

MARYLAND INSURANCE COMMISSIONER *
200 ST. PAUL PLACE, SUITE 2700 *
BALTIMORE, MARYLAND 21202 *

V. *

OPTIMUM CHOICE, INC. *
800 KING FARM BLVD., MD051-1000 *
ROCKVILLE, MARYLAND 20850 *
NAIC #96940 *

CASE NO.: MIA-2020-04-039

UNITEDHEALTHCARE INSURANCE *
COMPANY *
185 ASYLUM AVENUE *
HARTFORD, CONNECTICUT 06103 *
NAIC# 79413 *

CASE NO.: MIA-2020-04-040

UNITEDHEALTHCARE OF THE *
MID-ATLANTIC, INC. *
800 KING FARM BLVD., MD 051-1000 *
ROCKVILLE, MARYLAND 20850 *
NAIC # 95025 *

CASE NO.: MIA-2020-04-041

INVESTIGATION NO.: MCLH-133-2017-I

* * * * *

CONSENT ORDER

This Consent Order ("Order") is entered into by the Maryland Insurance Commissioner ("Commissioner") and Optimum Choice, Inc., UnitedHealthcare Insurance Company, and UnitedHealthcare of the Mid-Atlantic, Inc., (collectively "Respondents" or "UHC") pursuant to §§2-108 and 2-204 of the Insurance Article, Md. Code Ann. (2017 Repl. Vol. & Supp.) ("Insurance Article"), to resolve the above-captioned matter, in lieu of litigation, before the Maryland Insurance Administration ("Administration").

Findings

1. At all times relevant to this Order, UnitedHealthcare Insurance Company ("UHC"), has held and currently holds a Certificate of Authority from the Administration to act as an insurer in the State of Maryland.

2. At all times relevant to this Order, UnitedHealthcare of the Mid-Atlantic, Inc. ("UHCMA") and Optimum Choice, Inc., ("OCI") have held and currently hold Certificates of Authority to act as health maintenance organizations in the State of Maryland.

3. At all times relevant to this Order, United Behavioral Health, Inc., operating under the brand Optum, is a provider network that acted as the managed behavioral health organization for Respondents.

4. A survey was sent in October, 2017, to Respondents regarding compliance with the federal Mental Health Parity and Addiction Equity Act ("MHPAEA")¹. After receiving the survey response from Respondents, the Administration opened investigation MCLH-133-2017-1 to gather additional information necessary to determine compliance with the federal rule.

5. Additional information relevant to this Order was received through an examination of United Behavioral Health, Inc., regarding Respondents' health maintenance organizations UHCMA (examination number: MCLH-4-2018-E) and OCI (examination number: MCLH-5-2018-E).

6. On November 14, 2018, the Administration queried the HMO Respondents, UHCMA and OCI, through examinations MCLH-4-2018-E and MCLH-5-2018-E about how the OON reimbursement rates are calculated for these HMO products, in consideration of §19-710.1 of the Health-General Article.

¹ See Federal Register, Volume 78, No. 219, published November 13, 2013.

7. In the same query, the Administration asked if UHC applied rate reductions (25%-35% for non-physician behavioral health providers) uniformly, regardless of whether the OON reimbursement rate is dictated by 125% of the annual rate schedule or 140% of CMS rate, under § 19-710.1(b)(2)(iii) of the Health-General Article.

8. On November 21, 2018, in response to the Administration's query, UHC stated, "[r]ate reductions are applied uniformly independent of whether the reimbursement rate is 125% of the annual rate schedule or 140% of the CMS rate."

9. On December 19, 2018,² in response to additional queries by the Administration, UHC provided a chart including 26 M/S provider types (both physician and non-physicians including Nurse Practitioner and Physician's Assistant) that demonstrated that Respondents paid all of these M/S providers the same reimbursement rate for CPT 99203 when billed OON for a UHCMA or OCI member.

10. On January 23, 2019, the Administration asked Respondents the following:

For HMO products, OON reimbursement for M/S providers is not varied for E/M codes or other codes where different types of M/S providers may bill the same code (example 99203 in Query 5C³). However, for HMO products, OON reimbursement for MH/SUD providers is reduced based on provider type. . . . Please explain how this practice complies with MHPAEA.

11. On February 11, 2019, in response to the Administration's inquiry, a representative of Respondents stated:

This practice complies with MHPAEA because OON provider reimbursement for HMO products is based on Maryland regulation, and for MH/SUD providers, when payment is based on CMS published rates, CMS similarly takes a reduction for non-physician provider types.

² Query 5C

³ Response sent December 19, 2018

12. In the same response, Respondents cited to MA Payment Guide for Out of

Network Payments at 13, which is a guideline created by CMS for OON Medicare payments. This guide states, in pertinent part, at page 13 cited by Respondents:

Medicare usually pays as follows for non-physician practitioner independent billings;

Physician Assistants: 85% MFS
Nurse Practitioner: 85% MFS
Clinical Nurse Specialist: 85% MFS
Registered dietitian: 85% MFS
Clinical Psychologist: 100% MFS
Clinical Social Worker: 75% MFS

13. The Administration also asked Respondents to explain why, for HMO OON reimbursement, [UHC]'s reductions to OON non-physician MH/SUD providers are greater than those applied by CMS, as stated in the policy. The Administration asked Respondents to explain how this practice complies with the requirements of Section 19-710.1 of the Health-General Article.

14. On February 11, 2019, in response to the Administration's inquiry, Respondents stated:

"[t]he [UHC] reductions are consistent with section 19-710.1 because CMS also takes a reduction for non-physician provider types."

15. The Administration investigated Respondents for a year and seven months before it obtained all of the information it needed to understand how Respondents were developing reimbursement rates for OON providers.

Conclusions of Law

16. Based on the results of the Investigation and Examination, the Administration concluded that UHCMA and OCI violated Section 19-710.1 of the Health-General Article by: (1) aggregating claims paid to dissimilar health care providers for the same CPT to determine the average rate of reimbursement; and (2) for using a greater percentage of reduction for the

reimbursement of mental health care providers than the percent reduction used for other healthcare providers using the same CPT.

17. Section 19-710.1 of the Health-General Article provides in pertinent part:

(a)(8) "Similarly licensed provider" means:

(i) For a physician:

1. A physician who is board certified or eligible in the same practice specialty; or

2. A group physician practice that contains board certified or eligible physicians in the same practice specialty;

(ii) For a health care provider that is not a physician, a health care provider that holds the same type of license.

(b) In addition to any other provisions of this subtitle, for a covered service rendered to an enrollee of a health maintenance organization by a health care provider not under written contract with the health maintenance organization, the health maintenance organization or its agent:

(2) Shall pay the claim submitted by:

(iii) Any other health care provider:

1. For an evaluation and management service, no less than the greater of:

A. 125% of the average rate the health maintenance organization paid as of January 1 of the previous calendar year in the same geographic area, as defined by the Centers for Medicare and Medicaid Services, for the same covered service, to similarly licensed providers under written contract with the health maintenance organization;

or

B. 140% of the rate paid by Medicare, as published by the Centers for Medicare and Medicaid Services, for the same covered service to a similarly licensed provider in the same geographic area as of August 1, 2008, inflated by the change in the Medicare Economic Index from 2008 to the current year; and

2. For a service that is not an evaluation and management service, no less than 125% of the average rate the health maintenance organization paid as of January 1 of the previous calendar year in the same geographic area, as defined by the Centers for Medicare and Medicaid Services, to a similarly licensed provider under written contract with the health maintenance organization for the same covered service.

(c) For the purposes of subsection (b)(2)(iii) of this section, a health maintenance organization shall calculate the average rate paid to similarly

licensed providers under written contract with the health maintenance organization for the same covered service by summing the contracted rate for all occurrences of the Current Procedural Terminology Code for that service and then dividing by the total number of occurrences of the Current Procedural Terminology Code.

* * * *

(i) The Maryland Insurance Administration may take any action authorized under this subtitle or the Insurance Article, including conducting an examination under Title 2, Subtitle 2 of the Insurance Article, to investigate and enforce a violation of the provisions of this section.

(U) In addition to any other penalties under this subtitle, the Commissioner may impose a penalty not to exceed \$5,000 on any health maintenance organization which violates the provisions of this section if the violation is committed with such frequency as to indicate a general business practice of the health maintenance organization.

18. Section 19-729 of the Health-General Article provides in pertinent part:

(a) *Prohibited acts.* - A health maintenance organization may not:

(1) Violate any provision of this subtitle or any rule or regulation adopted under it;

(2) Fail to fulfill its obligations to provide the health care services specified in its contracts with subscribers[.]

19. Section 19-730 of the Health-General Article states in pertinent part:

(a) *In general.*- If any person violates any provision of § 19-729 of this subtitle the Commissioner may:

(1) Issue an administrative order that requires the health maintenance organization to:

* * *

(ii) Fulfill its contractual obligations[.]

* * *

(2) In addition to suspending or revoking a certificate of authority:

(i) Impose a penalty of not less than \$100, but not more than \$125,000 for each violation; and

(ii) Order the health maintenance organization to pay restitution to any person who has suffered financial injury because of the violation[.]

20. Section 4-113 of the Insurance Article states in pertinent part:

(b) *Discretionary grounds.*- The Commissioner may deny a certificate of authority to an applicant or, subject to the hearing provisions of Title 2 of this article, refuse to renew, suspend, or revoke a certificate of authority if the applicant or holder of the certificate of authority:

- (5) refuses or delays payment of amounts due claimants without just cause[.]
- (d) Instead of or in addition to suspending or revoking a certificate of authority the Commissioner may:
 - (1) impose on the holder a penalty of not less than \$100 but not more than \$125,000 for each violation of this article; and
 - (2) require the holder to make restitution to any person who has suffered financial injury because of the violation of this article.

21. The Administration finds that UHMCA and OCI violated § 19-710.1 and § 19-729 of the Health-General Article. UHIC violated § 4-113(b)(5) of the Insurance Article.

22. In order to resolve the issues between the parties and avoid the time and expenses associated with litigation, the parties have decided to enter into this Consent Order. UHC asserts that entering into this Consent Order is not to be construed as an admission of liability with respect to the violations found by the Insurance Commissioner in this case.

Order

WHEREFORE, for the reasons set forth above, it is **ORDERED** by the Commissioner and consented to by Respondents, that

A. Pursuant to § 4-113 of the Insurance Article, based on consideration of COMAR 31.02.04.02:

1. UHIC shall pay an administrative penalty to the State of Maryland for the violations stated herein in the amount of Sixty Two Thousand Five Hundred Dollars (\$62,500.00), within twenty business days of the effective date of this Order.

2. Administrative penalties shall be made payable to the Maryland Insurance Administration and shall identify the case by number. Unpaid penalties will be referred to the Central Collection Unit for collections.

B. Pursuant to § 19-730 of the Health-General Article, based on consideration of COMAR 31.02.04.02:

1. UHCMA shall pay an administrative penalty to the State of Maryland for the violations stated herein in the amount of Thirty Thousand Dollars (\$30,000.00), within twenty business days of the effective date of this Order.

2. Administrative penalties shall be made payable to the Maryland Insurance Administration and shall identify the case by number. Unpaid penalties will be referred to the Central Collection Unit for collections.

C. Pursuant to §19-730 of the Health-General Article, based on consideration of COMAR 31.02.04.02.

1. OCI shall pay an administrative penalty to the State of Maryland for the violations stated herein in the amount of Thirty Thousand Dollars (\$30,000.00), within twenty business days of the effective date of this Order.

2. Administrative penalties shall be made payable to the Maryland Insurance Administration and shall identify the case by number. Unpaid penalties will be referred to the Central Collection Unit for collections.

D. Respondents shall institute a plan for paying restitution to members for behavioral health claims affected by the violations found by the Administration as set out in Paragraph Number 21 above, for paid claims from April 1, 2016 through March 31, 2019.

1. Respondents shall re-adjudicate behavioral health claims affected by the violations found by the Administration as set out in Paragraph Number 21 above, for paid claims from April 1, 2016 through March 31, 2019 to identify members who incurred increased out-of-pocket expense(s) for behavioral health claims during that period ("eligible members").

2. Respondents shall make restitution payments to eligible members, subject to the coverage terms, conditions, and exclusions that applied to the

member's original claim.

3. Respondents shall provide written notice to each eligible member that accompanies the restitution payment that acknowledges the restitution is due to an adjustment in the reimbursement amount due for claims for certain health care services received from out of network providers. Respondents shall submit the notice to the Administration for approval prior to issuing the notice. The Administration shall return the notice with any corrections within thirty days from the date of receipt.

4. Respondents shall include interest owed under § 15-1005 of the Insurance Article in each restitution payment.

5. Respondents shall provide the Administration with a list of amounts of restitution payments made, including interest paid, and proof of restitution payments to Associate Commissioner Erica Bailey, Maryland Insurance Administration, 200 St. Paul Place, Baltimore, Maryland 21202 within six months after the Administration approves the notice to members.

E. UHCMA and OCI shall also submit a corrective action plan to the Administration detailing how UHCMA and OCI will comply with Section 19-710.1 of the Health-General Article within 90 days of the effective date of this Order.

F. UHIC shall also submit a corrective action plan to the Administration detailing how UHIC will comply with Section 4-113 (b)(5) of the Insurance Article within 90 days of the effective date of this Order.

G. Respondents agree that no amounts paid pursuant to this Order shall be included in or recoverable as expenses in any rate filing filed with the Administration or any other regulatory authority.

H. The executed Order and administrative penalty shall be sent to the attention

of: Erica J. Bailey, Associate Commissioner, Compliance & Enforcement Unit, 200 St. Paul Place, Suite 2700, Baltimore, MD 21202. The check shall include the market conduct investigation number MCLH-133-2017-1.

I. For the purposes of the Administration and for any subsequent administrative or civil proceedings concerning Respondents, whether related or unrelated to the foregoing paragraphs, and with regard to requests for information about Respondents made under the Maryland Public Information Act, or properly made by governmental agencies, this Order will be kept and maintained in the regular course of business by the Administration. For the purposes of the business of the Administration, the records and publications of the Administration will reflect this Order.

J. The parties acknowledge that this Order resolves all matters relating to the factual assertions and agreements contained herein and are to be used solely for the purposes of this proceeding brought by or on behalf of the Administration. Nothing herein shall be deemed a waiver of the Commissioner's right to proceed in an administrative action or civil action for violations not specifically identified in this Order, including, but not limited to, specific consumer complaints received by the Administration, nor shall anything herein be deemed a waiver of the right of Respondents to contest other proceedings by the Administration. This Order shall not be construed to resolve or preclude any potential or pending civil, administrative, or criminal action or prosecution by any other person, entity or governmental authority, including, but not limited to, the Insurance Fraud Division of the Administration, regarding any conduct by Respondents including the conduct that is the subject of this Order.

K. Respondents have had the opportunity to have this Order reviewed by legal counsel of their choosing, and are aware of the benefits gained and obligations incurred by the execution of the Order. Respondents waive any and all rights to any hearing or judicial review

of this Order to which it would otherwise be entitled under the Insurance Article with respect to any of the determinations made or actions ordered by this Order.

L. This Order contains the entire agreement between the parties relating to the administrative actions addressed herein. This Order supersedes any and all earlier agreements or negotiations, whether oral or written. All time frames set forth in this Order may be amended or modified only by subsequent written agreement of the parties.

M. This Order shall be effective upon signing by the Commissioner or his designee, and is a Final Order of the Commissioner under § 2-204 of the Insurance Article.

N. Failure to comply with the terms of this Order may subject Respondents to further legal and/or administrative action.

ALFRED W. REDMER, JR.
INSURANCE COMMISSIONER

signature on file with original

By: Erica J. Bailey
Associate Commissioner
Compliance & Enforcement

Date: 4/21/2020

**RESPONDENT'S CONSENT
OPTIMUM CHOICE, INC.**

The Respondent, Optimum Choice, Inc., hereby consents to the entry of this Consent Order and to the obligations contained within. Furthermore, the undersigned hereby affirms that he or she has taken all necessary steps to obtain the authority to bind Respondent to the obligations stated herein and does, in fact, have the authority to bind Respondent to the obligations stated herein resolving market conduct investigation MCLH-133-2017-1.

Name: JOHN J. MATTHEWS

signature on file with original

Signature: _____

Title: General Counsel & VP Regulatory Affairs, NE Region

Date: April 20, 2020

RESPONDENT'S CONSENT
UNITEDHEALTHCARE INSURANCE COMPANY

The Respondent, UnitedHealthcare Insurance Company, hereby consents to the entry of this Consent Order and to the obligations contained within. Furthermore, the undersigned hereby affirms that he or she has taken all necessary steps to obtain the authority to bind Respondent to the obligations stated herein and does, in fact, have the authority to bind Respondent to the obligations stated herein resolving market conduct investigation MCLH-133-2017-1.

Name: JOHN J. MATTHEWS

signature on file with original

Signature: _____

Title: General Counsel & VP Regulatory Affairs, NE Region

Date: April 20, 2020

RESPONDENT'S CONSENT
UNITEDHEALTHCARE OF THE MID-ATLANTIC, INC.

The Respondent, UnitedHealthcare of the Mid-Atlantic, Inc., hereby consents to the entry of this Consent Order and to the obligations contained within. Furthermore, the undersigned hereby affirms that he or she has taken all necessary steps to obtain the authority to bind Respondent to the obligations stated herein and does, in fact, have the authority to bind Respondent to the obligations stated herein resolving market conduct investigation MCLH-133-2017-1.

Name: JOHN J. MATTHEWS
signature on file with original

Signature: _____

Title: General Counsel & VP Regulatory Affairs, NE Region

Date: April 20, 2020