IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID WIT, *et al.*,
Plaintiffs-Appellees,
v.

UNITED BEHAVIORAL HEALTH,
Defendant-Appellant,

GARY ALEXANDER, *et al.*,
Plaintiffs-Appellees,
v.

UNITED BEHAVIORAL HEALTH,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California

Nos. 3:14-cv-2346, 3:14-cv-5337
Honorable Joseph C. Spero, Judge

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

Access to mental healthcare is a significant problem in California. According to one study, two-thirds of Californians surveyed reported that they or a close family member sought mental health services but were unable to get them.[1] One reason that individuals cannot access these crucial services is that health plans deny coverage for medically necessary treatment based on clinical guidelines that fall below generally accepted standards of care.

The district court properly recognized that a health plan's coverage decision should account for those generally accepted standards of care. When health plans and administrators erect barriers to mental healthcare, as the district court found United Behavioral Health (UBH) did here, patients are at a greater risk of unemployment, homelessness, substance use disorder, suicide, and incarceration. These consequences have profound and sometimes irreparable effects on the individual patient and their family members. The denial of coverage to which a patient is entitled can also impose substantial financial burdens on the State, which operates programs and distributes public funds that provide mental healthcare

[1] Mental Health in California, Kaiser Family Found., https://www.kff.org/statedata/mental-health-and-substance-use-state-fact-sheets/california/?utm_campaign=meetedgar&utm_medium=social&utm_source=meetedgar.com#:~:text=In%202017%2D2018%2C%205.2%25,5.6%25%20(13.8%20million) (last visited May 11, 2021).

services for its residents, often serving as a provider of last resort when private insurers do not provide coverage.

By tethering medical necessity to generally accepted standards of care, the district court's orders strike at the heart of health plan administrators' practice of limiting healthcare to cut costs. Affirming the district court's remedial order would broaden access to mental healthcare and prevent real costs to the public fisc. When health plans or their administrators limit healthcare access as UBH has done, California's expenditures on mental healthcare necessarily increase.[2]

ARGUMENT

I. ACCESS TO MENTAL HEALTHCARE IN CALIFORNIA IS INADEQUATE

One out of six Californians experience some mental illness.[3] For one out of 24 Californians, their mental illness is so severe that it becomes difficult to function in daily life.[4] However, only one third of adults with mental illness reported receiving mental health treatment or counseling.[5]

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[2] California files this amicus brief in support of Plaintiffs-Appellees pursuant to Federal Rule of Appellate Procedure 29(a)(2).

[3] Wendy Holt, Cal. Health Care Found., Mental Health in California: For Too Many, Care Not There 4 (2018), https://www.chcf.org/wp-content/uploads/2018/03/MentalHealthCalifornia2018.pdf.

[4] *Id*.

[5] *Id.* at 15.

Mental illness not only affects one's daily function but can shorten one's life. Those with serious mental illnesses live on average 10-25 years fewer than those without.[6] This issue is, in part, a result of suicides. For example, 4,300 Californians committed suicide in 2017, a 52% increase from the number in 2001.[7] The increase is more drastic for young Californians, as suicides for those aged 15 to 19 have increased 63% in that same time frame.[8]

Mental health treatment and substance use disorder treatment are viewed favorably by Californians, and the data show that more people would avail themselves of mental healthcare if they had access. About three-quarters of Californians surveyed say that counseling and medical treatment is very effective in helping people with mental health conditions lead healthy and productive lives, and a similar proportion agree with regard to substance use disorders.[9]

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[6] World Health Organization, Premature Death Among People with Severe Mental Disorders 1, https://www.who.int/mental_health/management/info_sheet.pdf; Jocelyn Wiener, *Breakdown: California's Mental Health System, Explained*, Cal Matters (April 30, 2019), https://calmatters.org/explainers/breakdown-californias-mental-health-system-explained/.

[7] *Id.*

[8] *Id.*

[9] Liz Hamel, et al., Kaiser Family Found. & Cal. Health Care Found., The Health Care Priorities and Experiences of California Residents 10 (2019), https://www.chcf.org/wp-content/uploads/2019/02/HealthCarePrioritiesExperiencesCaliforniaResidents.pdf.

However, Californians suffer a lack of access to mental healthcare. The majority of Californians surveyed agree that most people in the state suffering from mental health conditions are unable to access the services they need.[10] Two thirds of surveyed respondents reported that they or a family member have actually sought mental health services but were unable to get them.[11] In California, it is estimated that 73.9% (2,130,000) of adults with mild mental illness, 68.5% (983,000) of adults with moderate mental illness, and 40.6% (507,000) of adults with serious mental illness did not receive mental health treatment in 2017-2018.[12] Among the adults in California who reported an unmet need for mental health treatment in the past year, 35.3% (550,000) did not receive care because of cost.[13] Before the COVID-19 pandemic, the top health issue Californians wanted the state government to address was ensuring access to mental health treatment.[14] And the

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[10] *Id.* at 9.

[11] *Id.*; Holt, *supra* note 2, at 2.

[12] Kaiser Family Found., *supra* note 1.

[13] *Id.*

[14] Eran Ben-Porath, et al., California Health Care Foundation, Health Care Priorities and Experiences of California Residents: Findings from the California Health Policy Survey 4 (2020), https://www.chcf.org/wp-content/uploads/2020/02/HealthPolicySurvey2020.pdf.

need for mental health services has only increased during the COVID-19 pandemic.[15]

Health plans often deny coverage for mental healthcare based on a purported lack of mental necessity. Many plan beneficiaries in California are thus forced to seek out-of-network care for mental healthcare. Californians are four to eight times more likely to go out-of-network for mental healthcare than physical health office visits.[16] And studies show that steeper out-of-pocket costs effectively limit patients' access to mental healthcare.[17] In short, access to affordable mental healthcare in California is insufficient to meet the needs of residents, and this problem is only exacerbated when health plans improperly deny mental healthcare services to patients. And when Californians are able to obtain care, it is frequently

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[15] Nirmita Panchal, et al., *The Implications of COVID-19 for Mental Health and Substance Use*, Kaiser Family Foundation (Feb. 10, 2021), https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/.

[16] Navita Kalair, et al., Policy Memo, *Medical Necessity Standards for Mental Health Parity in California*, 17 J. Sci. Pol. & Gov. 1, 2 (2020), https://www.sciencepolicyjournal.org/uploads/5/4/3/4/5434385/kalair_etal_jspg_v17.2.pdf.

[17] Wendy Yi Xu, et al., *Cost-Sharing Disparities for Out-of-Network Care for Adults With Behavioral Health Conditions*, 2(11) JAMA Netw. Open. e1914554 (Nov. 6, 2019), https://jamanetwork.com/journals/jamanetworkopen/article-abstract/2753980.

because they pay out-of-pocket—something that is out of reach for thousands of Californians.[18]

II. THE DISTRICT COURT'S REMEDIAL ORDER BROADENS ACCESS TO MENTAL HEALTHCARE

The district court found that UBH created and then relied on behavioral health clinical criteria that were narrower than generally accepted standards of care.[19] The court further found that UBH did so to limit coverage and thereby control costs.[20] The court's remedies order—mandating UBH's use of clinical criteria conforming to generally accepted standards[21]—assures class members as well as other UBH beneficiaries that they may appropriately access the mental health benefits to which they are entitled under their health plans.

When a behavioral health plan administrator like UBH evaluates coverage requests with clinical criteria that fall below generally accepted standards of care, there is risk that the requests will be denied for a purported lack of medically necessity, even when the treatments sought are actually medically necessary.[22] A

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[18] *Id.*

[19] 2 ER 334 ("UBH's Guidelines were unreasonable and an abuse of discretion because they were more restrictive than generally accepted standards of care.").

[20] 2 ER 319-325.

[21] 1 ER 8-9.

[22] *See* Appellants' Excerpts of Record (ER) 1 ER 270-310; *see also* Kalair, *supra* note 14 at 2. A 2003 report by the Substance Abuse and Mental Health Services

health plan's use of clinical criteria that is inconsistent with generally accepted standards discourages clinicians from providing certain behavioral health treatments, and dissuades patients from seeking certain treatments if the healthcare is not covered under their health plan.[23] But when clinical criteria conform to generally accepted standards of care, as the district court's orders require UBH to do, it leads to more approvals for medically necessary treatment and, in turn, encourages clinicians to provide medically necessary treatment.[24] What's more, for individuals with mental health and substance use disorders, evidence shows that increased use of effective behavioral healthcare improves the physical and mental wellbeing of those individuals.[25]

Administration (SAMHSA) found that even where a proposed treatment is consistent with professional clinical standards, insurers use their medical necessity criteria to determine the proposed treatment is inconsistent with the insurer's interpretations of relative cost and efficiency and deny coverage. Sara Rosenbaum, et al., Substance Abuse and Mental Health Services Administration., https://hsrc.himmelfarb.gwu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1170&context=sphhs_policy_facpubs.

[23] Studies show a positive correlation between coverage for mental health treatments and the receipt and provision of mental health treatments. Institute of Medicine (US) Committee on the Consequences of Uninsurance, Care Without Coverage: Too Little, Too Late 3-5, 11 (2002), https://www.ncbi.nlm.nih.gov/books/NBK220636/.

[24] Kalair, *supra* note 14 at 2.

[25] Steve Melek, *Addiction and Mental Health vs. Physical Health: Widening Disparities in Network Use and Provider Reimbursement 22* (Nov. 19, 2019), Millman Research Report,

The remedial order also serves to put pressure on administrators of *other* ERISA plans and policies to adhere to generally accepted standards of care in their clinical guidelines. In California, there are approximately 5.6 million people in self-insured ERISA plans that use a plan administrator.[26] The remedial order offers a pointed reminder to those plan administrators that clinical guidelines should conform to generally accepted standards of care.

Amici America's Health Insurance Plans, Inc. (AHIP) contends that the district court's orders will limit employers' ability to provide high quality health coverage.[27] But employers rely upon administrators to utilize appropriate clinical criteria to ensure that their employees are actually receiving high quality health coverage.[28] Overly restrictive clinical criteria can act as a bar to the benefits that

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https://assets.milliman.com/ektron/Addiction_and_mental_health_vs_physical_health_Widening_disparities_in_network_use_and_provider_reimbursement.pdf.

[26] This number represents the Californians in a self-insured ERISA health plan or policy that an insurer administered in 2019. Wilson, *supra* note 15. California law, as of January 1, 2020, prohibits certain health plans and health plan administrators from using clinical criteria for behavioral health and substance use treatments that do not conform to generally accepted standards of care. S.B. 855, 2019-2020 Leg., Reg. Sess. (Cal. 2020).

[27] AHIP Br. at 1.

[28] Health-related work losses are estimated to cost US employers more than $260 billion each year, and may cost some companies more than direct medical expenditures. Rebecca J. Mitchell & Paul Bates, *Measuring Health-Related Productivity Loss*, 14(2) Popul. Health Manag. 93, 93 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3128441/?report=classic.

employers intended for their employees to receive, and that the employees themselves anticipated receiving.

The remedial order also clarifies the contours of the fiduciary duty that behavioral health administrators owe plan members, particularly with respect to clinical guidelines. In so doing, the district court's orders may serve to improve access to mental healthcare for millions of plan members suffering from mental illness and substance use disorder, who otherwise may be precluded from obtaining the mental healthcare benefits to which they are entitled.

In short, the remedial order ensures that class members obtain access to medically appropriate and necessary mental healthcare. Beyond the direct effects for class members, the order may also benefit the 700,000 Californians who are members of an UBH administered plan by encouraging UBH to adhere to generally accepted standards of care going forward.[29] Such a precedent is likely to influence other ERISA plans, thereby improving access for the millions of Californians in self-insured ERISA plans and policies that use a plan administrator.

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[29] This number represents the Californians in a self-insured ERISA health plan or policy that UnitedHealthcare administered in 2019. Katherine Wilson, *California Health Insurance Enrollment*, California Health Care Found. (July 31, 2020), https://www.chcf.org/publication/2020-edition-california-health-insurance-enrollment/. UBH manages behavioral health services for UnitedHealthcare's members. Behavioral Health Resources, UnitedHealthcare, https://www.uhcprovider.com/en/resource-library/behavioral-health-resources.html (last visited May 10, 2021).

III. REVERSAL OF THE REMEDIAL ORDER WOULD LIKELY HARM CALIFORNIA'S PUBLIC FISC

California expends substantial sums on the direct and indirect costs associated with mental healthcare and illness. Some of these costs include public funds spent on individuals with private insurance when the insurers deny medically necessary mental healthcare.

The State spends more on mental health services than any other State. In 2017-2018, California spent $8.3 billion on direct mental health services, $2 billion less than New York, the State with the second highest mental health expenditures.[30]

California directly spends on residents with private insurance. Reports indicate that some California behavioral healthcare providers have directed patients with private insurance to public programs to access a broader range of mental health services because of limited behavioral health coverage.[31] Indeed, publicly-

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[30] Mental Health in California: Understanding Prevalence, System Connections, Service Delivery, and Funding 70 (Cal. Budget and Policy Center ed., 2020), https://calbudgetcenter.org/wp-content/uploads/2020/03/CA_Budget_Center_Mental_Health_CB2020.pdf.

[31] Jocelyn Wiener, *'Go on Medi-Cal to Get That': Why Californians with Mental Illness are Dropping Private Insurance to Get Taxpayer-Funded Treatment*, Cal

funded behavioral health facilities have reported that numerous patients with private insurance seek services at their facilities.[32]

Where behavioral healthcare is limited by coverage, patients often can only access care once symptoms have reached crisis levels, either at emergency centers or, in some instances, in state prisons, and at great cost to California's taxpayers.[33] And when health plans or administrators impose barriers to mental healthcare, like UBH did here, patients are at a greater risk of unemployment, homelessness, substance abuse use, suicide, and incarceration, imposing financial and societal costs borne by the State and its residents.[34] But by conforming clinical criteria to generally accepted standards of care, the district court's orders will expand coverage for mental health conditions, and allow patients to access covered care before their symptoms reach crisis levels.[35]

Aside from these direct costs, untreated mental health and substance use disorders also impose indirect costs to California. For example, mental health

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Matters (July 31, 2020), https://calmatters.org/projects/california-mental-health-private-insurance-medi-cal/.

[32] *Id.*

[33] Kalair, *supra* note 14 at 2.

[34] Policy & Politics in Nursing and Health Care 204 (Diana J. Mason et al., eds., 8th ed. 2021).

[35] Kalair, note 14 at 2.

disorders are associated with a reduction in productivity. In 2019, 20.2% of California adults reported that mental health problems caused a moderate or severe work impairment in the previous 12 months.[36] Specifically, 25% reported that they were unable to work 8-30 days in the last year because of mental health issues; 16.1% said they were unable to work between 31 days and 3 months; and 20.2% said they were unable to work for more than 3 months.[37] Additionally—apart from the immeasurable toll of loss of life—suicide imposes an estimated $4.9 billion per in direct and indirect costs on California.[38]

The district court's orders expand access to mental healthcare to a significant number of Californians and alleviate substantial financial burdens for California. Moreover, greater access results in better mental health and greater productivity. Reversal of the district court's remedial order will undo these benefits to California residents and to the State.

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[36] 2019 California Health Interview Survey, UCLA Center for Health Policy Research, https://ask.chis.ucla.edu (select and search "All of California," "Mental and Emotional Health," "Emotional Well-Being" and "Work Impairment Past 12 Months").

[37] 2019 California Health Interview Survey, UCLA Center for Health Policy Research, https://ask.chis.ucla.edu (select and search "All of California," "Mental and Emotional Health," "Emotional Well-Being" and "Number of Days Unable to Work Due to Mental Problems").

[38] Analysis of California Senate Bill 855 Health Coverage: Mental Health or Substance Abuse Disorders 20 (Cal. Health Benefits Review Program ed., 2020).

CONCLUSION

California respectfully requests that this Court affirm the district court's remedial order.

Dated: May 19, 2021

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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