No. 101561-5

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 82800-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PREMERA BLUE CROSS,

Petitioner,

v.

P.E.L., P.L & J.L.,

Respondents.

PREMERA BLUE CROSS'S REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Respondents have filed a cross-petition for review of Division I's conclusions that: (1) issues of fact remain concerning their claim that Premera violated the Federal Parity Act because the wilderness exclusion in the Contract ("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 because the regulation's enabling statute, the Washington Parity Act, exempted residential services; 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."

The Court need not reach Issue (1) because federal law does not allow Respondents to enforce the Federal Parity Act through a breach of contract claim in the first place. But if the Court does accept review of Issue (1), it should reverse the Court

of Appeals and hold that Premera complied with the Federal Parity Act as a matter of law.

Respondents' Issue (2) does not satisfy any of the RAP 13.4 factors. The Court of Appeals correctly concluded that Washington Parity Act explicitly exempted wilderness programs such as Evoke from its coverage, and WAC 284-43-7080(2) cannot regulate activity that the Washington Parity Act expressly exempts.

Respondents' Issue (3) does not satisfy any of the RAP 13.4 factors. The Court of Appeals correctly concluded that Premera complied with the Federal Parity Act with respect to its NQTL analysis.

II. ARGUMENT IN REPLY

A. The Court should not review Respondents' Issue (1) that the Court of Appeals erred in finding a question of fact as to whether the Exclusion violates the Federal Parity Act.

Premera's petition for review seeks review of the Court of Appeals' conclusion that—even though Congress denied Respondents a federal cause of action for violation of the Federal

Parity Act—Respondents could nonetheless pursue an alleged violation of that law through a state-law breach of contract claim. Petition at 1. Respondents' Issue (1)—whether the Court of Appeals correctly determined that issues of fact preclude summary judgment on their contract claim—is subsumed by Premera's Issue (1). Because Respondents cannot base their breach of contract claim on an alleged violation of the Federal Parity Act, this Court need not reach the Court of Appeals' conclusion that there are issues of fact precluding summary judgment as to whether Premera violated the Federal Parity Act.

If the Court does review Respondent's Issue (1), it should reverse the Court of Appeals' finding that there is a jury issue regarding whether the Exclusion violates the Federal Parity Act. The Court of Appeals did not find any ambiguity regarding the meaning of any provision of the Contract. Instead, the parties disagree about whether the unambiguous Contract violates the Federal Parity Act. "The interpretation of an unambiguous contract is a question of law and may be resolved on summary

judgment." *In re Estates of Wahl*, 99 Wn. 2d 828, 831(1983). "If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision." *Mayer v. Pierce Cnty. Med. Bureau, Inc*., 80 Wn. App. 416, 420 (1995). The Court of Appeals therefore erred in holding that this question must be resolved by "a trier of fact." Opinion 23.

As a matter of law, the Contract did not violate the Parity Act. To establish a violation, a plaintiff must: "(1) identify a specific treatment limitation on mental health benefits; (2) identify medical/surgical care covered by the plan that is analogous to the mental health/substance abuse care for which the plaintiffs seek benefits; and (3) establish a disparity between the treatment limitation on mental health/substance abuse benefits as compared to the limitations that defendants would apply to the covered medical/surgical analogue." *Heather E. v. Cal. Physicians' Servs.*, No. 2:19-cv-415, 2020 WL 4365500, at *3 (D. Utah July 30, 2020); *see also Steve C. v. BlueCross & BlueShield of Mass.*, 450 F. Supp. 3d 48, 60 (D. Mass. 2020). In

other words, to establish a Parity Act violation, the plaintiff must show that mental health and medical-surgical service coverage are not in parity.

The trial court correctly found that the Respondents failed to satisfy elements 2 and 3. There was no finding that Premera's coverage for mental health services was not in parity with its coverage for medical-surgical services. It is undisputed that the Contract does not provide any medical-surgical benefit that is analogous to wilderness programs. The Court of Appeals itself agreed: "The trial court did not err by dismissing P.E.L.'s breach of contract claim alleging that Premera's wilderness exclusion violates the FPA [Federal Parity Act] as a treatment limitation applied more restrictively to mental health services than comparable medical and surgical services." App. A at 20-21. Yet, the Court of Appeals still held that there is an issue of fact as to whether the Exclusion is "a separate treatment limitation" because it is described in the mental health coverage section of the Contract.

This ruling makes no sense. Respondents either established *each* element of a Federal Parity Act claim or not. And the Court of Appeals held that they did not. Respondents failed to and cannot identify a medical-surgical service analogous to wilderness programs that the Contract covers. Indeed, the Court of Appeals held there is none. App. A at 20-21. Premera's coverage for mental health services is in parity with its coverage for medical-surgical services. That alone requires dismissal of their Parity Act claim.

The Court of Appeals opinion, moreover, is an outlier. The courts hold that a plan satisfies Parity Act requirements where, as here, coverage for analogous services are in parity. *Alice F. v. Health Care Serv. Corp*., 367 F. Supp. 3d 817, 828 (N.D. Ill. 2019) (a plan that excluded wilderness programs did not violate the Federal Parity Act when it covered residential treatment centers in parity with skilled nursing facilities); *A.G. v. Cmty. Ins. Co.*, 363 F. Supp. 3d 834, 841-42 (S.D. Ohio 2019)

(same); *Julie L. v. Excellus Health Plan, Inc.*, 447 F. Supp. 3d 38, 57-58 (W.D.N.Y. 2020) (same).

The Federal Parity Act requires Premera to cover residential treatment centers in parity with skilled nursing facilities and inpatient rehabilitation facilities, and it does. Therefore, there is no issue for the jury to decide and the Court of Appeals should have affirmed the trial court.

B. Respondents' Issue (2) does not satisfy any RAP 13.4 factors and the Court of Appeals correctly found that the Exclusion did not violate WAC 284-43-7080.

The Court should decline to review the Court of Appeals' conclusion that Premera did not violate WAC 284-43-7080(2). This holding satisfies none of the RAP 13.4 criteria. Indeed, Respondents never even explain how those criteria are satisfied by this issue. The Court of Appeals resolved a narrow, straightforward legal question that apparently has never arisen previously—and that will not arise in the future, because the Washington Parity Act has been amended to cover residential treatment.

In any event, the Court of Appeals correctly concluded that WAC 284-43-7080(2) does not apply here.

1. The Exclusion does not violate the Washington Parity Act because it explicitly exempted residential services such as Evoke from its scope.

At the time of P.E.L.'s stay, the Washington Parity Act expressly exempted "residential treatment" services from its scope. RCW 48.44.341(1)(c) (excluding "skilled nursing facility services, home health care, residential treatment, and custodial care" from the scope of the act). The Legislature later amended the Parity Act in 2020 to eliminate the residential treatment exception. House Bill Analysis at 1, H.B. 2338, 2020 Leg., Reg. Sess. (Wash. 2020) [App'x 1] ("[s]tate law excludes several categories of services from the definition of 'mental health services,' including, 'life transition problems,' substance use disorders, skilled nursing facility services, home health care, residential treatment, custodial care, and court-ordered treatment that is not medically necessary."). The 2020 amendment

eliminated the residential treatment exclusion for plans "issued or renewed on or after January 1, 2021." *Id.* at 3.

Respondents characterize Evoke as "residential treatment" services. *See* Respondents' Answer at 12 ("P.E.L. enrolled in residential treatment with Evoke.").[1] While the Washington Parity Act does not define "residential treatment," the plain and ordinary meaning of the term "residential" leaves no room for doubt that it applies to programs such as Evoke. Evoke requires a 42-day minimum stay and provides its students with room and board. Therefore, the Court of Appeals correctly concluded that the Evoke Wilderness Program services were outside the scope of the Washington Parity Act.

Respondents contend that their Washington Parity Act claim is based on OIC regulation WAC 284-43-7080(2), which

[1] The parties agree that Evoke is a form of "residential treatment," though, as discussed above, Evoke is neither licensed as a residential treatment center, nor does it provide residential treatment center services.

they say brings residential treatment into the scope of the Act. The Court of Appeals properly rejected this argument.

First, to the extent that Respondents argue that the OIC regulation has amended the Washington Parity Act, that of course is impossible. Regulations must be authorized by statute, and therefore "regulations 'cannot amend or modify the statute in question.'" *N. Cent. Wash. Respiratory Care Servs., Inc. v. State Dep't of Revenue*, 165 Wn. App. 616, 629 (2011) (quoting *Pierce Cnty. v. Dep't of Revenue*, 66 Wn.2d 728, 731 (1965)).

Second, WAC 284-43-7080 is actually consistent with the Washington Parity Act. The Washington Parity Act defines the covered "mental health services," and that definition excludes "residential treatment." RCW 48.44.341(1). In turn, WAC 284-43-7080(2) states that, "[i]f a service is prescribed for a mental health condition and is medically necessary, it may not be denied solely on the basis that it is part of a category of services or benefits that is excluded by the terms of the contract." In other words, WAC 284-43-7080(2) applies only to those mental health

"services" covered in RCW 48.43.341(1). The regulation does not, and cannot, define "services" in any other way. *Littleton v. Whatcom Cnty.*, 121 Wn. App. 108, 117 (2004) (explaining that a regulation's use of the term "solid waste" must be consistent with the enabling statute's definition of "solid waste").

2. The Federal Parity Act did not require or authorize the OIC to issue regulations contrary to the Washington Parity Act.

To avoid the clear exclusion of residential treatment from the state Parity Act, Respondents argue that the OIC actually enacted WAC 284-43-7080 to enforce the Federal Parity Act. Answer at 27-29. The Court of Appeals correctly concluded that this argument fails.

Respondents do not cite any authority for the novel argument that the Federal Parity Act authorizes or requires the OIC to issue a regulation that exceeds the scope of its authority under state law and overrides its authorizing legislation, the Washington Parity Act. The ACA contains no authorization or requirement for state regulators to issue regulations overriding

state statutes, and the U.S. Constitution would forbid such federal legislation.[2]

The ACA requires that individual plans sold on the Exchange, such as the Contract here, must comply with the Federal Parity Act. 42 U.S.C. § 18031(j). Congress vested some Federal Parity Act enforcement authority in state regulators. 42 U.S.C. § 300gg-22(a). But this means that the OIC is authorized to enforce the *Federal* Parity Act. There is no

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[2] The most that the OIC could do would be to issue regulations implementing the *Federal* Parity Act, if allowed by federal law. But the federal government cannot compel the OIC to issue regulations implementing federal law, nor could it authorize the OIC to issue regulations amending the Washington Parity Act. The Tenth Amendment prohibits "federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012). "[T]he Constitution simply does not give Congress the authority to require the States to regulate." *Id.* Courts have recognized that the ACA does not violate the Tenth Amendment because "[t]he ACA established a regime of 'cooperative federalism' to enforce [the ACA's] requirements"—not to issue any regulations under State statutes, and certainly not to issue regulations that amend state statutes. *West Virginia v. U.S. Dep't of Health & Human Servs.*, 145 F. Supp. 3d 94, 97 (D.D.C. 2015), *aff'd*, 827 F.3d 81 (D.C. Cir. 2016).

provision that requires or empowers state regulators to amend state statutes or to issue regulations that override contrary provisions of state statutes. In short, the OIC regulations cannot make the Washington Parity Act apply despite the applicable statutory exclusion.

C. Respondents' Issue (3) does not satisfy any RAP 13.4 factors and the Court of Appeals correctly found that Premera performed an adequate NQTL analysis.

Respondents request that the Court review the Court of Appeals' fact-specific finding that "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."

This issue does not satisfy any RAP 13.4 factor. This issue asks this Court to review a factual question relevant only to this case and that presents no issue of broader significance for Washington law.

In any event, the Court of Appeals correctly found that there is no genuine factual dispute that Premera follows the same

processes and procedures in developing medical/surgical and mental health contract exclusions:

> Premera has a single process and strategy in place to determine exclusions for [mental health and substance abuse] services and [medical/surgical] services, and both areas have some services excluded based on that approach. In developing the list of exclusions, Premera considers the same factors for all services.

CP 2691. Respondents offered no contrary evidence that Premera applies different processes or considers different factors when developing medical/surgical exclusions as opposed to mental health exclusions.

In addition, just as the Federal Parity Act generally provides no cause of action to Respondents, there is no cause of action under the Federal Parity Act for a plan's failure to conduct an NQTL analysis. *See Christine S. v. Blue Cross Blue Shield of New Mexico*, No. 218CV00874JNPDBP, 2022 WL 2132288, at *3 (D. Utah June 14, 2022). There is also no authority for imposing civil liability for a deficient NQTL analysis.

Finally, the NQTL regulation was not even in effect at the time of this claim. Plaintiffs alleged that Premera did not maintain sufficient written documentation of its mental health parity analysis, but the requirement that a health plan maintain such written documentation was not enacted by Congress until 2021. *See Duncan v. Jack Henry & Assocs., Inc.*, No. 6:21-CV-03280-RK, 2022 WL 2975072, at *21 (W.D. Mo. July 27, 2022) ("Under [29] 1185a(a)(8)(A), federal law requires ERISA plans or issuers to perform and document comparative analyses of the design and application of NQTLs and, beginning 45 days after December 27, 2020, make available to the Secretary, upon request, the comparative analyses. . ."). Respondents never explain how Premera violated a regulation that was not enacted at the time of its allegedly offending conduct.

III. CONCLUSION

The Court should deny Petitioner's cross-petition. Alternatively, the Court should review the Court of Appeals' finding that issues of fact preclude summary judgment on

Respondents' claim that Premera violated the Federal Parity Act and affirm the trial court's summary judgment that Premera did not violate the Federal Parity Act.

I certify that this document contains 2,536 words, pursuant to RAP 18.17.

RESPECTFULLY SUBMITTED this 17th day of February, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 17, 2023, I caused to have served a true and correct copy of **PREMERA BLUE CROSS'S PETITION FOR REVIEW**, on the following by the method(s) indicated below:

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DATED this 17th day of February, 2023.

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