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Trends and Developments in Coverage Disputes Over Mental Health Benefits

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Of the 507 federal managed care litigation cases filed in 2014, 16 of them (three percent) involved contested coverage of mental health benefits. In 2015, there were 499 federal managed care litigation cases, with 34 of them (seven percent) seeking coverage for mental health benefits. There have been 341 federal managed care litigation

cases filed through September 6, 2016 and 53 of them (16 percent) involve a dispute over mental health benefits.

This article will explore the upward trajectory in health plan disputes involving coverage of mental health benefits, along with case trends involving treatment at residential treatment centers and mental health parity laws.¹

I. Introduction and Source of Case Data

Managed Care Litigation is generally described as the tug of war among payors (insurers and self-funded plans), providers (physicians, hospitals, and other medical service providers), and patients (members or beneficiaries of health plans). Payors strive to adhere to their committed risk under their health plans, providers demand fair payment for services rendered, and patients simply want coverage for their medical expenses.

The litigation trends discussed in this article are derived from cases filed in the United States District Courts, whether filed as

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original proceedings or removed from state court. Insofar as the health plans at issue are invariably provided as employer group health benefits, the predicate for removal is usually the Employee Retirement Income Security Act of 1974 (ERISA). The discussed cases are against the five major health insurers: "Aetna," "United Healthcare," "Humana," "CIGNA," and Blue Cross Blue Shield Plans ("BCBS").²

II. Case Statistics: 2016, 2015, 2014

2016: Of the 53 cases seeking coverage for mental health benefits that were filed through September 15, 2016, the largest concentration of cases (23) was filed in the U.S. Tenth Circuit, which includes Utah. There are 29 cases involving residential treatment centers located in Utah, although Utah is not always the location in which the case is filed. The U.S. Ninth Circuit contained the second largest concentration of cases (17). The smattering of cases across the remainder of the circuits is statistically insignificant.

As against the major insurers, Aetna was a named defendant in the largest number of case filings (21), followed by BCBS (14), United (13), and CIGNA (5). Humana was not named a defendant in any of the followed cases.

Ten of the cases raised a claim or otherwise implicated mental health parity acts, two of the cases involved a dispute over coverage for autism,³ including one that sought coverage for Applied Behavior Analysis,⁴ three involved eating disorders,⁵ and two were putative class actions.⁶

2015: Of the 34 cases seeking coverage for mental health benefits that were filed in 2015, the largest concentration of cases (13) was filed in the U.S. Tenth Circuit, six of which involved residential treatment centers located in Utah. The U.S. Ninth Circuit contained the second largest concentration of cases (10). The smattering of cases across the remainder of the circuits is statistically insignificant.

As against the major insurers, United was a named defendant in the largest number of case filings (15), followed by BCBS (13), Aetna (5), and Humana (1). CIGNA was not named a defendant in any of the followed cases.

Eleven of the cases raised a claim or otherwise implicated mental health parity acts,⁷ five of the cases involved a dispute over coverage for autism,⁸ including two that sought coverage for

Applied Behavior Analysis,⁹ five involved eating disorders,¹⁰ and five were putative class actions.¹¹

2014: Of the 16 cases seeking coverage for mental health benefits that were filed in 2014, the largest concentration of cases (12) was filed in the U.S. Tenth Circuit (6) and U.S. Ninth Circuit (6), five of which involved residential treatment centers located in Utah. The smattering of cases across the remainder of the circuits is statistically insignificant.

As against the major insurers, BCBS was a named defendant in the largest number of case filings (11), followed by Aetna (1), United (1), Humana (1), and CIGNA (1).

Five of the cases raised a claim or otherwise implicated mental health parity acts,¹² three involved eating disorders,¹³ and one was a putative class action.¹⁴ None involved a dispute over coverage for autism or Applied Behavior Analysis.¹⁵

III. Emergent Case Themes

The greatest increase in case filings appears in coverage disputes over residential treatment centers, from seven cases in 2014, 16 cases in 2015, to 47 in 2016. While the volume of case filings has increased, the source of the coverage dispute is fairly constant: whether residential treatment is medically necessary and whether the patient could be treated in a less intensive setting, such as an outpatient level of care. Other cases involve instances where benefits have been paid but the parties dispute over whether the treatment is medically necessary beyond a certain date for which benefits have been paid. To a lesser degree, there is sometimes a dispute over whether the facility meets the plan's definition of a "Residential Treatment Facility"¹⁶ or whether a certain program, such as a Wilderness Treatment Program, is considered to be of proven effectiveness.¹⁷

There is a parallel increase in case filings alleging a violation of a federal or state mental health parity act, from 5 in 2014, to 11 in 2015, to 10 in 2016 (statistically insignificant from 2015). Across all years, the common theme in these cases is that the payor is discriminating, restricting, or otherwise improperly limiting mental health coverage, or placing an undue burden on access to coverage compared to other coverages for the underlying mental health benefit.

The U.S. Ninth and Tenth Circuits remain the situs for the majority of case filings, presumably due to California's large

population (U.S. Ninth Circuit) and the concentration of residential treatment centers in Utah (U.S. Tenth Circuit).

Treatment for mental health conditions is expensive and many providers are out of network, thereby increasing the member's self-pay obligation. Payors frequently grapple with diagnoses and whether benefits are truly payable for the length of time sought by the provider and patient. Given a greater awareness of mental health and a parent or guardian's desire to obtain all necessary treatment, coupled with the mandate that mental health benefits be "in parity" with other policy benefits, the case volume has grown exponentially as courts have become the last step in the exhaustion of administrative remedies under the member's health benefit plan.

While the emphasis of this article is trending data on new case filings, certain events in ongoing cases are significant and warrant mention. On September 19, 2016, class certification was granted in a pair of related cases where United Behavioral Health was alleged to have improperly denied coverage for mental health and substance abuse disorder treatment.¹⁸ Notwithstanding the parties' divergent claims on how many health benefit plans were at issue, the Court determined that all of the putative class member's plans require, as a precondition for coverage, "that the treatment at issue must be consistent with generally accepted standards of care."¹⁹ For purposes of class certification, the Court accepted plaintiffs' contention that "UBH breached its fiduciary duty and abused its discretion by developing and applying Guidelines that were more restrictive" than those either set forth under the health benefit plans or applicable state law.²⁰

In another class action alleging that the plan discriminated against persons with autism by excluding Applied Behavior Analysis therapy,²¹ the parties reached a settlement with a cash amount alleged to pay the claims at 100 percent, predicated on a damage model used in four other similar cases with the same plaintiff counsel.²² A fairness hearing is scheduled for January 5, 2017.²³

While litigation over plan benefits is often contentious, cases can achieve resolution on balanced terms. Furthermore, a class action is a procedural device that can be both a sword and a shield, where resolution can be achieved, and benefits conveyed, on terms applicable to all affected health plan members.

IV. Conclusion

Trending case data is an invaluable resource for the legal departments of both payors and providers because litigation outcomes often directly affect plan underwriting or the availability of plan benefits. That same trending of case data is an invaluable resource for patients and their counsel, and it may illustrate unequal application of an insurer's plan benefits across members or a gap in benefits.

The case data discussed above unquestionably reflects an explosive growth of cases seeking coverage for mental health benefits, and there is no indication that the upward trajectory of case filings will not continue. Actual disposition of the cases, however, will remain a fact-intensive inquiry under which the patient's documented health needs are considered against plan benefits and whether those benefits comport with applicable mental health laws.

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¹ See also *Trends and Developments in Managed Care Litigation*, published in the American Bar Association Health Law Section's ABA Health eSource, Vol. 12, No. 2, October 29, 2015. This article is a follow up to last year's article and specifically examines the increased number of filings seeking coverage for mental health benefits, as previously noted in the 2015 article.

2 The terms “Aetna,” “United Healthcare,” “Humana,” and “CIGNA” are intended to be generic terms which identify with the four major health insurers. The term “Blue Cross Blue Shield Plans” is intended to be a generic term that collectively represents the 36 independently operated Blue Cross and Blue Shield member companies. While these are not the only health insurers, these entities collectively comprise the largest percentage of the health insurance plans (self-funded, fully funded, or administrated plans) and, concomitantly, represent the greatest collective percentage of disputes.

3 *S.K., et al. v. Excellus Blue Cross Blue Shield*, U.S.D.C. S.D. NY, Doc. No. 1:16-cv-01176, (filed Feb. 16, 2016); *J.T.L., et al. v. Blue Cross and Blue Shield of Massachusetts, Inc.*, U.S.D.C. W.D. WA, Doc. No. 2:16-cv-00573, (filed Apr. 20, 2016).

4 *J.T.L., et al. v. Blue Cross and Blue Shield of Massachusetts, Inc.*, U.S.D.C. W.D. WA, Doc. No. 2:16-cv-00573, (filed Apr. 20, 2016).

5 *Cara Z v. CIGNA Health and Life Insurance Company*, U.S.D.C. S.D. FL, Doc. No. 1:16-cv-20849-DPG, (filed Mar. 8, 2016); *Elena N. v. United Healthcare Insurance Company of New York*, U.S.D.C. S.D. NY, Doc. No. 1:16-cv-05642, (filed July 15, 2016); *Aurora Bailey, et al. v. Anthem Blue Cross Life and Health Insurance Company, et al.*, U.S.D.C. N.D. CA, Doc. No. 3:16-cv-04439, (filed Aug. 5, 2016).

6 *J.T.L., et al. v. Blue Cross and Blue Shield of Massachusetts, Inc.*, U.S.D.C. W.D. WA, Doc. No. 2:16-cv-00573, (filed Apr. 20, 2016); *Aurora Bailey, et al. v. Anthem Blue Cross Life and Health Insurance Company, et al.*, U.S.D.C. N.D. CA, Doc. No. 3:16-cv-04439, (filed Aug. 5, 2016).

7 *Kirsten A. Danzo v. Anthem Blue Cross and Blue Shield*, U.S.D.C. E.D. MO, Doc. No. 4:15-cv-00033,

(filed Jan. 7, 2015); *A.D., et al. v. T-Mobile USA, Inc., et al.*, U.S.D.C. W.D. WA, Doc. No. 2:15-cv-00180, (filed Feb. 9, 2015); *Raquel F. v. United Healthcare Insurance Company, et al.*, U.S.D.C. N.D. CA, Doc. No. 5:15-cv-00879-NC, (filed Feb. 26, 2015); *Sarah P. v. United Healthcare Insurance Company of New York*, U.S.D.C. E.D. NY, Doc. No. 2:15-cv-01008, (filed Feb. 26, 2015); *W.P., a minor, et al. v. Anthem Insurance Companies, Inc.*, U.S.D.C. S.D. IN, Doc. No. 1:15-cv-00562-TWP-TAB, (filed Apr. 9, 2015); *Gabriella Raygoza et al. v. Conagra Foods, Inc., et al.*, U.S.D.C. C.D. CA, Doc. No. 2:15-cv-03741-SVW-JC, (filed May 18, 2015); *Jennifer Brazao v. United Healthcare, Inc., et al.*, U.S.D.C. C.D. CA, Doc. No. 8:15-cv-00876, (filed June 3, 2015); *Maria Stewart, et al. v. Applied Materials, Inc., et al.*, U.S.D.C. N.D. CA, Doc. No. 4:15-cv-02632-DMR, (filed June 12, 2015); *J.H. v. Blue Cross Blue Shield of Rhode Island*, U.S.D.C. D. RI, Doc. No. 1:15-cv-00265-L-LDA, (filed June 25, 2015); *Alexandra Carr et al. v. United Healthcare Services, Inc.*, U.S.D.C. W.D. WA, Doc. No. 2:15-cv-01105, (filed July 9, 2015); *Marlena A. Mills, et al. v. BlueCross BlueShield of Tennessee, Inc.*, U.S.D.C. E.D. TN, Doc. No. 3:15-cv-00552, (filed Dec. 14, 2015).

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A.D., et al. v. T-Mobile USA, Inc., et al., U.S.D.C. W.D. WA, Doc. No. 2:15-cv-00180, (filed Feb. 9, 2015); *W.P., a minor, et al. v. Anthem Insurance Companies, Inc.*, U.S.D.C. S.D. IN, Doc. No. 1:15-cv-00562-TWP-TAB, (filed Apr. 9, 2015); *Gabriella Raygoza et al. v. Conagra Foods, Inc., et al.*, U.S.D.C. C.D. CA, Doc. No. 2:15-cv-03741-SVW-JC, (filed May 18, 2015); *Maria Stewart, et al. v. Applied Materials, Inc., et al.*, U.S.D.C. N.D. CA, Doc. No. 4:15-cv-02632-DMR, (filed June 12, 2015); *J.H. v. Blue Cross Blue Shield of Rhode Island*, U.S.D.C. D. RI, Doc. No. 1:15-cv-00265-L-LDA, (filed June 25, 2015).

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A.D., et al. v. T-Mobile USA, Inc., et al., U.S.D.C. W.D. WA, Doc. No. 2:15-cv-00180, (filed Feb. 9,

2015); *W.P., a minor, et al. v. Anthem Insurance Companies, Inc.*, U.S.D.C. S.D. IN, Doc. No. 1:15-cv-00562-TWP-TAB, (filed Apr. 9, 2015).

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Kirsten A. Danzo v. Anthem Blue Cross and Blue Shield, U.S.D.C. E.D. MO, Doc. No. 4:15-cv-00033, (filed Jan. 7, 2015); *Sarah P. v. United Healthcare Insurance Company of New York*, U.S.D.C. E.D. NY, Doc. No. 2:15-cv-01008, (filed Feb. 26, 2015); *Elizabeth W. v. Empire HealthChoice Assurance, Inc., et al.* U.S.D.C. S.D. NY, Doc. No. 1:15-cv-05250-CM, (filed July 7, 2015); *Samantha S. v. Anthem Health Plans*, U.S.D.C. D. CT, Doc. No. 3:15-cv-01085-MPS, (filed July 15, 2015); *Jane Doe v. Blue Cross & Blue Shield of Rhode Island*, U.S.D.C. D. RI, Doc. No. 1:15-cv-00357, (filed Aug. 24, 2015).

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A.D., et al. v. T-Mobile USA, Inc., et al., U.S.D.C. W.D. WA, Doc. No. 2:15-cv-00180, (filed Feb. 9, 2015); *W.P., a minor, et al. v. Anthem Insurance Companies, Inc.*, U.S.D.C. S.D. IN, Doc. No. 1:15-cv-00562-TWP-TAB, (filed Apr. 9, 2015); *Gabriella Raygoza et al. v. Conagra Foods, Inc., et al.*, U.S.D.C. C.D. CA, Doc. No. 2:15-cv-03741-SVW-JC, (filed May 18, 2015); *Maria Stewart, et al. v. Applied Materials, Inc., et al.*, U.S.D.C. N.D. CA, Doc. No. 4:15-cv-02632-DMR, (filed June 12, 2015); *Alexandra Carr et al. v. United Healthcare Services, Inc.*, U.S.D.C. W.D. WA, Doc. No. 2:15-cv-01105, (filed July 9, 2015).

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D.E. v. Anthem Blue Cross Life and Health Insurance Company, U.S.D.C. C.D. Cal., Doc. No. 2:14-cv-03306, (filed April 29, 2014); *John Potter v. Blue Shield of California Life and Health Insurance Company*, U.S.D.C. C.D. Cal., Doc. No. 8:14-cv-00837, (filed June 2, 2014); *Elizabeth A. Craft and Jane Doe et al. v. Health Care Service Corporation*, U.S.D.C. N.D. Il., Doc. No. 1:14-cv-05853, (filed July 30, 2014); *Stephen B. v. Aetna Life Insurance Company*, U.S.D.C. C.D. Cal., Doc. No. 2:14-cv-06024-FMO-MRW, (filed July 31, 2014); and *Karen K.*

v. BlueCross BlueShield of Michigan, U.S.D.C. D. UT., Doc. No. 1:14-cv-00100-EJF, (filed Aug. 15, 2014).

- 13 *Nurit Zabłudovsky v. United Healthcare Insurance Company*, U.S.D.C. C.D. Cal., Doc. No. 2:14-cv-05985-DDP-CW, (filed July 30, 2014); *Stephen B. v. Aetna Life Insurance Company*, U.S.D.C. C.D. Cal., Doc. No. 2:14-cv-06024-FMO-MRW, (filed July 31, 2014); *Ariana M. v. Humana Health Plan of Texas, Inc., et al.*, U.S.D.C. S.D. TX, Doc. No. 4:14-cv-03206, (filed Nov. 7, 2014).
- 14 *Laural O'Dowd et al. v. Anthem Health Plans, Inc., et al.*, U.S.D.C. D. CO, Doc. No. 1:14-cv-02787-KLM, (filed Oct. 10, 2014).
- 15 The groupings of cases referenced in 2016, 2015, and 2014 do not necessarily fit neatly in one category to the exclusion of another. For example, a case may be categorized as both a putative class action and asserting a claim under a mental health parity act. E.g. *Aurora Bailey, et al. v. Anthem Blue Cross Life and Health Insurance Company, et al.*, U.S.D.C. N.D. CA, Doc. No. 3:16-cv-04439, (filed Aug. 5, 2016). Nevertheless, the grouping of cases in the manner described is intended to illustrate the same claims/themes being asserted in subsequent case filings.
- 16 E.g. *Anne S., et al. v. Aetna Choice POS II Plus Medical Plan, et al.*, U.S.D.C. D. UT, Doc. No. 2:16-cv-00466-CW, (filed June 3, 2016); *Caryn Davis and Steven Davis v. Aetna Insurance Company of Connecticut*, U.S.D.C. D. MD, Doc. No. 1:16-cv-00442-JKB, (filed Feb. 17, 2016).
- 17 E.g. *Mark S. and Lauren S. v. United Healthcare Insurance Company, et al.*, U.S.D.C. D. UT, Doc. No. 1:15-cv-00156-RJS, (filed Dec. 15, 2015).
- 18 *Wit v. United Behavioral Health*, USDC ND CA, 14-02346, Doc. 174, (09/19/16).

19 *Id.* at p. 5.

20 *Id.* at p. 30.

21 *A.D., et al. v. T-Mobile USA, Inc., et al.*, U.S.D.C.
W.D. WA, Doc. No. 2:15-cv-00180, (filed Feb. 9,
2015).

22 *Id.* at Doc. 34, p. 2.

23 *Id.* at Doc. 34, p. 2.