

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GUARDIAN FLIGHT LLC, *et al.*,

Plaintiffs,

v.

**AETNA LIFE INSURANCE COMPANY,
*et al.***

Defendants.

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Civil Action No. 3:24-cv-00680-MPS

**AETNA’S RESPONSE TO PLAINTIFFS’
“NOTICE OF POSITION OF THE UNITED STATES OF AMERICA”**

Aetna¹ files this response to address the three arguments in Exhibit A (Doc. 159-1) to Plaintiffs’ Notice (Doc. 159), the federal government’s *amicus curiae* brief in *Guardian Flight, L.L.C. v. Health Care Service Corp.*, No. 24-10561 (5th Cir. 2024) (“*HCSC*”).

The *HCSC* Amicus Brief

A. Judicial enforcement

The *HCSC* amicus brief first argues that a provider can judicially enforce a CIDRE’s payment determination despite “the absence of a specific statutory provision authorizing a provider to seek federal judicial enforcement of a CIDRE’s award.” Amicus Br. at 9. This is so, the brief argues, because various NSA provisions “create[] in the provider a right to be paid a fixed sum,” *i.e.*, the IDR award amount, and these “statutory features distinguish this case from circumstances where courts have declined to recognize implied rights of action.” *Id.* at 9–10. But the amicus brief does not cite any other case in which such features—or even similar features—have been held to create an implied right of action. *See id.*

¹ “Aetna” refers collectively to Aetna Health Inc., Aetna Life Insurance Co., and Aetna Health and Life Insurance Co. Aetna submits this notice without waiver of any argument that Defendants Aetna Health and Life Insurance Co. and Aetna Health Inc. are not proper parties.

Instead, the amicus brief cites a thirty-year-old footnote in which the Supreme Court accepted Justice Scalia’s proposition in dissent “that ‘to say that A shall be liable to B is the *express* creation of a right of action.’” Amicus Br. at 10–11 (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 n.11 (1994)) (italics in original). However, the statute at issue in *Key Tronic* stated, “as clearly as can be, that ‘[c]overed persons ... shall be liable ...’” 511 U.S. at 822 (Scalia, J, dissenting in part) (quoting 42 U.S.C. § 9607(a)(4)(B)); see *id.* at 818 n.11. In contrast, the NSA does **not** state that health plans or insurers “shall be liable” to providers for unpaid IDR awards. The NSA provisions on which the *HCSC* amicus brief relies only address to whom and when a “payment” of a binding IDR award should be made. Amicus Br. at 9–10 (quoting 42 U.S.C. §§ 300gg-111(a)(1)(C)(iv)(II)), (b)(1)(D), (b)(6), (c)(5)(E)(i)(I), (c)(6); § 300gg-112(a)(3)(B); 29 U.S.C. § 1185f(b)(6)). The NSA provisions do not address or allow judicial enforcement and imposition of liability when payment of an IDR award has not been made.²

B. ERISA preemption of state-law claims

The *HCSC* amicus brief’s second argument is that providers with patient assignments have standing to sue to enforce IDR awards through ERISA § 502(a). See Amicus Br. at 17–27. The government’s position is that “ERISA’s surprise-billing provisions modify ERISA plan benefits by modifying coverage and payment requirements,” plan participants have standing to sue under ERISA § 502(a)(1)(B) to vindicate these contractual rights, “[a]nd as assignees standing in the shoes of plan participants,” providers have derivative standing. *Id.* at 17.

In particular, “because ERISA’s surprise-billing provisions mandate that plans pay benefits to out-of-network air ambulance providers in accordance with IDR determinations, that mandate

² The government acknowledges that regulatory enforcement of an unpaid IDR award is available. See Amicus Br. at 13. The amicus brief posits that such regulatory enforcement will suffer from shortcomings, but this possibility is no basis for courts to invent a judicial enforcement remedy.

is enforceable through acclaim under section 502(a)(1)(B).” *Id.* at 21. “The NSA, as codified in the PHSA and ERISA,” imposes “a global directive that regulates the substantive content of group health plans, and effectively create[s] a mandatory contract term—*i.e.*, to pay benefits in accordance with IDR awards.” *Id.* (citations omitted); *see id.* (discussing 42 U.S.C. § 300gg-111(c)(6); *Id.* § 300gg-112(a)(3)(B), 112(b)(6); 29 U.S.C. §§ 1185f(a)(3)(B), (b)(6)). “A plan’s failure to do so would thus violate the plan (as modified by ERISA) and give rise to a wrongful denial of benefits claim under section 502(a)(1)(B). Any plan terms to the contrary would be trumped by ERISA and unenforceable.” *Id.* at 21–22 (citation omitted).

If the government’s position regarding ERISA coverage of NSA obligations is correct, the “global directive” is enforceable **only** through ERISA. *Id.* State law claims like Plaintiffs’ CUTPA claim about participation in the IDR process on behalf of a plan, including in particular the QPA and open negotiation process, are “trumped by ERISA”—*i.e.*, preempted. *Id.*; *see Aetna Health Inc. v. Davila*, 542 U.S. 200, 216 (2004) (“Congress’ intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA § 502(a) remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim.”).³ State law cannot require different participation standards than federal law. The government’s second argument in the *HCSC* amicus brief thus supports the ERISA preemption ground in Aetna’s pending motion to dismiss.

³ *See also Van Natta v. Sara Lee Corp.*, 439 F. Supp. 2d 911, 925 (N.D. Iowa 2006) (recognizing that state causes of action are preempted by ERISA even if they are based on state statutory duties and do not duplicate ERISA remedies, as allowing such claims would undermine the exclusivity of ERISA’s civil enforcement mechanism); *Burgos v. Grp. & Pension Adm’rs, Inc.*, 286 F. Supp. 2d 812, 816 (S.D. Tex. 2003) (finding that by providing a civil enforcement cause of action, ERISA provides the exclusive remedy to recover or enforce ERISA plan benefits and, thus, preempts any state-law claim seeking similar relief).

C. Independent provider standing under ERISA § 502(a)

Thirdly, the *HCSC* amicus brief argues that providers “themselves have a legally cognizable interest in the IDR-based payments” and, thus, have independent “standing to sue under ERISA section 502(a)(1)(B) separate from any injury incurred by plan participants.” Amicus Br. at 27–28. This argument is wrong as a matter of longstanding law. The Second Circuit and every other circuit that has addressed the issue has rejected a theory of independent provider standing under ERISA § 502(a). *See Brown v. BlueCross BlueShield of Tennessee, Inc.*, 827 F.3d 543, 545–46 (6th Cir. 2016) (collecting cases including *Rojas v. Cigna Health & Life Ins. Co.*, 793 F.3d 252, 257–58 (2d Cir. 2015)).

ERISA § 502(a) confers standing on “a participant or beneficiary” in an ERISA plan to bring a civil action to enforce certain rights under the plan. 29 U.S.C. § 1132(a). “Generally, § 502(a) is narrowly construed to permit only the enumerated parties to sue directly for relief.” *Montefiore Med. Ctr. v. Teamsters Loc. 272*, 642 F.3d 3621, 329 (2d Cir. 2011) (citations omitted). As a health care provider is neither a participant nor a beneficiary, it has no direct standing to sue under § 502(a) and can assert a claim under the statute **only** as an assignee of a participant’s or beneficiary’s right to benefits. *See Brown*, 827 F.3d at 545–46 (“The fact that a healthcare provider may be entitled to payment from an insurance company as a result of her clients’ participation in an employee plan does not make her a beneficiary for the purpose of ERISA standing.”); *Rojas*, 793 F.3d at 257–58 (“The ‘benefit’ the plan provides belongs to Rojas’s patients; Rojas’s claim to payment for covered services is a function of how Cigna reimburses healthcare providers under the Benefit Plan. That right to payment does not a beneficiary make.”).

Conclusion

The first and third arguments in the *HCSC* amicus brief are a call for the Fifth Circuit to indulge in ad hoc rewriting of the NSA and the ERISA to include features the government

apparently now wishes the statutes included. The Fifth Circuit is almost certain to reject the call. Indeed, the Fifth Circuit recently recognized in no uncertain terms that courts and regulators have no “license to alter the [NSA’s] unambiguous terms.” *Tex. Med. Ass’n v. United States Dep’t of Health & Human Servs.*, No. 23-40605, ___ F.4th ___, 2024 WL 4615744, at *7 (5th Cir. Oct. 30, 2024); see Dkt. 178 (Aetna’s Notice of New Authority discussing *Texas Medical*).

Unlike the first and third arguments, however, the *HCSC* amicus brief’s second argument is grounded in the statutory text of ERISA and the NSA. The Court can and should take notice that the government’s second argument supports the dismissal of Plaintiffs’ state-law CUTPA claim as preempted by ERISA.

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANTS
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AETNA HEALTH AND LIFE
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically on November 13, 2024. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ David Hughes
David Hughes