IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN, *et al.*, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS, JUDGE

PLAINTIFFS' OPPOSITION TO THE HEALTH PLAN OF WEST VIRGINIA, INC.'S MOTION TO CERTIFY APPEAL OF THE COURT'S JUNE 28, 2021 MEMORANDUM OPINION AND ORDER

INTRODUCTION

This Court denied The Health Plan of West Virginia, Inc.'s motion to dismiss on June 28, 2021. (ECF No. 63.) More than two months later, The Heath Plan moved to certify that order for interlocutory appeal. That unnecessary delay is reason enough to deny The Health Plan's request. Regardless, The Health Plan fails to meet its burden of showing that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of litigation.

There is no substantial ground for difference of opinion on the question at issue: whether the "health program or activity" language in Section 1557 of the Patient Protection and Affordable Care Act ("ACA") is ambiguous as applied to health insurers. The Health Plan's reliance on a solitary opinion from another district court in a distinguishable context does not change this. Further, the Fourth Circuit is unlikely to rule before discovery closes, meaning interlocutory review would require parallel work before both courts, creating inefficiencies and burdens without advancing termination of the litigation. For these reasons, the Court should deny The Health Plan's motion.

LEGAL STANDARD

As a general rule, appellate review is limited to final judgments. 28 U.S.C. § 1291. Because "federal law strongly favors finality in the district court before an appeal is pursued," the exception provided in 28 U.S.C. § 1292(b) is reserved for limited circumstances, and "should be used sparingly and ... its requirements must be strictly construed." *Ohio Valley Env't Coal. v. Elk Run Coal Co.*, No. 3:12-cv-0785, 2014 WL 4660782, at *2 (S.D.W. Va. Sept. 17, 2014) (quotation marks omitted). Indeed, "the interlocutory appeal mechanism was not intended to be used in ordinary suits and was not designed to provide early review of difficult rulings in hard cases." *Chicago Ins. Co. v. Health Care Indem., Inc.*, No. 3:09-cv-0659, 2010 WL 4260029, at *3 (S.D.W. Va. Oct. 21, 2010) (brackets and quotation marks omitted). Thus, interlocutory review is only appropriate where the district court's order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). The Health Plan's motion does not meet this standard. As such, even if the motion was timely, it would fail.

ARGUMENT

I. The Health Plan's Motion is Untimely.

Timeliness is the touchstone of appealability under 28 U.S.C. § 1292(b). The statute describes such an appeal as "immediate." 28 U.S.C. § 1292(b). The point is to "materially advance the ultimate termination of the litigation," not delay it. *Id.* In fact, if a district court certifies an order for appeal, the moving party then has only ten days to seek appeal—a requirement this Circuit treats as jurisdictional. *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989); *see also* 28 U.S.C. § 1292(b). It makes sense, then, that this Court has noted caution "against allowing amendments of previously issued orders where there has been gratuitous delay,

potentially undermining the ten-day limitation found in the statute." *Ohio Valley Env't Coal.*, 2014 WL 4660782, at *4; *see also Weir v. Propst*, 915 F.2d 283, 287 (7th Cir. 1990) ("The ten-day limitation in section 1292(b) is not to be nullified by promiscuous grants of motions to amend."); *Coal. For Equity & Excellence In Maryland Higher Educ. v. Maryland Higher Educ. Comm'n*, No. CIV. CCB-06-2773, 2015 WL 4040425, at *7 (D. Md. June 29, 2015) ("[A] district judge should not grant an inexcusably dilatory request.").

Here, The Health Plan's request is inexcusably dilatory. The order denying the motion to dismiss was entered June 28; yet, The Health Plan did not seek certification until September 1. In the interim, Plaintiffs served discovery on The Health Plan, received its responses and certain documents, and met and conferred with counsel over deficiencies, and attempted to work with The Health Plan on various discovery matters. In short, this case is being litigated, The Health Plan has been participating in that litigation, and The Health Plan no offers no justification for its tardiness in requesting certification.

This is sufficient ground for the Court to deny the motion as untimely. *See e.g.*, *Green v. City of New York*, No. 05-cv-0429, 2006 WL 3335051, at *2 (E.D.N.Y. Oct. 23, 2006) (denying motion for certification where there was a "more than two-month delay in requesting certification"); *Fabricant v. Sears Roebuck & Co.*, No. 98-cv-1281, 2001 WL 883303, at *1 (S.D. Fla. Jan. 29, 2001) (same where "[d]efendants waited forty-six days after the filing of the [interlocutory order]"); *Ferraro v. Sec'y of U.S. Dep't of Health & Hum Servs.*, 780 F. Supp. 978, 979 (E.D.N.Y. 1992) (same after "two and a half month delay"); *Morton Coll. Bd. of Trustees v. Town of Cicero*, 25 F. Supp. 2d 882, 885 (N.D. Ill. 1998) (same where motion was filed 30 days after the interlocutory order); *Oasis Research, LLC v. EMC Corp.*, No. 4:10-cv-

435, 2015 U.S. Dist. LEXIS 121111, *14-15 (E.D. Tex. Sept. 11, 2015) (untimely certification motion where filed one month after entry of underlying order).

II. There is No Substantial Ground for Difference of Opinion.

"That a controlling issue of law may be an issue of first impression does not necessarily translate into there also being substantial ground for difference of opinion." *Ohio Valley Env't Coal.*, 2014 WL 4660782, at *3. Nor does "a question of law [that] is complex or difficult" justify immediate appeal pursuant to 28 U.S.C. § 1292(b). *Id.* Rather, a "court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute." *APCC Servs., Inc. v. AT & T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003); *see also In re Flor v. BOT Financial Corp.*, 79 F.3d 281, 284 (2d Cir. 1996) (same).

Here, this Court has already done that. Faced with the question of whether the "health program or activity" language in Section 1557 of the ACA is ambiguous as applied to health insurers, this Court found The Health Plan's arguments not "persuasive," and its suggested reading of the regulation "untenable." (ECF No. 63 at 6-7.) The answer to the question at issue is "evident" and Congress's intention is "clear[]." (*Id.* at 4-5.) Congress clearly intended to prohibit discrimination broadly by all entities acting within the health system and, as a health insurer, The Health Plan "undoubtedly" qualifies as a "'health program' which Congress intended to rid of discrimination." (*Id.* at 4.) The meaning of "health program or activity" also is "evident" in view of the statute as a whole: the same section of the ACA provides that federal assistance includes "contracts of insurance," and it "is unclear to whom this clause would apply if not health insurance issuers like The Health Plan." (*Id.* at 5 (citing 42 U.S.C. § 18116).) Other sections of the ACA, which allow the states to offer insurance plans under a "basic health

program," provide further support, as does the ACA's overall statutory purpose of increasing the number of Americans covered by insurance. (ECF No. 63 at 5-6 (citing 42 U.S.C. § 18051).)

Nothing in The Health Plan's motion undermines this or shows substantial ground for difference of opinion. Rather, The Health Plan takes a mere eight lines to argue that a lone district court decision provides proof of substantial disagreement among the courts. (ECF No. 93 at 6 (citing *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817 (D.S.C. 2015).) The Health Plan is wrong. While *Callum* involved the ACA's application to a pharmacy, as this Court noted, the "precise question" before it here is different because this case asks whether a health insurer is covered by the statutory language. (ECF No. 63 at 4.) And, in contrast to this Court's thorough ruling, which analyzes the larger statutory context and structure to interpret the meaning of "health program or activity," *Callum* merely asserts that language is ambiguous without analysis, and spends the balance of its discussion weighing the level of deference and proper interpretation of the then-pending regulations under the ACA. *See, e.g.*, *Callum*, 137 F. Supp. 3d at 850 (observing that "the statute is silent" on the meaning of "health program or activity" without further comment about the statute's purported ambiguity). This does not give rise to the "genuine doubt" required "as to whether the district court applied the correct legal standard in its order" here. *Wyeth v. Sandoz, Inc.*, 703 F. Supp. 2d 508, 527 (E.D.N.C. 2010) (quote omitted); *see also id.* (observing that a court is not bound to "find reasonable cause for disagreement whenever authorities lack unanimity," and a court can deny certification "even though the only other reported decision on the issue at hand disagrees with the conclusions of the court"). With no further support for its argument, The Health Plan fails to carry its burden, and its motion fails.

III. An Immediate Appeal Will Not Materially Advance the Ultimate Termination of the Litigation as to The Health Plan.

The Health Plan claims that judicial economy supports its request for certification

because interlocutory review will materially advance the termination of its involvement in the litigation. (ECF No. 93 at 6-7.) Again, The Health Plan is wrong. It has not sought a stay of proceedings in this Court, which means that The Health Plan will be subjected to the very discovery that it claims an interest in avoiding. The fact discovery deadline is December 1, 2021, and the expert discovery deadline is April 29, 2022. ECF No. 75. But to even be allowed an appeal, The Health Plan would still need to complete briefing and obtain rulings from this Court and from the Fourth Circuit. After that, and assuming *arguendo* an appeal is allowed, the Fourth Circuit's "median disposition time for cases decided on the merits is about six months from notice of appeal to entry of judgment."[1] In other words, the Fourth Circuit would be very unlikely to rule on the merits before discovery concludes in this Court, meaning that an appeal would multiply the efforts required of the parties and courts without a likelihood of advancing the termination of the litigation. This, too, dooms The Health Plan's motion.

CONCLUSION

For all the reasons above, the Court should deny The Health Plan's motion to certify the June 28, 2021 Opinion and Order for immediate appeal pursuant to 28 U.S.C. § 1292(b).

Dated: September 15, 2021

Respectfully submitted,

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[1] United States Court of Appeals for the Fourth Circuit, "FAQs – Opinions," *available at* https://www.ca4.uscourts.gov/faqs/faqs-opinions.

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