

01-10891

No. 01-10891

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In the  
United States Court of Appeals  
for the Fifth Circuit

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RUBY R. CALAD,

Plaintiff - Appellant - Appellee,

and

WALTER PATRICK THORN,

Plaintiff - Appellee

v.

CIGNA HEALTHCARE OF TEXAS, INC., d/b/a Healthsource, d/b/a CIGNA Corporation

Defendant - Appellee,

and

AETNA U.S. HEALTHCARE, INC. and  
AETNA U.S. HEALTHCARE OF NORTH TEXAS, INC.,

Defendants - Cross-Appellants - Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas, Dallas Division

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**REPLY BRIEF OF DEFENDANTS - CROSS-APPELLANTS - APPELLEES**  
**AETNA U.S. HEALTHCARE INC. and**  
**AETNA U.S. HEALTHCARE OF NORTH TEXAS INC.**

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U.S. COURT OF APPEALS

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HEALTHCARE INC. and AETNA U.S.  
HEALTHCARE OF NORTH TEXAS INC.

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## I. INTRODUCTION

In its brief in response to Defendants - Cross-Appellants - Appellees Aetna U.S. Healthcare, Inc. and Aetna U.S. Healthcare of North Texas, Inc.'s (collectively referred to hereinafter as "Aetna") opening brief, Plaintiff-Appellee Walter Patrick Thorn makes several inaccurate statements concerning the applicable law and the record on appeal. Accordingly, without rearguing its opening brief, Aetna files this short reply brief to address a portion of those misstatements and mischaracterizations.

## II. REPLY ARGUMENTS AND AUTHORITIES

### A. Proper Jurisdiction over Calad's Claims Provides the Basis for the District Court's Retention of Jurisdiction over Thorn's Claims

In his brief, Thorn contends that Aetna "[u]nnecessarily inject[ed] a de novo standard of review"<sup>1</sup> into this appeal and argues that "the propriety of remanding Mr. Thorn's claims for a nonjurisdictional reason has nothing whatever to do with whether the district court correctly found Ms. Calad's claims completely preempted and subject to dismissal."<sup>2</sup> This argument is simply not accurate. The Court of Appeals for the Fifth Circuit has plainly

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<sup>1</sup> Thorn Br. at 6.

<sup>2</sup> *Id.*

stated that “[o]nce the court has *proper removal jurisdiction* over a federal claim, it may exercise supplemental jurisdiction over state law claims, even if it dismisses or otherwise disposes of the federal claim or claims.” *Copling v. Container Store, Inc.*, 174 F.3d 590, 594 (5th Cir. 1999) (emphasis added) (citation omitted); *see also Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 337 (5th Cir. 1999). As a matter of simple logic, whether the district court had the discretion to retain jurisdiction over Thorn’s claims necessarily hinges on whether the district court had “proper removal jurisdiction” in the first instance. As such, a de novo examination into the question of proper removal jurisdiction is a threshold inquiry for determining whether the district court abused its discretion in remanding Thorn’s claims to state court.

**B. Economy, Convenience, Fairness, and Comity Are the Factors a Federal Court Must Consider in Determining Whether to Retain Jurisdiction over State-Law Claims**

Thorn argues next that Aetna “ignore[d]” a four-factor test in its analysis concerning whether the district court abused its discretion in deciding to remand Thorn’s claims to state court.<sup>3</sup> Thorn appears to be

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<sup>3</sup> *Id.* at 7-8, 10 (stating that the remanded claim must be “(1) a separate and independent claim or cause of action; (2) joined with a federal question; (3) otherwise non-removable; and (4) a matter in which state law predominates”).

claiming that Aetna erroneously relied on the factors of judicial economy, convenience, fairness, and comity in establishing that the district court did, in fact, abuse its discretion. The United States Supreme Court has *expressly* stated, however, that a district court must consider these very factors in determining whether to retain jurisdiction over pendent state-law claims. In *Carnegie-Mellon University v. Cohill*, the Supreme Court stated that “a federal court *should consider and weigh in each case*, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims.” 484 U.S. 343, 350 (1988) (emphasis added). The Fifth Circuit has faithfully followed this reasoning. *See, e.g., Giles*, 172 F.3d at 339 (“When deciding whether to remand supplemental claims, a court should examine economy, fairness, convenience, and comity.”); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 456 (5th Cir. 1996) (“The Supreme Court has instructed that, when dealing with motions to remand pendent claims, courts should exercise their discretion in a way that best serves the principles of economy, convenience, fairness, and comity.”); *Engstrom v. First Nat’l Bank*, 47 F.3d 1459, 1465 (5th Cir. 1995) (“The factors to

be addressed in determining whether to retain jurisdiction once the federal claims have been disposed of are judicial economy, convenience, fairness, federalism, and comity.”).

Accordingly, in stark contrast to Thorn’s allegation that Aetna “ignore[d]” the applicable test for determining whether the district court abused its discretion in declining to retain jurisdiction over Thorn’s claims, Aetna followed the Supreme Court’s mandate in *Cohill*. Furthermore, as Aetna’s opening brief reveals, under the *Cohill* analytical framework, the balance of these factors demonstrates that the district court abused its discretion in remanding Thorn’s claims to state court.

**C. Thorn Ignores the Allegation That Both CIGNA and Aetna “Put Systems in Place” That Caused Both Plaintiffs’ Alleged Injuries**

Although it is not entirely clear from his response brief, it appears that Thorn is claiming that Aetna is relying merely on the fact that Calad and Thorn sued CIGNA and Aetna for joint and several liability to demonstrate that the factors of fairness and convenience of the parties weigh in favor of retention of jurisdiction over Thorn’s claims and that this is the only fact that

would support retention of jurisdiction.<sup>4</sup> If so, this is a mischaracterization of the record on appeal. Thorn ignores the Plaintiffs' allegation in their petition that *both* CIGNA and Aetna "put systems in place" that injured *both* Calad and Thorn.<sup>5</sup> Thus, aside from the allegation of joint and several liability against both CIGNA and Aetna, the plaintiffs alleged (and have not renounced) that both defendants caused the claimed injuries.<sup>6</sup> Given that Thorn voluntarily chose to sue both Aetna and CIGNA together with Calad, Aetna can hardly be faulted in defending itself for taking his pleadings at face value and assuming that they mean what they say.

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<sup>4</sup> See *id.* at 8-9.

<sup>5</sup> See 1R14 ("The *Defendants*, either *jointly* or singularly as the evidence may show, failed during the time in which they were influencing, controlling, participating in, or providing medical necessity decisions within the standard of care for *Ruby Calad's* need for continued hospitalization and the diagnosis, treatment and rehabilitation of *Walter Thorn's* injured hand. Additionally, these *Defendants put systems in place* such as to make such sub-standard care more likely than not." (emphasis added)).

<sup>6</sup> The district court also failed to address this allegation when it was determining whether to retain jurisdiction over Thorn's claims. See 2R464.

#### D. *Corporate Health* Dictates the Dismissal of Thorn's Claims

Finally, Thorn urges that "it is not at all clear that *Corporate Health* [*Insurance, Inc. v. Texas Department of Insurance*<sup>7</sup>] has the . . . effect" of establishing that Thorn has failed to state a claim under the Texas Health Care Liability Act.<sup>8</sup> Without rearguing the arguments in its opening brief, Aetna submits that the error of Thorn's most recent contention is plainly revealed by a review of the holding in that case:

When the liability provisions [of the Texas Health Care Liability Act] are read together, they impose liability *for a limited universe of events*. The provisions *do not* encompass claims based on a managed care entity's denial of coverage for a medical service recommended by the treating physician: that dispute is one over coverage, specifically *excluded* by the Act. Rather, *the Act would allow suit for claims that a treating physician was negligent for delivering medical services, and it imposes vicarious liability on managed care entities for that negligence*.

*Corporate Health*, 215 F.3d at 534 (emphasis added). Furthermore, the Fifth Circuit stated on rehearing that, "[i]t may be that state causes of action persist *only* for actions based in some part on malpractice committed by *treating physicians*. If so, state causes of actions [sic] against [health maintenance

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<sup>7</sup> 215 F.3d 526 (5th Cir.), *on reh'g*, 220 F.3d 641 (5th Cir. 2000), *pet. for cert. filed*, 69 U.S.L.W. 3317 (U.S. Oct. 24, 2000) (No. 00-665).

<sup>8</sup> See Thorn Br. at 13.

organizations] for the decisions of their utilization review agents would still be preempted[.]” *Corporate Health Ins., Inc. v. Texas Dep’t of Ins.*, 220 F.3d 641, 643 n.6 (5th Cir. 2000) (on reh’g) (emphasis added).

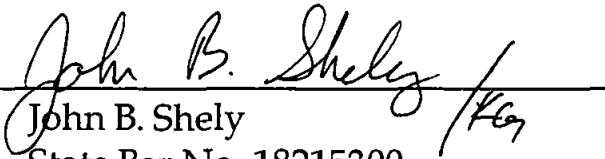
As the Fifth Circuit made clear in *Corporate Health*, the Act under which Thorn sues applies only to *vicarious liability* claims against a managed care entity, and *not* to direct liability claims for alleged negligence in determining a participant’s rights to benefits. Thorn is alleging the latter claim in this case. As such, he fails to state a claim for which relief can be granted, and the district court abused its discretion in not retaining jurisdiction over Thorn’s claims, entertaining dispositive motions, and swiftly dismissing the case for failure to state a claim for which relief can be granted.

### III. CONCLUSION

With the foregoing clarifications of Aetna’s arguments and the record on appeal, Aetna respectfully requests that this Court grant the relief requested in its opening brief.

Respectfully submitted:

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## CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2001, two copies of the foregoing Cross-Appellants-Appellees' Reply Brief, in written form, and one copy in electronic computer readable form on a 3.5 inch disk in WordPerfect for Windows 9, labeled in accordance with 5TH CIR. R. 31.1, were served by Federal Express upon the following counsel of record:

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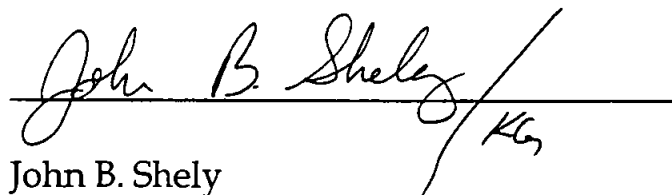
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In addition, I hereby certify that on December 10, 2001, seven copies of the foregoing brief, in written form, and one copy in electronic computer readable form on a 3.5-inch disk in WordPerfect for Windows 9, labeled in accordance with 5TH CIR. R. 31.1, were sent by Federal Express to the Clerk of the Fifth Circuit:

Charles R. Fulbruge, III  
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A handwritten signature in cursive script, reading "John B. Shely", is written over a horizontal line. To the right of the signature, there are initials "KG" written in a smaller, less formal script.

John B. Shely