



# California's Mental Health Parity Act

*An under-discovered piece of legislation  
to ensure mental health treatment and coverage*

BY DAVID LILIENSTEIN

The insurance business is one of the largest, if not *the* largest, American industry not subject to federal regulation.<sup>1</sup> This leaves oversight up to the states, and their respective insurance commissioners. However, even the most competent insurance commissioners have limited resources, often leaving the plaintiff's bar as the last resort for insureds to combat unlawful and unfair insurance company claims handling practices.

Insurer misconduct often goes undetected for years before being subject to the glare of litigation. For example, in the 1990s it was the "vanishing premiums" nightmare for life insurance policyholders.<sup>2</sup> Years of broken promises by insurers added up, as did their profits, until lawsuits put an end to this particular scheme. The same held true for disability insurers and their bad-faith claims handling practices.<sup>3</sup> The poster child for this was UnumProvident, whose conduct was so egregious and ongoing that insurance commissioners nationwide conducted their own investigation. The result, in 2005, was the largest fine in California Department of Insurance history, along with an agreement by the insurer to reevaluate thousands of previously denied claims.<sup>4</sup> After such bad publicity, UnumProvident "rebranded" in 2007 and became Unum Group. In that case, the lawsuits continue, seemingly unabated.

More immediately, it is the nation's health insurers that are in the legal

spotlight. Revelations of post claims underwriting and unlawful policy rescissions led to large arbitration verdicts, and cost one California insurer, Blue Cross, \$10 million in fines.<sup>5</sup> Now, for the most part, insureds with life-threatening – and costly – illnesses do not have to fear losing their health coverage because they got sick. Once again, however, the conduct at issue had been going on for years, resulting in tens of millions in profits, before it came under scrutiny.

Now, another area of health insurer misconduct is coming into focus. It concerns mental health benefits and treatment. Specifically at issue is compliance with California's Mental Health Parity Act, which prevents health insurers from offering two tiers of coverage: one for physical sicknesses and illnesses, and the other for mental health care. This issue is so new and the case law so scant that it provides an important, exciting and necessary opportunity for the plaintiff's bar.

## **Mental health parity laws, the overview**

Tens of millions of Americans suffer from some form of mental illness.<sup>6</sup> Unfortunately, many private health insurers traditionally provide levels of coverage for the treatment and care of mental illness that are lower than the available coverage for physical injuries and illnesses. For example, if an insured suffers a heart attack and requires substantial surgery, intensive care, extended hospitalization, rehabilitation and follow-up care such as physical therapy, these services are often covered

in their entirety, regardless of cost. However, if the same insured suffers from a mental illness that requires intense inpatient treatment, he or she often receives substantially lower levels of benefits, if coverage is available at all. As a result, insureds with severe mental illness often exhaust all their mental health benefits before they are fully treated.

Mental Health Parity Laws attempt to fix this problem. Most states passed Parity Laws in the 1990s. California passed its Mental Health Parity Act in 1999. Congress passed a federal Mental Health Parity Law in 1996, and strengthened it last year.<sup>7</sup> Although there are differences between the various state and federal parity laws, the overarching goal of these laws is identical: Parity Laws mandate an end to two-tiered benefits plans by requiring that health insurers provide *equal coverage* for mental health treatment and care as they do for other, physical illnesses and injuries.

## **California's Mental Health Parity Act**

California health care legislation can be, to put it mildly, very confusing. First, health insurance is referred to as disability insurance. Next, practitioners must determine whether a particular health insurance policy or plan comes under the jurisdiction of the Department of Managed Health Care ("DMHC") or the Department of Insurance ("DOI"). The Knox-Keene Act governs the DMHC,<sup>8</sup> while the insurance code governs the DOI. The (very) general rule of thumb is



that the DMHC regulates HMO plans, while the DOI is responsible for PPOs.

Fortunately, California's Mental Health Parity Act is codified in both places: Health and Safety Code section 1374.72 and Insurance Code section 10144.5. It requires, in part, that:

(a) Every health care service plan contract issued, amended, or renewed on or after July 1, 2000, that provides hospital, medical, or surgical coverage shall provide coverage for the diagnosis and medically necessary treatment of severe mental illnesses of a person of any age, and of serious emotional disturbances of a child, as specified in subdivisions (d) and (e), under the same terms and conditions applied to other medical conditions as specified in subdivision (c).

(b) These benefits shall include the following:

- (1) Outpatient services.
- (2) Inpatient hospital services.
- (3) Partial hospital services.
- (4) Prescription drugs, if the plan contract includes coverage for prescription drugs.

(c) The terms and conditions applied to the benefits required by this section, that shall be applied equally to all benefits under the plan contract, shall include, but not be limited to, the following:

- (1) Maximum lifetime benefits.
- (2) Copayments.
- (3) Individual and family deductibles.

(d) For the purposes of this section, "severe mental illnesses" shall include:

- (1) Schizophrenia.
- (2) Schizoaffective disorder.
- (3) Bipolar disorder (manic-depressive illness).
- (4) Major depressive disorders.
- (5) Panic disorder.
- (6) Obsessive-compulsive disorder.
- (7) Pervasive developmental disorder or autism.
- (8) Anorexia nervosa.
- (9) Bulimia nervosa.

(e) For the purposes of this section, a child suffering from, "serious emotional

disturbances of a child" shall be defined as a child who (1) has one or more mental disorders as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, other than a primary substance use disorder or developmental disorder, that result in behavior inappropriate to the child's age according to expected developmental norms, and (2) who meets the criteria in paragraph (2) of subdivision (a) of Section 5600.3 of the Welfare and Institutions Code.

The statute thus makes very clear that mental illness and mental health benefits must be provided on a par with coverage for physical illnesses and injuries.

Note that the California Parity Act does not include treatment for substance abuse. However, substance abuse is often one component of a greater set of mental illnesses or, in children, serious emotional disturbances. Do not rule out Parity Act coverage before fully understanding a client's overall mental health picture.

The California Code of Regulations provides important clarification of the intended scope of the Parity Act. It states that:

(a) The mental health services required for the diagnosis, and treatment of conditions set forth in Health and Safety Code section 1374.72 shall include, when medically necessary, all health care services required under the Act including, but not limited to, basic health care services within the meaning of Health and Safety Code sections 1345(b) and 1367(i), and section 1300.67 of Title 28. These basic health care services shall, at a minimum, include crisis intervention and stabilization, psychiatric inpatient hospital services, including voluntary psychiatric inpatient services, and services from licensed mental health providers including, but not limited to, psychiatrists and psychologists.  
(28 C.C.R. §1300.74.72.)

The key phrase here is "all health care services." This should be read into subsection (b) of the Parity Act. It confirms

that the benefit list there is illustrative and nonexclusive, and that it is the treatment, not the place of treatment, that is important. This is a crucial distinction, since many mental health programs and facilities do not fall neatly into the category of outpatient services or inpatient or partial hospitalization.

### Analyze the policy or plan

Few people know about the Parity Act. Insurers don't mention it. Most physicians don't understand it. So without some legal analysis, your client may not be aware that his or her policy, on its face, violates the statute, and treatment that was denied should instead have been covered.

First go to the benefits portion of the plan or policy. Find the main summary of available benefits. Then look for separate coverage provisions, if any, for mental health care and treatment. These can be either in the main benefits summary, in a separate section, or in a combination of both. Always check the exclusions section of the policy/plan, for what is provided in the main benefits section may be limited by specific exclusions. Below are some common Parity Law violations to look for:

Since what is at issue is parity, look to whether the same level of coverage, or the same limitations, hold true for both physical and mental health care. One common problem area concerns maximum benefits: a policy may offer unlimited benefits on the physical side, or has a very high lifetime benefits limits (such as \$1 million or more), but will severely limit the mental health benefits that are offered. If there is a difference, the policy violates the Parity Act.

Another problem area involves the number of days' coverage is provided for hospital care versus mental health facility treatment. Many policies cover hospitalizations of unlimited duration, but limit treatment in a mental health facility to a specific number of days (either for the life of the coverage or per year). This two-tiered system of benefits is precisely what the Parity Act is meant to end.



Once you have completed your analysis of the policy provisions, and identified Parity Act deficiencies, you will be dealing from a position of strength against the insurer.

### Special coverage for children

Always keep in mind that the Parity Act provides special, and greater, protections for children than it does for adults.<sup>9</sup> The operative language in the statute is "Serious Emotional Disturbances of a Child." If the subject policy does not recite the language of subsection (e) verbatim, look closer. Insurers often summarize or paraphrase the language of section (e), and manage to omit or misconstrue crucial language. Once a child is diagnosed with a condition from the DSM-IV manual, there is a very good chance that he or she will meet one of the criteria referenced in Welfare & Institutions Code section 5300.3(a)(2). Look to past treatment, to school records, and if appropriate, to court records, to determine whether these criteria are met.

### Residential treatment and the narrow interpretation of parity laws

Very often, the only facilities that provide proper care for seriously emotionally disturbed children are residential treatment centers. These are often out-of-state facilities. Treatment can last months, or longer, and is costly – upwards of \$1,000 day. Insurers are naturally aware of this, and many policies exclude residential treatment care entirely. The insurer will cry foul when accused of violating the Parity Act. It will contend that residential treatment facilities are not inpatient hospitals, do not provide partial hospitalization, and cannot be considered outpatient treatment. Therefore, they will claim, residential treatment is not required under subsection (b) of the Parity Act, and the policy exclusion is perfectly lawful.

Some courts agree with this analysis. In *Wayne W. v. Blue Cross of Cal.*, 2007 U.S.

Dist Lexis 81362 (D.Utah 2007), a judge in Utah strictly construed the language of subsection (b) to uphold policy language excluding any coverage for residential treatment. Similarly, in *Harlick v. Blue Shield of Cal. Group Health Plan*, 2010 U.S. Dist Lexis 19294, the court affirmed the denial of treatment for a young lady so afflicted with eating disorders and other mental health problems that she had a feeding tube placed in her so she could gain weight, on the basis that the policy's residential treatment exclusion did not violate the Parity Act.

The problem with *Wayne W.* and *Harlick* is that both courts narrowly construed subsection (b) of the Parity Act, without ever considering the regulations that mandate coverage for all medically necessary health care services. (See 28 C.C.R. §1300.74.72.) Currently, there is no appellate decision on this issue. *Harlick*, however, is currently on appeal before the Ninth Circuit, so time will tell if excluding medically necessary residential treatment for seriously emotionally disturbed children violates the Parity Act.

### Medical necessity

Medical necessity will always be the insurer's defense to allegations of Parity Law violations. Be sure therefore to fully understand why the claim at issue was denied. Was it because the level of coverage wasn't available under the policy, or because the carrier determined that the specific treatment was not medically necessary? Since the Parity Act mandates equal coverage only for medically necessary health care, if no medical necessity exists the insurer will – rightly – contend that Parity Act compliance is not at issue.

### Remember ERISA

To fully understand an insured's rights, it is essential to determine whether an action can be brought under California's consumer-friendly bad-faith laws, or will be preempted by the insurer-friendly federal ERISA statute.<sup>10</sup> If a bad-faith action will lie, then tort damages may be

available upon a showing of an unreasonable claim denial.<sup>11</sup> This of course includes potential recoveries for emotional and financial distress (which, by the nature of a mental health claim denial, can be substantial), punitive damages (ditto), and attorneys' fees. If the policy at issue was purchased as an individual policy, California law will likely govern any action.

ERISA, as most know, is a game changer. No bad faith, no punitive damages. Federal Court. A bench trial, if that. At best, the insurer pays the benefits it should have paid in the first place, possibly along with some attorneys' fees.<sup>12</sup> This provides almost no incentive for an insurer to properly adjudicate mental health claims. If the coverage came from an employer-sponsored group health plan, chances are that ERISA will preempt all state bad-faith liability.<sup>13</sup> As a result, millions of insureds have little remedy in the face of egregious Parity Act violations.

The California Mental Health Parity Act was first enacted in 1999. If you come across a health care plan that does not offer mental health benefits on par with benefits for physical health problems, chances are the conduct at issue has been going on for years. Keep this in mind as you draft your complaint, conduct discovery, and negotiate on your client's – or clients' – behalf.



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*See Endnotes on Next Page*



## Endnotes

<sup>1</sup> See, McCarran-Ferguson Act, 15 U.S.C. §§1011 *et seq.*

<sup>2</sup> See, e.g., *Gaidon v. Guardian Life Ins. Co. of America* (N.Y. 1999) 725 N.E.2d 598, 602-603

<sup>3</sup> See, e.g., *Hangarter v Paul Revere*, 373 F3d 998, 1011 (9th Cir. 2004)

<sup>4</sup> The DOI press release can be found here: <http://www.insurance.ca.gov/0400-news/0100-press-releases/0080-2005/release089-05.cfm>

<sup>5</sup> *Bates v. Health Net Inc.* (2007) LASC Case No. BC321432. Information on the \$10 million fine can be found in the very useful blog of attorney Brian King, at <http://www.erisa-claims.com/blog/latest-on-the-california-rescission-front.cfm>

<sup>6</sup> See, National Institute of Mental Health "The Numbers Count: Mental Disorders in America." (<http://www.nimh.nih.gov/statistics/index.shtml>)

<sup>7</sup> This article only addresses California's Mental Health Parity laws. Note, however, that a huge hole in the Federal Parity law is the exemption it grants to group health plans sponsored by employers with fewer than fifty employees. This effectively rules out application of the federal statute to most small businesses.

<sup>8</sup> California Health & Safety Code §§1340 *et seq.*

<sup>9</sup> See subsection (e) of the Parity Act, *supra*.

<sup>10</sup> The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 *et seq.*

<sup>11</sup> See, e.g., *California Shoppers v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1.

<sup>12</sup> The contention ERISA preempts parity laws was put to rest in *Thompkins v. BC Life and Health Ins. Co.*, 414 F.Supp.2d 953, n.4 (C.D.Cal. 2006).

<sup>13</sup> The (very) general exceptions to this are government-sponsored plans and Church plans.