



Triple Threat: How Lawsuits, the Government, and You Can Combat Insurance Discrimination

D. Brian Hufford
David Lloyd
Nell Peyser

1

Today's Presenters



D. Brian Hufford
Attorney
Zuckerman Spaeder LLP



David Lloyd
Chief Policy Officer
The Kennedy Forum



Nell Peyser
Attorney
Zuckerman Spaeder LLP

 ZUCKERMAN SPAEDER | 2

2

Learning Objectives

- Provide a deeper understanding of the **federal Mental Health Parity Act** and similar state laws and the implications of **insurers' efforts to avoid their responsibilities** under these laws.
- Empower participants to **fight back by learning about the legal effort** to hold insurers accountable and the opportunities it is creating **for patients and counselors** to enforce their **legal rights**.
- Provide an understanding of the government's role in fighting insurance discrimination, **what policymakers and regulators can learn from the private legal effort**, and what it will take to finally deliver behavioral health parity.



3

Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA" or "Parity Act")

- Intended to prohibit coverage practices that discriminate against mental health or substance use disorder (SUD) coverage
- Enacted as an amendment to ERISA, the Public Health Service Act, and the tax code and implemented by DOL, HHS and IRS
- Only applies **IF** a health plan provides both medical and surgical benefits and mental health or SUD benefits
- Plans subject to the Act must ensure that:
 - Financial requirements and treatment limitations applicable to mental health or SUD benefits are no more restrictive than the predominant requirements/limitations applied to substantially all medical and surgical benefits covered by the plan
 - There are no separate cost-sharing requirements/treatment limitations that apply only with respect to mental health or SUD benefits
 - Non-quantitative treatment limitations cannot be more stringent for mental health or SUD benefits than medical/surgical benefits in a classification of care (e.g., in-network inpatient)

4

ERISA Requirements

Equates all employer-sponsored health plans to common law trusts

- Requires that the plan's terms be set forth in a written document and given to the plan member (29 U.S.C. § 1022)
- Imposes fiduciary duties on those who administer the plan and make discretionary decisions (29 U.S.C. § 1104)
- Affords plan beneficiaries a private right of action to enforce these rights and obtain benefits, equitable relief and injunctive relief (29 U.S.C. §§ 1132(a)(1)(B) and (a)(3))

5

Current State of Play for Enforcement of Insurer Guidelines

- Private Litigation
- Changes to State or Federal Law
- Governmental Enforcement
- Individual Advocacy

6

Does MHPAEA Make a Difference?

- Private enforcement has made some headway:
 - Exclusion of all coverage for residential treatment of mental health conditions
 - Exclusion of all coverage for most common/effective treatment for autism
 - Discriminatory reimbursement rate targeting mental health providers
- To date, agency enforcement has lagged:
 - DOL involvement in *Doe/Smith*
 - DOL Inspector General report on parity enforcement

7

Wit v. United Behavioral Health

Case Highlights

- A class of more than 50,000 plaintiffs were denied coverage for mental health and SUD treatment based on UBH's unlawfully restrictive internal guidelines
- Held: UBH violated the terms of the patients' plans and breached its fiduciary duties under ERISA because, while the plans required UBH to evaluate medical necessity and clinical appropriateness according to generally accepted standards of care, UBH's guidelines were pervasively more restrictive than that standard

8

Wit v. United Behavioral Health

Remedies

- 10-Year Injunction: UBH must cease using its internal guidelines and, instead, must evaluate medical necessity/clinical appropriateness using criteria created by independent professional organizations that reflect generally accepted standards of care, including the American Society of Addiction Medicine (ASAM) Criteria for SUD treatment
- UBH must train its personnel on how to faithfully apply the court-ordered criteria and on ERISA's fiduciary duties
- UBH must reprocess more than 67,000 claims that it previously denied based on its own guidelines

9

Wit v. United Behavioral Health

Appeal and Takeaways

- Ninth Circuit recently reversed trial court decision in its entirety
- Plaintiffs are seeking en banc review
- Unlikely that such a case will ever be brought again
- Is DOL our only hope?

10

Generally Accepted Standards of Care

- Treat the **underlying condition**, not only current symptoms
- Treat **co-occurring** conditions
- Treat at the least intensive level of care that is **safe** and **effective**
- Err on the side of **caution**
- Effective treatment includes services to **maintain function**
- Determine **duration** based on individual needs
- Take unique needs of **children/ adolescents** into account
- Make level of care decisions based on a **multidimensional assessment**

11

Changes to State or Federal Law

- Federal laws create a floor, above which many states have heightened standards; states are the primary regulators of insurers, providers and facilities
- Examples of recently enacted laws and regulations
 - Some states have their own Mental Health Parity laws
 - Some states specify the criteria payers have to use to make medical necessity decisions (e.g., California)
 - Some states require mandate coverage for certain conditions
- Congress amended the federal Parity Act to require plans to perform annual comparative analyses and make available to DOL; also requires DOL to request 20 per year (plan beneficiaries can also obtain)
- Federal regulations on telehealth and ERISA appeal deadlines

12

Individual Non-litigation

- Understand the basics of ERISA and Mental Health Parity laws
- Appeal every claim that you believe to be improperly denied or underpaid — never accept an initial denial as a final decision
- Be loud: the squeaky wheel gets the grease
- Identify and involve advocates (including, particularly for self-funded plans, corporate HR departments, corporate behavioral health-focused committee/ombudsperson)
- Where necessary, seek help from DOL, your state department of insurance, and/or a private lawyer

13

Current Issues

- Precertification requirements for mental health and SUD only
- Delayed decisions on precertification
- Frequency of utilization review
- Red tape/runaround
- Low reimbursement rates
- Inadequate networks
- Use of proprietary medical necessity guidelines and refusal to publish
- Specific clinical policies for certain high-cost treatments
- Challenges to provider credentials and treatment programs
- Modifications, tracked as “approvals”

14

What's Next

- Wit petition for rehearing/en Banc review; DOL needs to enforce
- Demand parity analysis and use tool kit
- Be loud: the squeaky wheel gets the grease

15

Resource List

- [Parity Registry](#)
- [The Kennedy Forum: Health Insurance Appeals Guide](#)
- [The Kennedy Forum: Parity Toolkit](#)
- [DOL Employee Benefits Security Administration Resources](#)

16



ZUCKERMAN
SPAEDER
www.zuckerman.com

©2022. All Rights Reserved

17