

# Managed Care Litigation Update<sup>®</sup>

## NEWSWORTHY

District Court grants Blue Cross Blue Shield of Massachusetts, Inc.'s Motion to Dismiss finding *inter alia*, plaintiff (an attorney) failed to exhaust his administrative remedies and that his law firm lacks standing under ERISA for alleged failure to provide coverage. **Roy A. Bourgeois, et al. v. Blue Cross Blue Shield of Massachusetts, et al.**, U.S.D.C. D. MA, No. 20-40051 (Doc. 46, March 31, 2021). **DISCLOSURE:** I represent BCBS MA.

District court dismisses putative class action alleging Aetna failed to administer ERISA plans correctly due to use of clinical policy bulletins "that are not a part of, or incorporated in, any of the ERISA plans." Plaintiff "failed to allege facts showing that he was denied a covered benefit." **Dennis E. Curtis, et al. v. Aetna Life Insurance Company**, USDC D CT, No. 3:19-cv-1579, (Doc. 46, filed Mar. 18, 2021). **See also MCLU Vol. 138.**

Eighth Circuit rules that North Dakota statute purporting to forbid balance billing of air ambulance charges was preempted by the Airlines Deregulation Act and that the McCarran-Ferguson Act did not save these provisions from preemption. **Guardian Flight, LLC v. Jon Godfread, et al.**, USAC 8<sup>th</sup> Cir., No. 19-1343, 2021 WL 983084, (Doc. 5015428, filed Mar. 17, 2021).

District court dismisses section 1983 claims and allegations of MHPAEA violations on grounds plaintiff fails to state a plausible claim. **M.F., et al., v. Magellan Healthcare Inc., et al.**, USDC ND IL, No. 20-cv-3928, (Doc. 50, filed Mar. 24, 2021).

## RECENTLY FILED ACTIONS

OON air ambulance provider seeks ERISA benefits associated with transport from Oranjestad, Aruba to Fort Lauderdale, Florida. Basis of denial is not stated in complaint. Other actions by this provider reported in **MCLU Vol. 132 and 171.**

Member seeks ERISA benefits associated with residential inpatient treatment at Viewpoint Center. Applying the American Academy of Child and Adolescent Psychiatry Child and Adolescent Service Intensity Instrument Version 4.1, defendant concluded "she could benefit from Residential treatment based on her symptoms and behavior" but "Viewpoint Center is not available for authorization."

Removed action in which OON substance abuse disorder providers, both inpatient and outpatient, seek ERISA benefits pertaining to 513 members. Plaintiffs assert they were owed 70% of covered charges until the out-of-pocket maximums were met and after that point 100% of covered charges. Instead, defendant's paid 27.82% of covered charges.

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## RECENTLY FILED ACTIONS

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Removed action in which pro se physician and alleged assignee seeks \$991,760 in statutory penalties due to alleged failure to provide SPD in response to request made during appeal of claim asserting \$1,772.36 in underpayment.

Removed action in which OON physician groups who offer plastic, reconstructive, and cosmetic surgical procedures and treatments seek ERISA benefits and allege underpayment of claims. Plaintiffs assert claims under Texas state law, including breach of implied contract, breach of the duty of good faith and fair dealing, restitution, quantum meruit, promissory estoppel, negligent misrepresentation, tortious interference with economic advantage, violations of the Texas Prompt Pay Act, and violations of the emergency service statutes. Other actions by this provider reported at *MCLU Vol. 151, 169, 170*.

Removed action in which member seeks \$67,699.79 in ERISA benefits associated with “complications with his heart.” Grounds for denial are not stated in the underlying complaint.

OON orthopedic group seeks \$9,568,248.18 in alleged underpayments on billed charges of \$10,445,443.39 since 2014. Plaintiff asserts violations of ERISA, NJ state law, breach of contract, and breach of fiduciary duties. Other actions by this provider reported at *MCLU Vol. 163, 167, 168, 170*.

In-network physician with [ ] seeks over \$900,000 in benefits from [health insurer] where he alleges his contract with [ ] guaranteed him 80% of billed charges.

ERISA plan seeks \$54,652.54 in subrogation following personal injury settlement involving injuries sustained “while riding his bicycle by a dog.”

Member seeks over \$72,000 in ERISA benefits associated with residential inpatient treatment at Turn About Ranch from July 26, 2017 through December 1, 2017. Coverage was provided through August 22, 2017 but denied thereafter on the grounds that the extension was not medically necessary.

Removed action in which governmental health benefits pool disputes payment obligations for certain transplant services arising under Service Agreement. The repriced claim amount was \$6,518,918.24 and the amount paid was \$5,242,334. The obligation to pay the remaining \$1,276,584.24 is disputed.

Removed action in which member seeks coverage for removal of an LAP band that was diagnosed as a blockage. Plaintiff alleges the claim was denied on the grounds of an exclusion for gastric bypass surgery but contends an exception should apply because of the blockage.

OON neurosurgery practice alleges persistent underpayment and wrongful denials of claims. The underlying claims include but are not limited to those for emergency services. Plaintiff asserts counts under ERISA, breach of contract as assignee, breach of implied contract, unjust enrichment, interference with provider's contractual relationship with insureds, and third-party beneficiary of insurance contracts.

Member seeks ERISA benefits and alleges her claim was wrongfully denied due to HR inaccurately identifying her as part time.

Member seeks over \$300,000 in ERISA benefits associated with residential inpatient treatment received at Solacium Sunrise treatment center. Coverage was provided from February 5 through March 5 but denied thereafter on the grounds the continued stay was not medically necessary, as demonstrated by the records provided.

Self-insured plan seeks damages resulting from alleged misrepresentations submitted in response to RFP by plan administrator.

Removed action in which member seeks ERISA benefits from a retirement plan associated with various cancer treatments. The claim was denied on the grounds the disabled member had not enrolled in Medicare Part B as the primary payor.

Plan sponsor alleges breach of fiduciary duties against plan administrator following payment review audit indicating \$1,402,687.57 in overpayments to providers. Plaintiffs allege systemic errors in overpayments to providers and a lack of due diligence in pursuing overpayments.

Member seeks benefits under marketplace policy following denial of PA request for "facial feminization surgery based upon a diagnosis of gender dysphoria." Plaintiff alleges discrimination on the basis of sex in violation of Section 1557 of the ACA.

Member seeks ERISA benefits associated with residential inpatient treatment at Chrysalis. The claim was ultimately denied for failure to timely file claim. Member asserts claim was timely filed, and medical records were provided, but the wrong revenue code was used, though the member was not told the wrong revenue code was used to permit timely refiling.

Removed matter in which member seeks ERISA benefits associated with botox injections to treat neck pain following automobile accident. The claim was denied as not medically necessary.

Member seeks ERISA benefits associated with residential inpatient treatment at Avalon Hills Treatment Center. Coverage was provided from December 10, 2020 through January 6, 2021 but denied thereafter on the grounds continued treatment was not medically necessary pursuant to the [ ] Care Guidelines.

Member seeks over \$150,000 in ERISA benefits associated with residential inpatient treatment at Viewpoint Center and Vista Adolescent Treatment Center. The Viewpoint claim was denied as not medically necessary pursuant to the [ ] Level of Care Guidelines for Residential Treatment of Mental Health Disorders and the [ ] Common Criteria and Clinical Best Practices for All Levels of Care Level of Care Guidelines. 24 days of coverage were provided at Vista but the claim was denied thereafter as not medically necessary.

Member and facility seek ERISA benefits associated with post-stroke stay at Craig Hospital. Coverage was provided from May 9, 2019 through May 17, 2019 but denied thereafter on the grounds “The member is no longer demonstrating significant functional gains.”

Member seeks ERISA benefits associated with residential mental health treatment at Havenwood Academy. Coverage was provided from May 12, 2018 through May 29, 2018 but denied thereafter as not medically necessary.

Removed action in which OON emergency physicians allege underpayment of claims involving ERISA and FEHBA plans, among others. Plaintiff asserts breach of state emergency services statute, breach of contract, quantum meruit, and declaratory judgment.

## ADDITIONAL NEWSWORTHY (REGULATORY)

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OIG announces delay until January 1, 2023 effective date of new AKS safe harbors pertaining to prescription drugs and point-of-sale reductions to be codified at 42 C.F.R. § 1001.952(h)(6) through (9), (cc), and (dd). Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Service Fees, 86 FR 15132-01, 2021 WL 1056746 (filed Mar. 22, 2021).

# MCLU is online and searchable.

The underlying database to this publication, containing approximately 2,700 federal cases reported in this publication, is online. The Case Description field is word searchable. Searches can also be performed by Payer, Date Range, District Court and/or Court of Appeal, citation, or Judge. Past issues are available for immediate download.

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Payer	Defendant	Plaintiff	Date	District Court	Court of Appeal	MCLU Vol#	Case Name and Docket No.	Case Description	Judge
CIGNA	Cigna Health and Life Insurance Company	Cara Z	2016-3-7	S.D. FL	Eleventh	52	Cara Z v. CIGNA Health and Life Insurance Company, U.S.D.C. S.D. FL, Doc. No. 1:16-cv-20849-DPG, (f...	Minor child seeks recovery of mental health benefits associated with residential treatment at Olive...	Darrin P. Gayles
BCBS	Excelsus Blue Cross Blue Shield	Kirby L.	2016-10-3	N.D. NY	Second	66	Kirby L. v. Excelsus Health Plan, Inc., et al., U.S.D.C. N.D. NY, Doc. No. 3:16-cv-01195-DNH-DER, (f...	Plaintiff, who suffers from an eating disorder, depression, and anxiety, seeks recovery of mental h...	David N. Hurd
UNITED	United Healthgroup, Inc.	Jamie Bushell	2017-3-19	S.D. NY	Second	77	Jamie Bushell, et al. v. United Healthgroup, Inc., et al., U.S.D.C. S.D. NY, Doc. No. 1:17-cv-02021-...	Putative class action in which plaintiff, who suffers from anorexia nervosa, contends defendants den...	J. Paul Oetken

## ABOUT THE AUTHOR

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**Jonathan M. Herman** is the founding member of [Herman Law Firm](#), which represents health insurers, plan administrators, and self-funded plans in reimbursement disputes and compliance matters. He is also on the Roster of Arbitrators for the American Arbitration Association (Healthcare, Commercial) and a Neutral for the American Health Lawyers Association.



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