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**DEPARTMENT OF JUSTICE**



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May 15, 2023

*Via TrueFiling*

Hon. Tracie L. Brown, Presiding Justice  
Hon. Marla J. Miller, Associate Justice  
Hon. Jon B. Streeter, Associate Justice  
1st District Court of Appeal  
350 McAllister Street  
San Francisco, CA 94102

RE: **Request for Publication** (Cal. Rules of Court, rule 8.1120);  
*Futterman v. Kaiser Foundation Health Plan, Inc.* (Cal. Ct. App., Apr. 25, 2023, No. A162323) 2023 WL 3070944.

Dear Honorable Justices:

Pursuant to rule 8.1120 of the California Rules of Court, the California Attorney General's Office respectfully requests that this Court partially publish its recent opinion (the Opinion) in *Futterman v. Kaiser Foundation Health Plan, Inc.* (Cal. Ct. App., Apr. 25, 2023, No. A162323) 2023 WL 3070944.

**Interest of the Attorney General**

The Attorney General has an important interest in protecting the health, safety, and rights of the residents of the State of California. Preserving access to medically necessary mental healthcare is critical to safeguarding that interest. When insurers deny individuals medically necessary mental healthcare, California is forced to expend public resources to provide that care. In fact, California spends more on mental health services than any other state, spending \$8.3 billion on direct mental health services between 2017 and 2018.<sup>1</sup>

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<sup>1</sup> Mental Health in California: Understanding Prevalence, System Connections, Service Delivery, and Funding 70 (Cal. Budget and Policy Center ed., 2020), [https://calbudgetcenter.org/app/uploads/2020/03/CA\\_Budget\\_Center\\_Mental\\_Health\\_CB2020.pdf](https://calbudgetcenter.org/app/uploads/2020/03/CA_Budget_Center_Mental_Health_CB2020.pdf).

Document received by the CA 1st District Court of Appeal.

### **The Opinion**

The Court held, in part, that “[o]verpayment for mental health coverage by members who sought mental health treatment is a nontrivial economic injury sufficient to confer standing” under section 17204 of the Business and Professions Code. (Opn. at p. 10; *Futterman, supra*, at \*5.) The Court also clarified that section 1371.25 of the Knox Keene Act—which bars claims against a health plan for vicarious liability—is not a grant of absolute immunity where plaintiffs allege direct liability. (Opn. at p. 16; *Futterman, supra*, at \*7.) Finally, the Court clarified the scope of the Department of Managed Health Care’s (DMHC) regulatory authority with respect to California’s Mental Health Parity Act. (Opn. at p. 17; *Futterman, supra*, at \*8.)

### **Reasons Why Partial Publication is Warranted**

An opinion “should be certified for publication in the Official Reports” if it meets any one of the nine criteria listed in the California Rules of Court, rule 8.1105(c). The Opinion should be published based on at least two such criteria, the Opinion:

- “[a]dvances a new . . . clarification . . . of a provision of a [ ] statute”; and
- “[i]nvolves a legal issue of continuing public interest.”

(Cal. Rules of Court, rule 8.1105(c).)

### **The Opinion clarifies three statutory provisions.**

The Opinion holds that the plaintiffs have standing under section 17204 of the Business and Professions Code based on overpayment of health insurance premiums to Kaiser Foundation Health Plan (Kaiser) for mental health coverage. Section 17204 provides that, to have standing under California’s Unfair Competition Law (UCL), a plaintiff must demonstrate that they “suffered an injury in fact and ha[ve] lost money or property as a result of the unfair competition.” (Bus. & Prof. Code, § 17204.) The Opinion helpfully demonstrates the quantum of economic injury needed to create standing in this context. The Court held that because “[t]he complaint alleges that [plaintiffs] did not receive the coverage promised by [Kaiser] because Kaiser had an actual and consistent practice of basis treatment decisions for severe mental illness on factors unrelated to medical necessity,” then “the allegations of the complaint are sufficient to establish standing.” (Opn. at pp. 9-10; *Futterman, supra*, at \*5.) In other words, the plaintiffs plainly “acquire[d] in a transaction less [ ] than he or she otherwise would have.” (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 323.) Because this holding clarifies that insureds who do not receive the mental health benefits for which they have contracted may allege a UCL violation against their plan, particularly in an integrated system such as Kaiser, it warrants publication.

The Opinion also clarifies section 1371.25 of the Knox Keene Act, which bars claims against a plan for vicarious liability. (Health & Saf. Code, § 1371.25 [“A plan, any entity contracting with a plan, and providers are each responsible for their own acts or omissions, and

are not liable for the acts or omissions of, or the costs of defending, others.”)] The Court held that this statute does not immunize a plan for liability arising from its own acts in the provision of care. As the Court explained, “plaintiffs’ claim is that [Kaiser] *itself* does not provide coverage as required by the Parity Act because it arranges and pays for medical treatment for severe mental illness at a different or insufficient level than it does for the treatment of physical illness.” (Opn. at p. 14, emphasis added; *Futterman, supra*, at \*7.) The Opinion helpfully distinguishes cases in which section 1371.25 barred vicarious liability against a plan for the acts or omissions of its medical groups. (*Ibid.*, citing *Martin v. PacifiCare of California* (2011) 198 Cal.App.4th 1390 and *Watanabe v. California Physicians’ Service* (2008) 169 Cal.App.4th 56.) This holding clarifies that the Knox Keene Act’s statutory bar against vicarious liability does not preclude direct liability for a plan for its own acts or omissions regarding the provisions of care.

Finally, the Opinion disposes of any argument that the regulatory scheme, which authorizes Kaiser’s integrated structure, precludes the underlying litigation. The Court noted that the “evidence regarding Kaiser’s integrated system is intended to describe how [Kaiser] is able to promise coverage so that members do not have equal access to certain treatment.” (Opn. at p. 15-16; *Futterman, supra*, at \*8, discussing section 1395 of the Knox Keene Act.) But the Court held that “[a]cknowledging that the context in which coverage is provided does not interfere with the Legislature’s regulation of health care delivery systems under the Knox Keene Act.” (Opn. at p. 16; *Futterman, supra*, at \*8.) The Court distinguished cases where courts abstained from performing purely regulatory functions. (*Ibid.*, citing *Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, 133 and *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1301-1302.) Here, the Court did not abstain in favor of the regulator (the Department of Managed Health Care), holding that, “a finding here that the Plan violated the Parity Act would not interfere with the DMHC’s regulatory authority.” (Opn. at p. 17; *Futterman, supra*, at \*8.) This holding will provide much-needed guidance to lower courts currently struggling with the abstention doctrine.

**The Opinion involves a legal issue of continuing public interest.**

The issue of access to mental healthcare has received much public attention for many years. According to a recent survey, 90% of Americans believe that the nation is in the midst of a mental health crisis.<sup>2</sup> Troublingly, a quarter of adults say they did not get the mental healthcare or medication they thought they needed in the past year.<sup>3</sup> Unfortunately, California fares worse than the nation as whole. Among adults with any mental illness in the state, 63.2% did not

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<sup>2</sup> Kaiser Family Foundation, New KFF/CNN Survey on Mental Health Finds Young Adults in Crisis; More Than a Third Say Their Mental Health Keeps Them From Doing Normal Activities, <https://www.kff.org/other/press-release/new-kff-cnn-survey-on-mental-health-finds-young-adults-in-crisis-more-than-a-third-say-their-mental-health-keeps-them-from-doing-normal-activities/>

<sup>3</sup> *Ibid.*

receive any mental health services.<sup>4</sup> Overall, 6% of Californians reported needing mental health treatment or counseling but not being able to get it.<sup>5</sup> Of those with an unmet need, 36% did not receive care because of cost.<sup>6</sup> If partially published, the Opinion will provide guidance to patients and plans alike regarding their rights and responsibilities with respect to the provision of mental healthcare.

For the foregoing reasons, the Attorney General's Office respectfully requests that this Court partially publish the Opinion.

Sincerely,



MARTINE N. D'AGOSTINO  
Deputy Attorney General

For ROB BONTA  
Attorney General

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<sup>4</sup> California Health Care Foundation, *Mental Health in California, 2022—Quick Reference Guide*, <https://www.chcf.org/wp-content/uploads/2022/07/MentalHealthAlmanac2022QRG.pdf>.

<sup>5</sup> California Health Care Foundation, *Mental Health in California, 2022: Waiting for Care*, <https://www.chcf.org/wp-content/uploads/2022/07/MentalHealthAlmanac2022.pdf>

<sup>6</sup> *Ibid.*