

# Managed Care Litigation Update®

## NEWSWORTHY

DC Court of Appeals determines 60-day Medicare overpayment refund rule applies to Medicare Advantage plans, reversing the district court that determined the rule was invalid as arbitrary and capricious.

*UnitedHealthcare Insurance Company, et al. v. Xavier Becerra, et al.*, USAC DC Cir., No. 18-5326, (Doc. 1910101, filed Aug. 3, 2021).

District court grants request of certain religious hospitals to enjoin HHS from enforcing Section 1557 of the ACA to require insurers provide coverage for gender-transition procedures or abortions. The decision was grounded in alleged violations of the Religious Freedom Restoration Act.

*Franciscan Alliance, Inc., et al. v. Xavier Becerra, et al.*, USDC ND TX, No. 7:16-cv-108-O, (Doc. 205, filed Aug. 9, 2021).

District court grants motion to dismiss of ERISA plan where member's bariatric surgery resulted in complications, and member alleges the prior authorization for such surgery should not have been approved pursuant to the applicable clinical criteria. *Lisa Zahuranec v. CIGNA Healthcare, Inc., et al.*, USDC ND OH, No. 1:19-cv-2781-PAB, (Doc. 49, filed Jun. 29, 2021) (NOA filed Jul. 29, 2021).

US Chamber of Commerce files challenge to the insurer transparency regulations, particularly Transparency in Coverage, 85 Fed. Reg. 72,158 (Nov. 12, 2020), which require posting on the internet of the insurer's negotiated rates and maximum allowable costs. *Chamber of Commerce of the United States of America, et al. v. United States Dept. of HHS, et al.*, USDC ED TX, No. 6:21-cv-309, (Doc. 1, filed Aug. 10, 2021).

## RECENTLY FILED ACTIONS

Adversary case in which creditor and alleged assignee in bankruptcy case asserts underpayment of claim. Billed charges were \$365,270 and the amount paid was \$3,019.23.

Emergency medicine provider seeks benefits and alleges underpayment. Billed charges were \$280,259 and the amount paid was \$80,171.26. Basis of payment was maximum reimbursable charge. Other actions filed by this provider are reported in **multiple prior MCLU Vols.**

Removed action in which member seeks ERISA benefits for child's residential treatment at Second Nature-Uintas and Catalyst Residential Treatment Center. Both claims were denied, though the underlying complaint does not identify the grounds for denial. Plaintiff asserts violations of the MHPAEA and the California Mental Health Parity Act.

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## RECENTLY FILED ACTIONS

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Member seeks over \$175,000 in ERISA benefits associated with psychiatric care at Austen Riggs Center. Coverage was provided by another insurer from May 23, 2017 through February 8, 2018 but denied thereafter upon change of insurance. The grounds for denial were failure to meet the [insurer's] Behavioral Medical Necessity Criteria for Residential Mental Health Treatment for Adults.

Plan sponsor challenges claims submitted and then forwarded by administrator where sponsor asserts claims were both delinquently submitted and not properly coordinated with primary payor. Billed charges at issue approximate \$3.5 million.

Member seeks ERISA benefits associated with amputation of right toe. Member's referral from his PCP recommended amputation of the lower leg, as did a second opinion, but plaintiff's preferred physician believed only the toe needed to be removed. Plaintiff treated with his preferred provider at an in-network facility but without plan's approval.

Removed action in which member challenges ERISA plan's subrogation rights following settlement of personal injury claim.

Member seeks over \$100,000 in ERISA benefits associated with residential inpatient treatment at Change Academy Lake of the Ozarks and alleges violations of the MHPAEA. The claim was denied as not medically necessary.

Removed action in which OON surgeon and ambulatory surgical center seek benefits and allege underpayment of \$605,876.67 spanning treatment of three members. Disputed fees involve those of the primary surgeons, assistant surgeons, and ambulatory surgical center invoices.

State of New York asserts systemic violations of state and federal mental health parity laws associated with outpatient psychotherapy and counseling. The complaint asserts United uses a UM tool called "ALERT" to identify high-use members and high-cost episodes associated with behavioral health benefits, but that they do not use a comparable tool pertaining to medical/surgical benefits.

DOL asserts violations of the MHPAEA on the basis of (1) OON reimbursement rate reductions that were more significant than the reductions for medical/surgical benefits and (2) the use of outlier management, particularly the "ALERT" program, without corresponding UM tools used for medical/surgical benefits.

Member seeks ERISA and COBRA benefits associated with treatment following a stroke and blockages that caused the member to take FMLA, a leave of absence that resulted in being terminated and rehired, and a subsequent resignation on health grounds. Member disputes the effective dates of coverage.

Member seeks MA benefits associated with nursing assistance to perform catheterization. Plaintiff alleges no action has been taken on the claim in 9 months even though the claim had historically been covered.

Member seeks over \$215,000 in ERISA benefits associated with residential inpatient treatment at Wingate Wilderness Therapy, Vista at Dimple Dell, and Explorations. The Wingate claims were denied pursuant to the wilderness treatment exclusion. The Vista claim was denied for lack of the facility's proper accreditation. The Exploration claim was denied for lack of PA.

## ADDITIONAL NEWSWORTHY (REGULATORY)

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Illinois Legislature passes act prohibiting site of service restrictions on treatment for autism spectrum disorders and habilitative services for children. 2021 Ill. Legis. Serv. P.A. 102-322 (S.B. 1592 (approved Aug. 6, 2021)).

[Mitchell Hasenkampf](#) leads the firm's compliance practice group, which advises clients on matters including utilization review and prompt pay requirements for government and commercial plans, Member incentives, marketing and member communications, and Grievance and Appeal processes.

# MCLU is online and searchable.

The underlying database to this publication, containing over 3,000 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-DEP, (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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