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Increasing Access to Mental Health Treatment: Implications of *Wit v. United Behavioral Health* for Kentucky's Healthcare System

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Increasing Access to Mental Health Treatment: Implications of *Wit v. United Behavioral Health* for Kentucky's Healthcare System

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Mental health and substance abuse (MH/SA) problems are on the rise in the United States, in what many Americans call a "mental health crisis."^[1] According to the Substance Abuse and Mental Health Services Administration, there was an increase in adults with either a mental illness or substance abuse disorder from 2019 (61.2 million in 2019)^[2] to 2020 (73.8 million in 2020).^[3] Moreover, MH/SA often goes untreated,^[4] with the cost of healthcare being cited as the most common barrier keeping Americans from attaining care.^[5] These effects are particularly prevalent in the Commonwealth of Kentucky, where 43.7 percent of adults reported anxiety and depressive symptoms in 2021.^[6] In 2020, Kentucky had the nineteenth highest suicide mortality rate of the fifty states (801 deaths, 17.6 per 100,000 people).^[7] Moreover, in 2020, Kentucky had the second highest drug overdose mortality rate (1,330 deaths, 49.2 per 100,000 people).^[8] This crisis has been uniquely exacerbated in Kentucky by the Opioid Epidemic, inducing the Kentucky

state government's attempts to negotiate with pharmaceutical companies and pass legislation aimed at securing drug treatment.[9] Amidst these attempts to provide MH/SA treatment to Kentuckians, there exists a barrier that often goes unnoticed—judicial shields for health insurance companies to deny MH/SA coverage on a federal level.

In *Wit v. United Behavioral Health*, the U.S. court for the Northern District of California implemented an overhaul of the U.S. healthcare system.[10] During a staggering mental health crisis affecting millions of Americans, the *Wit* district court ordered United Behavioral Health (UBH), a health insurance provider, to reprocess approximately 67,000 MH/SA treatment claims that were denied to thousands of class action plaintiffs.[11] The plaintiffs, participants and beneficiaries of UBH healthcare plans, alleged that UBH violated its fiduciary duties by evaluating plan coverage using standards that did not comport with the evidence and recommendations of the scientific and medical community (i.e., "generally accepted standard of care," or, GASC).[12] The district court agreed, highlighting UBH's conflict of interest in serving as both an entity which benefits from cutting costs and a plan administrator, who acts as a fiduciary when exercising discretion over approving/denying participants' claims.[13]

This conflict of interest is not an uncommon issue when dealing with health insurance companies, particularly those which administer plans governed by the Employment Retirement Income Security Act (ERISA).[14] ERISA establishes fiduciary duties upon plan administrators who exercise discretion,[15] delineating that the fiduciary must act with the explicit purposes to (1) provide benefits to beneficiaries and (2) distribute reasonable expenses of the beneficiary's plan.[16] In *Wit*, the district court determined that UBH violated these duties when it denied patients' claims using internal guidelines that were more restrictive than the GASC.[17]

The *Wit* ruling was considered a landmark in behavioral healthcare law, with Congressman Patrick Kennedy calling the decision the "*Brown v. Board of Education* for the mental health movement." [18] Celebrations, however, did not last long, as the Court of Appeals for the Ninth Circuit issued a reversal in January of 2023.[19] The Ninth Circuit held that the district court improperly applied the standard for reviewing the health insurance company's decisions in denying coverage. Indeed, Supreme Court interpretations of ERISA indicate that when the written agreements to healthcare plans contain clauses granting discretion to the plan administrator, the standard for judicial review gives deference to the administrator's decision, which will only be overruled for an abuse of discretion.[20] Within this heightened standard of review, a plan administrator's conflicts of interest should be taken into consideration,[21] a factor that the district court in *Wit* gave much weight.[22] According to the Ninth Circuit, this amount of weight was inappropriate and should not outweigh UBH's discretion.[23]

Many in the healthcare law field consider the Ninth Circuit's reversal a huge blow to the MH/SA treatment movement.[24] Prior to the reversal, U.S. district courts outside the Ninth Circuit began to adopt the Northern District of California's reasoning by recognizing the need for health insurance companies to utilize the GASC in making coverage determinations.[25] With the decision now overturned, there is the potential that imploring GASC compliance will not only be stymied, but also that insurance providers' discretion in denying MH/SA treatment will be bolstered. If given the opportunity to adjudicate a similar case, Kentucky federal district courts should adopt the California district court's holding and avoid the Ninth's Circuit's reversal. By holding insurance providers accountable to provide coverage based upon the medically-accepted standards, Kentucky can take the necessary step in addressing its ongoing mental health crisis and ameliorate the lack of access to MH/SA treatment that Kentuckians desperately need.

[1] Deidre McPhillips, *90% of US Adults Say the United States is Experiencing a Mental Health Crisis, CNN/KFF Poll Finds*, CNN Health (Oct. 5, 2022), <https://www.cnn.com/2022/10/05/health/cnn-kff-mental-health-poll-wellness/index.html>.

[2] Substance Abuse and Mental Health Svcs. Admin., *Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health 4* (2020), <https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf> p. 4.

[3] Substance Abuse and Mental Health Svcs. Admin., *Key Substance Use and Mental Health Indicators in the United States: Results from the 2020 National Survey on Drug Use and Health 3* (2021), <https://www.samhsa.gov/data/sites/default/files/reports/rpt35325/NSDUHFFRPDFWHTMLFiles2020/2020NSDUHFFR1PDFW102121.pdf> p. 3 [hereinafter SAMHSA 2021].

[4] *About Mental Health*, Ctrs. for Disease Control and Prevention (CDC) (June 28, 2021), <https://www.cdc.gov/mentalhealth/learn/index.htm>.

[5] SAMHSA 2021, *supra* note 3 at 51.

[6] Nat'l All. on Mental Illness, *Mental Health in Kentucky* (2021), <https://www.nami.org/NAMI/media/NAMI-Media/StateFactSheets/KentuckyStateFactSheet.pdf>.

[7] Ctrs. for Disease Control & Prevention Nat'l Ctr. for Health Stats., *Suicide Mortality by State* (last visited Mar. 27, 2023), <https://www.cdc.gov/nchs/pressroom/sosmap/suicide-mortality/suicide.htm>.

[8] Ctrs. for Disease Control & Prevention Nat'l Ctr. for Health Stats., *Drug Overdose Mortality by State* (last visited Mar. 27, 2023), https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm.

[9] Ky.gov Attorney General Daniel Cameron, Tackling the Drug Epidemic (last visited Mar. 27, 2023), <https://www.ag.ky.gov/Priorities/Tackling-the-Drug-Epidemic/Pages/default.aspx>.

[10] *Wit v. United Behav. Health*, No. 14-cv-02346-JCS, 2019 U.S. Dist. LEXIS 35205 (N.D. Cal. Feb. 28, 2019); *Wit v. United Behav. Health*, No. 14-cv-02346-JCS, 2020 U.S. Dist. LEXIS 205435 (N.D. Cal. Nov. 3, 2020).

[11] *Wit*, 2020 U.S. Dist. LEXIS 205435, at *81 (N.D. Cal. Nov. 3, 2020).

[12] *Id.*

[13] *Wit*, 2019 U.S. Dist. LEXIS 35205, at *210 (N.D. Cal. Feb. 28, 2019).

[14] Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (1974) [hereinafter ERISA]. See U.S. Dep’t of Lab., Report to Congress, Annual Report on Self-Insured Group Health Plans 5 (Mar., 2018), <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2018.pdf> (<https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2018.pdf>) (describing how employer-based insurance is one of the most common ways Americans attain health insurance, with about 136 million people covered by ERISA-based plans).

[15] *Id.* at 185.

[16] *Id.* at 203.

[17] *Wit v. United Behav. Health*, No. 14-cv-02346-JCS, 2019 U.S. Dist. LEXIS 35205, at *163–164 (N.D. Cal. Feb. 28, 2019).

[18] Wayne Drash, *In Scathing Ruling, Judge Rips Insurer for Putting ‘Bottom Line’ Over Patients’ Health*, CNN Health (Mar. 6, 2019, 3:04 PM), <https://www.cnn.com/2019/03/06/health/unitedhealthcare-ruling-mental-health-treatment/index.html>.

[19] *Wit v. United Behav. Health*, 58 F.4th 1080 (9th Cir. 2023). This decision replaced an earlier opinion by the same panel of three judges from March of 2022 (see *Wit v. United Behav. Health*, Nos. 20-17363, 21-15193, 20-17364, 21-15194, 2022 U.S. App. LEXIS 7514 (9th Cir. Mar. 22, 2022)).

[20] *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008).

[21] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

[22] *Wit*, 2019 U.S. Dist. LEXIS 35205, at *210.

[23] *Wit v. United Behav. Health*, 58 F.4th 1080, 1097 (9th Cir. 2023).

[24] K. Mejdrich, *Patients Down, But Not Out, After 9th Circ. Benefits Ruling*, Law360 (Feb. 03, 2023), https://plus.lexis.com/document/?pdmfid=1530671&crd=a7f7cf9c-4745-4dae-a4d4-943b3e11cc89&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A67G6-8N81-JTNR-M3GP-00000-00&pdcontentcomponentid=122080&pdteaserkey=&pdslpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&comp=674k&earg=sr0&prid=e91b32b4-58ea-4183-bdda-7330cc0ab38f.

[25] M. DeBofsky, *Behavioral Health Ruling Supports Benefit Claim Appeals*, Law360 (Mar. 17, 2020), https://plus.lexis.com/document/?pdmfid=1530671&crd=d56a07f7-94f6-4e47-b833-bcc2da5fd8d5&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5YFH-SWM1-F60C-X1RH-00000-00&pdcontentcomponentid=122100&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=8e45a803-b484-47c3-afb6-d9512a239089&comp=bfbtk&earg=sr6.

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