

## Self-Effacing Judge Asks For Road Map In UnitedHealth Trial

By **Cara Bayles**

*Law360, San Francisco (October 16, 2017, 10:17 PM EDT)* -- A California federal magistrate judge overseeing claims that UnitedHealth Group improperly denied coverage for mental health and substance abuse treatment told class members at the start of their bench trial Monday that he's "just some dumb judge" who would need expert testimony on coverage guidelines to give him "a road map" for their case.

The plaintiffs in two related lawsuits allege 222 of the company's internal guidelines for granting and denying coverage violate the Employee Retirement Income Security Act and California state laws, and rely on experts to show they don't meet industry standards. But U.S. Magistrate Judge Joseph C. Spero told attorneys on both sides that he would not go "line by line" through thousands of pages or search to see if the wording of one provision is identical to language elsewhere that has been deemed problematic by a witness.

"I certainly have my opinions, but I'm just some dumb judge. I'm going to rely on the expert. I'm not going to try to figure it out on my own," Judge Spero said. "The bulk of the plaintiffs' case [is] each of those lines is wrong for the following reasons. If you don't give me that, I'm not going to extrapolate. I expect you to give to me chapter and verse on every single one. ... I should have a road map from the testimony. Similarly, the defendants are going to have to challenge every single one of those. This can't be done on a general basis."

The two consolidated class actions, filed in 2014, claim that UnitedHealth subsidiary United Behavioral Health's guidelines aren't consistent with generally accepted standards of care, violating policyholders' plans and breaching the insurer's fiduciary duty.

In one case, led by named plaintiff Gary Alexander, the claims focus on outpatient treatment, while the other suit, led by David and Natasha Wit, focuses on residential treatment and hospital stays.

The plan holders in each suit beat motions to dismiss filed after Judge Spero determined they had adequately established that UBH acted as a fiduciary when it created the plan guidelines for what mental health and substance abuse treatments would be covered. The judge then granted class certification in September 2015.

During opening arguments Monday, class counsel Caroline Reynolds of Zuckerman Spaeder LLP told the judge that UBH was motivated by money instead of its fiduciary duties under ERISA when it crafted

internal guidelines for granting and denying coverage. She said those internal policies also violated the terms of UBH's health care plans, as well as the state's Mental Health Parity and Addiction Equity Act of 2008, which requires that mental health issues get coverage on par with physical ailments.

"Post-Parity [Act], UBH relied on its guidelines to drive denials, a fact the people who wrote the guidelines knew very well," she said. "This company consistently chose the path that saved it the most money."

But UBH attorney Jennifer Romano of Crowell & Moring LLP rejected that narrative, detailing the long review process through which the guidelines were rewritten on a regular basis. She said UBH gathered comments from physicians, which were then used by a committee to draft recommendations. She noted the minutes of those committee meetings "do not reflect any conversation about profits."

She also contended that the guidelines met the terms of all the health plans, which meant there could be no finding of an ERISA violation. And she noted that the language of the guidelines wasn't binding.

"UBH doctors will test about what the words mean in isolation and what they mean when they're doing their job. These doctors will explain that most care is authorized," she said. "The guidelines are just that — they are guidelines. They are not an algorithm and not a script."

Testimony kicked off with class expert Marc Fishman, a psychiatrist who helped craft the American Society of Addiction Medicine criteria. Those recommendations for matching patients with the level of care they need are considered industry standard, he said, but he added that UBH's guidelines didn't follow the regulations.

He said the company tended to "undermatch" patients with facilities or treatment that offered less than what they needed, and recommended expensive, live-in rehab only when it was necessitated by safety, not by efficacy of treatment. He also said that at times during the class period, which stretches back to May 2011, the guidelines had a "fail first" requirement that people with addiction had to use substances in order to get treatment.

"Perhaps the best analogy is for a chronic medical condition," he said. "You still need to get treatment for chronic diabetes even if it's under control right now, precisely because it is that treatment that's keeping it in control."

On cross-examination, UBH attorney Jeffrey Howard Rutherford of Crowell & Moring read from the guidelines, which said UBH sought to "develop and sustain systems of care including services to manage crises and facilitate recovery, resiliency and well-being," and to "safely, efficiently and effectively assess" patients' needs. He also noted that the regulations specifically stated that "enrollees' specific benefit documents supercede these guidelines."

UBH spokeswoman Tracey Lempner said in a statement that the company tailored its coverage to individual needs.

"Each person seeking treatment for mental health or substance use is unique," she said. "We provide access to evidence-based care in the appropriate setting, based on the patient's specific needs and health benefits plan."

Class attorneys declined to comment Monday.

The policyholders are represented by Caroline E. Reynolds, Jason S. Cowart, D. Brian Hufford, Carl S. Kravitz, Aitan Goelman and Adam Abelson of Zuckerman Spaeder LLP, and Meiram Bendat of Psych-Appeal Inc.

UBH is represented by Nathaniel P. Bualat, Jeffrey Rutherford, Andrew Holmer, April N. Ross and Jennifer S. Romano of Crowell & Moring LLP.

The cases are David Wit et al. v. United Behavioral Health, case number 3:14-cv-02346, and Gary Alexander et al. v. United Behavioral Health, case number 3:14-cv-05337, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dani Kass and Y. Peter Kang. Editing by Breda Lund.