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9th Circ. Reopens Door To Reprocessing In UBH Battle

By **Kellie Mejdrich**

Law360 (August 25, 2023, 5:40 PM EDT) -- The Ninth Circuit's third version of its ruling in a consolidated class action pitting United Behavioral Health against patients challenging coverage denials largely came out in UBH's favor, but it reopened the door for health plan participants to demand claim reprocessing on a class basis, experts say.

The **substituted opinion issued** by the Ninth Circuit on Tuesday backed elements of the two prior decisions that were good for UBH, but eschewed language from both prior decisions that said reprocessing itself wasn't a remedy under the Employee Retirement Income Security Act that justified class treatment.

Even though the panel ended up concluding that the UBH plaintiffs can't force UBH to reprocess their 67,000 claims for mental health and substance use disorder treatment through a classwide denial of benefits claim under ERISA, it kept certification in place for three classes on the participants' ERISA fiduciary breach claim. Those claims are tied to health plan participants' allegations that the company designed overly restrictive coverage guidelines for behavioral health that prioritized cost savings over participants' interests.

Though he called it a "narrow revision," Norton Rose Fulbright's Jeff Wurzburg said the change was important and said observers should keep an eye out for the impact of the UBH case — which stretches back to 2014 — on the behavioral health space.

"Importantly, it reinforces the principle that reprocessing is available where a beneficiary is harmed due to the failure of a health plan to adjudicate a benefit in alignment with the terms of the plan. Ultimately, employers and health plans need to stay tuned for the next chapter of the litigation and its implications for access to behavioral health care," said Wurzburg, who is a health care attorney and senior counsel at the firm.

UBH **appealed** to the Ninth Circuit in December 2020 after U.S. Chief Magistrate Judge Joseph C. Spero's landmark November 2020 **ruling**, which combined with a 2019 **judgment** had envisioned three certified classes, reprocessing of 67,000 claims, and a 10-year injunction requiring certain coverage by UBH overseen by a special master.

The Ninth Circuit three-judge panel heard oral arguments in the consolidated appeal in August 2021. The panel's three opinions were released in March 2022, in January and on Tuesday.

Benefits attorneys agreed that the procedure underlying the case and the set of panel-specific decisions was uncommon: "A third rewrite of the same opinion is unusual in my experience," said Andrew Oringer, partner at the Wagner Law Group and a longtime ERISA attorney focusing on benefits and executive compensation.

The Ninth Circuit's first unpublished opinion in March 2022 had **fully reversed** the district court's class certification and judgment on both an ERISA fiduciary breach claim and a denial of benefits claim, triggering the initial petition for rehearing from the participants, which was filed in May 2022.

That led to the panel's second ruling in January, which the panel issued as a substituted published opinion. It **partially reversed** the lower court, knocking out certification and judgment on the participants' ERISA denial of benefits claim and partially reversing judgment on the fiduciary breach

claim. Participants then filed **another petition** for rehearing and rehearing en banc in March 2023.

Similar to the panel's opinion from January, Tuesday's decision kept the district court's class certification order on an ERISA fiduciary breach claim in place, and partially upheld judgment on that claim.

Part of the district court's judgment upheld by the panel on the fiduciary breach claim, which was also upheld in January, was a finding that the insurer's guidelines for making medical necessity or coverage determinations when processing behavioral health claims impermissibly conflicted with state-mandated criteria. The panel said that portion of the ruling would remain intact because UBH didn't appeal it. But the panel reversed judgment on the fiduciary breach claim to the extent that the judgment was based on the court's erroneous finding that UBH was required to cover all care that was consistent with generally accepted standards of care, or GASC.

Epstein Becker Green's David Shillcutt said he didn't see the panel's Tuesday decision as "disturbing the core substantive holdings from January," particularly regarding plan responsibilities on medical necessity criteria and GASC.

"There is no single place to look to, to figure out what generally accepted standards of care are," Shillcutt said. "So if we interpret this standard plan term, that most plans have, to mean that medical necessity criteria means generally accepted standards of care, then that puts the courts in the position of creating a new set of medical necessity criteria like we saw the district court do," Shillcutt said.

Even after the Ninth Circuit's third pass, the UBH case could still benefit from further appellate scrutiny, attorneys said. The panel left the possibility open, noting in its opinion that "subsequent petitions for rehearing or rehearing en banc, if any, are permissible."

A ruling from the full Ninth Circuit, instead of just the panel, could add further clarity, said J.J. Conway, a longtime plaintiff-side ERISA attorney based in Michigan.

"The case really could have benefited from a fresh look by an en banc panel. After three bites at the apple, in the form of three different decisions, the court seemed to be searching for a way to disband the class," Conway said.

Attorneys representing both workers and employers agreed that the Wit case is one to watch, particularly because of the way it left open the possibility of classwide reprocessing beyond the present case.

"What they are basically saying is that yes, you can have reprocessing. And yes, you can have it for a class, if you can show that everyone in the class might be entitled to benefits. Which Wit wasn't able to say," said Matt Lavin, partner at Arnall Golden Gregory who represents plaintiffs in ERISA class actions. Lavin refers to the last name of two lead plaintiffs and behavioral health claimants in the case, David and Natasha Wit.

Management-side attorneys question, however, whether the Ninth Circuit meant to allow for that, or whether the panel's shift on reprocessing is more of a distinction without a difference when it comes to class certification.

"The question is, even in a situation where the claims themselves are too dissimilar to support class status for the claims, is it possible that there's enough to tie those claims together in the context of a request for reprocessing that there is sufficient similarity?" said Wagner's Oringer.

"That's the question that it seems as though Wit leaves open," Oringer said.

U.S. Circuit Judges Morgan Christen and Danielle J. Forrest and U.S. District Judge Michael M. Anello, sitting by designation, sat on the panel for the Ninth Circuit.

The cases are David Wit et al. v. United Behavioral Health, case numbers 20-17363 and 21-15193, and Gary Alexander et al. v. United Behavioral Health, case numbers 20-17364 and 21-15194, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Bruce Goldman and Nick Petruncio.