NELSON HARDIMAN
HEALTHCARE LAWYERS

Client Alert: Court Rules Against UnitedHealthcare Subsidiary – Mental Health and SUD Treatment Denied to Thousands of Patients Across the Country

On March 5, 2019, a landmark ruling was handed down against United Behavioral Health ("United") finding that **United unlawfully denied mental health and substance use treatment to its policyholders across the country.** The California federal court found that United followed faulty internal coverage guidelines that failed to comply with generally accepted standards of care. The fallout from this ruling against the UnitedHealthcare subsidiary could set the stage for a major shift in the behavioral health industry.

United insureds filed the class-action suit under the Employee Retirement Income Security Act of 1974 ("ERISA") after they were denied outpatient, intensive outpatient, and residential treatment services for mental illnesses or substance use disorders between 2011 and 2017. Plaintiffs asserted two claims: (1) breach of fiduciary duty, based on the theory that United owed certain duties of diligence and care to its insureds and that it breached those duties by developing coverage guidelines that were inconsistent with generally accepted standards of care and by prioritizing cost savings over members' health, and (2) arbitrary and capricious denial of benefits, based on the theory that United improperly denied its insureds' requests for coverage by using its overly restrictive guidelines to make coverage determinations.

U.S. Chief Magistrate Judge Joseph C. Spero of the USDC for the Northern District of California authored the 106-page ruling which addressed United's Level of Care Guidelines and United's Coverage Determination Guidelines (collectively, "the Guidelines"). Both the Level of Care Guidelines and Coverage Determination Guidelines are used by United to determine whether a member's treatment qualifies for coverage.

Judge Spero recognized the various authoritative sources for generally accepted standards of care, including, inter alia, the American Society of Addiction Medicine Criteria ("ASAM Criteria"), the American Association of Community Psychiatrist's ("AACP") Level of Care Utilization System ("LOCUS"), and the Medicare benefit policy manual issued by the Centers for Medicare and Medicaid Services ("CMS Manual").

The court then found that a preponderance of the evidence showed that the following standards are generally accepted in the field of mental health and substance use disorder treatment and placement:

- Effective treatment of mental health and substance use disorders requires treatment of the individual's underlying condition and is not limited to alleviation of the individual's current symptoms;
- Effective treatment of mental health and substance use disorders requires treatment of co-occurring behavioral health disorders and/or medical conditions in a coordinated manner that considers the interactions of the disorders and conditions and their implications for determining the appropriate level of care;
- Patients should receive treatment for mental health and substance use disorders at the least intensive and restrictive level of care that is safe and effective;
- Where there is ambiguity as to the appropriate level of care, the practitioner should err on the side of caution by placing the patient in a higher level of care;
- Effective treatment of mental health and substance use disorders includes services needed to maintain functioning or prevent deterioration;
- The appropriate duration of treatment for behavioral health disorders is based on the individual needs of the patient – there is no specific limit on the duration of treatment;
- The unique needs of children and adolescents must be taken into account when making level of care decisions involving their treatment for mental health or substance use disorders; and
- The determination of the appropriate level of care for patients with mental health and substance use disorders should be made on the basis of a multidimensional assessment that takes into account a wide variety of information about the patient.

Next, the court examined whether United's Guidelines are consistent with these generally accepted standards. Calling testimony by United's expert witnesses "evasive – and even deceptive," the court

ultimately concluded that United's Guidelines completely failed to meet generally accepted standards of care. Specifically, Judge Spero made the following findings:

1. **United's Guidelines deviate from generally accepted standards of care by placing excessive emphasis on acuity and crisis stabilization, while ignoring the treatment of the individual's underlying condition.** The overemphasis on acute symptoms and crisis stabilization is reflected in the Guidelines' requirement that in order to obtain coverage upon admission, there must be a "reasonable expectation that services will improve the member's presenting problems within a reasonable period of time." This requirement – which applies to all levels of care – places the focus on the immediate symptoms that brought the member to treatment, with no consideration of the long-term, underlying conditions. The Guidelines also provide that, in order to qualify for continued coverage, a member must be receiving "active" treatment, i.e., treatment that is focused on the factors that led to admission. As the court unequivocally stated, "neither 'acute symptoms' nor 'acute changes' should be a mandatory prerequisite for coverage of outpatient, intensive outpatient, or residential treatment."
2. **United's Guidelines deviate from generally accepted standards of care by failing to address the effective treatment of co-occurring conditions.** The criteria in the Guidelines for determination of appropriate level of care look only to whether treatment of the current condition is likely to be effective at that level of care. Meanwhile, per the Guidelines, treatment of a co-occurring condition at a given level of care needs only be sufficient to ensure that it is safely managed and that its treatment does not undermine treatment of the current condition. The Guidelines are void of any criteria that take into account whether the member's co-occurring conditions can be effectively treated at the requested level of care or whether the co-occurring conditions necessitate a higher level of care than may otherwise be appropriate.
3. **United's Guidelines deviate from generally accepted standards of care by failing to err on the side of caution in favor of higher levels of care and by pushing patients to lower levels of care where possible even when the lower levels of care are likely to be less effective.** United's Guidelines are actively focused on pushing members down to lower levels of care as soon as the members' acute symptoms are addressed, with no consideration as to whether treatment will be as effective at the lower levels of care. Indeed, under the Guidelines, coverage at a particular level of care will be discontinued unless moving to a lower level of care is "unsafe."
4. **United's Guidelines deviate from generally accepted standards of care by precluding coverage for treatment to maintain level of function.** By focusing only on acuity, United's Guidelines preclude coverage of important treatment services that are aimed at maintaining a member's functional level. United's Guidelines require a finding that services are expected to cause a patient to "improve" within a reasonable period of time. Instead of defining "improve" to mean a control of symptoms and maintenance of a functional level, United's Guidelines narrowly define "improvement" as a "reduction or control of the acute symptoms that necessitated treatment in a level of care."
5. **United's Guidelines deviate from generally accepted standards of care by precluding care based on a member's lack of motivation.** Specifically, the Guidelines in place from 2014-2017 provide that "continued stay criteria are no longer met" when the member "is unwilling or unable to participate in treatment and involuntary treatment or guardianship is not being pursued." It is inconsistent with the generally accepted standard of care to make lack of motivation an automatic reason for discontinuation of coverage at a given level of care.
6. **United's Guidelines deviate from generally accepted standards of care by failing to address the unique needs of children and adolescents.** The court noted that it was particularly troubling that United's Guidelines fail to address in any meaningful way the different standards that apply to children and adolescents in the treatment of mental health and substance use disorders. United does not have any separate level of care criteria for children and adolescents, and the criteria for coverage determinations similarly make no distinctions for the unique needs of children and adolescents.
7. **United's Guidelines deviate from generally accepted standards of care by using an overly broad definition of "custodial care" coupled with an overly narrow definition of "active" treatment and "improvement."** United's Guidelines exclude coverage for custodial care services provided in acute inpatient and residential treatment settings. Though generally accepted standards of care limit custodial services to services that do not require the continued attention of trained medical or paramedical personnel, United's Guidelines define custodial care so broadly that even skilled clinical services may be excluded from coverage. United's Guidelines define "active" care as the opposite of "custodial" care and provide that treatment is not active – and thus custodial – whenever that treatment is not focused on the member's critical presenting problem and can be provided in a less restrictive setting.
8. **United's Guidelines deviate from generally accepted standards of care by imposing mandatory prerequisites rather than a multidimensional approach.** Though the Guidelines contain "Best Practices" that instruct practitioners to collect a wide range of information about the member, the Guidelines do not allow for adequate consideration of this information in the actual requirements that govern coverage determinations.

The court further explained that United's Guidelines failed to meet ASAM Criteria and violated the laws of Illinois, Connecticut, Rhode Island, and Texas by failing to comply with state laws requiring the use of ASAM Criteria (or, in the case of Texas, criteria issued by the Texas Department of Insurance) – rather than United's internal Guidelines – to make coverage determinations for the treatment of substance use disorders.

The case will next move to the remedy phase, where the judge will determine how United should be punished.

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