

*Special Commentary*

***Wit-lash: The 9<sup>th</sup> Federal Circuit Court's  
Threat to Behavioral Health Coverage in ERISA Plans***

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Mental health care and behavioral health care access have, for many years, been recognized as ongoing issues of national significance, even for those with otherwise adequate health insurance. For Americans who are insured through their employers, a recent decision by a three-judge panel of the 9<sup>th</sup> Circuit Court of Appeals<sup>1</sup> threatens coverage of ongoing mental/behavioral health services at levels that presently adhere to national guidelines.

Employer-sponsored self-insured health plans are regulated by the U.S. Department of Labor under the Employee Retirement Income Security Act (ERISA).<sup>2</sup> The regulatory approach draws from principles of trust law in prioritizing the integrity of pooled resources over individual beneficiaries' entitlements. Thus, for example, beneficiaries who are physically harmed by a plan administrator's denial of medically necessary care are only compensated by the monetary value of the services they were denied.

The original case<sup>3</sup> arose from the denial of various behavioral health benefits to a large number of ERISA plan beneficiaries by United Behavioral Health (UBH). The beneficiaries claimed and were awarded class action status based on common elements in their cases, forming three distinct classes for the purposes of the original litigation. The defendants moved for summary judgment, asking the court to dismiss the case based on the failure of the plaintiffs to meet the basic standards for adjudication of the specific issues raised. The 9<sup>th</sup> Circuit panel decision reverses a very detailed magistrate judge's opinion<sup>4</sup> from the federal District Court for the Northern District of California, which upheld ERISA beneficiaries' entitlement to the full range of benefits under national guidelines and required UBH to reprocess tens of thousands of claims.

In essence, the 9<sup>th</sup> Circuit panel opinion finds that UBH and the plans' administrators fulfill their ERISA duties when they cover benefits that do not diverge from the national guidelines, regardless of whether coverage extends to the full range of services addressed by the guidelines. Both national provider organizations and patient advocacy organizations have expressed alarm and outrage at this finding, and a further appeal to the full 9<sup>th</sup> Circuit Court of Appeals appears likely. However, it is important to keep the fundamental principles of ERISA law in mind. To the extent that ERISA prioritizes maintaining the pool of employee benefit resources over individual entitlements, the current opinion could be defended as consistent with a long line of similar cases.

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<sup>1</sup> *Wit v. United Behavioral Health*, 9<sup>th</sup> Cir. (Cal.), March 22, 2022, 2022 WL 850647.

<sup>2</sup> Kathryn L. Moore, *Understanding Employee Benefits Law* (Carolina Academic Press 2d ed. 2020).

<sup>3</sup> *Wit v. United Behavioral Health*, Case no. 14-cv-02346-JCS, N.D. Cal. (Nov. 3, 2020), 2019 WL 1033730

<sup>4</sup> *Id.*

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## TRANSCRIPT OF INTERVIEW WITH PROFESSOR JULIA COSTICH

Transcript of James Unland's Interview with Julia Costich,  
Professor in the Department of Health Service Management and Policy  
at the University of Kentucky

UNLAND: It's my pleasure to be joined by Julia Costich, an attorney and a professor in the Department of Health Management and Policy at the University of Kentucky. She has some familiarity with the case at hand, *Wit v. United Behavioral Health*. Thank you for joining me for a minute, Julia.

PROFESSOR

COSTICH: Thank you.

UNLAND: I first heard about this case from somebody in what I would call the mental health industry—a psychologist who said, “have you heard what's going on in California about this case and the fact that it may cause people to have more limited mental health coverage?” And I'm just trying to get some background on this and why people, including some publications, are giving this case a lot of attention. So, anything you can tell me about it, I'd be grateful, and I know my readership would be.

PROFESSOR

COSTICH: Thank you. The distinctive feature of this case is that it concerns a group of employer-sponsored, self-insured health plans. This kind of health plan is very common and covers something over 40% of insured people in the United States, but what a lot of people who have this kind of coverage don't realize is that it is not subject to all of the requirements of state law or even some of the requirements of federal insurance law. Instead, this kind of plan is regulated by the United States Department of Labor. And the mental model for the regulatory approach is pension plans—employer-sponsored pension plans. The concept with the pension plan is that everybody should have access to whatever they are entitled to with regard to the benefits from the pension plan.

In the mid-seventies, there was a whole wave of bankruptcies among pension plans, and so Congress enacted the Employee Retirement Income Security Act—ERISA, as we call it, and these health insurance plans -- although they're not pension plans -- are covered by ERISA under the category of what ERISA calls “employee welfare plans.”

The concept here is that the pool of benefits available should be adequate for all people entitled to coverage. And this means that “recovery” in the case of some kind of administrative snafu that actually hurts the patient is limited to the value of whatever the covered benefit that was denied might have been. This amount is going to be a lot less than the normal medical malpractice recovery because these claims are exempt from state tort law. They drive people crazy because there are many cases, as in the *Wit* case, where the standard of coverage seems to be inequitable or even just inappropriately stingy. In this case, the issue was whether United Behavioral Health was obligated to cover all the services that were recommended in the guidelines from the American Academy of Addiction Medicine, and these guidelines are a standard of care in a lot of health benefit plans.

But the judge in the *Wit* case said that as long as United Behavioral Health covered a reasonable subset of these benefits, there was nothing that would mandate that they cover everything recommended by these nationally recognized clinical guidelines. So I think you can see why this raised a stink. Sorry if I'm a bit long-winded but I wanted to give the context, as well as the finding of the Court.

UNLAND: That's very, very important. I urge you to make any other points that you wish to make. Where does the case itself stand now? I'm told that the Federal Ninth Circuit, which is, I think, in San Francisco—it may make some ruling soon. Or it has been asked to.

PROFESSOR

COSTICH: Yes. The result has been appealed to the full Ninth Circuit. This ruling was just from a three-judge panel of the Ninth Circuit, and it is strikingly brief. But if anybody's interested, I do encourage you to read the original U.S. Magistrate Judge's opinion in the case as it was originally filed. That judge found in favor of the plaintiffs, and it was that decision that was reversed by the 3-judge panel of the Ninth Circuit.

I fully expect that the full Ninth Circuit will be asked to rule on this case and, much as I hate to say it, I am not particularly optimistic that they will find that the denial of the full range of benefits will be a violation of the plan administrator's fiduciary duties. ERISA plan administrators have pretty broad discretion and, once again, keep in mind the objective with ERISA plans is to protect the integrity of the pool of funds available for everybody.

So, it reminds me sometimes of, you know, trying to hand out pieces of cake to 6-year-olds, and everybody is supposed to get exactly the same size piece of cake, so—or at least the size piece of cake that they are entitled to. It'll be interesting to see whether the full Ninth Circuit can find a way to uphold the original decision of the U.S. Magistrate Judge.

UNLAND: And what did the original decision say, basically?

PROFESSOR

COSTICH: The original decision said that the plan administrator needed to cover the full range of benefits according to the nationally recognized clinical guidelines.

UNLAND: I'm now understanding, from your remarks and this background, why people in what might be called the mental health services or psychological services industry are so intent on watching this case.

PROFESSOR

COSTICH: Right because this decision would affect a lot of Americans in employer-sponsored, self-insured plans. So, if you work for, you know, Ford or General Motors or Toyota or United Parcel or whatever...you know, if you work for a large multi-state employer your health coverage very likely falls into this category.

UNLAND: Well, I am not an expert in mental health but I have read countless articles and studies in recent years, and see commercials and so on, and news reports about the growing importance -- if anything, the tremendously growing importance of mental health and mental well-being issues. It sounds like if this decision goes against those who want to have a full battery of benefits--is the only recourse then, is to go to Congress?

PROFESSOR

COSTICH: Yes. And that would be a very heavy lift indeed. ERISA has stood the test of time for nearly 50 years. So it's going to be tough. I think where we're going to see this play out, initially, is in coverage for residential treatment for people with substance use disorders, and other mental health conditions, because that's the most expensive kind of treatment.

UNLAND: But over the decades, including during my lifetime, the acceptance of that kind of treatment has grown tremendously.

PROFESSOR

COSTICH: Yes, and I think there's been some pushback in recent years to the whole de-institutionalization movement that we saw in the 70s and 80s when nearly all the mental health facilities closed practically all of their beds. And what we found is then we had a tremendous increase in people who were on the street with no place to go. There are a lot of social and economic factors in play here. So, in ERISA jurisprudence, in the kind of law that judges make that kind of consideration is not primary and it annoys people to death. In the history of these ERISA cases, some judges went out of their way to find some grounds to uphold the plaintiff's case,

because they're so frustrating because, obviously, the plaintiff has suffered egregious harm. And yet, all the plaintiff can get back is, you know, \$30,000.00 that the operation would have cost or whatever.

UNLAND: Well look, I want to thank you for taking the time to speak with me, and I commend to our readers your very intelligent article. It is not an exhaustive treatment of the history of this case but it certainly will give our readers a picture of where we are now, and I intend to look further into some of the possible consequences of all this, one way or the other.

I want to thank you very much. We've been talking with Julia Costich, a professor in the Department of Health Management and Policy at the University of Kentucky, an attorney, and we may be in further touch on this. Thank you for your time.

PROFESSOR

COSTICH: Thank you.