

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GUARDIAN FLIGHT LLC, et al.,

Plaintiffs,

v.

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

Defendants.

§
§
§
§
§
§
§
§
§
§
§

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

JURY TRIAL DEMANDED

PLAINTIFFS’ RESPONSE TO AETNA’S NOTICE OF NEW AUTHORITY

Plaintiffs Guardian Flight, LLC (“Guardian Flight”), REACH Air Medical Services, LLC (“REACH”), CALSTAR Air Medical Services, LLC (“CALSTAR”), Med-Trans Corporation (“Med-Trans”), Air Evac EMS, Inc. (“Air Evac”), and AirMed International LLC (“AirMed”) (collectively “Plaintiffs”) file this Response to Aetna’s Notice of New Authority (“Notice”) and would respectfully show the Court as follows:

The Fifth Circuit’s decision in *Texas Medical Association v. United States Department of Health and Human Services*, No. 23–40605, ___ F.4th ___, 2024 WL 4615744 (5th Cir. Oct. 30, 2024) (“*TMA*”) concerns a challenge to agency regulations regarding the method of calculating the Qualifying Payment Amount (“QPA”) in the No Surprises Act (“NSA”). The QPA is generally the median contracted rate for a service in a given area. Aetna’s Notice strains to find relevancy, but *TMA* does not remotely address any of the issues in Aetna’s motion to dismiss. The way a QPA is calculated has nothing to do with how Independent Dispute Resolution (“IDR”) awards are enforced, and Aetna cites no authority for such a connection. Instead, Aetna takes some of the *TMA* court’s dicta on the QPA out of context to suggest it is relevant here. It is not.

For example, Aetna argues that the NSA “places responsibility for enforcing IDR awards on the Departments...rather than allowing providers a private right of action to enforce IDR

awards through the courts.” Doc. 178 at 2. In alleged support of this argument, Aetna cites the *TMA* court’s statement that “[t]he ACT places the responsibility *for auditing QPA calculations* on the Departments rather than the providers.” *Id.* (quoting *TMA* at 19) (emphasis added). But the Departments’ statutory authority to audit the QPA has *nothing to do* with enforcement of IDR awards that have not been paid. Moreover, Aetna implies that Plaintiffs have an administrative remedy to enforce IDR awards by filing a complaint with the Departments. *Id.* The Fifth Circuit certainly does not say this, and neither does the NSA. Aetna’s brief cites and relies on a paragraph in the *TMA* opinion that solely concerns permissive audits arising from complaints regarding how QPAs are calculated and applied. *See* 42 U.S.C. § 300gg-111(a)(2)(A)(ii)(II) (complaints must “involve[] the compliance of the plan or coverage, respectively, with either of the requirements described in subclauses (I) and (II) of such clause” [the QPA requirements]).

Ironically, Aetna had the first-ever published QPA audit, which found multiple violations of the NSA and its regulations. *See* <https://www.cms.gov/files/document/qpa-final-report-aetna-tx.pdf>. The Departments found that Aetna routinely failed to notify providers of their right to dispute payment, *id.* at 9, failed to disclose its QPA, *id.* at 10, and erroneously calculated the QPA for air ambulance claims resulting in an amount that was up to 73% less than what it should have been, *id.* at 16. While the Departments’ audit revealed systemic violations, it never once mentioned IDR awards and appears not to have considered them within its scope. Aetna’s argument that the NSA’s QPA audit provision precludes judicial enforcement of IDR awards is nonsensical and refuted by its own QPA audit.

Aetna’s argument that *TMA* somehow confirms that the NSA preempts CUTPA is likewise groundless. There was no unfair trade practice claim at issue in *TMA*, much less a claim under Connecticut law. Aetna posits that because the “Departments are empowered to monitor, police,

punish, and deter alleged bad faith participation in the IDR process,” enforcement by private plaintiffs through state law “would usurp the Departments’ power.” *Id.* at 3. Once again, Aetna cites zero authority for dots that simply do not connect. Under Aetna’s reasoning, private enforcement of ERISA (which happens in court every day) would usurp the Department of Labor’s regulatory enforcement of ERISA violations. It of course does not. Private causes of action for damages have no impact on regulatory enforcement, which typically involves civil penalties owed to the government and injunctive relief against repeat bad actors.

Aetna also argues that its preemption argument is supported by dicta saying the “NSA fully addresses all patient and health plan/insurer liability to a provider with regard to a claim subject to the NSA.” *Id.* But all this statement says is that the IDR process and resulting award sets the amount owed (the provider liability). There is no discussion of what happens if such awards are repeatedly not paid. The *TMA* opinion simply had nothing to do with enforcing IDR awards.

In reality, Aetna’s Notice is merely another attempt (without leave of Court) to have the final word. Its action is particularly surprising given the fact it previously briefed to this Court that notices of additional authority are “not a venue for submission of additional argument.” *See* Doc. 169 at 1. Enforcing IDR awards in court and holding insurers like Aetna accountable for the financial harm their unfair trade practices cause comfortably coexists alongside the Departments’ permissive regulatory enforcement powers. The Fifth Circuit’s *TMA* opinion, which affirmed the vacatur of some of the Departments’ NSA regulations, is irrelevant to the IDR enforcement issues before this Court. Aetna’s submission should be disregarded.

Dated: November 26, 2024

/s/ Adam T. Schramek

PULLMAN & COMLEY LLC

Timothy G. Ronan
850 Main Street
P.O. Box 7006
Bridgeport, CT 06601-7006
T: 203.330.2000
F: 203.576.8888

NORTON ROSE FULBRIGHT US LLP

Adam T. Schramek (*pro hac vice*)
Texas Bar No. 24033045
D. Conn No. phv207863
98 San Jacinto Boulevard
Suite 1100
Austin, TX 78701-4255
Telephone: (512) 474-5201
Facsimile: (512) 536-4598
adam.schramek@nortonrosefulbright.com

Dewey J. Gonsoulin III (*pro hac vice*)
Texas Bar No. 24131337
D. Conn No. phv207862
1550 Lamar Street
Suite 2000
Houston, Texas 77010
Telephone: (713) 651-5151
Facsimile: (713) 651 5246
dewey.gonsoulin@nortonrosefulbright.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on November 26, 2024, a true and correct copy of the foregoing was served electronically on all counsel of record.

/s/ Adam T. Schramek

Adam T. Schramek