.C. §18031(j) 23
42 U.S.C. §300gg-26(a)(3) .... passim
ORS §§418.205–.327 13
ORS §418.205(7)(a) 13
RCW 48.18.510 17
RCW 48.44.341 34

Regulations

45 C.F.R. §146.136(c) 7
WAC 284-43-7000 32
WAC 284-43-7080(2) .... passim

Rules

RAP 13.4 .... passim

I. INTRODUCTION

In 2016, Respondent/Plaintiff P.E.L. was a teenager diagnosed with serious mental health conditions and in need of life-saving residential treatment. She was admitted to Evoke, a licensed wilderness therapy program in Oregon which set her on a path towards wellness. Premera Blue Cross ("Premera") denied all coverage for Evoke based upon a contractual exclusion of "wilderness programs," appearing only in its mental health benefit (the "Exclusion"). The Exclusion, applicable only to mental health benefits, violated the Affordable Care Act's ("ACA") mental health parity requirements, which were expressly incorporated into the contract. *See* CP 85; 42 U.S.C. §300gg-26(a)(3)(A)(ii).

Despite this straightforward contract breach, the trial court found that: (1) under the ACA, Premera need only cover treatment at Residential Treatment Centers ("RTCs"), a different type of residential treatment facility; (2) WAC 284-43-7080(2), which implemented the ACA's parity law and is also

incorporated into the contract, does not mean what it says when it prohibits the categorical exclusion of mental health services without considering medical necessity. Instead, the trial court rewrote the rule to exclude residential treatment; and (3) even if Premera's actions violated the ACA and WAC 284-43-7080(2), Plaintiffs cannot pursue a breach of contract claim to remedy Premera's breach.

The Court of Appeals Division I reversed the trial court's decision, in part, and affirmed in part. The appellate court concluded that Plaintiffs could enforce the terms of the contract, as modified by the ACA. *See* Opinion at 6–8. "[G]iven the absence of any indication that Congress intended the ACA to preempt breach of contract claims, courts should permit plaintiffs to pursue claims to enforce a promise to comply with the ACA under the terms of a health plan." *Id.* at 7, *quoting Briscoe v. Health Care Service Corp.,* 281 F. Supp. 3d 725, 739 (N.D. Ill. 2017) (internal quotation omitted). The Opinion is consistent with multiple federal district court decisions and one federal

appeals court. *See Briscoe*, 281 F. Supp. 3d at 739; *York v. Wellmark, Inc.,* 2017 U.S. Dist. LEXIS 199888 (S.D. Iowa Sep. 6, 2017), *affirmed,* 965 F.3d 633, 639 (8th Cir. 2020).

The Court of Appeals further concluded that no evidence of objective symptomology of emotional distress is required to establish a claim for insurance bad faith. Opinion at 24–26. This determination is consistent with Washington caselaw. *See e.g., Woo v. Fireman's Fund*, 161 Wn.2d 43, 70 (2007) (affirming an award of damages for emotional distress in the absence of any objective symptomology in insurance bad faith case).

In short, there is no basis for review of the Opinion by this Court under RAP 13.4. Should the Court accept any of the issues for review, and it should not, it should also consider three important issues related to the enforcement of federal parity requirements, pursuant to RAP 13.4(d):

Did the Court of Appeals err when it concluded that:

(1) issues of fact remain concerning whether the Exclusion is an illegal separate treatment limitation applicable only to mental health benefits;

(2) WAC 284-43-7080(2) did not require Premera to cover wilderness treatment, when medically necessary, in 2016, even though the regulation implemented the ACA's parity requirements; and

(3) no reasonable jury could find that Premera failed to conduct a "medical necessity" review or the required Non-Quantitative Treatment Limitation ("NQTL") analysis for wilderness treatment?

II. IDENTITY OF RESPONDENTS

Respondents P.E.L., by and through her parents, and her parents, P.L. and J.L., are insureds who purchased a Premera insurance contract in 2016. P.E.L.'s claim for coverage of treatment at Evoke was denied by Premera in 2016, spurring this litigation.

III. STATEMENT OF THE CASE

A. PREMERA'S CONTRACT PROVIDES COVERAGE FOR RESIDENTIAL MENTAL HEALTH TREATMENT.

P.E.L. was covered under an individual/family Premera insurance contract governed by Washington law. CP 83–85, 135. Premera promised to comply with state and federal laws, including the ACA and the Federal Parity Act, even when compliance conflicted with the terms of the plan. CP 85, 110, 135.

Premera's contract provides for coverage of all treatment for mental health conditions when medically necessary ***including residential treatment:***

> Mental Health Care
>
> This plan covers ***all*** of the following services:
>
> - Inpatient, ***residential treatment*** and outpatient care to manage or reduce the effects of the mental condition.

CP 110 (emphasis added). The contract term "residential treatment" is undefined and not limited to a particular type of

provider. *See* CP 144 (definition of "provider"), 145–146 (no definition of "residential treatment").

Within the mental health benefit, the contract excludes "wilderness programs." CP 112. It does not list wilderness programs under its general exclusions or anywhere else in the contract. CP 119–123. By the contract's plain terms, the Exclusion applies only to mental health benefits, limiting the coverage for residential mental health treatment.

Premera admitted it administered the Exclusion only to deny mental health treatment. CP 441, 1457:16–1458:5. In a document purporting to describe its federally-mandated parity analysis (*see* 29 U.S.C. §1185a(a)(4); 45 C.F.R. §146.136(c)(2)(i), (ii)(A) (1)–(6), (c)(4)), Premera described the Exclusion as an "example of excluded mental health/substance use benefits." CP 150–51 (hereinafter "NQTL Statement").

B. PREMERA'S ADOPTION OF THE EXCLUSION DEVIATED SUBSTANTIALLY FROM ITS STANDARD PRACTICES.

Premera requires its Medical Policy Committee to meet regularly to review data and make coverage determinations about

medical and mental health services through the creation of a medical policy. CP 3151–3153. Medical policies "evaluate the medical necessity of [a] particular service or treatment or to determine if [it is] investigational or experimental." CP 3151; *see* CP 1437:25–1438:8, 1439:14–1440:4, 1444:25–1445:5. Under the Medical Review procedure, the medical policy drives the insurer's decision to exclude services from Premera's insurance contracts. CP 3152 (Experimental and investigational services "describe which services are likely to be excluded from coverage"). Services that are not considered "medically necessary" are excluded from coverage. *See id.*

In the NQTL Statement, Premera claimed the decision to exclude wilderness treatment was based on the following criteria:

> The plan bases decisions to cover services on [1] whether the service is generally accepted in the medical community as an effective medical treatment, [2] the availability of scientific research addressing the service's medical efficacy, [3] whether there are state licensing standards for providers of the service, [4] whether there are generally accepted medical standard for evaluating medical necessity and [5] whether the service

> actually treats a medical or mental health/substance use condition. ***Services that do not meet these criteria are plan exclusions.***

CP 150 (bracketed numbers and emphasis added). But Premera produced no documentary evidence showing that such an analysis actually occurred. CP 405, ¶5; CP 443, RFP No. 26 (no NQTL analysis or disclosure documents for 2016 related to wilderness exist), CP 444, RFP Nos. 27, 28 (no documents produced regarding whether wilderness treatment is "generally accepted in the medical community as an effective treatment" or any documents showing that the Exclusion applies "equally" to medical/surgical and mental health services). Indeed, nothing was produced except the handful of NQTL statements starting in 2017, well after the denial of P.E.L.'s treatment. *See* CP 150, CP 405 ¶5, CP 1491:21–23, 1492:20–23.

Premera's Rule 30(b)(6) witness, Robert Small, M.D., confirmed that Premera added the Exclusion to its contracts without conducting any formal review to determine whether wilderness treatment was medically necessary or convening its

Medical Policy Committee. CP 1441:13–20, 1442:1–10, 1442:24–1443:3, 1445:17–20. *See also* CP 2443:14–2444:16.

Adding the Exclusion to the Premera contract was Dr. Small's idea. In 2012, he noticed that Premera was receiving claims for wilderness treatment, and that the claims were routinely denied without any specific exclusion in the plan or any formal determination that the treatment was not medically necessary.[1] CP 1446:21–1447:15. Dr. Small suggested to the head of member contracts that Premera should "put the exclusion in print" because of "repeated inquiries" they received about the treatment. CP 1447:8–24. Based on that communication alone, Premera inserted the Exclusion into all of its Washington insured plans without ***any*** formal or informal review of medical necessity or the five-factor analysis in the NQTL statement. CP 1448:7–

[1]Until the Exclusion appeared in the policy, Premera had no legal authority to apply it. *See Drollinger v. Safeco Ins. Co.,* 59 Wn. App. 383, 386 (1990) ("[C]overage will not be excluded unless the policy does so in clear language").

12, 1449:12–18. No documentary evidence of any other analysis exists. CP 1444–1446, RFP Nos. 27–28.

The sole evidence of any medical necessity review of wilderness treatment by Premera was Dr. Small's testimony that he conducted unidentified "literature reviews" of wilderness treatment during his 20 years at Premera. CP 1444:6–19. This testimony was heavily disputed by Plaintiffs. ***First,*** other than Dr. Small's testimony, there is no evidence of any such review (*e.g.*, saved notes, emails, reports, or files) to show that Dr. Small actually conducted a medical necessity review of wilderness programs. CP 1444:6–19. A reasonable jury could conclude that Dr. Small's testimony inflated the significance of his "periodic literature reviews" to equate them with a formal "medical necessity" analysis under the contract and medical policy. *See e.g.,* CP 143, 3152.

Second, Dr. Small testified that his periodic reviews were unrelated to the decision to add the Exclusion. CP 1449:22–1450:1. A reasonable jury could conclude that Dr. Small's

"periodic review" was nothing more than his personal efforts to remain informed, and not a formal medical necessity review by Premera.

Third, even if Dr. Small's periodic review is considered to be evidence of a "medical necessity" review, that testimony is controverted by Premera's own internal policy and NQTL statement. Premera requires a formal process before inserting an exclusion into its contracts. CP 150 (describing how Premera establishes "Plan Exclusions"); CP 3151 ("Medical policies…establish coverage for new and developing medical and behavior health procedures"). Premera's process is far more involved than one employee informally perusing medical journals without documentation.

Fourth, there is conflicting testimony from Dr. Small (on behalf of Premera) that Premera excluded wilderness programs without any analysis at all. CP 1441:13–20 (Premera conducted no analysis that wilderness was experimental/investigational);

1442:6–10 (no formal consideration of wilderness programs at all).

C. P.E.L. REQUIRED MENTAL HEALTH TREATMENT AT EVOKE, A LICENSED WILDERNESS FACILITY.

P.E.L. was diagnosed with multiple serious mental health conditions including Major Depressive Disorder, Anxiety Disorder, and possible PTSD. CP 435. In February 2016, she was hospitalized with acute suicidal ideation. CP 400–01, ¶2; 435. P.E.L. was eventually released to her home with intensive outpatient treatment but could not be maintained safely. *Id.* Her local treatment team unanimously agreed she needed immediate treatment in a residential program, but there were no programs available locally. CP 400–01, ¶2.

P.E.L. enrolled in residential treatment with Evoke. *See* CP 355; CP 520–21; CP 539–41. Evoke is licensed in Oregon to offer residential mental health treatment statutorily defined as an "outdoor youth program." CP 1478; *see generally* ORS §418.205(7)(a); *see generally,* ORS §§418.205–.327; *J.G.*

v. Boeing Co. Master Welfare Plan, No. C20-1510RSL, 2023 U.S. Dist. LEXIS 11308, at *8–11 (W.D. Wash. Jan. 23, 2023) (Evoke was properly licensed in Oregon to deliver residential mental health treatment). Even Premera agrees that Evoke offered intermediate residential treatment. *See* CP 50.

D. P.E.L.'s Treatment at Evoke Was Medically Necessary.

Plaintiffs presented extensive evidence that P.E.L.'s treatment at Evoke was medically necessary. Her treating physician, Julia Bledsoe, M.D., would have prescribed P.E.L.'s treatment at a residential mental health treatment program like Evoke. CP 994, ¶9. Plaintiffs' experts, Dr. Gass and Dr. Glass, opined regarding the medically necessity of Evoke's treatment. CP 996–1017, 1054–58. Plaintiffs also submitted evidence of external reviewers who concluded that wilderness programs can be medically necessary. CP 455–473; *see S.L. v. Premera Blue Cross*, 2020 U.S. Dist. LEXIS 149764, at *2 (W.D. Wash. Aug. 17, 2020) (Premera paid for treatment at Evoke for another

enrollee); *see also J.G.,* 2023 U.S. Dist. LEXIS 11308, at *11 (Treatment at Evoke ordered to be covered).

E. PROCEDURAL BACKGROUND

This lawsuit was filed on October 1, 2019 with an amended complaint filed on July 9, 2020. CP 1–7, 26–34. The parties filed cross motions for summary judgment on November 13, 2020. CP 367–99; 543–71. The trial court denied Plaintiffs' Motion for Partial Summary Judgment and denied in part and granted in part Defendants' Motion for Summary Judgment. CP 1320, RP 77–79, 81.

On May 14, 2021, the parties filed another round of cross motions on summary judgment. CP 1545–1568; 2395–2426. On June 11, 2021, the trial court dismissed all of Plaintiffs' claims. RP 127:3–133:19; CP 2952.

Plaintiffs timely filed an appeal and the Court of Appeals issued its Opinion on November 21, 2022.

IV. ARGUMENT

A. PREMERA'S PETITION DOES NOT DEMONSTRATE ANY RAP 13.4 FACTORS.

Under RAP 13.4, review by the Court is only accepted if the appellate decision conflicts with a decision of another Washington appellate court; if it raises a significant question under the state or federal constitutions; or if it involves an issue of substantial public interest. None of these factors are present.

1. Insureds May Enforce Premera's Promise to Comply with the ACA Parity Requirements.

The Opinion properly concluded that insureds may bring a breach of contract claim to enforce their coverage rights, even when those rights are modified by the ACA. Opinion at 7. This is not a close call. The Opinion is consistent with the requirements of the Premera contract, Washington statute and caselaw.

First, the Premera contract expressly incorporates the ACA's requirements, including its Parity provisions as a supervening contractual requirement:

> If Congress, federal or state regulators or the courts make further changes or clarifications regarding the Affordable Care Act and its implementing regulations, … ***this plan will comply*** with them ***even if they are not stated*** in this booklet ***or if they conflict with statements made in this booklet***.

CP 85 (emphasis added). Compliance with the ACA is part of the express bargain between Plaintiffs and Premera. When Premera ignored the parity requirements, it breached this contractual provision.

Second, the ACA requirements and related OIC regulations are incorporated into Premera's contract by state statute. *See* RCW 48.18.510; *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 11 (2018).

Third, state and federal caselaw holds that governing insurance law is incorporated into an insurance contract's terms, excising conflicting terms. *UNUM Life Ins. v. Ward*, 526 U.S. 358, 376–77, 119 S. Ct. 1380 (1999); *Durant,* 191 Wn.2d at 11; *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 12 (2001); *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 121 Wn.2d 669, 671 (1993).

Premera promised Plaintiffs a specific benefit, residential treatment for mental health conditions, that would comply with the ACA parity laws ***even if compliance conflicted with the literal terms of the plan***. Consistent with that promise, Premera may not apply a separate categorical exclusion of a type of residential treatment only to mental health benefits. *See* 42 U.S.C. §300gg-26(a)(3)(A)(ii). This is properly a breach of contract claim. *See Condry v. UnitedHealth Grp., Inc.,* No. 17-cv-00183-VC, 2017 U.S. Dist. LEXIS 130089, at *9 (N.D. Cal. Aug. 15, 2017) (Plaintiff "is not trying to create a private right of action under the Affordable Care Act but rather to enforce her own rights in contract and quasi-contract"); *see e.g., Heston v. Int'l Med. Grp.*, 528 F. Supp. 3d 963, 976 (S.D. Ind. 2021).

Unable to locate a conflict within Washington cases, Premera argues that the Opinion conflicts with ***out-of-jurisdiction*** federal decisions. Pet. at 13–16. Conflicts with non-Washington decisions do not justify review under RAP 13.4. Premera cites to a California case for the proposition that the

Court should grant review even where there is no in-state conflict. *See* Pet. at 22, *citing Etcheverry v. Tri-Ag Serv., Inc.,* 993 P.2d 366, 367 (Cal. 2000).[2] RAP 13.4, however, does not allow for review based upon factors other than those specifically listed. *See id*.

Premera's "conflict" is also manufactured. Only one of Premera's cases involves breach of insurance contract claims and the Affordable Care Act.[3] *See* Pet. at 13–16 (cases relate to the Fair Labor Standards Act, Federal Insurance Contributions Act,

---

[2] In *Etcheverry*, ***eight federal appellate courts*** had ruled differently from the California appellate court. *Id.,* 993 P.2d at 368. Here, "[w]here lower federal precedents are divided or lacking, state courts must necessarily make an independent determination of federal law." *Id.*

[3] Even the two cases cited in the Opinion do not involve either the ACA or insurance. *See* Opinion, p. 7, n. 8. Premera's sole case addressing whether breach of contract claims may incorporate the ACA's requirements, *Marlena Mills v. BlueCross Blueshield of Tenn., Inc.,* 2017 U.S. Dist. LEXIS 2730, at *15 (E.D. Tenn. Jan. 9, 2017), does not address the McCarran Ferguson Act and was wrongly decided. *Id.* In any event, a single federal district court case decided differently from the Opinion is hardly "settled federal law." Pet. at 22.

Montana's "little HIPAA" statute, New York's Exempt Income Protection Act, and the Airline Deregulation Act, among others). At most, Premera's cases conclude that, apart from insurance, when Congress does not create a private cause of action, the relevant federal law cannot be enforced via a state law breach of contract claim. *See e.g.,* Pet. at 14. But under the McCarran Ferguson Act ("MFA"), 15 U.S.C. §1101, *et seq.,* different rules apply to insurance.

With the MFA, "silence on the part of Congress shall ***not*** be construed to impose any barrier to the regulation or taxation of [insurance] by the several states." 15 U.S.C. §1011 (emphasis added); *see also* 15 U.S.C. §1012. Consistent with that directive, the federal courts in *Briscoe* and *York* concluded that "the ACA does not preempt consumers' traditional ability to vindicate their rights under the insurance laws of their state." *Briscoe,* 281 F. Supp. 3d at 739; *York,* 2017 U.S. Dist. LEXIS 199888, at *57. Such breach of insurance contract claims may be pursued, even when they rest on violations of the ACA. *Briscoe,* 281 F. Supp.

3d at 739. The Court of Appeals concluded that the reasoning in *Briscoe* is correct. Opinion at 7.

This makes sense when considering the federal Parity requirements. As Premera conceded, Congress placed the federal Parity Act within ERISA so that insureds who receive their coverage through private employment may enforce the Parity requirements pursuant to ERISA's statutory causes of action. *See* CP 2616; 29 U.S.C. §1132(a).

With the ACA, Congress mandated that exchange plans comply with the Federal Parity Act. 42 U.S.C. §18031(j). No evidence suggests that Congress intended to leave consumers who purchased their health coverage on state exchanges with fewer rights than those with employer-based coverage, as claimed by Premera. *See* CP 1558. Rather, courts concluded that the MFA allows exchange consumers to enforce the terms of their insurance contracts, as modified by the ACA's Parity requirements, as traditional state law claims. *Briscoe,* 281 F. Supp. 3d at 739; *York,* 2017 U.S. Dist. LEXIS 199888, at *57;

see e.g., Mingus v. Blue Cross & Blue Shield of Kan., Inc., 2017 U.S. Dist. LEXIS 179159, at *5 (D. Kan. Oct. 30, 2017). Premera had no response to the argument regarding the MFA before the appellate court and fails to address it in its Petition.

Instead, Premera argues that *Briscoe* involved only ERISA plans. Pet. at 16. Not true – *Briscoe* involved ***both*** ERISA and non-ERISA enrollees in Blue Cross Blue Shield of Illinois. *See Briscoe,* 281 F. Supp. 3d at 729 (one plaintiff was "insured by a plan she bought directly through BCBSIL"); *Briscoe v. Health Care Serv. Corp.,* 2020 U.S. Dist. LEXIS 9447, at *5 (N.D. Ill. Jan. 21, 2020) (*Briscoe* plaintiffs moved to certify ERISA and non-ERISA classes).

Premera tries to distinguish *Briscoe* and *York* by asserting that the plans in those cases affirmatively covered the disputed benefit, separate from federal law requirements, such that the denial of coverage was a breach of the contract. Pet. at 18–21. Premera argues that here there is no "wilderness benefit" in the contract that is not being applied, wholly ignoring that the benefit

sought by Plaintiffs is coverage for residential mental health treatment. *Id.* Residential mental health coverage is the "independent right" Plaintiffs seek to enforce.[4] *See York,* 2017 U.S. Dist. LEXIS 199888, at *56.

B. INSURANCE BAD FAITH CLAIMS MAY BE PURSUED WITHOUT EVIDENCE OF OBJECTIVE SYMPTOMOLOGY.

Premera also appeals the Court of Appeals' determination that Plaintiffs' insurance bad faith claim may be pursued even without evidence of objective symptomology. Pet. at 33. Premera urges the Supreme Court to "clarify" this issue but fails

---

[4]Tangentially, Premera claims that the Opinion rejected another "line of settled federal authority" when it concluded that an issue of fact exists regarding whether the Premera contract violated the Parity requirements. Pet. at 31. The three federal district court decisions that Premera cites are outliers. *See id.* Most courts hold that a specific exclusion applicable only to mental health benefits facially violates the federal Parity law. *See Danny P. v. Catholic Health Initiatives,* 891 F.3d 1155, 1158 (9th Cir. 2018); *N.R. v. Raytheon Co.,* 24 F.4th 740, 747 (1st Cir. 2022); *Gallagher v. Empire HealthChoice Assurance, Inc.,* 339 F. Supp. 3d 248, 258 (S.D.N.Y. 2018); *A.Z. v. Regence Blueshield*, 333 F. Supp. 3d 1069, 1081 (W.D. Wash. 2018); *Vorpahl v. Harvard Pilgrim Health Ins. Co.*, 2018 U.S. Dist. LEXIS 121316 (D. Mass. July 20, 2018); *A.F. v. Providence Health Plan*, 35 F. Supp. 3d 1298, 1315 (D. Or. 2014).

to identify any actual conflict between the Opinion and any decision by Washington appellate courts or with the state or federal constitutions. Premera merely points to *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 262 (1996), as the source of "confusion" (not conflict). Pet. at 25. But, as the Opinion properly concluded, "*Dombrosky* involved a claim for NIED [negligent infliction of emotional distress]" rather than a claim for insurance bad faith. *See* Opinion at 25.

The Opinion properly found that "Washington courts have not required expert testimony to support claims for emotional damages outside of the general breach standard in negligence claims." *Id.; see e.g., Woo*, 161 Wn.2d at 70; *Coventry v. Am. States Ins. Co.*, 136 Wn.2d 269, 284 (1998); *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 333 (2000). That is the Opinion's limited holding, which does not conflict with Washington appellate caselaw.

Nor should this issue be addressed due to "public policy." *See* Pet. at 28. ***First,*** the mere existence of a "public policy"

question without more is insufficient under RAP 13.4. And ***second,*** while Premera claims that the "issue … recurs frequently," it offers no example. The Court should deny Premera's Petition as wholly failing to meet the requirements under RAP 13.4.

C. IF PREMERA'S PETITION IS ACCEPTED, THE COURT SHOULD CONSIDER ADDITIONAL ISSUES, PURSUANT TO RAP 13.4

Should the Court accept either issue for review (and it should not), it should also consider the following issues of substantial public interest that should be determined by this Court:

1. Premera's Policy Facially Violated the ACA's Parity Requirements.

The Court of Appeals erred when it concluded that issues of material fact prevent adjudication as to whether Premera's contract violates the ACA's parity requirements on its face. Opinion at 21–23. Violations of the Parity law can be either facial or applied. *See* 42 U.S.C. §300gg-26(a)(3)(A)(ii); *N.R. v.*

Raytheon Co., 24 F.4th 740, 747 (1st Cir. 2022*); A.Z. v. Regence Blueshield,* 333 F. Supp. 3d 1069, 1081 (W.D. Wash. 2018).

The appellate court did not analyze whether the Exclusion, on the face of the contract, violated the Parity law. Opinion at 21–22.

This is a pure question of law. By its terms, Premera's wilderness exclusion is a separate treatment limitation applicable only to mental health benefits:

> The Mental Health, Behavioral Health and Substance Abuse benefit does not cover:
>
> …
>
> Outward bound, ***wilderness***, camping, or tall ship programs or activities.

CP 111–12 (emphasis added). The term "wilderness" appears nowhere else in the contract.

Separate exclusions that facially apply only to mental health benefits are illegal. *Danny P.*, 891 F.3d at 1158; *Doe v. United Behavioral Health*, 523 F. Supp. 3d 1119, 1128 (N.D. Cal. 2021). This is true for separate wilderness exclusions that

are facially applicable only to mental health benefits. *See Michael D. v. Anthem Health Plan of Ky. Inc.,* 369 F. Supp. 3d 1159, 1175 (D. Utah 2019); *Vorpahl*, 2018 U.S. Dist. LEXIS 121316, at *10; *Gallagher*, 339 F. Supp. 3d at 258. If this appeal is taken up by the Court, it should conclude that the Exclusion is a separate exclusion imposed only on mental health benefits, in violation of the Parity law, 42 U.S.C. §300gg-26(a)(3)(A)(ii).

2. Premera Violated WAC 284-43-7080(2) When It Administered its Wilderness Exclusion.

The appellate court erred when it concluded that Premera did not violate WAC 284-43-7080(2) (which prohibits the application of categorical exclusions to mental health services without a determination of medical necessity) when it administered the Exclusion without considering medical necessity. Opinion at 11–13. While the appellate court does not invalidate the rule, it asserts that the rule improperly "altered" the state statutory definition of "mental health services" to apply to residential services and that Plaintiffs failed to offer citation to

support the "alteration." *Id.* at 12. This conclusion ignores that the regulation properly interprets both the state and federal parity laws *in pari materia,* providing full effect to both, without any alteration of state statute.

The regulation implements the federal parity requirements and the state parity law. WAC 284-43-7000. As written, WAC 284-43-7080(2) does not "override" the state Parity requirements. If the regulation and the state statue may "logically stand side by side and be held valid" there is no "alteration." *See O.S.T. v. Regence BlueShield,* 181 Wn.2d 691, 702 (2014).

When the Washington legislature established the State Parity Act in 2006, it set a floor for coverage that did not include residential treatment. *See id.* Later, when Congress passed the ACA, it raised the coverage requirements from that floor to include "residential treatment." *See id.* at 702–703; 42 U.S.C. §300gg-26(a)(3)(A)(ii). WAC 284-43-7080(2), issued in 2014, properly recognized that the "floor" was raised by the ACA. *See*

e.g., Unitedhealthcare of N.Y., Inc. v. Lacewell, 967 F.3d 82, 92 (2d Cir. 2020) (courts must first attempt to reconcile state law and ACA requirements).

The regulation does not alter state statute. The State Parity Act and the ACA stand *in pari materia*, and must "be read together as constituting a unified whole … which maintains the integrity of the respective statutes." *Hallauer v. Spectrum Properties, Inc.,* 143 Wn.2d 126, 146 (2001); *see e.g., DTH Media Corp. v. Folt*, 841 S.E.2d 251, 262 (2020) (applying federal and state statutes *in pari materia*). That is exactly what the rule accomplishes.

Premera could have complied with state **and** federal parity requirements by simply following WAC 284-43-7080(2). ***First,*** it must comply with the State Parity Act by covering all "services provided to treat mental disorders" when medically necessary, except those services that were expressly excluded under state law, such as residential mental health treatment. *See* RCW 48.44.341(1), (2). ***Second,*** it must also comply with the

Federal Parity Act and ACA requirements by ensuring that there is no "separate treatment limitation" applicable only to mental health benefits even when the service in question is residential treatment. 42 U.S.C. §300gg-26(a)(3)(A)(ii).

3. A Reasonable Jury Could Find That Premera Violated the ACA's Parity Law When It Failed to Conduct a Formal Medical Necessity Review or Parity Act Analysis of Wilderness programs.

The Court of Appeals erred when it concluded that there were no issues of material fact regarding whether Premera complied with the federal Parity Act's requirement that "in operation" the "processes, strategies, evidentiary standards or other factors used" to apply the Wilderness treatment "are comparable to and applied no more stringently than the processes, strategies, evidentiary standard or other factors" applied to medical/surgical benefits. Opinion at 16–21. A reasonable jury could easily conclude that Premera violated this provision of the Parity law based upon the following undisputed facts:

- Premera did not follow its own policies and procedures, including its Medical Review Criteria, before adding the Wilderness Exclusion to its contract. CP 3151; *see also* CP 1437:25–1438:8, 1439:14–1440:4, 1444:25–1445:5.

- Premera did not consider whether there were state licensing standards for Wilderness providers. CP 2939:18–24.

- Premera did not conduct any formal review of the scientific evidence for Wilderness Treatment's efficacy. CP 1441:13–20, 1442:6–10.

- Premera never evaluated the medical necessity of Wilderness treatment. CP 1448:7–12, 1449:12–18. The Court of Appeal's determination that Dr. Small's testimony that he reviewed periodically the literature is not the kind of formal medical necessity review described in the Premera policies.

- No NQTL analysis of Premera's wilderness exclusion was conducted. CP 443, RFP No. 26, CP 444, RFP Nos. 27, 28.

Instead of allowing this claim to go forward to a jury, the Court of Appeals weighed the evidence itself, relying nearly entirely on the testimony of Dr. Small, which it wrongly asserted is "uncontroverted." *See* Opinion at 17. Since Dr. Small failed to keep any records of his "periodic reviews" Plaintiffs had no documentary evidence with which to challenge his testimony.

Nonetheless, Dr. Small's informal review of the literature is not a "medical necessity" review under the Premera plan or medical policy. *See* CP 143 (definition of "Medical Necessity" requires a showing that the services in question meet or do not meet the specific contractual standards for medical necessity); CP 3151–52. And Dr. Small's conclusions about wilderness treatment were vigorously challenged by Plaintiffs' experts, Dr. Gass and Dr. Glass. CP 996–1017, 1054–58.

V. CONCLUSION

The Court should deny Premera's Petition for Review in full. Should the Court accept either or both of Premera's issues for review, it should also accept for review the three issues identified by P.E.L.

VI. CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b), the undersigned counsel for Respondents hereby certify that the foregoing document contains 4,979 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the

certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits).

RESPECTFULLY SUBMITTED: February 2, 2023.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC

/s/ Eleanor Hamburger
Eleanor Hamburger, WSBA # 26478
Daniel S. Gross, WSBA # 23992
3101 Western Ave., Ste. 350
Seattle, WA 98121
Tel. (206) 223-0303
ehamburger@sylaw.com;
dgross@sylaw.com

PNW STRATEGIC LEGAL
SOLUTIONS, PLLC

/s/ Marlena Grundy
Marlena Grundy, WSBA # 47026
1408 140th Pl. NE, Ste. 170
Bellevue, WA 98007
Tel. (425) 223-5710
marlena@pnwsls.com

Attorneys for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on February 2, 2023, I served a copy of this document, via Appellate Courts' Portal e-mail, on the following parties/counsel of record:

Gwendolyn C. Payton
John R. Neeleman
KILPATRICK TOWNSEND &
STOCKTON LLP
1420 Fifth Ave., Ste. 3700
Seattle, WA 98101
Tel. (206) 467-9600
gpayton@kilpatricktownsend.com
jneeleman@kilpatricktownsend.com
irountree@kilpatricktownsend.com
Counsel for Premera Blue Cross

Adam H. Charnes
KILPATRICK TOWNSEND &
STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
acharnes@kilpatricktownsend.com
Counsel for Premera Blue Cross

Gretchen J. Hoog
CORR DOWNS PLLC
100 W. Harrison St., Suite N440
Seattle, WA 98119
(206) 962-5040
ghoog@corrdowns.com
dhutchings@corrdowns.com
Counsel for Breaking Code Silence

Lenore Silverman
FAGEN FRIEDMAN &
FULFROST LLP
6300 Wilshire Blvd., Suite 1700
Los Angeles, CA 90048
(510) 550-8216
lsilverman@f3law.com
Counsel for Breaking Code Silence

DATED: February 2, 2023, at Seattle, Washington.

/s/ Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)
Email: ehamburger@sylaw.com

SIRIANNI YOUTZ SPOONEMORE HAMBURGER

February 02, 2023 - 12:53 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,561-5
Appellate Court Case Title:	Premera Blue Cross v. P.E.L., P.L & J.L.

The following documents have been uploaded:

- 1015615_Answer_Reply_20230202123755SC842085_9790.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was PEL Answer to Petition for Review 020223 final.pdf

A copy of the uploaded files will be sent to:

- GPayton@kilpatricktownsend.com
- acharnes@kilpatricktownsend.com
- daniel@sylaw.com
- dhutchings@corrdowns.com
- ghoog@corrdowns.com
- irountree@kilpatricktownsend.com
- jneeleman@kilpatricktownsend.com
- lsilverman@f3law.com
- marlena@pnwstrategiclegalsolutions.com
- staff@pnwstrategiclegalsolutions.com

Comments:

Sender Name: Stacy Hoffman - Email: stacy@sylaw.com
Filing on Behalf of: Eleanor Hamburger - Email: ehamburger@sylaw.com (Alternate Email: matt@sylaw.com)

Address:
3101 Western Ave., Suite 350
Seattle, WA, 98121
Phone: (206) 223-0303

Note: The Filing Id is 20230202123755SC842085