

# Client Alert

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## Fifth Circuit Adds Headwinds to ERISA Summary Judgments, Suggests Possible Alternative Procedure

Summary judgments on ERISA claims could become increasingly more difficult in the Fifth Circuit under *Katherine P. v. Humana Health Plan, Inc.*, No. 19-50276, 2020 WL 2479687 (5th Cir. May 14, 2020) (Ho, J.). The proper procedure for resolving ERISA claims subject to de novo review has remained an open question after the Fifth Circuit's 2018 holding in *Ariana M.* that ERISA claims are no longer entitled to what was, essentially, a default "abuse of discretion" standard in the Fifth Circuit. In this case, however, the parties did not seriously challenge the use of summary judgment to resolve the claims under the de novo standard of review, and the court did not reach the issue specifying the correct procedure. Instead, the court overturned summary judgment under the "normal" summary judgment standard—the administrative record created a genuine issue of material fact. Therefore, the correct procedure for resolving ERISA claims under the default de novo standard of review set forth in *Ariana M.* remains unresolved, but the court suggested that it may endorse the Ninth Circuit's approach, where district courts review the administrative record and make findings of fact and conclusions of law under FRCP 52, without conducting a traditional bench trial.

### Background

ERISA beneficiary Katherine P. received partial hospitalization treatment for nearly three months to treat an eating disorder. Humana agreed to pay for the first 12 days of treatment but denied coverage for the remainder as not medically necessary under the four-factor Mihalik Criteria. Humana's reviewers concluded that Katherine P. failed two of the criteria.

Katherine P. sued Humana in the Western District of Texas to recover additional benefits. The parties filed cross-motions for summary judgment, and the magistrate recommended judgment for Humana based on Katherine P.'s failure to satisfy the two Mihalik Criteria. Judge Pitman accepted the magistrate's recommendation and entered judgment for Humana.

### The Fifth Circuit Reversed Humana's Summary Judgment

In the Fifth Circuit, neither party "seriously contend[ed]" that the plan delegated discretionary authority to Humana. Thus, the court applied the de novo standard of review limited to the administrative record pursuant to the framework of *Ariana M. v. Humana Health Plan of Texas, Inc.*, 884 F.3d 246 (5th Cir. 2018) (en banc). Although a footnote in Humana's brief said that the court should apply an abuse of discretion standard because ERISA preempts Texas's ban on discretionary clauses (i.e., Tex. Ins. Code § 1701.062), the court held that Humana waived this issue by failing to explain why.

Under the de novo standard, the court noted that the proper procedure remained an open question. Specifically, is summary judgment appropriate on disputed ERISA claims under the de novo standard of review, or should the district court conduct a bench trial? *Citing Koch v. Metro. Life Ins. Co.*, 425 F. Supp. 3d 741, 746–47 (N.D. Tex. 2019) (canvassing different approaches among the circuits).

Despite the open question, Katherine P. and Humana both assumed that summary judgment was appropriate, so the Fifth Circuit declined to reach the issue. Instead, the court applied normal summary judgment standards turning on whether a genuine dispute of material fact exists in the administrative record. The administrative record on Katherine P.'s claim for partial hospitalization supported such a material fact issue, precluding summary judgment.<sup>1</sup>

On remand, the court left the appropriate procedure “to the district court’s sound discretion,” while also approvingly citing to the Ninth Circuit’s procedure. In the Ninth Circuit, district courts reviewing an ERISA claim de novo “need not conduct a traditional trial but rather just review the administrative record and make findings of fact and conclusions of law.” See *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1094–95 & n.4 (9th Cir. 1999) (en banc) (describing the procedure as a “novel form of trial”).

## Considerations for the ERISA Administrative Record

*Katherine P. v. Humana* demonstrates, once again, the importance of a lawful delegation of discretionary authority in the administrative record. Under *Ariana M.*, de novo review is the default standard unless the plan lawfully delegates discretionary authority, and *Katherine P.* shows that courts may be wary of granting summary judgment without a valid delegation supporting a lower standard of review.

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<sup>1</sup> One of the Mihalik criteria required that the patient show that treatment at a less intense level of care has been unsuccessful, and Katherine P.'s last appeal to Humana included her declaration describing her history of failed treatment. Katherine P.'s physicians also said that a lower level of care was not successful in treating her condition. The court noted that opinions of treating physicians do not receive “special weight,” but they are competent summary judgment evidence.