

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

CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

CIVIL ACTION NO. 3:20-cv-00740
JUDGE CHAMBERS

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES; TED CHEATHAM, in his official
capacity as Director of the West Virginia Public
Employees Insurance Agency; and THE
HEALTH PLAN OF WEST VIRGINIA, INC.,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO CERTIFY APPEAL OF
THE COURT’S JUNE 28, 2021 MEMORANDUM OPINION AND ORDER**

The Health Plan of West Virginia, Inc. (“THP”), by counsel, submits this memorandum of law in support of its *Motion to Certify Appeal of the Court’s June 28, 2021 Memorandum Opinion and Order*. THP moves to certify the Court’s June 28, 2021 Memorandum Opinion and Order (ECF No. 63) for immediate appeal pursuant to 28 U.S.C. § 1292(b) because there is substantial ground for difference of opinion as to the meaning and scope of the phrase “health program or activity” as used in Section 1557 of the ACA, which is a controlling question of law as to the Plaintiffs’ only claim against THP in this case. Immediate review of the Court’s

ruling on that question of law will facilitate early resolution of the sole claim against THP and will not interfere with the development of this case as to the other defendants or remaining issues.

I. PROCEDURAL POSTURE

On November 12, 2020, Plaintiffs filed their Class Action Complaint against multiple defendants, including THP. This putative class action asserts claims against THP and others for allegedly discriminating against the Plaintiffs based upon their status as transgender individuals. *See generally* Compl., ECF No. 1. In general, the Plaintiffs allege that they have been denied health insurance coverage for treatments that are covered for cisgender individuals. *Id.*

Plaintiffs' sole claim against THP is found in Count Two of their Complaint. In Count Two, Plaintiffs allege discrimination in violation of Section 1557 of the Patient Protection and Affordable Care Act (the "ACA"). Section 1557 of the ACA prohibits discrimination under "any health program or activity, any part of which is receiving Federal financial assistance" 42 U.S.C. § 18116. *See also* Compl., ECF No. 1, at ¶¶ 135-148 ("Count Two"). Plaintiffs allege that Section 1557 of the ACA applies to THP, and by extension to the health plans offered by THP to PEIA participants such as Plaintiffs Brian McNemar and Zachary Martell, because THP receives Federal funding for its Medicare Advantage program. *See* Compl., ECF No. 1, at ¶¶ 15, 139B. Plaintiffs do not allege that THP receives Federal financial assistance for Zachary Martell's plan, and there is no dispute that Zachary Martell's plan does not receive Federal funding. As such, THP moved to dismiss the Plaintiffs' only claim against it for failure to state a claim. *See* ECF Nos. 21-22.

On January 11, 2021, THP filed its Motion to Dismiss and Memorandum in Support. On February 16, 2021, the Plaintiffs filed their response in opposition. On February 23,

2021, THP filed its Reply in further support of THP's Motion to Dismiss. The crux of THP's motion is that, since Mr. Martell's health plan does not receive Federal dollars, Mr. Martell's health plan need not comply with Section 1557 of the ACA. Further, given that Mr. Martell's health plan need not comply with Section 1557 of the ACA, Plaintiffs cannot pursue a Federal action under the ACA.

On June 28, 2021 the Court entered its Memorandum Opinion and Order (the "Opinion"), denying THP's motion to dismiss. The Opinion hinges on the interpretation of the statutory phrase found in ACA Section 1557: "any health program or activity." The Court acknowledged that, were it to follow the current implementing regulations for Section 1557, then it would be forced to bar Plaintiffs' sole claim against THP in this case. *See* ECF No. 63, at pp. 2-3. However, the Court concluded this phrase, "any health program or activity," was not ambiguous, and therefore did not follow the implementing regulations. Accordingly, and pursuant to 28 U.S.C. § 1292(b), THP respectfully requests that the Court certify its Opinion for immediate appeal.

II. ANALYSIS

The Court should certify its Opinion for immediate appeal pursuant to 28 U.S.C. § 1292(b) because the Court's decision "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). As detailed below, there is substantial ground for difference of opinion as to whether the Court should defer to the current implementing regulations for Section 1557 of the ACA, a question of law that would be dispositive of the Plaintiffs' sole claim against THP in this case.

Orders denying motions to dismiss are interlocutory in character and are not ordinarily appealable. *District of Columbia v. Trump*, 959 F.3d 126, 130 (4th Cir. 2020).

However:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b). When deciding whether to certify an interlocutory order for immediate appeal, § 1292(b) requires a district court to consider three factors: (1) whether the order involves a “controlling question of law”; (2) whether there is “substantial ground for difference of opinion” as to that question of law; and (3) whether an immediate appeal may “materially advance the ultimate termination of the litigation.” *Fannin v. CSX Transp., Inc.*, No. 88-8120, 873 F.2d 1438, 1989 WL 42583, at *2 (4th Cir. Apr. 26, 1989 (Table Decision)). All three factors are satisfied here.

- A. This Court’s Opinion involves a “controlling question of law,” namely whether the phrase “any health program or activity” is sufficiently ambiguous to require deference to regulatory guidance.

First, the Plaintiffs’ only claim against THP necessarily depends on whether Section 1557 of the ACA applies to all of THP’s operations (including its health plan offerings to PEIA participants such as Plaintiffs McNemar and Martell) or only to the extent any of THP’s operations receive Federal financial assistance (which is limited to its Medicare Advantage plans).

The answer to this question turns on the meaning and scope of the phrase “any health program or activity” as used in Section 1557, which is purely a question of law. *See, e.g., Stone v. Instrumentation Laboratory Co.*, 591 F.3d 239, 242-43 (4th Cir. 2009) (matters of statutory interpretation present questions of law). The Court’s Opinion agrees that “the viability of Plaintiffs’ claim [against THP] hinges on [this] issue.” ECF No. 63, at p.4.

- B. There exists a difference of opinion, namely between this Court and the *Callum* Court, as to whether “any health program or activity” is sufficiently ambiguous to require deference to regulatory guidance.

Second, there is substantial ground for difference of opinion as to whether the Court should have granted THP’s motion to dismiss. “An issue presents a substantial ground for difference of opinion if courts, as opposed to parties, disagree on a controlling question of law.” *Ohio Valley Environmental Coalition, Inc. v. Independence Coal Co., Inc.*, No. CV 3:10-0836, 2011 WL 13161421, at *3 (S.D.W.Va. June 20, 2011). As noted in the Court’s June 28, 2021 Memorandum Opinion and Order, the United States Department of Health and Human Resources (“HHS”), the agency that administers the ACA, promulgated a final rule in 2020 that narrowed the scope of Section 1557. *See* ECF No. 63, at p.2. *See also* 45 C.F.R. § 92.3. Under HHS’s current regulations, health insurers such as THP are not “principally engaged in the business of providing healthcare,” and therefore the phrase “any health program or activity” does not “encompass[] all of the operations” of THP. *See* 45 C.F.R. § 92.3(b)-(c). Instead, according to HHS, Section 1557’s nondiscrimination provisions “apply to [THP’s] operations only to the extent any such operation receives Federal financial assistance,” and it is undisputed that THP’s health plan offerings to PEIA participants do not receive such assistance. *Id.*

The Court declined to defer to HHS’s rule and therefore denied THP’s motion to dismiss, finding Section 1557 to be unambiguous for purposes of *Chevron* deference. *See* ECF

No. 63, at pp. 3-8. However, in Footnote 2 of its Opinion, the Court acknowledged that “[a]t least one court has concluded that Section 1557 is ambiguous under *Chevron* step one.” *Id.* at p.3 n.2 (citing *Callum v. CVS Health Corp.*, 137 F.Supp.3d 817 (D.S.C. 2015)). The *Callum* court, which was also tasked with determining the meaning and scope of the phrase “any health program or activity,” ultimately afforded *Skidmore* deference to the agency’s then-proposed interpretation of that phrase.¹ Accordingly, THP respectfully contends that there is substantial ground for difference of opinion as to whether the Court should have deferred to HHS’s current regulations under *Chevron* and dismissed the Plaintiffs’ sole claim against THP.

- C. An immediate appeal will materially advance the ultimate termination of the litigation as to THP; in additional, an immediate appeal will not prejudice the other Defendants’ defenses.

Third, certifying an immediate appeal of the Court’s Opinion will materially advance the ultimate termination of this litigation. If the Fourth Circuit Court of Appeals disagrees with and reverses the Court’s Opinion, immediate appellate review will advance this litigation through early resolution of the only claim against THP. This will spare THP from potentially “protracted and expensive litigation” as a defendant in this putative class action, *see Fannin*, 1989 WL 42583, at *2, and will also narrow the remaining issues in the case.

Finally, the Court’s Opinion presents a discrete legal issue that is peculiar to THP in this case. None of the other defendants have argued that Section 1557’s implementing regulations bar the Plaintiffs’ claims against them. THP is **not** requesting a stay of these proceedings if it is allowed to immediately appeal the Court’s Opinion. Granting THP’s motion will not otherwise affect the proceedings in this Court or obstruct the Plaintiffs’ ability to develop

¹ At the time of the *Callum* decision, HHS had proposed but not yet promulgated its regulations for Section 1557. 137 F.Supp.3d at 850.

their case. For all of these reasons, THP respectfully believes that judicial economy weighs in favor of certifying the Court's Opinion for immediate appeal pursuant to 28 U.S.C. § 1292(b).

III. CONCLUSION

For the reasons set forth above, THP requests that the Court grant its motion to certify its June 28, 2021 Memorandum Opinion and Order for immediate appeal pursuant to 28 U.S.C. § 1292(b). There are substantial grounds for difference of opinion as to a controlling question of law that is dispositive of the Plaintiffs' sole claim against THP, and permitting immediate appeal of that issue will materially advance the ultimate termination of this litigation.

Dated: September 1, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2021, I electronically filed the foregoing
document with the Clerk of the Court using the CM/ECF system, which will send notification of
such filing to the following CM/ECF participants:

Walt Auvil, Esquire
Anna P. Prakash, Esquire
Nicole J. Schladt, Esquire
Sasha Buchert, Esquire
Avatara Smith-Carrington, Esquire
Tara L. Borelli, Esquire
Carl S. Charles, Esquire
Nora Huppert, Esquire

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/s/ Aaron C. Boone _____
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