

No. 01-21255  
No. 01-20610

01-20610

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

01-21255

KENNETH B. FORD, M.D.

Plaintiff - Appellant

v.

NYLCARE HEALTH PLANS OF THE GULF COAST INC; et al.

Defendants

AETNA HEALTH PLANS OF TEXAS; AETNA LIFE AND CASUALTY CO;  
THE METRAHEALTH CARE PLAN OF TEXAS INC; THE INSURANCE COMPANY INC;  
TRAVELERS INSURANCE COMPANY; METROPOLITAN LIFE INSURANCE COMPANY;  
AETNA U.S. HEALTHCARE, a Pennsylvania corporation

Defendants - Appellees

On Appeal from the United States District Court  
for the Southern District of Texas, Houston Division

**RESPONSE BRIEF CONCERNING COSTS  
FILED WITH LEAVE OF COURT**

John B. Shely  
TBA No. 18215300  
Kendall M. Gray  
TBA No. 00790782  
ANDREWS & KURTH L.L.P.  
600 Travis, Suite 4200  
Houston, Texas 77002  
(713) 220-4200  
(713) 220-4285 (Telecopier)

U. S. COURT OF APPEALS  
**FILED**

APR 15 2002

CHARLES R. FULBRUGE III  
CLERK

Attorneys for Defendants-Appellees  
Aetna U.S. Healthcare, Inc., f/k/a Aetna  
Health Plans of Texas, Inc. and Aetna  
U.S. Healthcare Inc., substituted by court  
order for Aetna Life and Casualty Company

## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

### Defendants-Appellees

#### *"United"*

United HealthCare of Texas, Inc. (f/k/a The MetraHealth Care Plan of Texas, Inc.)

United HealthCare Insurance Company (f/k/a The MetraHealth Insurance Company)

United HealthCare Corporation

#### *Counsel for United*

Paula Denney  
JoAnn Dalrymple  
Michael Jung  
Strausburger & Price LLP

#### *"Aetna"<sup>1</sup>*

Aetna U.S. Healthcare, Inc. (f/k/a Aetna Health Plans of Texas, Inc.)

---

<sup>1</sup> Indirectly owned by Aetna Inc., a public company.

Aetna U.S. Healthcare Inc. (substituted by court order for Aetna  
Life and Casualty Co.)

*Counsel for Aetna*

John B. Shely  
Kendall M. Gray  
Andrews & Kurth L.L.P.

**Plaintiff-Appellant**

Kenneth B. Ford, M.D.

*Counsel for Plaintiff-Appellant*

Kenneth R. Wynne  
Mark Maney  
Wynne & Maney LLP

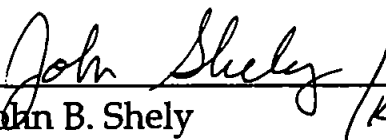
  
\_\_\_\_\_  
John B. Shely

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## RECORD REFERENCES

Sample Reference	Meaning
12R826	Record at volume 12, page 826
App. Br. at 25	Appellant's Brief at page 25
2R3874 (sealed doc) at PX11, p. 515	Plaintiff's Summary Judgment Exhibit 11, sealed and unnumbered by the clerk, as indicated at 2R3874
4DX14(Ford):772	Defendants' certification hearing Exhibit 14 (Ford Deposition) at page 772, not numbered by the District Clerk and contained in Redrope 4
RE5:6	Record Excerpt 5 at page 6

TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Pursuant to this Court's order, Aetna files this response brief to address the matter of costs awarded to the Aetna Appellees as prevailing parties below. Aetna would respectfully show:

**I. FACTUAL BACKGROUND AND DISPOSITION BELOW**

**A. Dr. Ford's Costly Lawsuit Was No Charitable Undertaking**

Almost six years ago, Dr. Ford filed a lawsuit.<sup>2</sup> Though he now clothes himself in the garb of the public servant,<sup>3</sup> Dr. Ford's complaint was much more forthright about his aims. Dr. Ford sought to recover an astronomical sum in damages for himself and other physicians by certifying a national class action against three groups of managed care defendants.<sup>4</sup> One need only multiply Dr. Ford's supposed \$100,000 in damages,<sup>5</sup> add in the claimed treble damages, and multiply by the number of physician specialists in the putative national class to realize the motivating factor behind this supposed "public interest" lawsuit. Most of

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<sup>2</sup> 14R1-18.

<sup>3</sup> Reply Brief of Appellant Dr. Kenneth B. Ford ("Reply Br.") at 33 n.8.

<sup>4</sup> 14R1-18.

<sup>5</sup> App. Br. at 63.

these claims were summarily rejected at the motion to dismiss stage and Dr. Ford has not appealed that ruling.<sup>6</sup> The Lanham Act claim, however went forward beyond the motion to dismiss stage.

Early in the proceedings, when it was in their interests to do so, Dr. Ford and his counsel trumpeted their willingness to put their finances on the line in seeing the case through to its conclusion:

Q. (By Mr. Wynne): Dr. Ford, are you willing to see this matter through financially?

A. (Dr. Ford) Yes. I will see it through as far as I can go. And I've spoken with you in the past and if I feel like I'm running out of gas, I know that you'll step up and help me.

Q. What is our arrangement for paying the out-of-pocket costs on this matter thus far?

A. Thus far, you pay 50 percent and I pay 50 percent.

Q. And has your counsel assured you that if, as and when you ever run out of gas on your 50 percent, that your counsel will keep stepping up for it?

A. That's correct.<sup>7</sup>

One hears a different tune now.

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<sup>6</sup> RE6.

<sup>7</sup> Proceedings of Sept. 8, 1999 -- Vol. 1 (Class Certification Hearing) at 73.

## B. Dr. Ford's Claim Thoroughly Failed

Prior to summary judgment, Dr. Ford's putative class action for damages had been defanged, leaving only a modified individual Lanham Act claim for injunctive relief. Given that advertising has never been the focus of Dr. Ford's supposed grievances against managed care, it is no surprise that the Lanham Act claim ultimately failed.

Dr. Ford's lawsuit did not arise when Dr. Ford read managed care advertising that he found injurious or false. On the contrary, Dr. Ford freely admitted that he had never read any of the advertisements about which he complained.<sup>8</sup> In fact, he just was upset with managed care generally, and he wanted someone "to do something" about it.<sup>9</sup> His "investigation" consisted of asking his office clerical staff whom to sue.<sup>10</sup> After rounding up the "usual suspects," his counsel pressed a "false advertising" claim for advertisements Dr. Ford had never seen. With this less than gossamer record, Dr. Ford instituted litigation that has put

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<sup>8</sup> 4R3533, 3523, 3465.

<sup>9</sup> 4R3477-78, 3582, 3465-67.

<sup>10</sup> 4R3608-09, 3462.

defendants to tremendous costs and legal fees, simply to act out his hostility for how health care in America is financed.

In contrast to the “usual suspects” approach employed by Dr. Ford, this Court has required (and all recent Lanham Act precedent continues to require) a concrete injury to competition or good will in order to establish a Lanham Act injury and sustain standing on such a claim. *See Logan v. Burgers Ozark Country Cured Hams Inc.*, 263 F.3d 447, 460 (5th Cir. 2001) (noting that Proctor & Gamble lacked standing in part because “the case did not involve one *competitor* directly injuring another by making false statements about its own goods and thus influencing customers to buy its product instead of the competitor’s product.” (emphasis added)); *id.* at 461 (“The asserted injury in this case [unlike Dr. Ford’s] is that HoneyBaked’s literally false advertising about its own goods influenced its customers to buy its product *instead of* Logan’s product.” (emphasis added)).<sup>11</sup>

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<sup>11</sup> *See also Telecom Int’l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001) (“[T]o have standing for a [Lanham Act] false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury”); *Joint Stock Soc’y v. UDV N. Am., Inc.*, 266 F.3d 164, 180 (3d Cir. 2001) (holding out the potential for non-competitor standing, but noting that “the focus is on protecting ‘commercial interests [that] have been harmed by *a competitor’s* false advertising,’ . . . and ‘securing to the business community the advantages of *reputation and good will* by preventing their

Obviously, Aetna does not perform knee surgeries and Dr. Ford does not sell managed care plans; the parties do not have interchangeable products. Likewise, Dr. Ford nowhere alleged or proved that Aetna's advertising influenced members to buy Aetna's product "instead of" Dr. Ford's "product." Thus, the District Court properly refused to accept the fanciful theory Dr. Ford continues to peddle here:

- Managed care hurts my pocketbook<sup>12</sup>
- I have an expert that says managed care is bad<sup>13</sup>
- Aetna's "advertising" says that managed care is good<sup>14</sup>
- Therefore, I have a Lanham Act injury.<sup>15</sup>

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diversion from those who have created them to those who have not.'" (emphasis added)).

<sup>12</sup> Reply Brief of Appellant Dr. Kenneth B. Ford ("Reply Br.") at 7 ("[W]henver someone joins defendant's HMO plan, less money is spent on that person's medical care, and physicians such as Dr. Ford demonstrably make less money").

<sup>13</sup> Reply Br. at 13 ("Dr. Relman . . . testified that many of the advertising claims were literally false, including that a primary care physician under the defendants' plans is just like a traditional family physician and that the defendants do not treat their members like a collection of symptoms").

<sup>14</sup> Reply Br. at 16-17 (argument concerning "[t]he defendants' core claims that they provide higher quality medical care and vest control in patients and their doctors").

<sup>15</sup> Reply Br. at 7-8 ("Standing under the Lanham Act requires only a 'reasonable interest to be protected against the alleged false advertising.' . . . The

Dr. Ford, at best, complained of an attenuated, unspecified, non-competitive financial grievance, but made no effort to link that "injury" to deception, as opposed to effective, truthful advertising, or perfectly legal managed care cost controls unrelated to advertising.<sup>16</sup> Dr. Ford's claim thus fell far short.

**C. The District Court Disallowed Certain Expenses But Properly Awarded Costs To The Victors**

With this state of affairs, the District Court rightly recognized that Dr. Ford should not be allowed to avoid paying costs. Said the court:

Plaintiff has pursued litigation against these Defendants for over five years. He originally asserted ten claims against Defendants, most of which were dismissed within the first year of the suit. Plaintiff later attempted to certify his case as a class action, but the Court denied certification. For nearly two years after the denial of class certification, Plaintiff elected to pursue his single remaining claim. The Court finally dismissed this claim in April 2001. . . .

The Court finds no reason to penalize Defendants by denying them costs. Reasons for this

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reasonable interest here is manifest. Physician incomes are being destroyed by the defendants' managed care").

<sup>16</sup> See, e.g., *Joint Stock Soc'y*, 266 F.3d at 180 ("Under the first factor of the *Conte Bros.* test, we must look for an injury that 'flows from that which makes defendants' acts unlawful").

decision include: (1) Plaintiff has the financial ability to satisfy the award—indeed, Plaintiff testified that he had the financial ability to provide notice to tens of thousands of individuals had a class been certified; (2) there is no proof that Defendants engaged in inappropriate conduct during the course of litigation; (3) the case, as it proceeded, did not pose a novel or complex question of law—as stated *supra*, almost all of Plaintiff’s claims were dismissed four years ago; and (4) there is no evidence in the record of benefit to the public, as Plaintiff asserts. Accordingly, the Court will not deny Defendants an award of costs as prevailing party.<sup>17</sup>

Dr. Ford, in his single footnote devoted to the cost issue,<sup>18</sup> has marshaled neither proof nor argument to demonstrate that any of these findings is wrong, let alone showed that the District Court abused its discretion.

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<sup>17</sup> RE14 at 3-4.

<sup>18</sup> Reply Br. at 33, n. 8.

## II. ARGUMENTS AND AUTHORITIES

*"[L]iability for costs is a normal incident of defeat."*<sup>19</sup>

Dr. Ford cannot run from the "normal incidents" of defeat—his responsibility to pay Aetna's costs. The law of this circuit (reference to which is wholly absent from Dr. Ford's cost argument) makes that very clear.

The District Court has broad discretionary powers in the awarding of costs, and it will be overturned only if it abuses that discretion. *Walters v. Roadway Express, Inc.*, 557 F.2d 521, 526 (5th Cir. 1977). Prevailing parties like Aetna are "prima facie" entitled to costs and enjoy a strong presumption that costs will be awarded. *Schwarz v. Folloder*, 767 F.2d 125, 131 (5th Cir. 1985); *Walters*, 557 F.2d at 526.

It is incumbent upon Dr. Ford, the losing party, to overcome that strong presumption because denial of costs to the prevailing party is in the nature of a penalty imposed for misconduct in the course of the litigation. *Walters*, 557 F.2d at 526. The district court found no proof of misconduct

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<sup>19</sup> *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 101 S.Ct. 1146, 1150 (1981).

warranting such a penalty, and Dr. Ford has neither challenged that finding nor pointed to contrary proof in the record.

Dr. Ford likewise cannot prevail by complaining that Aetna ought to pay its own cost simply because it has the financial means to do so. A district court's discretion to consider the circumstances of an impecunious plaintiff (*unlike* Dr. Ford) is only grounds for *reducing* an award not grounds for *refusing* to award costs. See *Chapman v. AI Transport*, 229 F.3d 1012, 1039 (11th Cir. 2000). Dr. Ford makes *no argument* for reduction. Moreover, such a decision must be supported by "substantial documentation of a true inability to pay," and may not be based upon the "relative wealth of the parties." *Id.* at 1039.

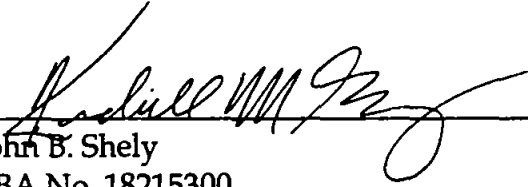
All the evidence indicates that Dr. Ford and his counsel have the means to pay, and that Aetna is entitled to be paid. On such a record, the only possible abuse of discretion would be for the Court below to have denied Aetna its costs.

### III. CONCLUSION

Dr. Ford does not challenge the amount of costs awarded to Aetna, and he has not shown that the District Court abused its discretion in awarding costs.

WHEREFORE, PREMISES CONSIDERED, Aetna respectfully requests that this Court affirm the judgment of the District Court in all respects, award Aetna its costs in this appeal, and grant such other and further relief to which Aetna may show itself entitled.

Respectfully submitted,



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John B. Shely

TBA No. 18215300

Kendall M. Gray

TBA No. 00790782

ANDREWS & KURTH L.L.P.

600 Travis, Suite 4200

Houston, Texas 77002

(713) 220-4200

(713) 220-4285 (Telecopier)

Attorneys for Defendants-Appellees,  
Aetna U.S. Healthcare, Inc., f/k/a  
Aetna Health Plans of Texas, Inc. and  
Aetna U.S. Healthcare Inc.,  
substituted by court order for Aetna  
Life and Casualty Company

CERTIFICATE OF SERVICE

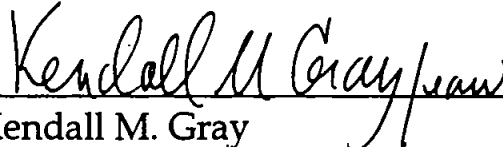
I hereby certify that on April 12, 2002, two copies of the foregoing Appellees' Brief, in written form, and one copy in electronic computer readable form on a 3.5 inch disk in MS Word 2000, labeled in accordance with 5TH CIR. R. 31.1, were served by hand delivery upon the following counsel of record:

Kenneth R. Wynne  
Mark Maney  
2730 Chase Tower  
Houston, Texas 77002  
Attorneys for Plaintiff

P. Michael Jung  
Paula Denney  
STRASBURGER & PRICE LLP  
1221 McKinney Street, Suite 2800  
Houston, Texas 77010  
Attorneys for Defendants-Appellees

In addition, I hereby certify that on April 12, 2002, seven copies of the foregoing brief, in written form, and one copy in electronic computer readable form on a 3.5-inch disk in MS Word 2000, labeled in accordance with 5TH CIR. R. 31.1, were sent by Federal Express to the Clerk of the Fifth Circuit:

Charles R. Fulbruge, III  
Clerk, United States Court of Appeals, Fifth Circuit  
109 John Minor Wisdom U.S. Court of Appeals Bldg.  
600 Camp Street  
New Orleans, Louisiana 70130

  
Kendall M. Gray

**CERTIFICATE OF COMPLIANCE**

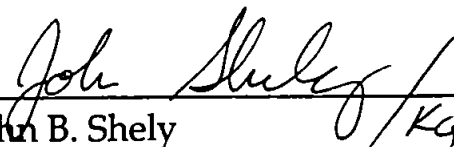
Pursuant to 5TH CIR. R. 32.2.7(c) (now 5TH CIR. R. 32.3 & FED. R. APP. P. 32(a)(7)(C)), the undersigned certifies this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b) (now FED. R. APP. P. 32(a)(7)(B)) and 5TH CIR. R. 32.3.

1. EXCLUSIVE OF THE EXEMPT PORTIONS IN 5TH CIR. R. 32.2.7(b)(3) (now 5TH CIR. R. 32.2 & FED. R. APP. P. 32(a)(7)(B)(iii)), THE BRIEF CONTAINS 1,491 words.

2. THE BRIEF HAS BEEN PREPARED in proportionally spaced typeface using MS Word 2000 in Book Antiqua 14 pt.

3. THE UNDERSIGNED HAS PROVIDED AN ELECTRONIC VERSION OF THE BRIEF TO THE COURT AND OPPOSING COUNSEL.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5TH CIR. R. 32.2.7 (now 5TH CIR. R. 32.2 & FED. R. APP. P. 32(a)(7)(B)), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

  
\_\_\_\_\_  
John B. Shely / KG