

Managed Care Litigation Update®

NEWSWORTHY

On remand from Supreme Court, Eighth Circuit sorts through PBM trade association arguments that ERISA and Medicare Part D preempt North Dakota's PBM regulations, concluding that ERISA does not preempt any of the provisions before it but that Medicare Part D does preempt certain quality assurance measures and provisions restricting pharmacies from disclosing certain information to patients. *Pharmaceutical Care Mgmt. Assn. v. Wehbi, et al.*, USAC 8th Cir., No. 18-2926, 2021 WL 5355916, (filed Nov. 17, 2021).

Ninth Circuit affirms dismissal of putative class action alleging wrongful refusal to cover peripheral nerve stimulation ("PNS") treatment and concludes the plan appropriately relied on the medical policy's classification of PNS as investigative and not medically necessary. *Marie Fortier v. Anthem, Inc., et al.*, USAC 9th Cir., No. 20-56361, (Doc. 32, filed Nov. 12, 2021). Previously reported at *MCLU Vol. 154*.

Tennessee court of appeals reverses district court and permits the enforcement of a \$50 reimbursement limitation applicable to MCOs involving non-emergent care provider by ER physicians. The district court concluded the limitation was implemented in violation of the Uniform Administrative Procedures Act, but the court of appeals determined the internal management exception applied to exempt the limitation from the UAPA. *Emergency Medical Care Facilities, P.C. v. Division of TennCare*, Tenn. App. Ct., No. M2020-01358-COA-R3-CV, 2021 WL 4641485, (filed Oct. 7, 2021).

RECENTLY FILED ACTIONS

Removed action in which OON emergency providers seek over \$1.9 million in ERISA benefits and allege underpayment associated with 38 claims. Plaintiffs allege 5% of billed charges have been paid. Other actions by this provider reported in *MCLU Vol. 150, 153, 158, 162, 167*.

[] seeks over \$580,000 in repayment from [] laboratories created for rapid COVID-19 tests where "high-level evaluation and management consultations" were billed in conjunction with each rapid test. [] further asserts the labs were unlicensed and that additional fees were charged associated with transmitting the point of care tests to another facility.

Removed action in which member seeks \$12,898.20 in dental benefits from self-funded ERISA plan. Dentist recommended implants but the claim for implants was denied because, according to the allegations in the underlying complaint, a bridge would have been a cheaper option.

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RECENTLY FILED ACTIONS

Removed action in which OON provider seeks \$80,319.73 in ERISA benefits. Plaintiff's assert claims of quantum meruit and breach of implied contract.

Member seeks over \$110,000 in ERISA benefits from self-funded plan associated with residential treatment at Solstice East and alleges violations of MHPAEA. The claim was denied as not medically necessary pursuant to the [] Behavioral Health Medical Necessity Criteria.

Removed action in which member seeks ERISA benefits for biopsy. Plaintiff asserts she received the bill and timely submitted it for payment but that the claim was neither paid nor denied.

OON surgical group and alleged assignee seeks ERISA benefits associated with alleged emergency intraoperative intervention. Billed charges were \$45,477.60 and the amount paid was \$5,795.

OON surgical group and alleged assignee seeks ERISA benefits associated with alleged emergency endometriosis surgery and laparoscopy. Billed charges were \$229,084.024 and the amount paid was \$6,399.80.

Putative class action in which surgical assists allege reimbursement by United ERISA plans is arbitrary, inconsistent, and improper due to administration of claims by Multiplan. Plaintiffs seek their billed charges.

Member seeks over \$94,000 in ERISA benefits from self-funded plan associated with residential treatment at True North Wilderness Program and Ascend Recovery for substance abuse treatment. The True North claim was denied for lack of medical necessity and because wilderness therapy is not a proven treatment for the member's conditions. Coverage was provided at Ascend from May 18, 2020 through June 26, 2020 but denied thereafter for lack of medical necessity pursuant to the ASAM Criteria.

OON orthopedic group and alleged assignee seeks 837 claim data in support of contesting a denial of claim. Plaintiff asserts the EOB contains "several glaring irregularities" and it seeks to do a "routine look-back at the 837."

Removed action in which OON hospital alleges breach of implied contract and quantum meruit and asserts underpayment. Billed charges were \$2,427,575.94 and the amount paid was \$179,596.77. Other actions by this provider reported at *MCLU Vol. 153, 174*.

Removed action in which OON plastic surgeons allege underpayment in violation of the Florida Insurance Code, particularly sections 627.64194 and 641.513. Billed charges were \$159,943 and the amount paid was \$6,065.64. Other actions filed by this provider reported in *MCLU Vol. 168, 171, 178*.

OON ambulatory surgical center seeks ERISA benefits and asserts that [] inappropriately applied "local plan pricing" rather than applying the plan terms of the home plan, resulting in underpayments or non-payments and subsequently inappropriate pre-payment review.

Removed action in which specialty medicine group of physicians and dental physicians allege \$2,568,759.69 in underpayments associated with claims for sleep disorders and related cranial facial problems. Plaintiff asserts an additional \$1,577,000 in lost business due to delayed payment, including those caused by an SIU investigation of Plaintiff's claims.

Member seeks ERISA benefits associated with pre-approved corrective jaw surgery by OON physician. Plaintiff is being balance billed for difference between billed charges of \$24,001.01 and paid amount of \$247.69.

Removed action in which OON surgical facility alleges underpayment associated with 6 claims and seeks payment of billed charges or UCR. Other actions by this provider reported at *MCLU Vol. 179, 181, 185*.

Putative class action in which members challenge the denial by [] ERISA plans of nutritional counseling as treatment of various eating disorders. Plaintiffs allege the denials violate both the terms of the plans and the MHPAEA.

ADDITIONAL NEWSWORTHY (REGULATORY)

Washington state insurance commissioner issues technical assistance advisory regarding the implementation of the Federal No Surprises Act in light of the pre-existing Washington Balance Billing Protection Act, noting that the federal regime applies to a broader scope of plans and services than Washington's BBPA. Technical Assistance Advisory 2021-05, WSR 21-22-073, (issued Nov. 17, 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.

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|--------|---|---------------|-----------|----------------|-----------------|-----------|---|---|------------------|
| 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



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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