

A Family Member's Legal Experience With an Insurer's Refusal to Recertify Inpatient Mental Health Treatment

Marcy Shyovitz, M.A., J.D.

My son Nathaniel has bipolar disorder and was hospitalized for 6 months, during which time our insurance company was prepared to refuse certification more than once despite a policy that included 365 days of inpatient mental health treatment. A break in coverage by the insurance company would have meant that Nathaniel, still suicidal, would not receive the life-saving care he needed. Fortunately, I am a lawyer, which enabled me to act as a legal advocate for my son when our insurer threatened not to recertify. Because my son's experience with the insurance company is not unusual—many patients with mental illness struggle with insurance companies who refuse to certify treatment—I believe that the family or support people of seriously ill psychiatric patients should be prepared to act in circumstances similar to mine. Psychiatric inpatient units should, as a matter of course, provide information on legal remedies that can be obtained before irreparable harm occurs.

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My son Nathaniel has bipolar disorder. When he became depressed and agitated and talked of hurting himself several years ago, he was hospitalized in an excellent facility close to home. Although my family had an insurance policy that covered 365 days of inpatient mental health treatment, the insurer was prepared to refuse certification more than once during Nathaniel's 6-month hospitalization. A break in coverage by the insurance company would have meant that Nathaniel, still suicidal, would not receive the life-saving care he needed. Fortunately, I am a lawyer, which enabled me to act as a legal advocate for my son when our insurer threatened not to recertify. Because my son's experience with the insurance company is not unusual—many patients with mental illness struggle with insurance companies who refuse to certify treatment—I believe that the family or support people of every seriously ill psychiatric patient should be prepared to act in circumstances similar to mine. Every psychiatric inpatient unit should, as a matter of course, provide information on legal remedies that can be obtained before irreparable harm occurs.

THE CHILD

Nathaniel, or Tani, was an alert, playful baby, who seemed to savor each new stage of life. For the first 2 years, he was an active, good-natured child. Because of the timing of my third son's birth, my husband and I were not particularly surprised when Tani started to act like a "terrible 2." However, by the time Tani was in pre-kindergarten, I knew that something was amiss. He seemed clingy, needy, headstrong, and independent all at the same time. Headstrong gave way to belligerent, needy to demanding. He would not do anything that did not suit him; he kicked and hit when he did not get what he wanted. I took him to a clinical psychologist, and, for a year or so, things improved somewhat.

As he turned 8, my child, who could tenderly hug me and then kick me in the span of a minute, began to spiral out of control. We spent the next 4 very long years in a mental health combine—swept in, cut to emotional shreds, and spit back out into the psychiatric field. When the chief of pediatric and adolescent psychiatry at a Washington, D.C., hospital told me to look for placement for a child with an incorrigible conduct disorder, I realized it was time to look for help beyond our home in suburban Maryland.

In November 1994, my husband took Tani to Columbus, Ohio, where an experienced pediatric psychiatrist confirmed my suspicions of manic-depressive illness. Tani began taking medication, and, in 7 weeks, he was an emotionally stable sixth-grader. Next, Tani started a 6-year relationship with a therapist, who helped him capture and internalize the emotional and social skills he had missed.

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I offer this narrative with the support and encouragement of my son, Nathaniel.

Reprint requests to: Marcy Shyovitz, M.A., J.D., 1114 Kersey Road, Silver Spring, MD 20902.

Because I had long-standing ties to Boston, Tani's medication was managed by a psychiatrist at Massachusetts General Hospital. We went to Boston several times a year, and I spoke to the doctor on a weekly basis.

While Tani received patient and generous support from his doctors and therapists, the world around was unkind. Classmates taunted him about the old days, seizing every opportunity to remind him of his errant past. School relationships refused to take root; Tani was isolated and excluded from group activities. The harder he tried to fit in, the tighter the ranks closed. In November of his junior year in high school, he was beaten in the home of a classmate. He began to decompensate rapidly, and, by early December, he was depressed and highly agitated. One Sunday afternoon, he simply exploded. He was admitted to a private psychiatric hospital and began what would become a 6-month stay.

THE INSURER

Like many people, my family was covered by health insurance provided by my husband's employer. Unlike many people, I understood the language of the insurance contract.

Although we were fortunate to have mental health coverage in complete parity with all other benefits, the insurer's case manager made clear from the outset that the insurer was disinclined to certify a lengthy stay. This communication was transmitted on the day after my son's arrival at the hospital in the absence of any knowledge about my son or his medical condition. For about 6 weeks, a therapeutic status quo was maintained as I, in tandem with Tani's physicians, politely but forcefully explained the history and severity of my child's illness.

The insurer, a thousand miles away, grew impatient, however. Weekly nurse-to-nurse reviews were intensified to the physician-to-physician level, with repeated inquiries by the insurer's doctors about the medication regimen. A reviewing psychiatrist based in Florida finally denied continued certification, opining that my son's failure to progress was, in fact, "the fault of the mother."

At that point, I telephoned the insurance company's behavioral health management entity and requested to speak to the person in charge. When I was told that there was no one for me to speak to, I quietly stated that I would call my state's insurance commission in order to get the information I needed. Within 5 minutes, the Senior Vice President for Behavioral Health returned my call. I explained that my son was still quite ill and often spoke about hurting himself or running away. After a lengthy conversation, the vice president assured me that she would personally oversee my son's case. Tani's transfer to the residential treatment center was authorized. His physicians would continue to apprise the insurer of all relevant information. The vice president agreed that Tani's doctor would always

speak to the same insurer psychiatrist, obviating the further complications brought on by duplicate reports to multiple reviewers.

For more than 2 months, hostilities ceased. Then, I received a call from the utilization review nurse, the hospital's liaison with the insurance company. She told me that neither the usual doctor nor, in fact, any doctor at all was available for the required review. Tani would not be covered by insurance until a review could be scheduled for the following week. I telephoned the insurer's case manager and insisted on speaking to a psychiatrist. Initially, I was told that absolutely no one was in the building. I calmly explained that unless I spoke to a senior person in the organization, I was prepared to turn to the legal system for help. Within 5 minutes, the psychiatrist for the insurer's behavioral health entity took my call.

The insurer's chief psychiatrist and I argued back and forth about my son's case not being reviewed, who determined medical necessity, and the insurer's refusal to recertify, resulting in a break in coverage. Finally I told him that I would have no choice but to go to court that afternoon. I explained that I had already drafted the documents that would ask a judge to compel the insurer to continue certification, pending a hearing. Fortunately, I never had to use those documents. However, should I have needed to, I would have been ready.

THE STRATEGY

Briefly, there are 2 kinds of remedies in the law: remedies at law and remedies in equity. When a remedy at law, usually a lawsuit after the fact seeking money damages, is inadequate or inappropriate under the circumstances, a court then has the power, or jurisdiction, to compel an entity to act, or to refrain from acting, in a certain manner. This equitable jurisdiction is important in critical medical situations because it provides a remedy before the harm has actually occurred and because, in true emergencies, it allows the court to rule even if both sides to the controversy are not present.

Not long after Tani was admitted to the hospital, I prepared 4 documents (Appendices) that sought to invoke the equitable jurisdiction of the court: a complaint for breach of contract, alleging that the insurer was breaking its promise to pay for all medically necessary covered services; a motion for a preliminary injunction, which sought to enjoin, or prevent, the insurer from refusing to authorize continued certification; an application for a temporary restraining order, which allows a court to act *ex parte* (with only 1 party present) if circumstances warrant such a dramatic measure; and an affidavit from Tani's doctor, with spaces left blank to fill in the relevant information.

In order for injunctive relief to be issued, 4 factors must be satisfied: (1) there must be no adequate remedy at law; (2) there must be a significant risk of irreparable harm if

equitable relief is not granted; (3) the party seeking the motion (the proponent) must show that he/she will likely succeed on the merits, after a full hearing on the matter; and (4) the proponent must show that, after balancing the interests of both parties, granting the motion will help the proponent more than it will harm the opponent.

POSTSCRIPT

Tani has graciously permitted me to incorporate some of his work into my article. What follows is the essay he submitted with his college applications.

Film At 11 by Tani Shyovitz

My family is a lot like a football team. My parents are the seasoned veterans. My older brother is the team's superstar. My younger brother is the cautious rookie. And me—I am the team's big gamble who has not quite met his potential yet. Hope, Pride, Strength, Prayer, Love, and Trust round out the rest of our team.

Today's match-up is a difficult one: we are taking on the Odds. The Odds are 11 huge guys ready to take down anyone who steps up to challenge them. They have respect for nobody and contempt for everyone. They lie, cheat, and steal just to come out sneering at the opposition.

The game gets underway. The Odds have won the toss and elect to kick. Prayer catches the kickoff, but he is brought down before he is able to make a significant gain.

As I line up at quarterback to start the drive, 1 of the Odds yells at me, "Hey, Tani! I hear your parents are gonna split up. You gonna cry about it or what?" He starts to laugh.

I pretend it does not get to me, but I cannot fool myself. My parents have been fighting over their contracts, and each is at a

deadlock with the team. We all knew they would both be gone by the season's end.

The comment really does get to me: on first down I fumble the snap. One of the Odds comes in, picks up the ball, and begins to run it back. It is Pride and Strength who finally bring him down after a big return. What is worse than our losing the ball is that Love gets shaken up badly on the play.

The rest of the half continues in a similar fashion. We fumble, we stumble, and we grumble. My older brother does manage to make a terrific catch for a touchdown. He does this after hearing he has gotten into a great college and will be studying there. Still, we are manhandled by the Odds, and we head to the locker room at halftime down by 2 touchdowns.

I pass by the Odds' coach on my way to the locker room and overhear him talking. "I don't think Tani is gonna get anything started," he says. "He has no consistency. His career has had more ups and downs than the elevator at the Empire State Building. They've got nothing on us." He laughs a sadistic laugh.

I begin to think less of myself all the way back to the locker room. But suddenly I have a thought. "Why am I listening to this guy?" I ask myself. "Who's he to me?" I walk into the locker room and begin speaking to my dejected teammates.

"Hey! Who's to say we can't go out and beat these guys? Sure, the Odds are against us, but everyone always loves to see the underdog win. And you know what they don't have that we do? We have a sense of unity. Our team has been through thick and thin, and we've always found a way to pull through and work things out. Now let's go out and show the Odds what we're made of!"

We walk back onto the field.

—Film at 11, indeed.

Disclosure of off-label usage: The chair has determined that, to the best of his knowledge, no investigational information about pharmaceutical agents has been presented in this article that is outside U.S. Food and Drug Administration–approved labeling.

continued

Appendix 1. Complaint for Breach of Contract

Disclaimer: The model document that follows is for informational purposes only. It is not, and should not be construed to be, legal advice of any kind.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MARCY SHYOVITZ
1114 Kersey Road
Silver Spring, MD 20902
Plaintiff

as Next Friend for
NATHANIEL SHYOVITZ

v.

Civil Action No.

[INSURANCE COMPANY NAME]
[INSURANCE COMPANY ADDRESS]
Defendant

Serve [NAME OF RESIDENT AGENT]
[ADDRESS OF RESIDENT AGENT]

COMPLAINT FOR INJUNCTIVE RELIEF
(BREACH OF CONTRACT)

1. Plaintiff, Marcy Shyovitz, sues as Next Friend of Nathaniel Shyovitz, a minor child. Shlomo Shyovitz, Plaintiff's husband, has in force a contract of insurance with Defendant [INSURER NAME], which provides coverage for Mr. and Ms. Shyovitz and their 3 children. Ms. Shyovitz's husband and his employer, [EMPLOYER NAME], have paid premiums to Defendant, in order that Defendant provide payment for medical services for Ms. Shyovitz and her family, including Nathaniel. Under this contract, Defendant has agreed to pay for all covered medical services that are deemed medically necessary under generally accepted medical standards.
2. Nathaniel, who is 16 years old, suffers from bipolar disorder (manic depression). Bipolar disorder is characterized by, inter alia, severe depression, mania, suicidal thoughts, and violent and/or threatening behavior toward self or others. Nathaniel Shyovitz has, in the past, experienced debilitating depression, severe manic episodes, suicidal thoughts and gestures, and injurious or violent behavior toward himself and others.
3. On December 10, 1999, Nathaniel was in a greatly agitated state, likely suffering severe depression and mania concurrently. Nathaniel took a wooden component from an exercise machine and smashed it through 2 panes of glass. When Ms. Shyovitz and other family members attempted to bring him under control, Nathaniel responded violently, first hitting and kicking family members and then threatening to harm himself and others with a large kitchen knife. Although Ms. Shyovitz had given Nathaniel prescribed medication, eventually she was required to summon the Montgomery County Police. The police officers, with the help of the medicine, were able to subdue Nathaniel.
4. With the aid of the police, Ms. Shyovitz transported Nathaniel to [HOSPITAL NAME], where he was admitted with the consent of Defendant. At [HOSPITAL NAME], Nathaniel has received intensive treatment as an inpatient under the supervision of [Doctor NAME]. Nathaniel spent 6 weeks on the inpatient hospital unit and then, with authorization from Defendant, moved to the hospital's Residential Treatment Center (RTC).
5. Since his admission to the RTC in January 2000, Nathaniel has continued to receive intensive treatment on a variety of fronts. His medications have been adjusted, changed, and adjusted again, in an attempt to find the combination of medicines that are right for Nathaniel. As Defendant knows, management of neuropsychiatric medicines is particularly difficult in the adolescent years. Nathaniel receives individual psychotherapy 3 times per week and engages in group therapy at least once a day. This aggressive intervention notwithstanding, [Doctor NAME] has determined that Nathaniel remains a threat to himself and/or to others and that treatment at the RTC must continue.
6. In spite of [Doctor NAME]'s determination that Nathaniel's continued hospitalization is medically necessary, Defendant today informed both [DOCTOR NAME] and Ms. Shyovitz that it will not recertify Nathaniel's continued hospitalization.
7. Defendant's refusal to certify payment for Nathaniel Shyovitz's continued hospitalization—hospitalization that has been deemed medically necessary by [DOCTOR NAME]—constitutes a breach of contract by Defendant to pay for all covered services which are medically necessary under generally accepted medical standards.
8. [HOSPITAL NAME] has informed Ms. Shyovitz that it cannot treat Nathaniel free of charge, and that a promise to pay is a prerequisite to continued treatment. Ms. Shyovitz and her family are unable to bear the costs of continued hospitalization. As a result, Nathaniel faces premature discharge from the hospital.
9. [DOCTOR NAME] has determined that termination of Nathaniel's hospitalization at this time poses a serious threat to Nathaniel's life and to the life and/or safety of others. This threat is caused by Defendant's breach of contract with the Shyovitz family.
10. Ms. Shyovitz, on Nathaniel's behalf, is without an adequate remedy at law. An action for damages would be inadequate compensation for any harm that may befall Nathaniel or others, if, in his current state, Nathaniel is forced to leave the hospital.
11. Under the circumstances, the only remedy that will protect the health and safety of Nathaniel Shyovitz and others is for this Court to enjoin Defendant to certify coverage of Nathaniel's hospitalization, as long as such hospitalization is deemed medically necessary by [DOCTOR NAME].

WHEREFORE, Plaintiff demands judgment against Defendant for an injunction that Defendant certify Nathaniel Shyovitz's continued hospital stay as long as [DOCTOR NAME] determines Nathaniel's condition so requires.

Attorney

Appendix 2. Motion for Preliminary Injunction

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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MARCY SHYOVITZ
1114 Kersey Road
Silver Spring, MD 20902

Plaintiff
as Next Friend for
NATHANIEL SHYOVITZ

Civil Action No.

[INSURANCE COMPANY NAME]
[INSURANCE COMPANY ADDRESS]
Defendant

Serve [NAME OF RESIDENT AGENT]
[ADDRESS OF RESIDENT AGENT]

MOTION FOR PRELIMINARY INJUNCTION

1. Plaintiff Marcy Shyovitz, as Next Friend of her minor son Nathaniel Shyovitz, moves this Court for a preliminary injunction. Ms. Shyovitz asks that Defendant be enjoined from terminating certification of Nathaniel Shyovitz's continued hospitalization at [HOSPITAL NAME], as long as such treatment is deemed medically necessary by Nathaniel's physician, [DOCTOR NAME]. Ms. Shyovitz asks for such relief pending her action for injunctive relief against Defendant filed herein. In support of this motion, Plaintiff relies on the allegations in her complaint, the affidavit of [DOCTOR NAME] filed herein, and Teferi v. Dupont Plaza Assocs., 77 Md. App. 566, 551 A.2d 477 (1989).
2. Plaintiff asserts as follows:
 - a. It is likely that Plaintiff will succeed on the merits, as her contract of insurance with Defendant provides that Defendant must pay for medically necessary covered services for the members of Ms. Shyovitz's family, including her minor son Nathaniel. The affidavit of [DOCTOR NAME] establishes that continued hospitalization is medically necessary for Nathaniel, in his present condition.
 - b. The balance of inconvenience must be struck in favor of continued payment, by Defendant, of the cost of Nathaniel's hospitalization. As the attached affidavit attests, Nathaniel is adamant that he will harm himself or others or run away if he manages to "escape."
 - c. If Nathaniel does not remain in the hospital, he may suffer death, serious physical injury, or other irreparable harm. The Shyovitz family has no means to continue Nathaniel's treatment, other than through Defendant's contractual obligation to them.
 - d. A preliminary injunction will serve the public interest in that, without continued hospitalization, Nathaniel, in his present condition, poses a danger to himself and others, known and unknown. Moreover, the public interest is better served by having [DOCTOR NAME], rather than Defendant, determine questions of medical necessity.

Attorney

Appendix 3. Application for Temporary Restraining Order

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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MARCY SHYOVITZ
1114 Kersey Road
Silver Spring, MD 20902

Plaintiff
as Next Friend for
NATHANIEL SHYOVITZ

Civil Action No.

[INSURANCE COMPANY NAME]
[INSURANCE COMPANY ADDRESS]
Defendant

Serve [NAME OF RESIDENT AGENT]
[ADDRESS OF RESIDENT AGENT]

APPLICATION FOR TEMPORARY RESTRAINING ORDER

1. Plaintiff Marcy Shyovitz has filed a complaint for injunctive relief for breach of contract against Defendant. Ms. Shyovitz, as Next Friend of her minor son Nathaniel Shyovitz, demands that Defendant be enjoined to pay for all medically necessary inpatient hospital days for Nathaniel, so long as [DOCTOR NAME] deems such treatment medically necessary. Along with her complaint, Plaintiff has filed herein a Motion for Preliminary Injunction, supported by an affidavit by [DOCTOR NAME].
2. Plaintiff also requests that this Court issue a Temporary Restraining Order that shall remain in effect pending a hearing on her motion for a Preliminary Injunction. Plaintiff so requests on the basis that Nathaniel's condition poses a threat of immediate and irreparable injury to himself and others, if his hospitalization is terminated at the present time.
3. In support of this Application, Plaintiff calls particular attention to the allegation in Doctor's affidavit that Nathaniel, in his present condition, presents a serious and immediate risk of suicide or serious physical harm to himself or to others.
4. Plaintiff requests that bond be waived on the basis that Plaintiff is financially unable to provide surety or other security for a bond, that Plaintiff and her son face extraordinary hardship, and that substantial injustice would result if an injunction does not issue.

Attorney

Appendix 4. Affidavit From Doctor

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MARCY SHYOVITZ
1114 Kersey Road
Silver Spring, MD 20902
Plaintiff
as Next Friend for
NATHANIEL SHYOVITZ

Civil Action No.

v.
[INSURANCE COMPANY NAME]
[INSURANCE COMPANY ADDRESS]
Defendant

Serve [NAME OF RESIDENT AGENT]
[ADDRESS OF RESIDENT AGENT]

**AFFIDAVIT OF [DOCTOR NAME] IN SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION AND
APPLICATION FOR TEMPORARY RESTRAINING ORDER**

The affiant doctor swears and deposes on oath as follows:

1. That she is Nathaniel Shyovitz's attending psychiatrist at [HOSPITAL NAME] and has been Nathaniel's treating psychiatrist since 1995.
2. That as attending physician, [DOCTOR NAME] has direct and specific knowledge related to Nathaniel's condition. That Nathaniel suffers from manic depressive illness, which, in its present state, is characterized by a tendency to suicide, or violent behavior caused by severe depression, manic rage, or both. That in this state, Nathaniel presents a threat of serious harm to himself and to others.
3. That, under the present circumstances, Nathaniel's condition requires hospitalization, both to treat him and to restrain him from harming himself or others.
4. That termination of this hospitalization carries a serious threat that Nathaniel may harm himself or others.
5. That there are no means of counteracting this threat other than continued hospitalization.

Doctor

State of Maryland,
County of Montgomery, ss:

Subscribed and sworn to me this _____ day of _____, 2000.

Notary Public