

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

MANHATTANLIFE INSURANCE AND ANNUITY
COMPANY, PASCHALL AND ASSOCIATES, INC.,
and WILLIAM C. PASCHALL,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, DEPARTMENT OF THE
TREASURY, DEPARTMENT OF LABOR, XAVIER
BECERRA *in his official capacity as Secretary
of Health and Human Services*, JANET
YELLEN *in her official capacity as Secretary
of the Treasury*, and JULIE A. SU *in her official
capacity as Acting Secretary of Labor*,

Defendants.

Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs ManhattanLife Insurance and Annuity Company, Paschall and Associates, Inc. d/b/a Paschall Health Insurance, and William C. Paschall bring this action for declaratory and injunctive relief against defendants the United States Department of Health and Human Services (HHS), Department of the Treasury, Department of Labor, and the current heads of those agencies in their official capacities, and allege as follows:

INTRODUCTION

1. This action under the Administrative Procedure Act (APA) challenges certain provisions of a final rule issued by defendants in clear violation of their statutory authority and without observance of the APA’s notice-and-comment requirement.

2. Federal law imposes certain requirements on most health insurance policies sold in the United States, including that they cover “essential health benefits,” *i.e.*, that they qualify as comprehensive health insurance. These requirements do not apply, however, to certain insurance that qualifies as an “excepted benefit.” 42 U.S.C. § 300gg-91(c). The excepted benefit at issue here—“fixed indemnity insurance,” *id.* § 300gg-91(c)(3)(B)—is exempt from federal regulation if it satisfies three statutory criteria: separateness, noncoordination, and independence. *Id.* § 300gg-21(c)(2) (providing that federal requirements “shall not apply” to fixed indemnity insurance “if all of the following conditions are met”); *see infra* ¶ 28.

3. This case is about the Departments’ attempt to add a fourth criterion found nowhere in the statute. Under the final rule, fixed indemnity insurance is not exempt from federal insurance requirements unless, in addition to meeting the three statutory criteria, the policy’s marketing, application, and enrollment materials include a conspicuous notice stating that the product is “NOT health insurance.” 89 Fed. Reg. 23,338, 23,382, 23,389 (Apr. 3, 2024) (the “Notice Rule”).

4. This is not the first time the Departments have unlawfully attempted to graft new requirements onto the fixed indemnity exemption. In 2014, HHS promulgated a regulation requiring that, in addition to satisfying the three statutory criteria, fixed indemnity insurance would be exempt from otherwise applicable requirements only if purchased by an individual who also purchased minimum essential coverage, *i.e.*, comprehensive health insurance. 79 Fed. Reg. 30,240, 30,253 (May 27, 2014). Plaintiff ManhattanLife’s predecessor sued HHS on the ground that it had no authority to augment Congress’s exclusive list of criteria. The district court agreed. *Central United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 329 (D.D.C. 2015). So did the D.C. Circuit, because “nothing in the [statute] suggests Congress left any leeway for HHS to tack on additional criteria.” *Central United Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016).

5. The Notice Rule is *Central United* redux. While Congress “exempted *all*” fixed indemnity policies that satisfy the three statutory criteria, the Departments, “with [their] additional criterion, exemp[t] *less than all*” such conforming policies. *Id.* But now, as then, the Departments “lac[k] authority to demand more of fixed indemnity providers than Congress required.” *Id.* at 75. Congress commanded in clear and unambiguous terms that federal requirements “shall not apply” to fixed indemnity policies “if [three statutory] conditions are met.” 42 U.S.C. § 300gg-21(c)(2). The Departments are not at liberty to countermand Congress by providing that federal requirements *shall* apply to fixed indemnity insurance that meets all of the statutory criteria unless the Departments’ preferred notice is given. Nor did Congress authorize the Departments to regulate exempted benefits; that would defeat the entire purpose of the exemption, which was to leave regulation of these forms of insurance to the States. The Departments may believe that Congress should have given them this authority. But “an agency may not rewrite clear statutory terms to suit

its own sense of how the statute should operate.” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014). Because the Notice Rule exceeds the Departments’ statutory authority, it must be vacated.

6. Even if the Departments had statutory authority to impose a notice requirement, the Notice Rule is arbitrary, capricious, and contrary to law. The Departments claimed the Notice Rule was necessary given the purported “prevalence of aggressive and deceptive sales and marketing practices” that could cause consumers to “mistakenly enroll in ... fixed indemnity excepted benefits coverage as a substitute for comprehensive coverage.” 89 Fed. Reg. at 23,409. But the Departments’ sweeping claims of widespread consumer deception and confusion are unfounded. They rest on isolated anecdotes, with the Departments’ own source conceding the lack of a “comprehensive and data-informed view of the fixed indemnity market.” Christen Linke Young & Kathleen Hannick, *Fixed Indemnity Health Coverage is a Problematic Form of “Junk Insurance”*, Brookings (Aug. 4, 2020), [tinyurl.com/2x7vv6ee](https://www.tinyurl.com/2x7vv6ee). And although all agree that “States play an important role in regulating fixed indemnity excepted benefits,” 89 Fed. Reg. at 23,382, the Departments failed to explain why state regulators cannot be relied upon to address any abusive sales practices within their jurisdictions. While the Departments claimed they merely “aimed to support informed consumer choice,” *id.* at 23,379, in reality the Notice Rule is designed to dissuade consumers from purchasing fixed indemnity insurance because the Departments disagree with Congress’s decision to allow consumers the freedom to purchase such policies as they see fit.

7. Even if the Departments had statutory authority to impose a federal notice requirement and the record supported the need for one, the notice imposed by the Notice Rule is arbitrary, capricious, and contrary to law because it contradicts the statute and requires insurers to make false statements. The statute uniformly refers to and treats fixed indemnity insurance as a type of health

insurance—one exempt from the strictures placed on *comprehensive* health insurance. That treatment is also reflected in the Departments’ own regulations, the preambles to their proposed and final rules, and longstanding industry practice. And it comports with common sense: like other health insurance, fixed indemnity policies pay money to an insured upon the occurrence of a health-related event, and thus fall squarely within the ordinary understanding of “health insurance.” Despite all this, and without any explanation, the Notice Rule unlawfully demands that insurers falsely tell their customers that fixed indemnity insurance is “NOT health insurance.”

8. Making matters worse, the Departments failed to give regulated parties the requisite notice of the final rule. The proposed rule offered two alternative notices, both of which stated merely that fixed indemnity insurance is not “*comprehensive* health insurance.” The Departments never suggested that, contrary to the statute, regulations, and industry and common understanding, the Departments might decide to omit “comprehensive” from the notice entirely. Plaintiffs thus could not have reasonably anticipated that the Departments would abruptly decide to mandate a notice falsely stating that fixed indemnity insurance is “NOT health insurance” at all. The lack of legally required notice independently renders the Notice Rule unlawful.

9. Accordingly, the Court should vacate the Notice Rule as in excess of statutory authority; arbitrary, capricious, and contrary to law; and without observance of proper procedure.

PARTIES

10. Plaintiff ManhattanLife Insurance and Annuity Company is an insurance company organized and existing under the laws of the State of Texas with its principal place of business in Houston, Texas. ManhattanLife sells fixed indemnity insurance policies in the individual and group markets.

11. Plaintiff Paschall and Associates, Inc. d/b/a Paschall Health Insurance is a corporation organized and existing under the laws of the State of Texas with its principal place of business

in Tyler, Texas. Paschall Health Insurance sells fixed indemnity health insurance policies, including those issued by ManhattanLife. Paschall Health Insurance is owned by plaintiff William C. Paschall.

12. Plaintiff William C. Paschall is an insurance agent based in Tyler, Texas. Mr. Paschall has spent his career building a small business, Paschall Health Insurance, that specializes in helping the residents of East Texas find the insurance product that fits their budget and lifestyle, which in many cases is fixed indemnity health insurance. Mr. Paschall has built a name, reputation, and livelihood through his small business.

13. Defendant HHS is an executive department of the United States headquartered in Washington, D.C.

14. Defendant Department of the Treasury is an executive department of the United States headquartered in Washington, D.C.

15. Defendant Department of Labor is an executive department of the United States headquartered in Washington, D.C.

16. Defendant Xavier Becerra is the Secretary of HHS. Secretary Becerra is sued in his official capacity only.

17. Defendant Janet Yellen is the Secretary of the Treasury. Secretary Yellen is sued in her official capacity only.

18. Defendant Julie A. Su is the Acting Secretary of Labor. Acting Secretary Su is sued in her official capacity only.

JURISDICTION AND VENUE

19. The Court has jurisdiction over this APA action under 28 U.S.C. § 1331.

20. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) because this is an action against officers and agencies of the United States, at least one plaintiff resides in this district, and no real property is involved in this action.

STANDING

21. Plaintiffs face imminent, concrete, and particularized injuries due to the Notice Rule, and those injuries would be redressed by a ruling setting the Notice Rule aside.

22. ManhattanLife sells fixed indemnity insurance policies that satisfy the statutory criteria to be exempt from federal requirements. Accordingly, these policies need not, and do not, satisfy those requirements. But if ManhattanLife does not comply with the Notice Rule, the fixed indemnity policies it sells will no longer be exempted, and therefore could not lawfully be sold. ManhattanLife will therefore be required either to stop selling its fixed indemnity policies in their current form or to alter its current application, enrollment, and marketing materials to include the new federal notice falsely stating that fixed indemnity policies are “NOT health insurance.” If it does the latter, ManhattanLife will sell fewer fixed indemnity policies because some of its current and prospective customers who would otherwise have purchased such policies will be dissuaded from doing so by a notice stating, falsely, that the policy is “NOT health insurance.” ManhattanLife thus faces imminent financial injury if the Notice Rule goes into effect.

23. Mr. Paschall, through his small business Paschall Health Insurance, sells fixed indemnity insurance policies to individuals in East Texas. Mr. Paschall earns a commission for each fixed indemnity policy he sells. Mr. Paschall has spent decades building a reputation for integrity and prides himself on being open and honest with his customers, including with respect to fixed indemnity policies, which lie at the core of his business. Mr. Paschall markets fixed indemnity policies as “health insurance” because he believes that, consistent with industry practice and common usage, fixed indemnity insurance is health insurance. In the normal course of his business,

Mr. Paschall uses the brochures and application forms provided by the policy’s issuer, including those provided by ManhattanLife. But if the Notice Rule goes into effect, the marketing and application materials that Mr. Paschall normally uses will falsely state that fixed indemnity insurance is “NOT health insurance.” As a result, Mr. Paschall will be injured in at least three ways:

- i. *Reduced Sales.* Because many of Mr. Paschall’s current and prospective customers understand fixed indemnity insurance to be health insurance, Mr. Paschall reasonably anticipates that some of his customers who otherwise would have purchased a fixed indemnity policy will, upon seeing the false statement compelled by the Notice Rule, decide not to do so. *See All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 235 (5th Cir. 2023) (“[E]conomic harm—like damage to one’s business interest—is a quintessential Article III injury.”).
- ii. *Wasted Business Time.* To maintain the trust of his customers and mitigate the confusion that he reasonably believes the Notice Rule will create, Mr. Paschall will be forced to spend time explaining why, despite the text of a government-imposed notice, fixed indemnity insurance is in fact health insurance. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (finding injury-in-fact where law caused plaintiff to “consum[e] its time and resources in a way they would not have been spent absent the ... law”).
- iii. *Compelled Speech.* If the Notice Rule goes into effect, Mr. Paschall will be compelled to either pass out written materials bearing a government-mandated message with which he disagrees, stop using marketing and application materials in his discussions with customers, or incur the expense of creating bespoke

marketing and application materials to use in lieu of those regulated by the Notice Rule. *See Book People, Inc. v. Wong*, 91 F.4th 318, 333 (5th Cir. 2024) (finding standing where challenged law forced plaintiff to either “submit” a “compelled” message or “refuse to comply and lose customers and revenue”).

BACKGROUND

24. Federal law imposes numerous requirements on health insurance issuers offering group or individual health insurance. For example, under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, insurers must allow policyholders to renew their coverage except in limited circumstances. 42 U.S.C. § 300gg-42.¹ Under the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), insurers cannot impose preexisting condition exclusions, 42 U.S.C. § 300gg-3, and must cover all “essential health benefits,” *id.* § 300gg-6.² These provisions reside in a subchapter of Title 42 entitled “Requirements Relating to Health Insurance Coverage.” *Id.* ch. 6A, subch. XXV.

25. These requirements, however, do not apply to a health insurance policy’s provision of “excepted benefits” in certain circumstances. “[F]ixed indemnity insurance” is one type of excepted benefit. *Id.* § 300gg-91(c)(3)(B). As the Departments have recognized, “fixed indemnity insurance” typically refers to health “insurance that pays a fixed amount under specified conditions without regard to other insurance.” 79 Fed. Reg. 15,808, 15,818 (Mar. 21, 2014).

¹ HIPAA made materially identical amendments to the Public Health Service Act (PHSA), *see* 42 U.S.C. § 300gg-41 *et seq.*, which is enforced by HHS; the Employee Retirement Income Security Act (ERISA), *see* 29 U.S.C. § 1181 *et seq.*, which is enforced by the Department of Labor; and the Internal Revenue Code (IRC), *see* 26 U.S.C. § 9801 *et seq.*, which is enforced by the Department of the Treasury. For ease of reference, this complaint cites the PHSA provisions and implementing regulations.

² The ACA added provisions to ERISA, 29 U.S.C. § 1185d, and the IRC, 26 U.S.C. § 9815, that incorporate by reference the new requirements in Title 42.

26. As ManhattanLife’s “Affordable Choice” policy shows, fixed indemnity insurance has all the hallmarks of health insurance. When an insured incurs costs because of a health event, the policy pays the beneficiary a fixed sum that can be used to cover those costs. An Affordable Choice plan might pay, for example, \$5,000 per day for inpatient hospital confinement and \$100 per doctor’s office visit, depending on the benefits schedule the customer selects. These benefits pay out without the insured having to first meet a deductible. Affordable Choice beneficiaries also have access to substantial discounts through a network of healthcare providers. With cash benefits and the network discounts combined, fixed indemnity beneficiaries are often insured against the vast majority of costs for an unexpected health event. An example from ManhattanLife’s brochure illustrates the point: a beneficiary of an “Elite” level Affordable Choice policy breaks his arm and incurs \$2,384 in medical bills for an emergency room visit, four follow-up office visits, and five follow-up x-rays; the policy pays \$925 in cash benefits to the beneficiary and provides a \$596 (25%) network discount, leaving the insured to pay \$863 out of pocket.

27. This kind of policy is a rational choice for some consumers, either as a supplement to or substitute for costlier comprehensive insurance. For example, “healthy peopl[e] may deliberately elect this benefit” because they “prefe[r] the lower premium and lower or absent deductible.” Young & Hannick, *supra*. Indeed, although wealthy individuals likely prefer more comprehensive plans regardless of the deductible, some “young, healthy, low-income families living paycheck-to-paycheck” might rationally choose a fixed indemnity policy with a low deductible—or no deductible at all—that provides direct payments if a medical event occurs. John C. Goodman, *Alternatives to Obamacare*, Forbes (Jan. 30, 2019) <https://tinyurl.com/yec73y65>. Fixed indemnity insurance is not for everyone, but for some it represents a reasonable and valuable option.

28. Fixed indemnity insurance is exempt from the ACA's requirements for comprehensive health insurance when "all of the following conditions are met:" (1) "The benefits are provided under a separate policy, certificate, or contract of insurance"; (2) "There is no coordination between the provision of such benefits and any exclusion of benefits under any group health plan maintained by the same plan sponsor"; and (3) "Such benefits are paid with respect to an event without regard to whether benefits are provided with respect to such an event under any group health plan maintained by the same plan sponsor or, with respect to individual coverage, under any health insurance coverage maintained by the same health insurance issuer." 42 U.S.C. § 300gg-21(c)(2). And to be exempt from HIPAA's requirements, fixed indemnity insurance need only satisfy the first of these conditions: that "the benefits are provided under a separate policy, certificate, or contract of insurance." *Id.* § 300gg-63(b). In short, fixed indemnity insurance is exempt from otherwise applicable federal requirements for health insurance if the benefits it provides are separate from, not coordinated with, and independent of other health insurance.

29. For many years, the Departments' implementing regulations simply parroted these three statutory criteria. *See, e.g.*, 45 C.F.R. § 146.145(b)(4) (2004); 26 C.F.R. § 54.9831-1(c)(4) (2008); 29 C.F.R. § 2590.732(c)(4) (2012).

30. In 2014, however, HHS purported to "amend the criteria for fixed indemnity insurance to be treated as an excepted benefit in the individual health insurance market." 79 Fed. Reg. at 30,253. Under the 2014 rule, fixed indemnity policies sold in the individual market would not be "considered an excepted benefit" unless, in addition to meeting the statutory criteria, the benefits were "provided only to individuals who have other health coverage that" satisfied the ACA's individual mandate. *Id.* at 30,253, 30,257; *see also NFIB v. Sebelius*, 567 U.S. 519, 538–39 (2012). The 2014 rule also required fixed indemnity insurers operating in the individual market to state on

their plan materials that the plan was “a supplement to health insurance” and “not a substitute for major medical coverage.” 79 Fed. Reg. at 30,253, 30,257.

31. In response, ManhattanLife’s predecessor, Central United Life Insurance Company, successfully challenged the minimum-essential-coverage requirement of the 2014 rule as beyond HHS’s statutory authority. As the D.C. Circuit explained:

Nothing in the PHSA suggests Congress left any leeway for HHS to tack on additional criteria. Nor do any subsequent amendments to it. ... At no point does the ACA give even the slightest indication the definition of “excepted benefit” was suddenly debatable; rather, the Act doubled down on the PHSA’s existing requirements. Ever since it first carefully defined what counts as an “excepted benefit” in 1996, Congress has never changed course or put its original definition in any doubt. Where the text is as clear as it is here, “that is the end of the matter.”

...

HHS lack[s] authority to demand more of fixed indemnity providers than Congress required

Central United, 827 F.3d at 73–75 (citations omitted).

32. On July 12, 2023, the Departments proposed to again amend the criteria for fixed indemnity insurance to be exempted from the requirements applicable to comprehensive coverage. *See* 88 Fed. Reg. 44,596. Specifically, the Departments: proposed to require fixed indemnity benefits to be paid on a strictly “per-period” basis, *id.* at 44,620–24; contemplated prohibiting fixed indemnity plans from paying benefits directly to providers, *id.* at 44,624–25; offered a new, expansive understanding of “coordination” of benefits, *id.* at 44,628–30; and—relevant here—proposed to modify the notice requirement established under the 2014 rule and make it applicable in the group market as well, *id.* at 44,625–28.

33. The Departments proposed two alternative versions of the revised notice. Both stated that fixed indemnity insurance is not “*comprehensive* health insurance.” *Id.* at 44,626, 44,628 (emphasis added). That wording aligned with the statutory scheme, which is clear that

“fixed indemnity insurance” is a type of “health insurance coverage” that is exempt from the requirements applicable to comprehensive health insurance. *See, e.g.*, 42 U.S.C. §§ 300gg-63(b), 300gg-91(b)(1), (c)(3)(B). It aligned with the Departments’ regulations, which include “fixed indemnity” insurance among types of exempted “health insurance coverage.” 45 C.F.R. §§ 146.145(b), 148.220(b). And it aligned with the Departments’ goal of “distinguishing fixed indemnity excepted benefits coverage from comprehensive coverage.” 88 Fed. Reg. at 44,626.

34. In full, the two proposed notices were:

Notice to Consumers About Fixed Indemnity Insurance

IMPORTANT: This is fixed indemnity insurance. **This isn’t comprehensive health insurance and doesn’t** have to include most Federal consumer protections for health insurance.

Visit HealthCare.gov online or call 1-800-318-2596 (TTY: 1-855-889-4325) to review your options for comprehensive health insurance. If you’re eligible for coverage through your employer or a family member’s employer, contact the employer for more information. Contact your State department of insurance if you have questions or complaints about this policy.

WARNING

This is not comprehensive health insurance. This is fixed indemnity insurance.

This may provide a cash benefit when you are sick or hospitalized. It is not intended to cover the cost of your care.

Contact your State department of insurance if you have questions or complaints about this policy.

For info on comprehensive health insurance coverage options:

- Visit HealthCare.gov online or call 1-800-318-2596 (TTY: 1-855-889-4325)
- Contact your employer or family member’s employer

88 Fed. Reg. at 44,626, 44,628.

35. The proposed rule never suggested that the Departments were considering a notice that would deem fixed indemnity insurance not to be “health insurance” at all. Nor did the Departments seek comments on this particular aspect of the proposed notices. Rather, the Departments sought comments on matters such as whether to specify that the notice was legally required or whether to include state-specific contact information. *See id.* at 44,627–28.

36. The Departments sought to justify these proposed changes, including the proposed notice, as necessary to “address reports of troubling marketing and sales tactics ... that mislead consumers to believe that hospital indemnity or other fixed indemnity insurance constitutes comprehensive coverage.” *Id.* at 44,619. Yet the Departments offered little more than a few anecdotes to support their claim of widespread consumer confusion.

37. ManhattanLife submitted comments on several aspects of the proposed rule, including the proposed notices. *See* Comment Letter from ManhattanLife to Departments (Sept. 11, 2023), tinyurl.com/bdze2vv8. Among other things, ManhattanLife argued that the Departments lacked statutory authority to require a notice of any kind and that the Departments had not adequately supported their claims of rampant customer confusion. *Id.* at 7, 10 (citing *Central United*, 827 F.3d at 73–75). Because they could not reasonably have anticipated that the Departments would impose such a requirement, ManhattanLife had no opportunity to comment on a notice that would deem fixed indemnity insurance not to be health insurance at all.

38. The Departments issued the final rule on April 3, 2024. 89 Fed. Reg. 23,338. Although they declined (for now) to finalize any other provision of the proposed fixed indemnity rule, the Departments adopted a revised version of the proposed notices. *Id.* at 23,388–89.

39. Unlike the proposed notices, which both stated only that fixed indemnity insurance is not “comprehensive health insurance,” the finalized notice requires fixed indemnity insurers to state that “a fixed indemnity policy” is “NOT health insurance.” *Id.* at 23,389. It further requires fixed indemnity insurers to state that, “[s]ince this policy isn’t health insurance, it doesn’t have to include most Federal consumer protections that apply to health insurance.” *Id.*

40. The Departments offered no explanation for this abrupt change. *See id.* at 23,387–88 (explaining other changes from proposed notices). Nor did they even attempt to justify deeming

fixed indemnity insurance “NOT health insurance” when the governing statute, the Departments own regulations, and even the preamble of the final rule all treat fixed indemnity insurance as a type of health insurance. *See supra* ¶ 33; 89 Fed. Reg. at 23,383 (including fixed indemnity insurance as part of the “Federal framework for health insurance coverage”).

41. In full, the final notice states:

**IMPORTANT: This is a fixed indemnity policy,
NOT health insurance**

This fixed indemnity policy may pay you a limited dollar amount if you’re sick or hospitalized. You’re still responsible for paying the cost of your care.

- The payment you get isn’t based on the size of your medical bill.
- There might be a limit on how much this policy will pay each year.
- This policy isn’t a substitute for comprehensive health insurance.
- Since this policy isn’t health insurance, it doesn’t have to include most Federal consumer protections that apply to health insurance.

Looking for comprehensive health insurance?

- **Visit [HealthCare.gov](https://www.healthcare.gov)** or call **1-800-318-2596** (TTY: 1-855-889-4325) to find health coverage options.
- To find out if you can get health insurance through your job, or a family member’s job, contact the employer.

Questions about this policy?

- For questions or complaints about this policy, contact your State Department of Insurance. Find their number on the National Association of Insurance Commissioners’ website ([naic.org](https://www.naic.org)) under “Insurance Departments.”
- If you have this policy through your job, or a family member’s job, contact the employer.

89 Fed. Reg. at 23,389.

42. This notice must be provided “in at least 14-point font” on “the first page (in either paper or electronic form, including on a website) of any marketing, application, and enrollment materials” at the time of enrollment or reenrollment. 89 Fed. Reg. at 23,418, 23,420 (to be codified at 45 C.F.R. §§ 146.145(b)(4)(ii)(D), 148.220(b)(4)(iii)(A)).

43. Under the Notice Rule, a fixed indemnity policy is not considered exempt from the requirements applicable to comprehensive health insurance if the required notice is not given. *Id.* As the Departments explained, under the Notice Rule, “fixed indemnity insurance offered without [the required] notice would not qualify as fixed indemnity excepted benefits coverage and would be subject to the Federal consumer protections and requirements applicable to comprehensive coverage.” 89 Fed. Reg. at 23,383. Of course, in order to “be subject to the Federal consumer protections and requirements applicable to comprehensive coverage,” fixed indemnity policies must provide “health insurance coverage” in the first place. *See, e.g.*, 42 U.S.C. § 300gg-6(a).

44. The Departments offered two sources of authority for the Notice Rule. First, they asserted that it was a permissible exercise of their “authority to interpret and implement the statutory provisions governing [excepted benefit] insurance products.” 89 Fed. Reg. at 23,381 & n.237. They did not specify, however, what specific statutory text the Notice Rule could be understood to “interpret” or “implement.” Second, the Departments asserted that the Notice Rule was permissible under their “authority to promulgate regulations as [they] determine may be necessary or appropriate to carry out the provisions” of the governing statutes. *Id.* at 23,381 & n.238. Again, the Departments did not point to any particular “provision” the Notice Rule was “carry[ing] out.”

45. The Departments also contended that *Central United* was distinguishable because the Notice Rule “is not an impermissible requirement being added to the statutory criteria for fixed indemnity benefits coverage.” *Id.* at 23,382. Two sentences later, however, the Departments stated that under the Notice Rule, “insurance offered without such a notice would not qualify as fixed indemnity excepted benefits coverage.” *Id.*

46. In justifying the Notice Rule, the Departments pointed to the “prevalence of deceptive marketing practices,” *id.* at 23,360, yet they offered scant evidence in support. And in the face

of comments explaining that a federal notice is unnecessary because States are more than capable of regulating deceptive marketing and addressing any consumer confusion, *see id.* at 23,382, the Departments offered no reasoned basis to find that state regulation is inadequate.

47. The Notice Rule is effective for plan years or coverage periods beginning on or after January 1, 2025. 89 Fed. Reg. at 23,418, 23,420 (to be codified at 45 C.F.R. §§ 146.145(b)(4)(ii)(D), 148.220(b)(4)(iii)(A)).

COUNT I

THE NOTICE RULE IS IN EXCESS OF STATUTORY AUTHORITY (5 U.S.C. § 706(2)(C))

48. The foregoing paragraphs are incorporated by reference.

49. The Notice Rule exceeds the Departments’ statutory authority. Under the statute, fixed indemnity policies are exempt from the requirements applicable to comprehensive health insurance if “all of the following conditions are met:” separateness, noncoordination, and independence. 42 U.S.C. § 300gg-21(c)(2). The Departments have no authority to “tack on” to that list “additional” conditions. *Central United*, 827 F.3d at 73. The Notice Rule does just that, providing a fourth condition that a fixed indemnity policy must satisfy to qualify as an exempted benefit.

50. Because the Notice Rule exceeds the Departments’ statutory authority, it should be vacated. *See* 5 U.S.C. § 706(2)(C) (providing that courts “shall” “hold unlawful and set aside agency action” that is “in excess of statutory jurisdiction, authority, or limitations”).

COUNT II

THE NOTICE RULE IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW (5 U.S.C. § 706(2)(A))

51. The foregoing paragraphs are incorporated by reference.

52. Even if the Departments had statutory authority to impose a notice requirement, the Notice Rule is unlawful because it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

53. The Departments premised the need for a federally mandated notice on the purported prevalence of deceptive marketing of fixed indemnity policies. But that premise is unfounded, resting primarily on anecdotes and speculation. Further, the Departments did not adequately explain why state regulation could not address problematic sales practices. The Notice Rule is thus unlawful because the Departments “failed to consider an important aspect of the problem” they set out to regulate and “offered an explanation for [the] decision that runs counter to the evidence.” *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019).

54. The Notice Rule is also arbitrary and capricious because it requires insurers to falsely tell prospective customers that fixed indemnity insurance is “NOT health insurance,” despite the statute, common usage, and industry practice all treating fixed indemnity insurance as a type of health insurance. Because the Notice Rule contradicts the statute’s express terms, as well as the statute’s “design and structure,” it is unlawful. *Util. Air. Regul. Grp.*, 573 U.S. at 321. And even if it were not substantively unlawful, the Notice Rule is arbitrary and capricious because the Departments “g[ave] no explanation whatsoever,” *Clarke v. CFTC*, 74 F.4th 627, 641 (5th Cir. 2023), for their decision to deem fixed indemnity insurance “NOT health insurance.”

55. For these reasons as well, the Notice Rule should be vacated.

COUNT III

THE NOTICE RULE WAS PROMULGATED WITHOUT PROPER PROCEDURE (5 U.S.C. § 706(2)(D))

56. The foregoing paragraphs are incorporated by reference.

57. The APA requires agencies to publish a “notice of proposed rule making” setting forth “the terms or substance of the proposed rule,” then provide the public with “an opportunity to participate in the rule making” by providing comments. 5 U.S.C. § 553(b)(3), (c).

58. The agency’s notice must “adequately frame the subjects for discussion such that the affected party should have anticipated the agency’s final course in light of the initial notice.” *Mock v. Garland*, 75 F.4th 563, 583 (5th Cir. 2023). If the final rule is not a “logical outgrowth of the rule proposed,” then “a court must set aside the agency action found to be ‘without observance of procedure required by law.’” *Id.* (quoting 5 U.S.C. § 706(2)(D)).

59. The Notice Rule is not a logical outgrowth of the proposed rule. Both of the Departments’ proposed notices—consistent with the statutory scheme, the Departments’ regulations, the Departments’ stated rationale, and longstanding industry understanding—contemplated that fixed indemnity insurance is health insurance, just not “comprehensive” health insurance. 88 Fed. Reg. at 44,626, 44,628. Nowhere in the proposed rule did the Departments suggest they were considering a notice that would deem fixed indemnity insurance not to be “health insurance” at all. Rather, the Departments sought comments on other, unrelated aspects of the proposed notices. *See id.* at 44,627–28. “Commentators reading the proposed Rule’s language could not have reasonably foreseen that the Final Rule would” abruptly shift from treating fixed indemnity insurance as a type of excepted health insurance to requiring insurers to state, falsely, that fixed indemnity insurance is “NOT health insurance.” *Mock*, 75 F.4th at 584.

60. Because plaintiffs “could not comment on the specifics of” the Notice Rule, they were prejudiced by the Departments failure to provide sufficient notice. *Id.* at 586. If the Departments had complied with their notice obligations, plaintiffs could and would have explained to the Departments that fixed indemnity health insurance is precisely that: health insurance.

61. The Notice Rule therefore “must be set aside as unlawful.” *Id.*

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court enter judgment in their favor and grant the following relief:

- (1) A declaration that the Departments acted unlawfully in promulgating the Notice Rule;
- (2) An order vacating:
 - a. 26 C.F.R. § 54.9831-1(c)(4)(ii)(D);
 - b. 29 C.F.R. § 2590.732(c)(4)(ii)(D);
 - c. 45 C.F.R. § 146.145(b)(4)(ii)(D); and
 - d. 45 C.F.R. § 148.220(b)(4)(iii)(A);
- (3) An injunction barring the Departments from enforcing the foregoing provisions;
- (4) Attorneys’ fees and costs pursuant to 28 U.S.C. § 2412; and
- (5) Any other just and proper relief.

May 21, 2024

Respectfully submitted,

/s/ Eric D. McArthur

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Counsel for Plaintiffs

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

ManhattanLife Insurance and Annuity Company; Paschall and Associates, Inc.; William Paschall

(b) County of Residence of First Listed Plaintiff Harris
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

See attachment

DEFENDANTS

United States Department of Health and Human Services et al.

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 INTELLECTUAL PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
5 U.S.C. § 706

Brief description of cause:

Unlawful agency action that exceeds defendants' statutory authority, is arbitrary and capricious, and failed to comply with required procedures

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

May 21, 2024

SIGNATURE OF ATTORNEY OF RECORD

/s/ Eric D. McArthur

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
- Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
- PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related cases, if any. If there are related cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.