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Deciphering First Circuit's Thirty-page Primer on NQTL Analysis and ERISA Information Requests

by Anna Mikhaylina on March 29, 2022

The widely publicized 2022 Report to Congress regarding the Mental Health Parity and Addiction Equity Act ("Parity Act") forewarned greater enforcement efforts by the Department of Labor and highlighted suspected deficiencies in health plans' compliance with the Parity Act. In addition, the First Circuit's recent decision in *N.R. v. Raytheon Co., 2022 WL 278537 (1st Cir. 2022)* will likely result in more litigation regarding Parity Act compliance. After a nuanced review of the plan documents and claim denials, the First Circuit Court of Appeals determined that a health plan's blanket assertion of compliance with the Parity Act is not enough for the case to be dismissed where a participant plausibly alleges that:

1. as written, the plan document covers some habilitative services for physical conditions, but bars such services for mental health conditions, and

2. the plan's denial of coverage for habilitative services was based on a mental health diagnosis, without a medical necessity review or confirmation of habilitative purpose of the services.[1]

Plan sponsors should take notice of the Court of Appeals' opinion and reexamine their internal processes and plan documents.

In general, the Parity Act requires equivalence in the way Mental Health and Substance Use Disorder ("MH/SUD") benefits and medical/surgical ("M/S") benefits are treated with respect to annual and lifetime dollar limits, financial requirements, and treatment limitations. Additionally, pursuant to the Consolidated Appropriations Act of 2021 ("CAA"), beginning February 10, 2021, group health plans must perform, document, and maintain comparative analyses of the design and application of their nonquantitative treatment limitations ("NQTLs") that apply to M/S and MH/SUD conditions and services. Some examples of NQTLs are prior authorization requirements, network composition, the specific requirements for different types of facilities, and a plan's credentialing of its providers. The congressionally mandated analyses must examine all NQTLs both as written in plan documents and in operation based on current data.

In *N.R. v. Raytheon Co.*, the central issue was the plan's decision to deny coverage for nonrestorative speech therapy for a minor with Autism Spectrum Disorder ("ASD"), allegedly because of an NQTL – an exclusion for "habilitative services" that was applied only to the treatment of mental health conditions. At the district court level, the

defendants successfully argued that there was no Parity Act violation because habilitative services are not covered for nonrestorative speech regardless of the type of condition, MH/SUD or M/S. Without providing any information about how the NQTL operated, the defendants alleged that a person with “a lisp, stutter, deafness, or physical deformity of the mouth or vocal [cords] from birth” would, like the named plaintiff, be barred from coverage because the purpose of treatment would be to help the person achieve a level of speech beyond what that person had previously achieved, not to restore speech. The district court accepted the defendants’ argument, and the plaintiffs appealed.

The plan document defined habilitative services as “health care services that help a person keep, learn or improve skills and functioning for daily living, such as ‘non-restorative’ ABA speech therapy.” The plaintiffs’ argument was that the plan provides a definition for habilitative services only once, in the "mental health" sub-list, as a type of mental health service, and, thus, by default, the exclusion could only apply to mental health services. The defendants countered that the plan addressed the habilitative services exclusion twice in the larger list of "Exclusions" under the plan: once generally in the main body of the list, and next, in a sub-list of mental health exclusions. Thus, all claims for nonrestorative speech therapy were barred, regardless of the type of condition.

After a close reading of the plan document, the Court of Appeals explained that the plan appeared to cover some services that improve function for those with a physical impairment, while explicitly excluding coverage of mental health services that "improve skills and functioning." The Court of Appeals also found plaintiffs’ allegation that defendants’ internal-level denials of speech therapy coverage without seeking confirmation of whether it was restorative provided sufficient support for the plaintiffs’ argument that, in operation, the plan violated the Parity Act because of the way the habilitative services exclusion was applied. Specifically, the plan's denial notices for N.R.’s claims stated that speech therapy was not covered for the diagnosis listed on the claim, and that diagnosis was always ASD. Accordingly, the Court of Appeals concluded that a Parity Act violation was possible, reversed the dismissal, and sent the case back to the district court for further proceedings. In addition, the Court of Appeals cautioned that the district court’s acceptance of the defendants’ assertion of how the plan worked was premature on a motion to dismiss, and that N.R.’s claims were articulated well enough to proceed to the discovery stage of litigation.

Notably, after the conclusion of the internal appeals process, in an unsuccessful attempt to discover how the plan applies the nonrestorative speech therapy exclusion, the plaintiff requested (1) the list of non-mental health conditions to which the plan applies the nonrestorative speech therapy exclusion, (2) the medical necessity criteria for applying the non-restorative speech therapy exclusion to M/S or MH/SUD benefits, and

(3) the processes, strategies, evidentiary standards, and other factors used to apply the exclusion. Essentially, the content of the requested documents was very similar to the content of congressionally mandated NQTL reports explained in the CAA. In their complaint at the district court level, the plaintiffs argued that the plan administrator violated ERISA's disclosure requirements by not responding to their information request. While providing for damages[2], §§1132(a) and (c) of ERISA authorize a plan participant to bring a civil suit against a plan administrator who fails to comply with requests for information that ERISA requires them to furnish. In turn, §1024(b)(4) and §1185a(a)(4) of ERISA require a plan administrator to furnish upon request, among other types of information, (1) instruments under which the plan is established or operated, and (2) criteria for medical necessity determinations made under the plan with respect to mental health services. The district court dismissed the § 1132(c) claim because the plaintiffs only attached a request letter sent to the claims administrator to their complaint, while alleging that they contacted the plan administrator as well.

In allowing the count under § 1132(c) to go forward, the Court of Appeals reiterated that the Congress undoubtedly intended for ERISA plan participants and beneficiaries to know about mandatory terms of their plans, and that at this stage of litigation, the plaintiffs' allegations are presumed to be true. Additionally, the Court of Appeals cautioned that § 1132(c) was not to be read in a "persnickety" manner when the defendants argued that N.R.'s claims regarding the request for information should be dismissed because the plaintiffs did not address their requests to the plan administrator personally. While the information request issue was not paramount to the Court of Appeal's analysis, the opinion provides an insight into what plans need to consider when faced with requests for information under the Parity Act and which plan terms are mandatory.

Takeaways

The Court of Appeals decision in *N.R. v. Raytheon Co.* illustrates significant risks associated with potential deficiencies in Parity Act compliance by examining a single NQTL in a thirty-page opinion. In light of this decision and the forewarned greater enforcement efforts by the Department of Labor, plan sponsors should take the following steps:

- Become familiar with the 2022 MHPAEA Report to Congress, including the Parity Act Self-Compliance Tool, available here and the compliance tips included in the document.
- Approach participant information requests for MH/SUD NQTLs carefully and develop internal guidelines regarding what type of information must be disclosed to participants.

- Revisit the “Exclusions” lists in your plan document. Exclusions that appear specific to mental health services may create compliance and litigation risk.
- Examine facially neutral definitions in the plan document and ensure the plan’s definitions are consistent when applied to MH/SUD and M/S benefits.
- Review your administrative services agreements (ASAs) to ensure clear allocation of Parity Act compliance and claims fiduciary authority and seek representations and performance guarantees regarding the quality of the claims adjudication.

Please contact a member of Verrill’s Employee Benefits & Executive Compensation Group if you have questions regarding Parity Act compliance, including the required analyses for NQTLs.

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[1] The Court of Appeals did, however, affirm the district court’s dismissal of the fiduciary breach claim, reiterating that the ERISA provision under which the fiduciary breach claim was brought requires financial harm to the plan rather than to an individual.

[2] Under §1132(c)(1)(B) of ERISA, if the plan administrator does not send the requested materials to the last known address of the requesting participant or beneficiary within 30 days after such request, the plan administrator, may be personally liable to such participant in the amount of up to $110 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. Additionally, each such violation with respect to any single participant shall be treated as a separate violation.

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