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Patients Down, But Not Out, After 9th Circ. Benefits Ruling

By **Kellie Mejdrich**

Law360 (February 3, 2023, 6:47 PM EST) -- The Ninth Circuit's recent decision that patients couldn't force United Behavioral Health to rethink its denial of some 67,000 coverage claims for mental health and substance use disorder treatment was a win for employers and plans, but the sprawling case likely isn't over.

A three-judge panel in a published opinion on **Jan. 26** partially reversed a pair of blockbuster trial court rulings in favor of the patients from **2019** and **2020** in the consolidated class action. Participants in thousands of employee benefit plans governed by the Employee Retirement Income Security Act and administered by UBH, which is UnitedHealth Group's behavioral health unit, first sued over the coverage denials in 2014.

While the panel reversed the district court in full in an unpublished decision in **March**, the new Wit v. United Behavioral Health opinion kept parts of the district court's final judgment and class certification order in place, including class certification on a fiduciary breach claim. The panel also preserved part of the trial court's judgment in favor of the patients on the fiduciary breach claim, including findings that UBH designed coverage criteria that conflicted with state laws.

The deadline for a rehearing petition on the ruling, which is expected, is now due March 10.

David Lloyd, chief policy officer at the Kennedy Forum, an advocacy group dedicated to improving how the U.S. health care system approaches mental health and substance use disorder treatment, said in an interview after the decision that he supported the case being reheard by the full circuit court.

"UBH violated their fiduciary duty and violated the laws of four states, but essentially, there's no remedy for people who were denied care, and we find that deeply problematic," Lloyd said. "And ultimately, as a public policy matter, that has to change. People have to have meaningful rights to challenge benefit denials."

Here are the key takeaways on the ruling from advocates and benefits attorneys who spoke to Law360.

Management-Side Victory

Attorneys representing employers and ERISA plans scored a clear win with the appellate court's ruling that the district court abused its discretion in certifying denial of benefits claims as class actions that sought reprocessing as a legal remedy.

One of the U.S. Chamber of Commerce's top lawyers praised the reprocessing rejection.

"The district court's approach threatened to multiply frivolous ERISA litigation. The U.S. Chamber supports the Ninth Circuit's rejection of plaintiffs' improper effort to use a class action to pursue a novel remedy that is not available under ERISA," Jenn Dickey, the chamber's deputy chief counsel, told Law360.

The appellate court wholly rejected what it called "plaintiffs' 'reprocessing' theory" as "a use of the class action procedure to expand or modify substantive rights provided by ERISA" in violation of

federal civil procedure rules and the Rules Enabling Act.

"Simply put, reprocessing is not truly the remedy that plaintiffs seek, it is the means to the remedy that they seek. But plaintiffs expressly disclaimed the actual remedy available to them and narrowed their theory of liability under [Section] 1132(a)(1)(B) in an attempt to satisfy Rule 23's commonality requirement," the appellate court said in its opinion, explaining the rationale behind reversing class certification.

Andrew Oringer, partner and general counsel at the Wagner Law Group and a longtime benefits and executive compensation attorney, said "plaintiffs essentially got whipsawed by their own strategy" on the reprocessing issue.

"On the class action side, the court was not convinced that you could essentially bypass the individualized nature of the claims with an assertion that the process was defective," Oringer said.

He said that could have an impact on the viability of ERISA cases challenging claims processing on a class basis.

So there will be claims, but will there be 67,000 all brought at once? And it just changes the game dramatically," Oringer said.

Plaintiffs attorneys took a different view, including J.J. Conway of J.J. Conway Law, who operates an employee benefits practice in Michigan and has been litigating benefits denials claims under ERISA for decades.

"The Wit court seemed hung up on the reprocessing of claims issue,'' Conway said. "The relief was essentially a claims remand with which most ERISA practitioners are familiar, and remands are frequently used when there are claims processing violations. It was surprising the court seemed to treat this as a novel concept.''

Plan Administrator Gets Wide Berth

Another critical holding in the sprawling **33-page opinion** was that the trial court erred in finding UBH incorrectly denied claims because their coverage guidelines were inconsistent with what's known as generally accepted standards of care, or GASC.

Instead, the appellate court found — both in its January and March opinions — that UBH's interpretation that some claims weren't covered even though they met the GASC standard did not constitute an abuse of discretion and therefore wasn't reversible by the court. That came despite the fact that participants alleged their ERISA plans specified the insurer would provide care consistent with generally accepted standards, including in plans that contained a medical necessity requirement.

"While the GASC precondition mandates that a treatment be consistent with GASC as a starting point, it does not compel UBH to cover all treatment that is consistent with GASC. Nor does the exclusion — or any other provision in the plans — require UBH to develop guidelines that mirror GASC," the appellate court wrote.

Management-side attorneys say the decision is grounded in precedent from the U.S. Supreme Court requiring that federal judges give significant deference to administrators of ERISA benefit plans, even in cases where the court identifies a preferable interpretation of the plan's terms.

"The court is instructing that — 'No, unless you find an abuse of discretion, we will not be substituting our judgment for the judgment of the administrator,'" Wagner's Oringer said.

David Shillcutt, senior counsel at Epstein Becker Green, said the panel's published opinion confirmed that GASC is "just a minimum standard for coverage, and that it's permissible for the plan to say, 'not everything that would meet that standard has to be covered.'"

He said that more broadly, the appellate panel's opinion confirmed that plans "are allowed to apply utilization management" when handling claims.

"I think there's a fundamental question here about the role of health insurance and health plans in our health care system, and the extent to which it's appropriate for health plans to serve as a gatekeeper function to manage care," Shillcutt said. "But it's called a managed system because they are tasked with managing utilization and costs."

The Kennedy Forum's Lloyd, in contrast, said such a finding invites ERISA plans "to use criteria that's inconsistent with generally accepted standards of care, and deny care that is medically appropriate for enrollees."

The findings on the issue of generally accepted standards was also a disappointment for the American Psychiatric Association, which filed an amicus brief in the appeal in support of the patient classes.

Reena Kapoor, chair of the American Psychiatric Association's committee on judicial action, said in a statement on the ruling, "We are disappointed that the court did not appreciate the difference between whether a particular treatment or illness is covered or excluded by the plan and whether the treatment is medically necessary."

"Had they understood that point, there would be no question that generally accepted standards of care provide the only rational basis for determining whether a treatment is medically necessary," Kapoor said.

The Battle's Not Over

Benefits attorneys and advocates on all sides are keeping a close eye on what's next in the case, with significant questions for the district court on remand unlikely to be resolved before another rehearing bid, which will likely trigger a flood of new amicus briefs.

Many of the amici that spoke in favor of the plaintiffs didn't respond to requests for comment on the opinion, including the U.S. Department of Justice and spokespeople for several attorneys general that signed onto briefs in favor of the patients. The U.S. Department of Labor, which submitted an amicus brief on the appeal, directed a request for comment to the DOJ.

A spokesperson with the California Attorney General's Office told Law360 it was "evaluating the ruling."

Among the claims left in the case because the appellate court found UBH did not specifically appeal them was the district court's finding that UBH breached its fiduciary duty to health plan participants because coverage limitations were stricter than certain state-mandated criteria. The panel also made clear that certain findings on the breach claim, which weren't related to how UBH interpreted GASC criteria, remained undisturbed.

"The district court also found, among other things, that financial incentives infected UBH's guideline development process and that UBH developed the guidelines with a view toward its own interests. Our decision does not disturb these findings to the extent they were not intertwined with an incorrect interpretation of the guidelines as inconsistent with the plan terms," the court said.

The panel also upheld certification of three patient classes on a fiduciary breach claim, finding UBH forfeited its appeal of that judgment.

Conway, the plaintiff-side ERISA attorney, said he didn't expect the decision to slow down lawsuits over mental health claims, although "Wit may cause litigants to replead these cases and challenge the ERISA-review standards themselves."

"The Wit decision is unlikely to reduce the number of class actions suits involving mental health treatments,'' Conway said. "As a legal matter, the Mental Health Parity and Addiction Equity Act may still be enforced through ERISA. And as a practical matter, the need for quality, comprehensive mental health care is overwhelming following the pandemic.''

--Editing by Haylee Pearl and Roy LeBlanc.