

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA**

UNITED HEALTHCARE SERVICES, INC.;
UNITEDHEALTHCARE INSURANCE
COMPANY; AND UMR, INC.,

Plaintiffs,

v.

HOSPITAL PHYSICIAN SERVICES
SOUTHEAST, P.C.; INPHYNET PRIMARY
CARE PHYSICIANS SOUTHEAST, P.C.; AND
REDMOND ANESTHESIA & PAIN
TREATMENT, P.C.,

Defendants.

Civil Action No. 1:23-cv-05221-JPB

JOINT PRELIMINARY REPORT AND DISCOVERY PLAN

1. Description of Case:

(a) Describe briefly the nature of this action.

This is a declaratory judgment action under 28 U.S.C. § 2201 seeking a determination as to whether certain state law claims are expressly preempted by § 514(a) of the Employee Retirement Income Security Act of 1974 (“ERISA”). See 29 U.S.C. § 1144(a).

(b) Summarize, in the space provided below, the facts of this case. The summary should not be argumentative nor recite evidence.

Plaintiffs (collectively, “United”) administer certain healthcare benefit plans with members in Georgia (the “United Benefit Plans”). Through this declaratory judgment action, Plaintiffs seek to determine the law governing their reimbursement of claims submitted by Defendants for medical services provided to members of the United Benefit Plans. The parties’ diverging views concerning the reimbursement obligations of ERISA-governed healthcare benefit plans are described in the Parties’ respective briefing on Defendants’ motion to dismiss. As set forth in the

Amended Complaint’s Prayer for Relief, Plaintiffs seek a judgment “declaring that all Non-Contractual State-Law Claims under Georgia law [as defined in ¶ 10 of the Amended Complaint] are preempted by ERISA and the Supremacy Clause of the United States Constitution, as they relate to requests by [Defendants] for reimbursement of their claims for out-of-network services to participants and beneficiaries in [United-administered ERISA plans].” Paragraph 10 of the Amended Complaint defines “Non-Contractual State Law Claims” to “include claims that provisions or doctrines of state law other than contract principles—such as unjust enrichment, quantum meruit, state RICO laws, common law conversion, civil conspiracy, good faith and fair dealing, or consumer protection law—entitle the [TeamHealth] affiliates to payment at their full-billed charges.”

(c) The legal issues to be tried are as follows:

Whether ERISA’s express preemption clause (Section 514(a) of ERISA, codified at 29 U.S.C. § 1114) preempts all Non-Contractual State Law Claims. In particular, Plaintiffs seek declaratory relief as set forth above.

(d) The cases listed below (include both style and action number) are:

(1) Pending Related Cases:

Atl. ER Physicians Team Pediatric Assocs., P.A. v. UnitedHealth Grp., Inc., 1:20-cv-20083, ECF No. 2 (D.N.J. Dec. 21, 2020); remanded to state court *Atlantic ER Physicians Team Pediatric Associates, P.A., et al. v. UnitedHealth Group, Inc. et al.*, Case No. GLO-L-1196-20, Gloucester County, Law Division

Emergency Care Servs. Of Pa., P.C. v. UnitedHealth Group, Inc., No. 5:20-cv-5094, ECF No. 1-3 (E.D. Pa. Sept. 15, 2020); remanded to state court *Emergency Care Services of Pennsylvania, P.C. et al. v. UnitedHealth Group, Inc., et al.*, Case ID No. 200900598, Pennsylvania, Court of Common Pleas Philadelphia County

Fla. Emergency Physicians Kang & Assocs., M.D., Inc. v. United Healthcare of Fla., Inc., No. 0:20-cv-60757, ECF No. 27 (S.D. Fla. June 9, 2020); remanded to state court *Florida Emergency*

Physicians Kang & Associates, M.D., Inc., v. UnitedHealthcare of Florida, Inc., et al., Case No. CACE 20003898, Fla. 17th Judicial Cir., Broward County

Fremont Emergency Servs. (Mandavia) Ltd. v. United Healthcare Ins. Co., No. 2:19-cv- 00832, ECF No. 40 (D. Nev. Jan. 7, 2020); remanded to state court Fremont Emergency Servs. (Mandavia) Ltd., et al. v. United Healthcare Insurance Company et al., Case No. A-19-792978-B, Department 27, Clark County, on appeal United Healthcare Insurance Co. et al. v. Fremont Emergency Servs. (Mandavia) Ltd. et al., Case No. 85525, Nevada Supreme Court

Emergency Services of Oklahoma PC, et al. v. UnitedHealthcare Insurance Co. et al., Case No. CJ-2019-482, Oklahoma, District Court of Cleveland County

Gulf-to-Bay Anesthesiology Associates, LLC v. UnitedHealthcare of Florida, Inc., et al., Case No. 20-CA-008606, Fla. 13th Judicial Cir., Hillsborough County

Emergency Physician Services of New York PC, et al. v. UnitedHealth Group, Inc. et al., Case No. 1:20-cv-08183-JGK-SN, S.D.N.Y.

Gulf-to-Bay Anesthesiology Assocs., LLC v. United Healthcare of Fla., Inc., Case No. 2023-CA-016780, Fla. 13th Judicial Cir., Hillsborough County

(2) Previously Adjudicated Related Cases:

ACS Primary Care Physicians Sw., P.A. v. UnitedHealthcare Ins. Co., 514 F. Supp. 3d 927, 934-935, 942 (S.D. Tex. 2021).

Emergency Care Servs. Of Pa., P.C. v. UnitedHealth Grp., Inc., No. 1:19-cv-01195, ECF No. 1 (M.D. Pa. July 11, 2019);

Emergency Department Physicians P.C. et al. v. United Healthcare, Inc. et al., Case No. 2:19-cv-12052 (E.D. Mich.)

Emergency Grp. Of Ariz. Pro. Corp. v. United Healthcare Inc., No. 2:19-cv-04687, ECF No. 18 (D. Ariz. Aug. 9, 2019); remanded to state court Emergency Group Of Arizona Professional Corp. et al. v. UnitedHealth Group, Inc., et al., Case No. CV2019-004510, Arizona Superior Court, Maricopa County

Gulf-to-Bay Anesthesiology Assocs., LLC v. United Healthcare of Fla., Inc., No. 8:20-cv-02964, ECF No. 1- (M.D. Fla. Nov. 2, 2020); remanded to state court Gulf-to-Bay Anesthesiology Assocs., LLC v. UnitedHealthcare of Fla., Inc., No. 17-CA-011207, Fla. 13th Judicial Cir., Hillsborough County

2. This case is complex because it possesses one or more of the features listed below (please check):

Plaintiffs do not believe that this case is complex.

Defendants contend that the case is complex because:

- (1) Unusually large number of parties
- (2) Unusually large number of claims or defenses
- (3) Factual issues are exceptionally complex
- (4) Greater than normal volume of evidence
- (5) Extended discovery period is needed
- (6) Problems locating or preserving evidence
- (7) Pending parallel investigations or action by government
- (8) Multiple use of experts
- (9) Need for discovery outside United States boundaries
- (10) Existence of highly technical issues and proof
- (11) Unusually complex discovery of electronically stored information

3. Counsel:

The following individually-named attorneys are hereby designated as lead counsel for the parties:

Plaintiff:

Greg Jacob, O'Melveny & Myers LLP

William H. Jordan, Alston & Bird LLP

Defendant:

Justin C. Fineberg, Lash Goldberg Fineberg LLP

James W. Cobb, Caplan Cobb LLC

4. Jurisdiction:

Is there any question regarding this Court's jurisdiction?

Yes No

If "yes," please attach a statement, not to exceed one page, explaining the jurisdictional objection. When there are multiple claims, identify and discuss separately the claim(s) on which the objection is based. Each objection should be supported by authority.

Please see the supplemental page attached to this joint discovery plan.

5. Parties to This Action:

(a) The following persons are necessary parties who have not been joined:

Plaintiffs contend that all necessary parties have been joined.

Defendants contend that there potentially are additional legal entities within the UnitedHealth

Group family of companies that must be joined as plaintiffs.

(b) The following persons are improperly joined as parties:

None.

(c) The names of the following parties are either inaccurately stated or necessary portions of their names are omitted:

None.

(d) The parties shall have a continuing duty to inform the Court of any contentions regarding unnamed parties necessary to this action or any contentions regarding misjoinder of parties or errors in the statement of a party's name.

6. Amendments to the Pleadings:

Amended and supplemental pleadings must be filed in accordance with the time limitations and other provisions of Fed.R.Civ.P. 15. Further instructions regarding amendments are contained in LR 15.

(a) List separately any amendments to the pleadings that the parties anticipate will be necessary:

At this time, the parties do not anticipate that any further amendments to the pleadings will be necessary.

(b) Amendments to the pleadings submitted LATER THAN THIRTY DAYS after the Joint Preliminary Report and Discovery Plan is filed, or should have been filed, will not be accepted for filing, unless otherwise permitted by law.

7. Filing Times For Motions:

All motions should be filed as soon as possible. The local rules set specific filing limits for some motions. These times are restated below.

All other motions must be filed WITHIN THIRTY DAYS after the beginning of discovery, unless the filing party has obtained prior permission of the court to file later. Local Rule 7.1A(2).

(a) *Motions to Compel*: before the close of discovery or within the extension period allowed in some instances. Local Rule 37.1.

(b) *Summary Judgment Motions*: within thirty days after the close of discovery, unless otherwise permitted by court order. Local Rule 56.1.

(c) *Other Limited Motions*: Refer to Local Rules 7.2A; 7.2B, and 7.2E, respectively, regarding filing limitations for motions pending on removal, emergency motions, and motions for reconsideration.

(d) *Motions Objecting to Expert Testimony*: Daubert motions with regard to expert testimony no later than the date that the proposed pretrial order is submitted. Refer to Local Rule 7.2F.

8. Initial Disclosures:

The parties are required to serve initial disclosures in accordance with Fed.R.Civ.P. 26. If any party objects that initial disclosures are not appropriate, state the party and basis for the party's objection. NOTE: Your initial disclosures should include electronically stored information. Refer to Fed.R.Civ.P. 26(a)(1)(B).

The Parties have agreed to exchange initial disclosures on March 18, 2024.

9. Request for Scheduling Conference:

Does any party request a scheduling conference with the Court? If so, please state the issues which could be addressed and the position of each party.

No Party requests a scheduling conference at this time.

10. Discovery Period:

The discovery period commences thirty days after the appearance of the first defendant by answer to the complaint. As stated in LR 26.2A, responses to initiated discovery must be completed before expiration of the assigned discovery period.

Cases in this Court are assigned to one of the following three discovery tracks: (a) zero month discovery period, (b) four months discovery period, and (c) eight months discovery period. A chart showing the assignment of cases to a discovery track by filing category is contained in Appendix F. The track to which a particular case is assigned is also stamped on the complaint and service copies of the complaint at the time of filing.

Please state below the subjects on which discovery may be needed:

Plaintiffs' Position:

Plaintiffs believe that any discovery should focus on the two issues that Defendants have raised in their motion to dismiss—namely, (i) whether there is an actual case or controversy (i.e., whether the Defendants view the claims at issue in this lawsuit as disputed and potentially subject to future litigation); and (ii) whether the dispute between the parties is limited to claims for emergency medical services or non-emergent anesthesia services delivered at in-network hospitals as Defendants claim in their motion to dismiss. ECF 29 at 18–19. Plaintiffs believe that the Court should deny the motion to dismiss on the basis of the allegations in the Amended Complaint and there is no need for Plaintiffs to submit evidence on allegations that have not been disputed. See *McElmurray v. Consolidated Government of Augusta* 501 F.3d a1244, 1251 (11th Cir. 2007) (a “district court has the power to dismiss for lack of subject matter jurisdiction on any of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) ***the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.***”) (citing *Williamson v. Tucker*, 645 F.2d 404, 413, 416 (5th Cir. 1981); see also *Gardner v. Mutz*, 962 F.3d 1329, 1340 (11th Cir. 2020). Further, Plaintiffs contend that the self-serving declaration of an official with Defendants’ parent company stating that Defendants have no “present intent” to commence litigation in Georgia does not negate the detailed factual allegations in the Amended Complaint establishing a live dispute. Nevertheless, if the Court believes that any material facts related to subject matter jurisdiction are in dispute, then Plaintiffs have already requested “a reasonable opportunity for discovery and, where necessary, a hearing[.]” *Brannen v. McGlamery*, 2021 WL 6072558, at *2 (S.D. Ga. 2021); see Plaintiffs’ Opposition to the Motion to Dismiss, ECF No. 30 at n. 2. As numerous courts in this jurisdiction have recognized, “the proper course in such instances is to deny the motion to

dismiss and permit the plaintiff to conduct targeted discovery of any such disputed jurisdictional facts.” *Majd-Pour v. Georgiana Cmty. Hosp., Inc.*, 724 F.2d 901, 903 (11th Cir. 1984); *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 729–31 (11th Cir. 1982) (holding “jurisdictional discovery is not entirely discretionary” because “the element of discretion, if any, exists not with respect to whether there will be jurisdictional discovery, but rather only with respect to the form that the discovery will take”); *Randstad Gen. Partner (US), LLC v. Beacon Hill Staffing Grp. LLC*, No. 1:19-CV-1655-ODE, 2020 WL 10460623, at *10 (N.D. Ga. June 19, 2020) (“Where there are disputed jurisdictional facts, plaintiffs are entitled to jurisdictional discovery.”).

Beyond the two issues raised in the motion to dismiss, Plaintiffs do not believe that any additional discovery (other than a limited production of Plan documents) is necessary or appropriate to determine whether ERISA precludes Defendants from using Georgia common law theories of quantum meruit, unjust enrichment, and common law conversion to compel United to reimburse them at their full billed charges. Defendants have not adequately explained why the “extensive merits discovery” they seek is relevant to the legal determination of whether those state common law claims are preempted.

Defendants’ Position:

Regarding jurisdiction: as set forth in Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction (“Motion”) and Defendants’ Reply in support of the Motion (ECF 2), Defendants’ position is that Plaintiffs have neither adequately pled the existence of a justiciable dispute nor presented the evidence necessary to prove that there is a justiciable dispute. Defendants further note that Plaintiffs did not specifically request jurisdictional discovery in their Response to the Motion. For these reasons, Defendants believe that the Court should grant the Motion without first ordering jurisdictional discovery.

Should this case proceed to the merits, Defendants believe that extensive merits discovery will be necessary. The topics for such discovery would include, without limitation, United's relationships with the self-funded health plans that it manages, the terms of United's contracts with those plans, plan documents, United's claims-handling procedures, United's pricing methodology, United's compensation for the administrative services it performs, flow of funds etc.

If the parties anticipate that additional time beyond that allowed by the assigned discovery track will be needed to complete discovery or that discovery should be conducted in phases or be limited to or focused upon particular issues, please state those reasons in detail below:

Plaintiffs' Position:

Plaintiffs do not believe that additional time beyond the default four months provided by the assigned discovery track is necessary.

Defendants' Position:

As Defendants describe above, if Defendants' motion to dismiss is denied, then extensive discovery on the merits is necessary. Defendants believe that four months will be insufficient for that discovery. Defendants expect such discovery to last a minimum of nine months due to the volume of ESI that would need to be produced and the likely number of depositions, which would include, at minimum, the following United executives: Rebecca Paradise, Jolene Bradley, Katherine (Vickie) Miller, Jenny Hayhurst, Brian Gray, Steve Beecy, Joseph Clark, Daniel Schumacher, Daniel Rosenthal, Sarah Peterson, and Angie Nierman, plus any of the witnesses that Plaintiff would seek to depose. Should the Court order jurisdictional discovery, Defendants believe that jurisdictional discovery should be completed and the Motion resolved before the parties begin merits discovery.

11. Discovery Limitation and Discovery of Electronically Stored Information:

(a) What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or Local Rules of this Court, and what other limitations should be imposed?

The Parties do not believe that any changes to the limitations imposed by the Federal Rules are necessary.

(b) Is any party seeking discovery of electronically stored information?

 X Yes No

If "yes,"

(1) The parties have discussed the sources and scope of the production of electronically stored information and have agreed to limit the scope of production (e.g., accessibility, search terms, date limitations, or key witnesses) as follows:

Please see the response to Question No. 10 for the Parties' positions on the appropriate scope of discovery. The Parties have agreed that, if discovery of electronically stored information is permitted, they will discuss the appropriate custodians and search terms after the receipt of particular discovery requests.

(2) The parties have discussed the format for the production of electronically stored information (e.g., Tagged Image File Format (TIFF or .TIF files), Portable Document Format (PDF), or native), method of production (e.g., paper or disk), and the inclusion or exclusion and use of metadata, and have agreed as follows:

The Parties intend to negotiate a protective order and a stipulated protocol for the production of electronically stored information (if it is permitted), which they hope to submit for the Court's approval within thirty (30) days of the commencement of the discovery period.

In the absence of agreement on issues regarding discovery of electronically stored information, the parties shall request a scheduling conference in paragraph 9 hereof.

12. Other Orders:

What other orders do the parties think that the Court should enter under Rule 26(c) or under Rule 16(b) and (c)?

The Parties have conferred and agree that no other orders are necessary at this time.

13. Settlement Potential:

(a) Lead counsel for the parties certify by their signatures below that they conducted a Rule 26(f) conference that was held on March 6, 2024, and that they participated in settlement discussions. Other persons who participated in the settlement discussions are listed according to party.

For plaintiff: Lead counsel (signature): /s/ Greg Jacob

Other participants: William Pollak, Meredith Garagiola, Blake Crohan

For defendant: Lead counsel (signature):

/s/ Justin Fineberg (did not attend 26(f) conference but aided in preparation and is fully informed about the matters discussed during the conference, including the status of settlement negotiations)

Other participants: Jonathan Siegelaub, Cameron Roberts, Jeremy Weberman

(b) All parties were promptly informed of all offers of settlement and following discussion by all counsel, it appears that there is now:

- A possibility of settlement before discovery.
- A possibility of settlement after discovery.
- A possibility of settlement, but a conference with the judge is needed.
- No possibility of settlement.

(c) Counsel() do or () do not intend to hold additional settlement conferences among themselves prior to the close of discovery.

(d) The following specific problems have created a hindrance to settlement of this case.

None.

14. Trial by Magistrate Judge:

Note: Trial before a Magistrate Judge will be by jury trial if a party is otherwise entitled to a jury trial.

(a) The parties (_____) do consent to having this case tried before a magistrate judge of this Court. A completed Consent to Jurisdiction by a United States Magistrate Judge form has been submitted to the clerk of court this _____ day _____, of 20__.

(b) The parties (X) do not consent to having this case tried before a magistrate judge of this Court.

/s/ Greg Jacob

Greg Jacob*
Brian Boyle*
Meredith Garagiola*
William Pollak*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383-5300
Fax: (202) 383-5414
gjacob@omm.com
bboyle@omm.com
mgaragiola@omm.com
wpollak@omm.com

William H. Jordan
R. Blake Crohan
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Suite 4900
Atlanta, GA 30309-3424
Tel.: (404) 881-7000
Fax: (404) 881-7777
bill.jordan@alston.com
blake.crohan@alston.com

Emily Seymour Costin*
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
Tel.: (202) 239-3300

/s/ Justin Fineberg

Justin Fineberg*
Florida Bar No. 53716
Jonathan E. Siegelaub*
Florida Bar No. 1019121
Jeremy A. Weberman*
Florida Bar No. 1031755
LASHGOLDBERG LLP
Weston Corporate Center I
2500 Weston Rd., Ste. 220
Fort Lauderdale, Florida 33331
Tel.: (954) 3384-2500
Fax: (954) 384-2510
jfineberg@lashgoldberg.com
jsiegelaub@lashgoldberg.com
jweberman@lashgoldberg.com

James W. Cobb
Georgia Bar No. 420133
Cameron B. Roberts
Georgia Bar No. 599839
CAPLAN COBB LLC
75 Fourteenth Street, NE, Suite 2700
Atlanta, Georgia 30309
Tel: (404) 596-5600
Fax: (404) 596-5604
jcobb@caplancobb.com
croberts@caplancobb.com

*admitted pro hac vice
Counsel for Defendants

Fax: (202) 239-3333
emily.costin@alston.com

Counsel for Plaintiffs

SCHEDULING ORDER

Upon review of the information contained in the Joint Preliminary Report and Discovery Plan form completed and filed by the parties, the Court orders that the time limits for adding parties, amending the pleadings, filing motions, completing discovery, and discussing settlement are as set out in the Federal Rules of Civil Procedure and the Local Rules of this Court, except as herein modified:

IT IS SO ORDERED, this _____ day of _____, 20____.

UNITED STATES DISTRICT JUDGE

Response to Question No. 4:

Plaintiffs' Position: As set forth in Plaintiffs' Opposition to Defendants' Motion to Dismiss, ECF 30, there is a live case or controversy between the Parties over the proper rate of reimbursement for Defendants' services to Plan members in Georgia. Defendants have consistently billed United at their full, inflated billed charges for services to Plan members in Georgia and disputed the reimbursement rates that United has applied pursuant to the Plans' terms. Defendants' parent company ("TeamHealth") has threatened to sue United under these exact circumstances, and TeamHealth's executives have stridently maintained that any claim paid at less than the full billed amount is "disputed" and subject to future litigation. Making good on this threat, Defendants' affiliates that were previously covered under the very same network contracts to which Defendants were parties have already filed suit in numerous jurisdictions across the country. Under the relevant case law, these actions establish subject-matter jurisdiction over this action.¹

Defendants' Position: As set forth in Defendants' Motion and Reply, there is no actual controversy between the Parties. Defendants do not intend to sue United in Georgia and have never expressed an intention to do so. Kent Bristow, the key decisionmaker, has submitted a sworn Declaration attesting that Defendants do not intend to sue United. United has submitted no evidence suggesting that Defendants intend to sue in Georgia and therefore has not met its burden of proving jurisdiction. Nor did United specifically request jurisdictional discovery in its Response to the Motion. Moreover, that some of Defendants' affiliates have sued United in other jurisdictions does not change that result. As Mr. Bristow attests, the decision about whether to sue United in a given market is based on a variety of local factors. That TeamHealth affiliates in one market elected to sue an insurer therefore does not suggest that affiliates in a different market will do the same.

¹ As noted above, if the Court believes that the facts related to subject matter jurisdiction are in dispute, Plaintiffs formally request jurisdictional discovery. See Plaintiffs' Opposition to the Motion to Dismiss, ECF No. 30 at n. 2.