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## OUTLOOK

### Insurers should pay for addiction treatment. They won't.

Lawyer D. Brian Hufford says the Trump administration could use existing laws to force coverage

In an October report on opioids' impact on New England communities, The Post's Joel Achenbach described the nation's opioid crisis as "a decentralized disaster that authorities understand they cannot solve with handcuffs and prison bars alone." Indeed, pretty much everyone, up to and including President Trump, is on board — at least rhetorically — with the idea that the crisis must be tackled in a manner more comprehensive than the usual law enforcement approach.

Last month, Trump declared the epidemic a public health emergency, calling it the "worst drug crisis in American history," adding that "addressing it will require all of our effort, and it will require us to confront the crisis in all of its very real complexity."

Strong words. Too bad Trump's administration won't use a tool that is immediately available and could bring treatment to millions of Americans.

Nearly a decade ago, our country took a remarkable step forward on behavioral care. With passage of the Wellstone-Domenici Mental Health Parity and Addiction Equity Act, Congress said group health insurance plans and insurance issuers that provide benefits for mental health and substance use disorders cannot treat such benefits more restrictively than they treat medical services. In other words, treatment claims related to opioid addiction, depression, anxiety and other behavioral conditions must get the same level of coverage as physical health claims. Two years later, within the Affordable Care Act, a.k.a. Obamacare, the parity requirement was extended to individual plans, and behavioral health coverage was included as an "essential health benefit" in ACA plans.

Despite this extraordinary public policy fo-



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**President Trump arrives in the East Room of the White House on Oct. 26 to speak and sign a presidential memorandum declaring the opioid crisis a national public health emergency.**

cus, we face an addiction crisis with no end in sight. Why are so many people suffering and so few getting treated? Within the complex answer is one glaring contributor: the destructive behavior of for-profit insurance companies.

As a litigator who has made a career of fighting for patients and providers, I've seen how pervasive this conduct is. Thanks to private lawsuits and action by states, the evidence is indisputable. New York has led the country in this fight, and its investigation of ValueOptions, an administrator of behavioral claims for 2.7 million people, found "denials were nearly twice as common for mental health claims than for other medical claims submitted" and "nearly four times as common" for addiction treatment. Another investigation revealed that, during one year, Blue Cross Blue Shield subsidiary Excellus denied inpatient addiction treatment "seven times as often" as inpatient medical services. The state said its action against Emblem Health

for "widespread violations" of parity laws could lead to more than \$30 million being returned to members.

This problem is so extensive because the largest insurers are primarily incentivized to maximize profits for shareholders, not to ensure proper coverage for the insured. Confronted with laws broadening behavioral coverage, insurers put their lawyers and lobbyists to work, not to determine how to best deliver on Congress's intent, but to find every possible way to undermine it. And it's worked. Consider that private insurers cover 54.4 percent of overall health-care spending costs — but only 20.8 percent of addiction treatment costs — according to a 2012 Columbia University study. That study also found individuals with private insurance are three-to-six times less likely than those with public insurance to receive specialty addiction treatment. Insurers' avoidance of legal obligations cannot be blamed on the Parity Act itself but on a failure to enforce it. On

Oct. 20, in testimony before the President's Commission on Combating Drug Addiction and the Opioid Crisis, Labor Secretary Alex Acosta stressed the opioid epidemic was the "number one issue" in joblessness, effectively sidelining millions of workers. But, while acknowledging that his department is responsible for enforcing the Act, he suggested it can only enforce the law employer by employer and is unable to directly challenge insurers.

In claiming such limited authority, the secretary strikingly overlooked a fundamental element of federal law. In fact, the Department of Labor has considerable authority to bring claims against insurers — it simply must choose to use it.

The law around this can get complicated — but at its heart are provisions within the Employee Retirement Income Security Act, which governs all private employer benefit plans. Under ERISA, an insurer that administers such a plan is a fiduciary, meaning it must comply with all requirements and remedies articulated by ERISA, including the Parity Act, which was incorporated into

ERISA and must act "solely in the interest of" insured parties. Not only are insured people allowed to sue to enforce ERISA, but the Labor Secretary is explicitly authorized to bring civil action against an insurer that violates ERISA.

This gives the administration a powerful weapon to address the opioid crisis. Enforcement of the Parity Act through ERISA would help ensure those who suffer from addiction can obtain effective treatment — treatment that should already be available under their health insurance policy. But that won't happen if Acosta maintains that his department cannot directly sue insurers.

The U.S. Court of Appeals for the Second Circuit weighed in on this issue in 2015 in a case my colleagues and I brought, *New York State Psychiatric Association, Inc. v. United-Health Group*, challenging whether an insurance company, acting as a claims administrator for an employer-funded plan, can be sued for Parity Act violations. The court's precedent-setting ruling struck down insurers' primary legal defense, saying an insurer that makes coverage decisions as administrator

of an ERISA plan is unquestionably a proper defendant in such cases. Indeed, the Second Circuit expressly rejected the argument of UnitedHealth, one of the nation's largest insurers, that it could not be sued directly for Parity Act violations. To the contrary, as the court held, UnitedHealth was deemed "a proper defendant" under ERISA for violating its fiduciary obligations by adopting policies which violated parity.

The failure — or unwillingness — to use this weapon as part of a national opioid strategy flies in the face of Trump's pledge to spend "a lot of time, a lot of effort and a lot of money on the opioid crisis." So far, the only effort to enforce key Parity Act provisions has come from private attorneys — but the lawsuits I and others are pursuing are not enough. Initiatives announced by Trump, or by Congress, may take hold at some point, but there's no reason for our leaders to wait. The law is there right now. It just needs to be enforced.

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