USES OF THE CLASS ACTION DEVICE IN AUTISM HEALTH BENEFITS LITIGATION

I. INTRODUCTION

In the past twenty years, a striking rise in the diagnosis of autism[1] has helped generate increasing levels of attention to the disorder within legislatures and courts throughout the United States.[2] A significant subset of both the legislative and judicial interaction with autism involves whether, and how, treatment for the disorder should be covered by health insurance providers.[3] This Note analyzes a collection of recent class action lawsuits in which parents of autistic children challenged insurers' denial of benefits for Applied Behavioral Analysis (ABA) therapy, perhaps the most widely accepted treatment for autism.[4] The Note specifically examines the strategic advantages and drawbacks of choosing to litigate a denial of benefits for autism therapy as a class action rather than as an individual lawsuit.

Section II begins with a brief overview of the characteristics and effects of autism and a discussion of ABA therapy and its use for autistic individuals. It then lays out the requirements for bringing a class action under FRCP 23,[5] while noting several of the most widespread critical assessments of the Rule. Finally, the Background section details a group of recent ABA therapy class actions, including several actions whose plaintiffs the Michigan firm of Mantese Honigman Rossman and Williamson represents.[6]

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1. While the rise in autism diagnoses over the past few decades is undeniable, the precise cause of the increase remains unclear. Possible causes include genetics, environmental factors, and an expansion of the diagnostic criteria physicians use to identify autistic spectrum disorders. *See* Jacqueline Stenson, *As Autism Cases Soar, a Search for Clues*, MSNBC.COM (Feb. 24, 2005, 2:58 PM), http://www.msnbc.msn.com/id/6947652/ns/health-mental_health/.

2. For a discussion of current autism legislation, see *infra* notes 37, 38. For an overview of the autism litigation this Note addresses, see *infra* Section II.D. Perhaps the most well-known examples of autism-related litigation to date are the cluster of cases filed in the U.S. Court of Federal Claims alleging that thimerosal, a mercury-based additive to routine childhood vaccines, contributes to autism. *See* Gordon Shemin, Comment, *Mercury Rising: The Omnibus Autism Proceeding and What Families Should Know Before Rushing Out of Vaccine Court*, 38 AM. U. L. REV. 459, 461-62 (2008).

3. *See* discussion *infra* Section II.D and notes 37, 38.

4. *See* discussion *infra* Sections II.D, II.B.

5. FED. R. CIV. P. 23.

6. The Mantese firm is located in Troy, Michigan. For more on the firm's involvement in autism benefits litigation, see MANTESE HONIGMAN ROSSMAN AND WILLIAMSON, P.C., www.manteselaw.com (last visited July 27, 2012).

Section III analyzes the intersection between the ABA therapy class actions and FRCP 23's requirements, using examples from these recent cases to address the pros and cons of employing the class action device in the context of ABA therapy benefits denials. The Analysis section then takes a more in-depth look into both the FRCP 23(a)(3) "typicality" requirement and the 23(b) "predominance" and "superiority" requirements, because a number of the ABA class actions have struggled with these requirements in particular.[7] The discussion recommends that courts resist the inclination to deal with ABA therapy benefits denials as individual administrative reviews of each autistic claimant, and instead re-conceptualize the ABA therapy claim as a more conventional contract dispute.

Section III contends the increasing success of ABA therapy class actions illustrates how using class actions to litigate autism benefits disputes can be more impactful and efficient than individual adjudications. It finishes by considering how the ABA therapy class actions promote due process and judicial efficiency—two policy goals with which FRCP 23 is explicitly concerned.

Section IV summarizes this Note's major arguments and, further, suggests that the increase in ABA therapy class actions may eventually help raise the level of autism awareness enough to prompt more widespread legislation ensuring adequate medical coverage of treatments for autism.

II. BACKGROUND

A. Characteristics of Autism

Autism is a neurological disorder that impairs the development of language, behavioral, and social skills.[8] Typically diagnosed in early childhood, autism often initially manifests itself through symptoms such as lack of eye contact, lack of interest in physical contact, and delayed or decreased ability to verbally communicate.[9] These symptoms reflect the fact that autistic children do not experience the world in the same way that neuro-typical children do; most crucially, many do not naturally feel a strong desire for social interaction.[10]

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7. *See* FED. R. CIV. P. 23.

8. *Symptoms of Autism*, AUTISM SPEAKS, http://www.autismspeaks.org/whatisit/symptoms.php (last visited Apr. 16, 2012).

9. *Id.*

10. *Id.*

As autistic children grow older and begin to interact with peers, these early difficulties usually become more pronounced.[11] Autistic individuals may engage in repetitive physical behaviors, such as arm-flapping and walking on tiptoes, and their difficulty processing emotions may lead them to scream or cry in inappropriate situations.[12] Almost by definition, those with autism have trouble interpreting the social cues, facial expressions, and verbal modulations that many of us take for granted. For example, an autistic child might not register the difference between his mother's smile and her frown, or understand that the meaning of a given statement (e.g. "Come here!") can depend on the context in which it is uttered.[13] Moreover, autistic children's difficulty processing social cues can erect considerable barriers throughout their adolescent and adult lives; they may experience difficulty making friends, developing romantic relationships, and sustaining gainful employment.[14]

Beyond cataloguing clusters of possible symptoms, it is difficult to generalize about autism, since the disorder presents with varying degrees of severity and through clusters of unique behavioral expressions across the population.[15] The high degree of variation among autistic individuals has led many to refer to autism not as a single, definable condition, but as a spectrum of disorders.[16] The "autistic spectrum" ranges from individuals with normal verbal skills and fairly mild difficulties understanding social cues, to totally nonverbal individuals who cannot adequately care for themselves or function independently in society.[17]

While the precise meaning of an autism diagnosis is variable, the statistics on autism are disturbingly clear: autism currently affects roughly one in every 110 children, and one of every seventy boys, and

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11. *Id.*

12. *Id.*

13. *Id.*

14. *See, e.g.*, Tony Attwood, *Romantic Relationships for Young Adults with Asperger's Syndrome and High-Functioning Autism*, INTERACTIVE AUTISM COMMUNITY (Feb. 20, 2009), http://www.iancommunity.org/cs/articles/relationships (discussing problems with social interaction as a roadblock to romantic relationships in individuals with Asperger's Syndrome); Teresa J. Foden, *Adult Employment: Strangers in a Strange Land*, INTERACTIVE AUTISM COMMUNITY (Jan. 28, 2008), http://www.iancommunity.org/cs/articles/strange_land (describing particular difficulties individuals with autism tend to experience in the workplace).

15. *See Frequently Asked Questions*, AUTISM SPEAKS, http://www.autismspeaks.org/whatisit/faq.php (last visited July 27, 2012).

16. *What Are the Autism Spectrum Disorders?*, NAT'L INST. OF MENTAL HEALTH, http://www.nimh.nih.gov/health/publications/a-parents-guide-to-autism-spectrum-disorder/complete-index.shtml (last visited July 27, 2012) ("[E]ach child will display communication, social, and behavioral patterns that are individual but fit into the overall diagnosis of ASD").

17. *See id.*

rates of diagnoses are becoming more frequent over time.[18] Autism costs the United States an enormous amount in healthcare, education, treatment, employment, and related expenses—some estimate the total national cost of autism at up to $90 billion per year.[19] Current theories speculate that both genetic and environmental factors contribute to autism.[20] Yet despite increasing scientific and media attention to autistic spectrum disorder (ASD), the cause(s) of the disorder remain largely unclear.[21]

Though there is little hope of a "cure" for autism any time soon, autism is treatable. A wide range of therapies exist to help those diagnosed with autism learn to develop some of the social and communicative behaviors that they do not naturally possess.[22] Behavioral studies demonstrate that these therapies tend to yield better results the earlier in childhood they begin, because the brain adapts more easily in very young children.[23] Autism researchers and advocacy groups, therefore, stress that early intervention (i.e., between the ages of one and three years old) is essential, both to maximize the autistic child's potential for social awareness and, ideally, to decrease the amount of time and money spent managing the child's autism over the course of his life.[24]

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18. *Id.*

19. *About Autism*, AUTISM SOCIETY OF AMERICA, http://www.autism-society.org/about-autism/ (last visited July 27, 2012).

20. AUTISM SPEAKS, *supra* note 15.

21. *Id.*

22. In addition to Applied Behavior Analysis (ABA) therapy, which this Note discusses in Section II(B), treatments for autism include art and music therapy; sensory integration therapy (which teaches autistic children to "reorganize and integrate" their frequently dramatic reactions to sensory input); traditional classroom therapy, preferably modified to suit the autistic child's particular needs; and the prescription of antidepressant or antipsychotic medication. *See Autism*, EMEDICINE HEALTH, http://www.emedicinehealth.com/autism/article_em.htm (last visited July 27, 2012).

23. *See Applied Behavioral Analysis for Children with Autism*, HEALING THRESHOLDS, http://autism.healingthresholds.com/therapy/applied-behavior-analysis-aba (last visited Apr. 15, 2012).

24. *See* Daniela Caruso, *Autism in the US: Social Movement and Legal Change*, 36 AM. J. L. & MED. 483 (2010); *Early Intervention Lessens Impact of Autism*, SCIENCE DAILY (June 16, 2004), http://www.sciencedaily.com/releases/2004/06/040616063622.htm.

B. Applied Behavior Analysis Therapy

Applied Behavioral Analysis (ABA) therapy is the most common, effective, and well-researched form of therapy for autistic children.[25] ABA therapy for autism involves repetitive, task-and-reward-based activities designed to teach children skills such as imitating others, making eye contact, listening, and appropriately answering questions.[26] ABA is usually performed by a "behavior analyst"—an individual who has studied behavior therapy and may have a degree in behavioral sciences.[27] ABA therapists normally tailor plans for each autistic child based on his particular needs, because each child's symptoms tend to vary so widely.[28] Although ABA therapy can occur in a "group" setting, therapists more often engage autistic children in one-on-one sessions.[29] ABA's effectiveness hinges on repetition and reinforcement of learned behaviors, and the most effective therapy can be time-consuming and intense, routinely spanning anywhere from twenty-five to forty hours per week.[30] Not surprisingly, such an individualized and intense therapeutic protocol comes at a high economic expense; it is not unusual for ABA to cost $50,000 a year for a single autistic child.[31]

Because public schools are largely ill-equipped and insufficiently funded to provide ABA therapy, many parents of autistic children must

25. *See* Angela Barner, *Unlocking Access to Insurance Coverage for Autism Treatment*, 6 J.L. ECON. & POL'Y 107, 110-11 (2009) (discussing numerous studies that have demonstrated the effectiveness of ABA therapy). For several recent studies indicating the effectiveness of ABA therapy on autistic children, see Howard Cohen et al., *Early Intensive Behavioral Treatment: Replication of the UCLA Model in a Community Setting*, 27 J. DEV. & BEHAV. PEDIATRICS 145 (2006); Glen O. Sallows & Tamlynn D. Graupner, *Intensive Behavioral Treatment for Children with Autism: Four-Year Outcome and Predictors*, 110 AM. J. MENTAL RETARDATION 417 (2005). For perhaps the single most influential ABA study, see Ivar O. Lovaas, *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*, 55 J. CONSULTING & CLINICAL PSYCHOL. 3 (1987) (demonstrating significantly improved behavioral skills in young autistic children who underwent ABA therapy).

26. Barner, *supra* note 25, at 110-11; *Applied Behavior Analysis (ABA)*, AUTISM SPEAKS, http://www.autismspeaks.org/treatment/aba.php (last visited Apr. 16, 2012).

27. Richard Saffran, *Autism and ABA (behavioral intervention)*, ABA RESOURCES FOR RECOVERY FROM AUTISM, http://rsaffran.tripod.com/faq.html (last visited Apr. 16, 2012). There is no licensing requirement or specific education required to be an ABA therapist. *Id.*

28. *See id.*

29. *Id.*

30. *Id. See also* AUTISM SPEAKS, *supra* note 26.

31. *See* Barner, *supra* note 25, at 109.

look to their own health insurance plans to help pay ABA expenses.[32] Although arguments in favor of ABA therapy health benefits differ substantially in detail, their general thrust is that "because autism is ordinarily diagnosed by pediatricians, in theory health insurance should pay for the therapeutic interventions medically necessary to improve the condition of patients."[33] Many insurance companies, however, continue to deny coverage for ABA therapy, claiming, for instance, that ABA remains an experimental treatment;[34] that it is "habilitative" therapy and therefore not covered by an existing plan;[35] or that it is "educational" rather than "medical" intervention.[36] Although thirty-one states have enacted legislation that requires insurance plans to cover some level of ABA therapy,[37] and autism advocacy groups have proposed ABA coverage legislation at the federal level,[38] many parents and families whose insurance companies currently deny coverage for ABA therapy are seeking relief through class action litigation.

C. Requirements and Policy Goals of Fed. R. Civ. P. 23

Fed. R. Civ. P. 23 sets out the following requirements for prospective class action claimants:

> (a) Prerequisites**.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
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> (1) the class is so numerous that joinder of all members is impracticable;

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32. *See, e.g.*, Glen Cheng, *Caring for New Jersey's Children with Autism: A Multifaceted Struggle for Parity*, 60 RUTGERS L. REV. 997, 1009-15 (2008) (discussing difficulties of securing an Individualized Education Program (IEP) for public school children with autism and citing advantages of treating autism through insurance coverage); Katherine Kimball, *Insuring a Future: Mandating Medical Insurance Coverage of Autism Related Treatments in Nebraska*, 42 CREIGHTON L. REV. 689, 713-16 (June 2009) (discussing the lack of public funds for autism education in Nebraska schools and advocating autism insurance legislation).

33. Caruso, *supra* note 24, at 526.

34. *See*, *e.g.*, Johns v. Blue Cross Blue Shield of Mich., No. 2:08-cv-12272, 2009 WL 910785, at *1 (E.D. Mich. Mar. 31, 2009).

35. *See*, *e.g.*, Parents' League for Effective Autism Servs. v. Jones-Kelley, 339 Fed. App'x 542, 548 (6th Cir. 2009).

36. *See* Class Action Complaint and Demand for Jury Trial at 70, Berge v. United States, (D.D.C. Mar. 5, 2010) (No. 10-cv-00373-RBW), at 6; Caruso, *supra* note 24, at 6.

37. *Autism Speaks State Autism Insurance Reform Initiatives*, AUTISM VOTES, http://www.autismvotes.org/site/c.frKNI3PCImE/b.3909861/k.B9DF/State_Initiatives.htm (last visited Apr. 15, 2012).

38. *See* Autism Treatment Acceleration Act of 2009, S. 819, H.R. 2413, 111th Cong. (2009) (proposing increased funding for ASD education, treatment, and research).

> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.
> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
> (1) prosecuting separate actions by or against individual class members would create a risk of:
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy . . . .[39]

Scholars have devoted an enormous amount of time to considering the policy implications of class actions.[40] For this Note's purposes, two broad goals behind allowing parties to bring class actions as opposed to individual suits prove especially important. First, class actions serve the interest of judicial economy insofar as they dispose of similar claims in one large lawsuit rather than in numerous multiple suits.[41] Second, they

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39. FED. R. CIV. P. 23.

40. For several influential books on class actions, see CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (Rand Institute for Civil Justice ed., 2000); MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009); STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

41. *See* YEAZELL, *supra* note 40, at 10-11.

serve the interest of equity by allowing individuals who would not have the resources to litigate individual suits—the "little guys"—to band together against a powerful legal opponent.[42] Critics point out, however, that these goals can come with a price. For instance, the "mass" structure of the class action device can conflict with individual notions of due process.[43] Plaintiffs who join a class (or who were not aware of their option to opt out of one) may not be as fully or fairly represented as they might have been in an individual suit,[44] and their own claims might not be adequately characterized by the claim of their class representative.[45] Critical anxiety over due process for class action defendants focuses in part on how the class action can function as a form of "judicial blackmail," unfairly forcing corporate defendants to settle rather than go bankrupt in the event of an unfavorable verdict.[46] Courts are therefore hesitant to certify classes when an individual lawsuit would be a preferable form of redressing the claims of proposed class action plaintiffs.[47] As we will see in the ABA therapy class actions, this concern over the defendant's right to due process often plays out in disagreements over whether proposed class action plaintiffs have adequately fulfilled the "typicality" requirement of Rule 23,[48] or whether the proposed plaintiffs' claims are too disparate to properly be bound together in a class action.[49]

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42. *See id.*

43. *See* REDISH, *supra* note 40, at 3.

44. *See* AmChem Products v. Windsor, 521 U.S. 591, 625-26 (1997) (citing possible conflict of interest issues inherent in the class action structure). For specifics about the particular conflict of interest that hindered class certification in the *AmChem* case, see note 94, *infra*.

45. *See*, *e.g.*, Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982), in which the Court denied class certification in an employment discrimination lawsuit based heavily on the individual discrimination claim of the proposed class representative. The Court cautioned that "the 'mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.'" *Id.* at 157 (citing E. Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 405-06 (1977)).

46. *See* In the Matter of Rhone-Poulenc Rorer, 51 F.3d 1293, 1297-98 (7th Cir. 1995) (discussing coercive potential of class actions brought against corporate defendants); REDISH, *supra* note 40, at 2.

47. *See*, *e.g.*, *Rhone-Poulenc*, 51 F.3d at 1297.

48. *See, e.g.*, *Johns*, 2009 WL 910785, at *3; Graddy v. Blue Cross Blueshield of Tenn., No. 4:09-cv-84, 2010 U.S. Dist. LEXIS 14896 (E.D. Tenn. Feb. 19, 2010).

49. *Graddy*, 2010 U.S. Dist. LEXIS 14896, at *24.

D. Recent ABA Therapy Class Actions

The Michigan law firm of Mantese Honigman Rossman and Williamson, P.C., has represented plaintiffs in many prominent ABA therapy class actions to date, including *Johns v. Blue Cross Blue Shield of Michigan*;[50] *Graddy v. Blue Cross Blueshield of Tennessee*;[51] *Potter v. Blue Cross Blue Shield of Michigan*;[52] *Churchill v. Cigna Corp.*;[53] and *Berge v. United States*.[54] In *Johns*, the parents of an autistic boy sued Blue Cross Blue Shield of Michigan (BCBSM) after the company denied the boy coverage for his ABA therapy on the basis that it was "experimental" and therefore not covered by the plan.[55] The plaintiffs challenged this interpretation of the plan's language, arguing that their son's ABA therapy was covered.[56] The plaintiffs also moved to certify a class consisting of "[a]ll plan participants and beneficiaries insured under ERISA-governed employee benefit plans administered by Blue Cross and Blue Shield of Michigan who have been denied coverage for ABA treatment within the last six years."[57] The United States District Court for the Eastern District of Michigan denied the plaintiffs' motion for class certification, holding that the plaintiffs failed to reach the "typicality" and "adequacy" requirements under FRCP 23.[58]

Nevertheless, autism advocates have characterized *Johns* as an ultimate victory for its nearly one hundred plaintiffs, because BCBSM subsequently settled for nearly $1 million and "agreed to reimburse all families who paid for behavioral therapy for their children after May 1, 2003, and who were covered under a Blue Cross Blue Shield of Michigan insurance policy."[59] Moreover, in May 2009, shortly before its settlement in *Johns*, BCBSM announced that it would provide an option for policyholders "to purchase coverage for autism treatment programs

50. *Johns*, 2009 WL 910785, at *1.

51. *See Graddy*, 2010 U.S. Dist. LEXIS 14896, at *26.

52. Potter v. Blue Cross Blue Shield of Mich., No. 10-cv-14981, 2011 U.S. Dist. LEXIS 92076, at *1 (E.D. Mich. July 14, 2011).

53. Churchill v. Cigna Corp., No. 10-6911, 2011 WL 3563489, at *1 (E.D. Penn. Aug. 12, 2011).

54. Class Action Complaint, *Berge*, (D.D.C. Mar. 5, 2010) (No. 10-cv-00373-RBW) at 1.

55. *Johns*, 2009 WL 910785, at *1.

56. *Id.*

57. *Id.*

58. *Id.* at *3.

59. *Blue Cross Blue Shield of Michigan Forced to Pay for Autism Care In Landmark Case*, PR NEWSWIRE, http://www.prnewswire.com /news-releases/blue-cross-blue-shield-of-michigan-forced-to-pay-for-autism-care-in-landmark-case-61818167.html (last visited Apr. 15, 2012).

that provide intensive early intervention," including ABA therapy.[60] However, BCBSM continues to view ABA therapy as "an investigational and experimental treatment."[61]

Less than a year later, in *Graddy*, a proposed class of parents sued Blue Cross Blueshield of Tennessee (BCBST) for its failure to cover ABA therapy for children with ASD.[62] The plaintiffs argued, inter alia, that BCBST "established and carried out a deliberate company-wide policy to deny all claims for ABA treatment, even though it knows that the terms of its Plans provide coverage for the treatment," and that it falsely labeled ABA as "experimental" therapy in order to avoid covering it.[63] BCBST moved to dismiss the plaintiffs' claims, arguing that they were "improperly pled as a class action" rather than as an individual suit.[64] The *Graddy* court denied the plaintiffs' motion for class certification, again holding that the plaintiffs failed to meet the "typicality" requirement under FRCP 23(a).[65] The court subsequently dismissed the case.[66]

In *Arce v. Kaiser*, a parent suing on behalf of an autistic child covered by Kaiser's health benefits program in California appealed the lower court's dismissal of the parent's "putative class action against health care service plan under Unfair Competition Law (UCL), for alleged violations of health plan contract and Mental Health Parity Act."[67] Kaiser had denied ABA benefits to the child, arguing that ABA fell under "non-health care services," "academic or educational interventions," or "custodial care," and so was not covered under his plan.[68] Unlike the courts in *Johns* and *Graddy*, the *Kaiser* court came out in favor of the plaintiffs; it reversed the lower court's grant of a demurrer to the insurance company and held that there was "a reasonable possibility that Arce can establish the requisite community of interest for a class action suit under the UCL, and resolution of the UCL claim

60. *Blue Cross Blue Shield of Michigan Plans to Offer Customer Groups Ability to Purchase Coverage of Autism Treatment Programs that Provide Intensive Early Intervention*, BLUE CROSS BLUE SHIELD OF MICH., http://www.bcbsm.com/pr/pr_05-11-2009_78322.shtml (last visited Apr. 15, 2012).

61. PR NEWSWIRE, *supra* at 59.

62. *Graddy*, 2010 U.S. Dist. LEXIS 14896, at *26.

63. *Id.* at *6-7.

64. *Id.* at *18.

65. *Id.* at *24, *27.

66. Stipulation of Dismissal, Graddy v. Blue Cross Blue Shield of Tenn. (Jul. 19, 2010), (No. 4:09-CV-84), at 1.

67. Arce v. Kaiser Found. Health Plan, 104 Cal. Rptr. 3d 545, 565 (2010).

68. *Id.*

would not require the court to make individualized determinations of medical necessity."[69]

Arce began a string of successes for ABA class action plaintiffs. In two subsequent cases, *Potter v. Blue Cross Blue Shield of Michigan* and *Churchill v. Cigna Corp.*, federal district courts certified classes on behalf of parents suing health insurance companies to receive ABA therapy benefits for their autistic children.[70] Like the plaintiffs in *Graddy*, those in *Potter* and *Churchill* were members of health insurance plans that deemed ABA therapy "investigative" or "experimental" and therefore declined to cover it.[71] While *Churchill* certified a class of plaintiffs whose claims for ABA therapy had been denied,[72] *Potter* went a step further and certified two subclasses of plaintiffs, including a subclass whose claims for ABA the defendants had explicitly denied and a subclass "who did not make a claim [for ABA therapy] in light of Defendant's policy that such treatment is deemed to be investigative or experimental."[73] In certifying this second subclass, the *Potter* court rejected the defendant's argument that plaintiffs who had not submitted claims could not file suit until they had exhausted their administrative remedies.[74] The court noted that the defendant's policy of rejecting ABA claims as experimental was sufficiently "longstanding and unwavering" to render such exhaustion futile.[75]

Finally, *Berge v. United States* is a class action that is currently being adjudicated in the United States District Court for the District of Columbia. The Mantese Honigman firm is, again, serving as counsel for the plaintiffs.[76] In *Berge*, a group of military families with autistic children are suing the United States because its TRICARE basic military health benefits program has denied coverage for ABA therapy based on the plan's conclusion that ABA falls under a "special education" exemption.[77] The court preliminarily certified the proposed class of "[a]ll individuals with autism who are TRICARE Basic program beneficiaries, and their parents and guardians, and who currently or in the future seek

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69. *Id.* at 499.

70. *See Churchill*, 2011 WL 3563489, at *1; *Potter*, 2011 U.S. Dist. LEXIS 92076, at *2.

71. *See Churchill*, 2011 WL 3563489, at *1; *Potter*, 2011 U.S. Dist. LEXIS 92076, at *1.

72. *Churchill*, 2011 WL 3563489, at *1.

73. *Potter*, 2011 U.S. Dist. LEXIS 92076, at *11-12.

74. *Id.* at *6-7.

75. *Id.* at *7.

76. Class Action Complaint, *Berge*, (D.D.C. Mar. 5, 2010) (No. 10-cv-00373-RBW) at 51.

77. *Id.* at 6.

TRICARE Basic program coverage for ABA therapy."[78] The United States and the *Berge* plaintiffs have filed cross motions for summary judgment that are currently pending in the district court.[79] Both the size and novelty of its potential class, as well as the plaintiffs' status as government employees and beneficiaries, make the ongoing *Berge* litigation an exceptional window into the intersection between autism-related legal issues and the uses of the class action device.

III. ANALYSIS

ABA therapy class actions illustrate how the success or failure of a proposed class often hinges on the "typicality" requirement: can the plaintiffs convincingly allege that the claim of a given class representative is "typical" of the rest of the class members such that the court can properly adjudicate all of the claims at once?[80]

This section begins by briefly discussing how ABA therapy class actions meet the less-contested numerosity, commonality, and adequacy prerequisites set by FRCP 23(a). It then demonstrates how the class actions discussed above are in fact well-suited to meeting the typicality requirement, despite several courts' insistence that individual lawsuits are preferable to class actions in such cases. After briefly contextualizing the ABA class actions' relationship to the "predominance" and "superiority" requirements set out in FRCP 23(b), this section concludes that ABA class actions fulfill all the prerequisites for class certification under FRCP 23, not only structurally, but in terms of the policy implications behind each requirement.

A. Numerosity

The requirement of FRCP 23(a)(1) that a class be "so numerous that joinder of all members is impracticable" is fairly permissive.[81] There is no strict quantitative measure for "numerosity"; courts have certified classes with as few as forty members, and those with membership in the

78. Order, Berge v. United States, No. 10-cv-00373-RBW (D.D.C. Mar. 4, 2011).

79. Plaintiffs' Amended Motion for Summary Judgment, Berge v. United States, (D.D.C. Dec. 17, 2010) (No. 10-cv-00373-RBW); Defendants' Motion for Summary Judgment, Berge v. United States, (D.D.C. Jan. 31, 2011) (No. 10-cv-00373-RBW).

80. *See* FED. R. CIV. P. 23(a)(3).

81. FED. R. CIV. P. 23(a)(1); *see also* STEVEN BAICKER-MCKEE, WILLIAM M. JANSEN & JOHN B. CORR, A STUDENT'S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 533-34 (12th ed. 2009) (discussing lack of strict numeric requirement for class certification under Rule 23(a)(1)).

hundreds and above will "almost surely" fulfill this prerequisite.[82] Although it is difficult to calculate the precise number of potential class members for all the autism class actions that this Note examines, those actions that do quantify their plaintiffs suggest that health insurance companies denied ABA therapy to hundreds, if not thousands of patients.[83] As autism diagnoses become more frequent, and ABA therapy more publicized and widely available, the number of potential claimants can only increase. Joinder of all ABA claims denials as individual cases, therefore, would be impracticable. It is more efficient, in terms of saving court costs and legal fees, to combine all class members in a single action than to adjudicate hundreds of individual cases against the same insurance company for the same reason.[84]

B. Commonality

The Supreme Court recently explained that the principal inquiry in determining "commonality" under FRCP 23 was "not whether the class raises common claims, but whether a class action can 'generate common *answers* apt to drive the resolution of the litigation.'"[85] Further, case law and the authors' commentary to Rule 23(a)(2) emphasize that common questions of law or fact "need not predominate" in order to fulfill the commonality requirement; rather, the proposed class members need only have specific legal questions in common.[86] The ABA class action claimants stand a good chance at achieving "commonality," because not only a common, but a primary question of fact in each case involves whether or not the defendant's health insurance plan covered ABA therapy for autistic children. The factual circumstances surrounding each claimant are also common, since each autistic child was denied the same type of treatment by the same insurance provider.

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82. BAICKER-MCKEE ET AL., *supra* note 81, at 534.

83. *See*, *e.g.*, Johns v. Blue Cross Blue Shield of Mich., No. 2:08-cv-12272, 2009 WL 910785, at *3 (E.D. Mich. Mar. 31, 2009) (proposed class contained "at least several hundred class members"); Class Action Complaint at 44, *Berge*, *supra* note 36 ("thousands of members of the class whose identities can be ascertained from the records and files of Defendants").

84. *See* Plaintiffs' Motion for Class Certification, Berge v. United States, (D.D.C. Jun. 3, 2010) (No. 10-373 (RBW 19)), at 26 (discussing "judicial economy" of certifying class of plaintiffs denied ABA therapy benefits by the same insurer under identical insurance contracts). To date, my research has not uncovered any autism class action that had trouble meeting the "numerosity" requirement.

85. Churchill v. Cigna Corp., No. 10-6911, 2011 WL 3563489, at *3 (E.D. Penn. Aug. 12, 2011) (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011)).

86. *Id.*

Defendant insurance companies might challenge the plaintiffs' claim to "commonality" in ABA class actions by arguing that the factual issues in these cases are not common to each claimant because each claimant has a different insurance contract and has potentially been denied different amounts of ABA benefits for different reasons. In *Arce*, the defendant Kaiser Permanente HMO successfully employed a version of this argument in Los Angeles County Superior Court.[87] Kaiser specifically alleged that "commonality" could only be determined by individual assessments of each putative class member, and that the plaintiffs' claims were therefore not suitably common to be combined in a class action.[88] However, the California Court of Appeal reversed this decision, noting that the plaintiffs' "central issues" depended not on the particularized review of each autistic child, but on the interpretation of the common terms of their insurance contracts with Kaiser.[89] Similarly, the *Churchill* court held that "[b]ecause the entire class was allegedly harmed by Cigna's uniform policy, and because resolution of the class members' claims hinges on whether such a policy is proper," individual differences in plan coverage and expected damages were "not significant enough . . . to defeat commonality."[90]

Moreover, critical surveys of class action caselaw generally illustrate that courts "have a liberal attitude toward this requirement, and close questions as to the existence of sufficient "commonality" tend to be resolved in favor of finding common questions."[91] The ABA therapy claimants, then, have strong arguments, as well as legal precedent, in their favor on the issue of "commonality."

C. Adequacy of Representation

The 23(a)(4) "adequacy" prerequisite requires that "the representative parties will fairly and adequately protect the interests of the class."[92] It takes into account that "class actions vest authority over the interests of passive members of the class in the hands of class activists," and therefore attempts to safeguard potential conflicts of interest between class representatives and class members.[93] Such conflicts might occur, for example, when a limited pool of funds for

87. Arce v. Kaiser Found. Health Plan, 104 Cal. Rptr. 3d 545, 555.
88. *Id.* at 561.
89. *See id.*
90. *Churchill*, 2011 WL 3563489, at *4.
91. BAICKER-MCKEE ET AL., *supra* note 81, at 534.
92. FED. R. CIV. P. 23(a)(4).
93. BAICKER-MCKEE ET AL., *supra* note 81, at 537.

damages pits class members against each other.[94] In addition, the "adequacy" requirement considers whether the plaintiffs' counsel is qualified to serve the interests of the class.[95]

Because the interests of class members and class representatives in the ABA therapy cases remain aligned, it is unlikely that defendants would mount their strongest argument against class certification on a theory of inadequate representation under Rule 23(a)(4). In the ABA therapy class actions, class representatives are all parents whose autistic children have been denied a specific form of treatment. As the immense mobilization behind organizations like Autism Speaks attests, the parents of autistic children have historically formed a cohesive interest group that has successfully banded together to protect the interests of those suffering from ASD.[96] This collective mobilization is likely to remain in full force in the ABA therapy cases, since the focus of these class actions is on clarifying coverage plan-wide, rather than on reimbursing a single individual. A favorable verdict in the ABA class actions would not pit class members against one another. Rather, all successful claimants would benefit equally from a favorable decision, since all are members of the same health plan.[97] In fact, the "passive" claimants benefit from the activism of the class representatives, since they will reap the benefits of a class action suit where, in an individual suit, only one claimant would prevail.

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94. *See, e.g., AmChem*, 521 U.S. at 696, in which the Court denied certification of a large class of asbestos claimants in part because certain plaintiffs who were already suffering illness as a result of asbestos exposure had an interest in immediately drawing on limited settlement funds, while other plaintiffs who had merely been exposed to asbestos had a contrary interest in "ensuring an ample, inflation-protected fund for the future."

95. *See Churchill*, 2011 WL 3563489, at *5.

96. Autism Speaks was founded by family members of an autistic child, and its corporate directors include parents of autistic children. *Autism Speaks History*, AUTISM SPEAKS, http://www.autismspeaks.org/about-us (last visited July 27, 2012); *Leadership*, AUTISM SPEAKS, http://www.autismspeaks.org/leadership.php (last visited July 27, 2012). The organization offers a strikingly successful example of its members' collective action. Its recent accomplishments include funding stem cell studies as well as doctoral students pursuing careers in autism research; organizing a World General Assembly on Autism at the United Nations in New York City; and raising $25.9 million through its "Walk Now for Autism Speaks" fundraiser. *See Accomplishments*, AUTISM SPEAKS, http://www.autismspeaks.org/sites/default/files/docs/2010_accomplishments.pdf (last visited July 27, 2012).

97. *See, e.g.,* Plaintiffs' Motion for Class Certification at 22-23, *Berge*, *supra* note 84 ("All of the claims in this case arise from Defendants' actions and each class member sustained the same type of harm. Plaintiffs have the exact same claims as all other class members and have every interest in vigorously litigating this case . . .").

The *Johns* court, however, held that the proposed class had not fulfilled the "adequacy" requirement, because the plaintiffs had not yet produced enough record evidence that the class representatives' and the class members' insurance plans were subject to the same benefit exclusions for "experimental" treatment.[98] But more recently, the *Potter* court held, to the contrary, that the ABA claimants successfully made out the adequacy requirement.[99] The *Churchill* court took a slightly different approach, finding that while the plaintiff (who was no longer a subscriber of the defendant's insurance plan) was an adequate representative for those class members seeking reimbursement for ABA claims, he was not an adequate representative "for current Cigna customers because his incentive is to seek only the highest amount of monetary relief possible, not injunctive relief from which he could not benefit."[100] The court therefore reduced the certified class to include "only former Cigna members," while granting plaintiffs leave to amend their Complaint to add current plan participants as class representatives.[101]

D. Typicality

Previous ABA class action plaintiffs have struggled most with Rule 23(a)(3), which requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class."[102] In both *Graddy* and *Arce*, defendant health insurers argued that those plaintiffs denied benefits for ABA therapy failed to make out the typicality requirement because these disputes required individualized assessments of particular insurance plans and transactions.[103] *Graddy* further suggested that the ABA class action could not meet typicality almost by definition, because autistic individuals are each different in terms of the severity of their symptoms and the levels of care they require.[104]

In *Graddy*, BCBST argued that the plaintiff's claim for a denial of ABA benefits should not be extended to cover the proposed class of "all persons who are participants in or beneficiaries of [a BCBST] employee benefit plan . . . and who have been denied coverage for ABA treatment to an insured person diagnosed with ASD."[105] BCBST focused on the

98. *Johns*, 2009 WL 910785, at *3.
99. *Potter*, 2011 U.S. Dist. LEXIS 92076, at *21-22.
100. *Churchill*, 2011 WL 3563489, at *5.
101. *Id*.
102. FED. R. CIV. P. 23(a).
103. *Graddy*, 2010 U.S. Dist. LEXIS 14896, at *25; *Arce*, 104 Cal. Rptr. 3d at 561.
104. *See Graddy*, 2010 U.S. Dist. LEXIS 14896, at *11.
105. *Id.* at *19.

"individualized nature," of Graddy's claim,[106] stating that the particular circumstances behind the plaintiff's denial of ABA benefits under the experimental treatment exclusion necessitated an "individualized review" of the plaintiff's particular administrative record.[107] Because the claims were particularized insofar as they related to the plaintiff's individual benefit plan and personal requests for ABA therapy coverage, the defendant maintained that a class action involving different plaintiffs' administrative records would be improper.[108]

After agreeing with BCBST that the *Graddy* plaintiffs could not sustain a class action, the *Graddy* court held that the plaintiffs failed to satisfy the 23(a)(3) typicality requirement.[109] The court sketched out its analysis of the issue in some detail:

> [t]he premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class . . . [t]here must be some connection shown, in other words, between the merits of each individual claim and the conduct affecting the class. . . where there are defenses unique to the individual claims of the class members, the typicality premise is lacking, for—under those circumstances—it cannot be said that a class member who proves his own claim would necessarily prove the claims of other class members. In this instance, the fact that all of the plaintiffs may have been subjected to some or all of Defendant's alleged wrongful practices does not eliminate the need for an individualized assessment as to the ultimate propriety of the benefits decisions affecting each and every class member.[110]

Both the court and defendants in *Graddy* characterized the plaintiff's denial of ABA therapy benefits as a discrete circumstance whose unique administrative history precluded its extension across a proposed class of other plaintiffs whose ABA benefits had been similarly denied.[111] The *Arce* defendants also successfully employed such an argument at the district court level, contending that "resolution of [the plaintiff's] claim would require the trial court to make individualized determinations of

106. *Id*.
107. *Id*. at *20.
108. *Id*. at *25-27.
109. *Id*. at *24.
110. *See Graddy,* 2010 U.S. Dist. LEXIS 14896, at *24-25.
111. *Id.* at *18.

medical necessity, which would defeat the commonality requirement for class claims."[112]

Part of the reasoning behind this insistence on individual administrative review appears to involve the court's own understanding of autism and ABA therapy. Individual administrative review was crucial, the *Graddy* court noted, because individual autistic children may respond differently to ABA therapy, and "because individuals suffering from ASD and autism 'may exhibit the characteristic traits of autism and ASD in any combination, and in different degrees of severity.'"[113] The court therefore suggested, in effect, that the "typicality" requirement could not be met because autistic children themselves are not typical. Depending on the circumstances, a denial of a specific type of benefit for one child diagnosed with autism might make sense, where a denial of that same benefit for another autistic child would be improper.[114] Autism's spectrum of "varied behavioral disorders" thus poses a conceptual hurdle for autistic plaintiffs attempting to aggregate claims based on the denial of benefits for autism therapy.[115]

More recently, the *Arce* court forcefully suggested that adjudicating ABA therapy cases did not require an assessment of each plaintiff's administrative record; rather, it only required the court's interpretation of the insurance contract terms at issue.[116] In *Arce*, the defendant Kaiser Permanente denied the plaintiffs' ABA therapy benefits based on the insurer's claim that ABA fell under a contractual exception for "'non-health care services,' 'academic or educational interventions,' or 'custodial care.'"[117] Reversing the lower court's decision, the California Court of Appeals stated:

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112. *Arce*, 104 Cal. Rptr. 3d at 554.

113. *Graddy*, 2010 U.S. Dist. LEXIS 14896, at *26.

114. *Id.* The "individualized assessment" approach to covering ABA therapy that the *Graddy* court endorses is highly problematic. If health insurance companies determine that ABA therapy is an effective treatment for autism—which mounting research will likely force them to do—then it will be far more efficient for both the insurer and the insured to provide the therapy for any child who receives an autism diagnosis. (To take a more familiar example, many insurance companies cover psychotherapy for plan members diagnosed with schizophrenia; they do not individually assess each member's level of schizophrenia to determine whether psychotherapy is appropriate in each case, because doing so would incur needless administrative costs and delay beneficial treatment). In addition, it is unclear how insurance companies would be able to assess which autistic children were well-suited for ABA therapy and which were not, because the therapy is by definition specifically tailored to each child's particular needs, and its efficacy in each case would therefore be especially difficult to predict in advance.

115. *Graddy*, 2010 U.S. Dist. LEXIS 14896, at *27.

116. *Arce*, 104 Cal. Rptr. 3d at 561-62.

117. *Id.* at 555.

> Resolution of this contractual issue would require the trial court to decide whether the therapies are "health care services," as that term is used in Kaiser's Evidence of Coverage, and if so, whether the therapies are subject to the contract's exclusion for "custodial care." It would not, however, require the trial court to evaluate whether the therapies are "medically necessary" for each member of the putative class. This is because the complaint does not allege that Kaiser's denial of coverage to the putative class was based on case-by-case determinations that the therapies were not medically necessary for the individual plan members. Instead, the complaint alleges that Kaiser's denial of coverage was based on an across-the-board determination that these categories of therapies are contractually excluded from coverage because they either are not "health care services" or are "custodial care," within the meaning of Kaiser's evidence of coverage.[118]

Subsequently, the *Potter* court's determination that the proposed class of plaintiffs met the FRCP 23 "typicality" requirement both echoed *Arce* and explicitly disagreed with the *Graddy* court's statement that individualized questions bearing on typicality precluded class certification.[119] *Potter* emphasized that "BCBS has made an across-the-board determination that ABA treatment is experimental, and therefore, not a covered benefit . . . . [and BCBS] bases its decision solely on its policy determination that ABA is experimental in all of its applications."[120] Such policy determinations are uniform—they do not require the kind of particularized assessments of each potentially covered member that might render a class's "typicality" impracticable or unfair.

Following the *Arce* and *Potter* courts' analyses of "typicality", a class representative's claim is "typical" of the class as a whole when the entire class is subject to a given insurance contract's terms. The later courts' focus thus shifted away from *Graddy*'s insistence on the subjective examination of the individual autistic child, and gravitated toward a standard analysis of contractual language. By moving the ABA cases from the realm of individual behavioral assessment into the realm of insurance contract interpretation, cases like *Arce* and *Potter* reframed the ABA class action plaintiffs less as a disaggregated collection of

118. *Id.* at 488-89.
119. *Potter*, 2011 U.S. Dist. LEXIS 92076, at *23.
120. *Id*.

individualized claimants than as a familiar class of contract disputants.[121] The defendant's interpretation of the contract—not the particular placement of each individual plaintiff across the autistic spectrum—is similarly at issue in each case.

The *Berge* class action complaint reiterates the construction of "typicality" advanced in *Potter* and *Arce*, alleging that typicality is satisfied because "[t]he plaintiffs . . . all have the same claims which are entirely focused upon Defendant's conduct, and not upon Plaintiffs' or the class members' actions or circumstances. Proof by Plaintiffs of their claims will constitute proof by all class members of their identical claims."[122] In *Berge*, whose plaintiffs have challenged the United States' denial of ABA benefits based on a "special education" insurance contract exception, the court must determine whether ABA itself fits the "special education" exception in the contract, not whether each individual plaintiff does or does not qualify for ABA.[123] The class action provides an efficient means to address this contractual question, whose centrality is paramount to all plaintiffs: "this is exactly the type of case suited to the class action device."[124]

E. FRCP 23(b) Requirements

After satisfying the four requirements under FRCP 23(a), class action plaintiffs must also satisfy additional requirements in 23(b). The line of ABA cases fits comfortably within the FRCP 23(b)(2) "injunctive relief" class—that is, a class in which the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole."[125] In a case such as *Berge*, for example, the court's determination whether ABA qualified as "special education" according to the terms of the United States

121. Although mass tort cases account for some of the most well-known class actions, claimants frequently use the class action device to adjudicate many different types of breach of contract disputes. *See*, *e.g*., Dupler v. Costco Wholesale Corp., 249 F.R.D. 29, 34-35 (E.D.N.Y. 2008) (class action alleging breach of contract for wholesaler's backdating policy on its standard form membership agreements); Flanagan v. Allstate Ins. Co., 242 F.R.D. 421, 425-26 (N.D. Ill. 2007) (class action alleging insurer's breach of employment contracts); Kleiner v. First Nat'l Bank of Atlanta, 97 F.R.D. 683, 685 (N.D. Ga. 1983) (class action alleging breach of contract based on bank's collection of interest rates higher than those specified in petitioners' loan agreements).

122. Class Action Complaint at 14, *Berge*, *supra* note 36.

123. Plaintiffs' Motion for Class Certification at 19, *Berge*, *supra* note 84.

124. *Id*. at 33.

125. FED. R. CIV. P. 23(b)(2).

military health insurance contract would be dispositive for every class action plaintiff.[126]

Certification of the ABA class actions would also be proper under the "predominance" and "superiority" prongs set out in FRCP 23(b)(3).[127] This subparagraph of Rule 23 states that class certification would be appropriate if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[128] Rule 23(b)(3) therefore mirrors the typicality requirement, attempting to ensure not only that class members have common causes of action, but also that these common questions vastly outnumber any particularized questions that might be better served by individual lawsuits.

Both *Churchill* and *Potter* held that the ABA therapy class actions satisfied the conditions set out in 23(b)(3).[129] The *Churchill* court opined, first, that because the exclusion of ABA under a provision barring coverage for "investigative" or "experimental" treatment was common to all Cigna members despite other variations in plan terms, "the propriety of this determination—specifically, whether it violates ERISA—can easily be litigated in a single forum."[130] Further, the court emphasized that because Cigna's policy with respect to ABA was nationwide in scope, "a nationwide class action contesting this uniform denial is the most cost-effective and efficient method for resolution of this dispute."[131] *Churchill* paid particular attention to the potential cost to individual plaintiffs that could result from denial of certification, noting that the possibility of high legal bills might "deter meritorious lawsuits."[132]

Similarly, the *Potter* court's analysis of the 23(b)(3) factors stressed that bringing the ABA therapy cases as a class action was superior to filing numerous individual suits because of the financial challenge presented to individual plaintiffs attempting to sue "a formidable insurance company."[133] The court reasoned that allowing the class action to proceed would "lower the perceived barriers" that might deter

126. Class Action Complaint at 32, *Berge*, *supra* note 36.
127. *See* FED. R. CIV. P. 23(b)(3).
128. *Id.*
129. *See Churchill*, 2011 WL 3563489, at *6; *Potter*, 2011 U.S. Dist. LEXIS 92076, at *24-28.
130. *Churchill*, 2011 WL 3563489, at *6.
131. *Id*. at *7.
132. *Id*.
133. *Potter*, 2011 U.S. Dist. LEXIS 92076, at *27.

potential plaintiffs from bothering to file suit in the first place.[134] Further, the court confirmed that the plaintiffs could fulfill the "predominance" prong, because the defendant health insurer issued standardized denials of ABA coverage across class members.[135] Even assuming individualized differences existed, "those differences [did] not establish that individual questions predominate over common ones."[136]

F. Policy Considerations Behind ABA Therapy Class Certification

Once we begin to read the ABA therapy cases as contractual disputes rather than collections of individual medical histories, we can see how the class action device provides a more efficient and equitable means of adjudication than hundreds of individual claims. Because "individual determinations" of each plaintiff's record are not at issue, the court can properly conserve its own resources by disposing of all the plaintiffs' claims in a single lawsuit.[137] Using a class action to resolve the ABA

134. *Id*. at *28.

135. *Id.* at *26.

136. *Id.* at *27.

137. The relative straightforwardness of adjudicating ABA therapy class actions becomes even clearer when we compare these cases to several high-profile mass tort class actions in which appellate courts ultimately denied class certification. In *AmChem*, for example, the Court held that a class of "[a]ll persons . . . who have been exposed in the United States . . . either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability" could not be certified because of the significant differences between each individual plaintiff's level and duration of exposure to asbestos. 521 U.S. at 602 n.5, 609. In contrast, the ABA class actions do not require a court to adjudicate complex causation issues; rather, they require the court to interpret the terms of an insurance plan which applies equally to all class members. They therefore present a far more uniform collection of plaintiffs and a much easier group for the court to deal with en masse.

The ABA class actions also avoid the 23(b)(3) "predominance" and "superiority" pitfalls involved in adjudicating a mass tort case like *Castano v. American Tobacco Co*., 84 F.3d 734 (5th Cir. 1996). In *Castano*, the court denied certification for a proposed class of "[a]ll nicotine dependent persons in the United States . . . who have purchased and smoked cigarettes manufactured by the defendants," as well as the family members of those persons. 84 F.3d at 737. The *Castano* court stated that the class action was not "superior" to individual lawsuits in part because the tort theory on which the case was based – "addiction-as-injury" –was too untried and "immature" to warrant a class action. *Id*. at 745-47. The court also held that *Castano*'s proposed class failed the "predominance" requirement because the district court did not adequately consider how differences in state law would affect the adjudication process. *Id*. at 741-44. Although the ABA class actions treat a relatively novel subject—determining health benefits for autistic individuals—the analytical steps that a court must take to interpret the relevant insurance contracts do not pose the same risks as *Castano'*s comparatively untested legal theory. Where the *Castano* court denied class certification in part because of the

therapy cases would also avoid inconsistent interpretations of those contract terms (such as "experimental therapy" or "special education") whose definitions have proved crucial across these disputes.[138]

Most importantly, the class action provides an outlet for the many ABA therapy plaintiffs who otherwise would not have the financial resources to adjudicate individual cases. As the *Berge* complaint notes, families with autistic children who must pay out of pocket for ABA therapy are already struggling financially, largely because ABA therapy itself is prohibitively expensive when insurers refuse to cover it.[139] Perhaps the most important objective of the FRCP 23 class action is to ensure that such plaintiffs are not prohibited from exercising their right

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difficulty involved in assessing whether the Rule 23 requirements had been met in such a "*sui generis* cause of action," the ABA therapy actions instead present the court with proposed classes whose identical claims and familiar interpretive structure make them more logically suited to collective action. *Id*. at 749. In addition, the majority of the ABA class actions—with the exception of *Berge*—involved a single state insurance company, so conflicts of law do not pose a barrier to collective adjudication.

138. For another case in which a health insurance company denied behavioral treatments, including ABA therapy, to an autistic child based on the insurer's interpretation of a particular contract term, see *Wheeler v. Aetna Life Ins. Co.*, No. 01 C 6064, 2003 WL 21789029, at *2 (N.D. Ill. July 23, 2003). In *Wheeler*, the defendant refused to cover these treatments because, it argued, they related to the child's "developmental delay," a condition that was apparently excluded from the plan. *Id*. at *2. The court found in favor of the plaintiff, reasoning that, because the plan both covered autism and defined it as a "developmental disorder," its proposed "[exclusion of] treatment for developmental delays caused by autism, would in effect render the provision for coverage for autism meaningless." *Id*. at *13. Though it is an individual lawsuit rather than a class action, *Wheeler* thus offers favorable precedent for those ABA class action plaintiffs arguing against the imposition of exclusionary contract provisions. *See also* Parents' League for Effective Autism Servs. v. Jones-Kelley, 339 Fed. App'x 542, 548-52 (6th Cir. 2009), in which the court rejected the defendant health care administrator's reliance on a distinction between "rehabilitative" services (which were covered) and "habilitative" services (which were not covered) to deny coverage for autistic children's ABA therapy. The *Jones-Kelley* court also stressed the crucial time concerns that underpin ABA therapy actions. The court granted its plaintiffs injunctive relief "because the early treatment of autism has been shown to provide significant improvement and the cost of providing care will be greater if these individuals do not receive treatment at an early stage." *Id.* at 546. *Jones-Kelley* thus recognized that adjudicating children's eligibility for ABA benefits is especially urgent because the therapy yields better results the earlier the child begins treatment. The collective impact of the class action promises not only to save judicial resources, but also to potentially reallocate time that might have been spent trying individual lawsuits toward more quickly and effectively addressing the autistic children's behavioral disabilities.

139. Class Action Complaint, *Berge*, (D.D.C. Mar. 5, 2010) (No. 10-cv-00373-RBW), at 33.

to due process because they lack the financial means to get into court in the first place.[140]

As more ABA therapy benefits cases materialize, defendants will likely continue to argue that individual cases remain preferable.[141] Health insurance companies may argue in particular that they have not acted similarly with respect to all potential claimants, because each claimant has a different amount of need, has filed different numbers of claims at different times, or stands to recover different amounts of damages.[142] But both the ABA plaintiffs' interest in exercising their rights and the courts' interest in avoiding the piecemeal adjudication of identical claims should ultimately outweigh the defendants' interest in avoiding class action litigation. The case law surrounding ABA therapy—including *Graddy* and *Johns*, in which class certification was denied—increasingly suggests that the defendants stand enough of a chance at receiving a favorable verdict that these actions should not compel the defendants to settle over "judicial blackmail" concerns.

IV. CONCLUSION

The precipitous rise in autism diagnoses throughout the United States promises to continue to increase autism-related disputes throughout our legal system. The ABA therapy cases that this Note discusses provide a glimpse into how several advocates for increased coverage of autism-related treatment have approached a category of claims against health insurance providers that is likewise bound to become more and more familiar to legal practitioners. By consolidating individual insurance claims, the ABA therapy cases illustrate how well their particular legal dispute fits within the parameters of FRCP 23. While several courts have insisted on adjudicating the ABA cases on an individual basis, this insistence is largely based on a misunderstanding of the ABA therapy claim as dependent on the particular condition of each autistic child. By viewing the ABA cases within a class action framework rather than as individual lawsuits, courts can more efficiently dispose of identical

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140. *See* STEVEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 945 (3d. ed. 2008) (noting that class actions "provide legal representation and relief to hundreds or thousands of individuals who cannot afford lawyers . . .").

141. The United States recently employed a version of this argument in *Berge* by arguing that the plaintiffs' proposed class action should be dismissed because they had not pursued final agency action. *See* Defendants' Motion for Summary Judgment, *Berge*, (D.D.C. Jan. 31, 2011) (No. 10-cv-00373-RBW) at 1.

142. *See*, *e.g.*, *Johns*, 2009 WL 910785, at *3; *Graddy*, 2010 U.S. Dist. LEXIS 14896, at *24-25.

insurance claims. In addition, certifying the ABA classes will ensure that courts avoid making individual medical judgments that these cases do not actually require.

The ABA therapy cases all suggest that the benefits of adjudicating autism benefits disputes as class actions exceed the costs, whether or not one represents the plaintiffs or the defendants. The class action device provides both a right to due process for plaintiffs whose medical expenses ironically foreclose their ability to pay for legal representation to obtain medical coverage, and a way for defendants to litigate important benefits issues all at once rather than through fragmented individual lawsuits. The ABA class action likewise promotes judicial economy by shrinking the number of ABA disputes on courts' dockets, and the contractual nature of the plaintiffs' claims ensures that courts will not have to face the thorny causation issues that often preclude class certification in mass tort litigation.

While a persuasive argument can be made that autism benefits decisions should be decided not in the nation's courts but in the legislature, state-mandated coverage of ABA therapy remains uneven and, in some cases, nonexistent. Federal health care reform might provide a more uniform framework for insurers to deal with ABA benefits in the future, but such a possibility remains uncertain. Aside from allowing litigants to adjudicate ABA benefits claims more efficiently, autism-related class actions may encourage state and federal legislators to pay greater attention to a disorder whose considerable financial impact on all citizens can be reduced through early ABA intervention.

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