

a coverage policy governing Wilderness Therapy.

The ACA mandates coverage specifically and expressly for “breastfeeding support and counseling services” as a preventive-health care benefit. In contrast, no federal regulation, not even the Mental Health Parity Act, mandates coverage of “Wilderness Therapy”. As UHC/UBH acknowledged in *Amy G.*, coverage determinations with respect to behavioral health treatments an insured seeks, which could include Wilderness Therapy among many other treatments, are based on the following case-by-case assessment:

When a member requests benefits for a level of care including an overnight stay, the request is reviewed individually by licensed clinicians. First, a UBH Care Advocate (a licensed masters-level clinician or nurse) collects from the provider the member’s individual clinical information, treatment history, proposed treatment plan and other relevant information, and the Care Advocate reviews available records for the same information. Ex. B at 36:5–11, 108:24–109:20 (Solomon Dep.). The Care Advocate also reviews the coverage terms in the applicable plan and UBH’s clinical guidelines. Ex. A at 8:13–9:5 (Johnson Dep.). If the Care Advocate determines that the service is medically necessary and covered under the plan, the Care Advocate can authorize benefits. Ex. B at 42:20–44:1 (Solomon Dep.). If the Care Advocate determines that the requested service is not medically necessary, including because it is an “unproven” service under the member’s benefit plan, the Care Advocate refers the request to a UBH Medical Director (a licensed psychiatrist) for independent peer review. *Id.* at 107:22–108:22. The Medical Director then seeks to have a peer-to-peer conversation with the treating provider and considers a host of factors to independently evaluate coverage, including the member’s individualized needs, the level of benefits requested, the proposed course of treatment, and the terms of the benefit plan. “Each case is taken individually” and involves “a determination of what is needed for that person at that time.” *Id.* at 167:5–20; *see also id.* at 121:8–123:18.

See UHC Amy G. Opp., Dkt. 68, at pg. 6.²

² To be clear, the above-referenced UBH clinicians *use* UBH’s Clinical Technology Assessment Committee’s (“CTAC”) assessments concerning whether a treatment for behavioral health diagnoses is “proven or medically necessary form of treatment for any behavioral health diagnoses” (*id.* at 5), but the CTAC assessments are not a coverage policy with respect to Wilderness Therapy, which is why the above-referenced process occurs as to each Wilderness Therapy claim.

Necessarily then, the differing coverage determinations and payments in *Amy G.*, on which that opinion is grounded, resulted from the foregoing individual case-by-case claim considerations and processing,³ untethered to an express uniform policy such as HCSC's breastfeeding support and counseling policy in this case. HCSC ignores these seminal differences.

Breastfeeding support and counseling services are expressly *and specifically* a federally mandated, delineated benefits that are required to be covered at no cost.⁴ Therefore, HCSC established and maintained its written Medical and Payment/Coding Policy that expressly stated when it would cover each breastfeeding support and counseling claim submitted. The Policy: expressly excluded out-of-network claims from no-cost coverage; and, expressly provided only limited procedure codes (the CPT codes) that, if identified in the insureds' claim, would trigger payment *specifically for* breastfeeding support and counseling claims. It is that Policy that Plaintiffs and each class member challenge. There was no comparable objective, written policy in *Amy G.*

Here, each breastfeeding support and counseling claim was to be adjudicated under the objective standards set forth in HCSC's written policy, the terms of which Plaintiffs and each Class member challenge (in that, it excluded out-of-network claims and the codes were too limited). That HCSC determined to make exceptions to its written policy (and thus some breastfeeding claims may have been paid, which is not what occurred in *Amy G.*) does not change the analysis.

The fact that some Class members' claims were processed or paid does not alter the fact

³ Such insurance claim processing is dictated and necessitated by the nature of the condition for which treatments, like Wilderness Therapy and other behavioral health therapies are sought, namely, the treatment of mental health conditions.

⁴ While one may not agree with the ACA's preventive health coverage mandate, or the inclusion breastfeeding support and counsel services as a delineated preventive service required to be covered, it is the law.

that HCSC's written policy was fundamentally deficient or render the class sought here any less certifiable under Rule 23. A contrary determination would run counter to well-established law that a product defect is no less a defect just because it does not materialize for all purchasers or users.⁵ To hold otherwise, would open the door to any insured (and any corporate defendant) taking affirmative steps to preemptively defeat the applicability of Rule 23 by treating some insureds' or consumer's claims differently than others, to create a contrived lack of commonality.

At bottom, as Plaintiffs' papers demonstrate and *Amy G.* highlights, the members of the Class in this Action were subject to the same Policy, rendering certification under Rule 23(a), (b)(1) and (b)(2) of the narrowed Classes and sub-Classes factually and legally supported. *See* Plaintiffs' renewed Motion (Dkt. 145, 148, 171). Accordingly, Plaintiffs request that the Court overrule HCSC's unfounded assertions, and grant Plaintiffs' Motion for Class Certification.

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⁵ *See Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) (rejecting the notion that individual manifestations of a defect precluded resolution of the claims on a class-wide basis). In *Wolin*, the Ninth Circuit concluded that the district court "erred when it concluded . . . that certification is inappropriate because [plaintiffs] did not prove that the defect manifested in a majority of the class's vehicles. . . ." *Wolin*, 617 F.3d at 1173; *see also Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (holding that the possibility of including people who have not been injured by defendant's conduct does not preclude class certification "because at the outset of the case many members may be unknown, or the facts bearing on their claims may be unknown.

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CERTIFICATE OF SERVICE

I, Kimberly M. Donaldson Smith, an attorney, hereby certify that on June 15, 2020, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Kimberly M. Donaldson-Smith
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