

K&L GATES

TRIAGE: RAPID LEGAL LESSONS FOR BUSY
HEALTH CARE PROFESSIONALS



Michael P. v. BCBS of Texas

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- Today's case is Michael P. v. Blue Cross Blue Shield of Texas, a federal district court case from the Western District of Louisiana
- I have isolated this case for attention because it shows that the gauntlet of the arbitrary and capricious standard does not always result in frustratingly blind deference to payors

THE RELEVANT FACTS ARE THESE:

- This suit arises from the denial of coverage for acute inpatient (“IP”) mental health services for plaintiff's minor daughter (the “Patient”).
- The Patient was admitted to the Menninger Clinic (“the Facility”) in Houston, Texas, on January 26, 2016, for IP mental health treatment.
- Blue Cross Blue Shield of Texas (Blue Cross) provided coverage for 11 days of IP treatment and then determined that further IP services were not medically necessary, although the Patient continued to receive IP treatment.
- Blue Cross cut off payment despite -- as you will see -- the Patient continued to need IP treatment for a variety of reasons

THE RELEVANT FACTS ARE THESE:

- The Plaintiff (the father of the Patient) appealed the denial of benefits through internal and external review procedures with Blue Cross.
- He then filed suit in the federal district court, alleging that the denial of benefits was an abuse of the Blue Cross' discretion.
- As listeners familiar with health plan appeals know, that all-too familiar term “abuse of discretion” often means the insurance company can get away with about anything
- Fortunately, not here

BIG PICTURE ISSUE

- The court addressed whether Blue Cross acted arbitrarily or capriciously in determining that the Patient's IP treatment was not medically necessary beyond the 11 days Blue Cross was willing to pay for (i.e., February 10, 2016).
- The non-covered period was 39 days – from February 6 to March 21, 2016.

THE TEST

- Blue Cross used the Milliman Care Guidelines (the “Guidelines”) to evaluate the medical necessity of the Patient's treatment.

- Under the relevant Guidelines, IP treatment is considered medically necessary if:
 - a patient risk exists; and
 - the treatment situation is appropriate at that level (i.e., the condition excludes a lower level of care).

- IP care would be justified upon an imminent danger of harm to self where at least one of several listed conditions is present, including: where there is imminent risk for recurrence of a suicide attempt or act of serious self-harm as evidenced by the patient's very recent history of suicide attempts or acts of serious self harm, and absence of sufficient relief of the action's precipitants.

THE HEART OF THE DISPUTE

- The Father's dispute was with Blue Cross findings that the Patient's condition had improved sufficiently as to her danger of suicide or self-harm by the last covered date.

- The Father argued that:

based on the Patient's history and the record of her care at the Facility,

there is insufficient evidence to show that her condition no longer required IP care by February 11, 2016.

MULTIPLE SUICIDE ATTEMPTS

- The record showed the following:
 - The Patient had multiple suicide attempts and DUIs in the year preceding admission.
 - Her last suicide attempt occurred just two (2) days before her admission to the Facility.
 - She had had four (4) IP hospitalizations for suicide attempts in the last two to three years.

BLUE CROSS REVIEWERS CONCEDED SUICIDAL TENDENCIES IN LATE JANUARY

- According to Blue Cross, the Patient met the Guidelines for admission to IP care on January 27, 2016, and was renewed -- but only for another five days on February 1.
- On both dates, the reviewer specifically noted, among other things, “ongoing [[suicidal ideation](#)]” after the Patient's most recent suicide attempt and severe symptoms as evidenced by “paranoid and [auditory hallucinations,] impaired insight, judgement [*sic*], and coping skills.”
- The Blue Cross Reviewer found that IP care was not medically necessary past February 5 and that the Patient could “safely be treated in a lower [outpatient] level of care.
- In contrast, the Patient’s treating psychiatrist and treating psychologist at the Facility both opined that the Patient’s IP treatment was appropriate in terms of type, duration, and level of care for the entire stay -- which outlasted the insurance by 39 days.

SUBSTANTIAL EVIDENCE

- The court concluded that there was some evidence to support Blue Cross's implicit determination that the Patient no longer posed an “imminent risk” of suicide or self-harm by the last covered date and/or that a lower level of care might have been feasible.
- The question was, however, whether that evidence amounted to a substantial amount in support of a denial of benefits.
- Blue Cross asserted that allowing the Patient's history to guide the determination is ill-advised, because “under that reasoning, the Patient would remain in acute IP care for the rest of her life.”
- Blue Cross had the temerity to assert that, despite the fact that the Patient’s IP care concluded less than six weeks after Blue Cross cut her off.
- The Patient then completed intensive outpatient treatment without returning to IP care.

SUBSTANTIAL EVIDENCE (CONT'D)

- Furthermore, the record showed that the Patient has improved dramatically since her treatment in 2016, with no further suicide attempts, and will soon be graduating college.
- The Patient's treatment providers at the Facility endorsed a longer stay, believing that her recurrent suicide attempts required acute IP care and could not be addressed through a short-term stay or lower level of care.
- The Patient's evaluations from around the time of the last covered date showed only modest improvement and she was not downgraded to the lowest level of responsibility at her acute IP facility until February 17.
- While the Patient denied [suicidal ideation](#) and appeared to be adjusting well to the program, she was still severely depressed by the last covered date and expressed ambivalence on her desire to live or die.

REVIEWERS' FALSE CONCLUSIONS

- The insurance company reviewers seem to have seized upon any indication that the Patient did not have active suicidal ideations as signifying an end to the risk that had justified her admission, even though:
 - there were clear signs that she still relied on the restrictions of an IP setting,
 - she had attempted suicide again after several prior IP stays,
 - her treating providers did not believe she could stop her cycle of suicidal and self-harming behavior without a longer stay, and
 - her treating psychiatrist believed that she posed an increased risk of completing suicide based on her history and comorbid substance use disorder.

REVIEWERS' FALSE CONCLUSIONS (CONT'D)

- While the Internal Review Organization (“IRO”) Doctor acknowledged some of these factors in his rationale for allowing an additional five days of coverage, the court concluded that neither he nor the record provides adequate justification for cutting off coverage so far short of the recommended treatment.
- Instead, the IRO Doctor’s decision to extend coverage for only five additional days stands in direct opposition to these risks and to his agreement that the Patient's completed stay at the Facility had “dramatically altered the course of [her] illness” in a way previous treatment could not.
- Accordingly, the evidence was **insufficient to support a denial** of benefits and the plan administrator's decision must be overturned.
- The court granted plaintiff's Motion for Summary Judgment and denied defendants' motion.
- The Patient’s family won and Blue Cross lost.

CONCLUDING OBSERVATIONS

- This case shows that, even where the standard is deferential toward the Payor, the Payor's reviewing doctors cannot ignore the record and the opinions of the treating physicians and institute an arbitrary insurance cut-off date.
- In a mental health case, it means the patient cannot be cut off by the insurance company the minute the Patient's stops overtly articulating that they are suicidal, when the Patient's overall behavior clearly shows they are still meeting IP mental health guidelines.

Today's Presenter



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Research Triangle Park

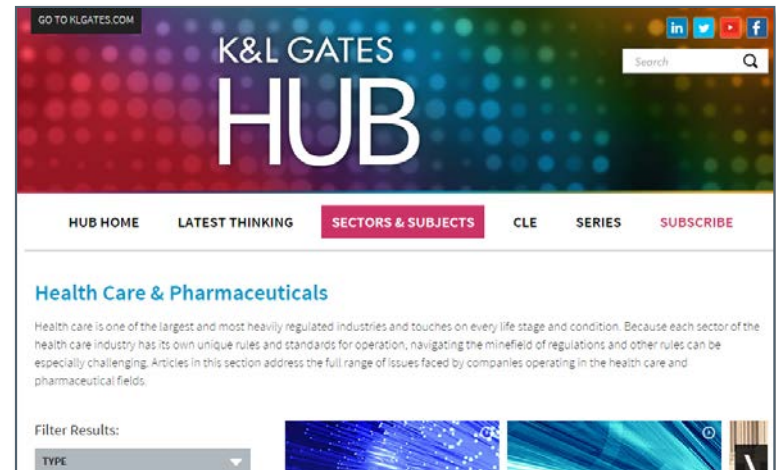
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