VOLUME 191B DECEMBER 31, 2021

Managed Care Litigation Update®

NEWSWORTHY

Texas Medical Association files suit challenging CMS rule, particularly Requirements Related to Surprise Billing, Part II, on grounds the adoption of the qualified payment amount owed pursuant to the No Surprises Act ("NSA") is presumptively reasonable in the arbitrations under the NSA. *Texas Medical Assn., et al. v. United States Dept. of Health and Human Services, et al.*, U.S.D.C. E.D. TX, No. 6:21-cv-425, (filed Oct. 28, 2021).

YEAR END REFLECTIONS:

It has been another tumultuous year, with COVID continuing to upend our personal and work lives. Inquiries to never contemplated legal problems are soaring, as we dutifully respond to client inquiries from our home offices. Payors, providers, and patients continue their tussle over an appropriate payment, with a new arbitration scheme looming large in the background. However, new cases filings in 2021 dramatically decreased (statistics beginning on p. 5).

Through it all, I sincerely hope that all of you, and your own families and loved ones have remained healthy during this time.

Managed Care Litigation Update® is entering is eighth year of publication. A heartfelt "thank you" to all who have contributed to the continued success of my newsletter.

Please take a moment to visit the Representative Subscribers, who have graciously agreed to publish their firm logos and links to their profiles on www.managedcarelitigationupdate.com

Best wishes to all for *health* and prosperity in 2021. *JMH*

RECENTLY FILED ACTIONS

Removed action in which member seeks $430,592.01 in benefits and alleges mistakes with the determination of coordination of benefits application. A balance remains after [health plan 1] alleges [health plan 2] was the primary insurer, Medicare Part A was the secondary insurer, and [health plan 1] was the tertiary insurer, but [health plan 2] asserts its policy was not yet in effect on the date of service.

Removed action in which physician group seeks benefits and alleges underpayment associated with emergency treatment. Billed charges were $376,300 and the amount paid was $6,753.28. Other actions by this provider reported at *MCLU Vol. 162*.

Removed action in which physician group seeks benefits and alleges underpayment. Billed charges were $234,796.50 and the amount paid was $12,120.64. Other actions by this provider reported at *MCLU Vol. 159, 161, 163, 168, 171, 178, 189*.

RECENTLY FILED ACTIONS

OON surgeons and alleged assignees seek ERISA benefits and assert underpayment associated with back surgery. Billed charges were $341,445.85 and the amount paid was $1,039.51.

Pro se member seeks ERISA benefits associated with "bilateral Synvisc-One injections" to treat osteoarthritis. Billed charges were $2,431.76 and the amount paid was $127.76.

Removed action in which purchaser of claims from OON hospitals seeks $3,282,774.06 in alleged underpayments. The sole cause of action is a "book account."

OON surgeon seeks ERISA benefits and alleges underpayment associated with laparoscopic surgery. Billed charges were $219,856.82 and the amount paid was $1,340.90. Plaintiff alleges certain codes were wrongfully denied and others were underpaid.

OON specialty surgical group seeks ERISA benefits and alleges underpayment associated with laparoscopic surgery. Billed charges were $277,956.37 and total payments were $6,302.40. The health plan contends certain CPT codes were bundled as inclusive of other claims.

Member seeks ERISA benefits from self-insured plan associated with vertebral body tethering ("VBT") to treat scoliosis. The claim was denied on the grounds VBT is investigational.

Member seeks over $295,000 in ERISA benefits from self-funded plan associated with residential treatment at New Vision Wilderness and Solstice West. The New Vision claim was denied on the grounds the wilderness therapy program was experimental, and the Solstice claim was denied on the grounds that a lower level of care was appropriate.

OON surgical group and alleged assignee seeks ERISA benefits and alleges underpayment associated with emergency intraoperative intervention to treat incisional hernias. Billed charges were $287,862 and the amount paid was $7,480.42. Other actions by this provider reported in *MCLU Vol. 184, 189*.

Removed action in which physician group and alleged assignees seek over $500,000 in ERISA benefits associated with both in-network and OON claims.

OON surgeon and alleged assignee seeks ERISA benefits associated with "emergency closed reduction of a fractured tibia and fibula with external fixator application spanning the left knee joint." Billed charges were $1,271,489.04 and the amount paid was $359,154.44. Basis of payment was the maximum allowable charge.

Removed action in which two members on the same ERISA policy both seek benefits associated with cancer treatment at the Mayo Clinic. The first claim was for preapproved treatment involving billed charges of $97,945.24 that was later denied, and the second claim involved medical expenses "in excess of $17,000" for treatment of a peripheral neuropathy condition.

Member seeks mental health benefits from ERISA plan and asserts violations of MHPAEA and the California Mental Health Parity Act. Plaintiff received residential treatment at Blue Fire Wilderness Therapy and Waterfall Canyon Academy. The Blue Fire claim was denied on "purported policy exclusions and limitations" and the Waterfall Canyon claim was denied as not medically necessary.

Removed action in which OON surgeon seeks $143,009.67 in benefits and alleges underpayment. Total billed charges between the primary surgeon and assistant were $143,970 and the amount paid was $960.33.

Member seeks ERISA benefits associated with treatment for Common Variable Immunodeficiency ("CVID") and alleges wrongful denial of associated claims from treating physicians.

Member seeks $56,154.02 in benefits associated with hospital charges and outside provider charges incurred pursuant to a gastric bypass surgery. The claim was denied based on an exclusion for obesity treatment, though plaintiff asserts the treatment was for GERD.

OON ER provider group seeks benefits and alleges underpayment associated with emergency claims. Billed charges were $623,248 and the amount paid was $20,862.74. Other actions filed by this provider are reported in multiple MCLU Vols.

ADDITIONAL NEWSWORTHY

District court grants member's MSJ awarding over $80,000 in mental health benefits associated with residential treatment at Eva Carlston Academy. The case was reviewed under a *de novo* standard after the 10th Circuit remanded and determined the determination of medical necessity should be based on both the Summary Plan Description and certain medical policy documents. *Lyn M., et al. v. Premera Blue Cross, et al.*, U.S.D.C. D. UT, No. 2:17-cv-1152-BSJ, (filed Nov. 30, 2021).

District court dismisses putative class action alleging insurer breached the Fair Credit Reporting Act and several state laws as part of a breach involving the theft of two laptops from the insurer's corporate office. The court determined plaintiffs failed to adequately allege Horizon was a consumer reporting agency subject to the FCRA. *In re Horizon Healthcare Services Inc. Data Breach Litigation*, U.S.D.C. D. NJ, No. 2:13-cv-7418-CCC-JSA, (filed Dec. 21, 2021).

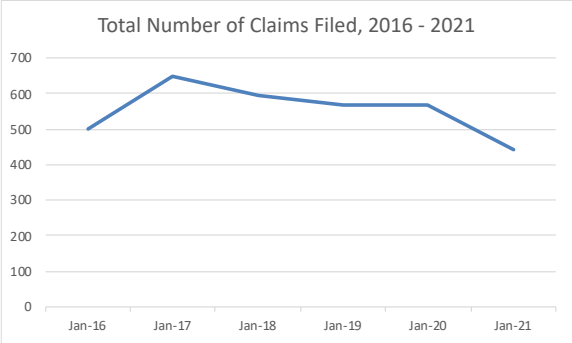
ADDITIONAL NEWSWORTHY (REGULATORY)

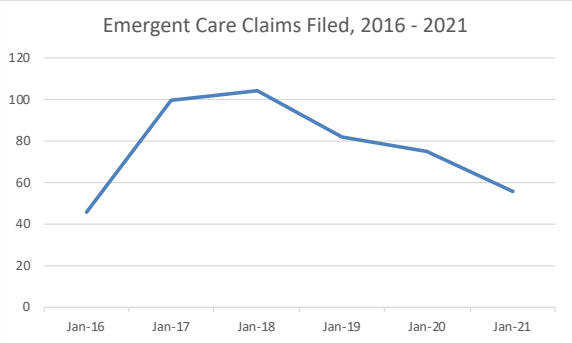
New York legislature passes prohibition on managed care providers requiring a prior authorization for certain substance use disorder medications, particularly buprenorphine products, methadone, and long-acting injectable naltrexone. 2021 Sess. Law. News of N.Y. Ch. 720 (A. 2030) (McKinney 2021) (approved Dec. 22, 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.

SIX YEAR TREND OF CLAIMS (2016 – 2021)

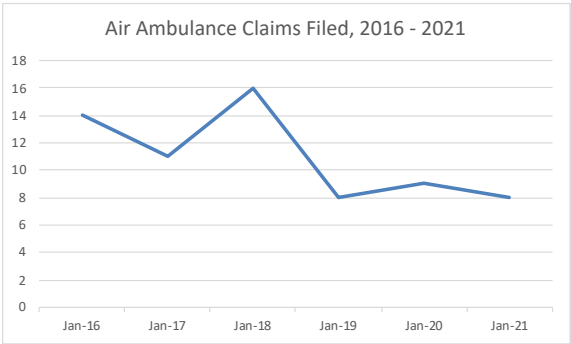
- Managed Care Litigation Update® covered 444 new case filings in 2021, 569 new case filings in 2020, 566 new case filings in 2019, 597 new case filings in 2018, 646 new case filings in 2017, and 499 new case filings in 2016.

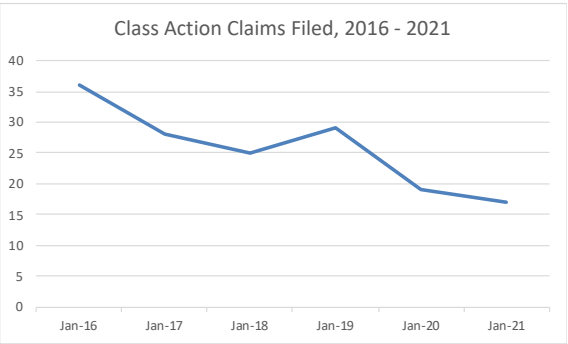




- DECREASING EMERGENT CARE CLAIMS: there was a decline in case filings over whether the services rendered fall under coverage for emergent care versus other health plan benefit provisions. There were 56 such cases in 2021 75 such cases in 2020, 82 such cases in 2019, 104 such cases in 2018, 100 cases in 2017, and 46 cases in 2016.

- STEADY AIR AMBULANCE CLAIMS: There were 8 new cases filed in 2021 involving coverage disputes over air ambulance transport, 9 such cases were filed in 2020, 8 such cases were filed in 2019, 16 such cases were filed in 2018, 11 such cases were filed in 2017, and 14 such cases were filed in 2016.

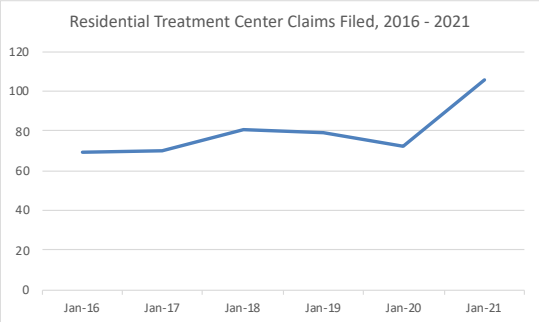


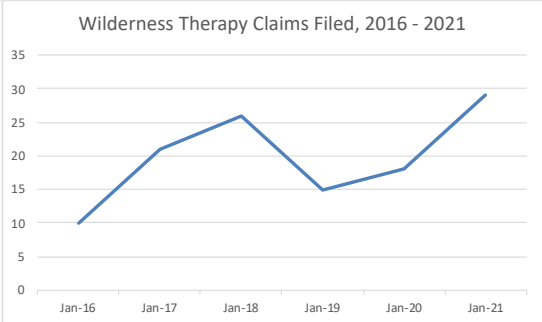


- DECLINING CLASS ACTIONS: There were 17 new putative class actions filed in 2021, 19 such cases filed in 2020, 29 such cases filed in 2019, 25 such cases filed in 2018, 28 such cases filed in 2017, and 36 new putative class actions in 2016.

- Dustin B. Pead, U.S. District Judge for the District of Utah, presided over the highest number of cases reported in this publication from 2016 – 2021 (72). Esther Salas, U.S. District Judge for the District of New Jersey presided over the second highest number of cases in the same period (58).

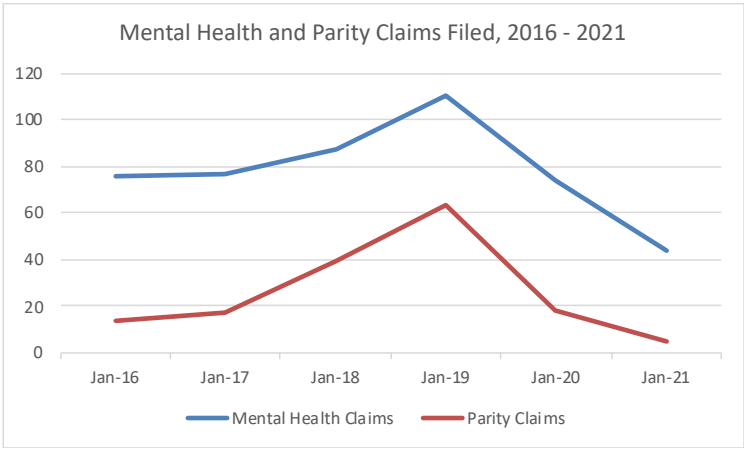
- INCREASE IN CLAIMS FOR RESIDENTIAL TREATMENT CENTERS: there were 106 new cases were filed in 2021 seeking coverage for treatment rendered at residential treatment centers, 72 new cases were filed in 2020, 79 new cases were filed in 2019, 81 such cases were filed in 2018, 70 such cases were filed in 2017, and 69 such cases were filed in 2016. As a point of reference, there were only 25 such cases in 2015.





- INCREASE IN CLAIMS FOR WILDERNESS THERAPY PROGRAMS: there were 29 new cases filed in 2021 seeking coverage for wilderness therapy programs, 18 new cases were filed in 2020, 15 new cases were filed in 2019, 26 such cases were filed in 2018, 21 such cases were filed in 2017, and 10 such cases in 2016.

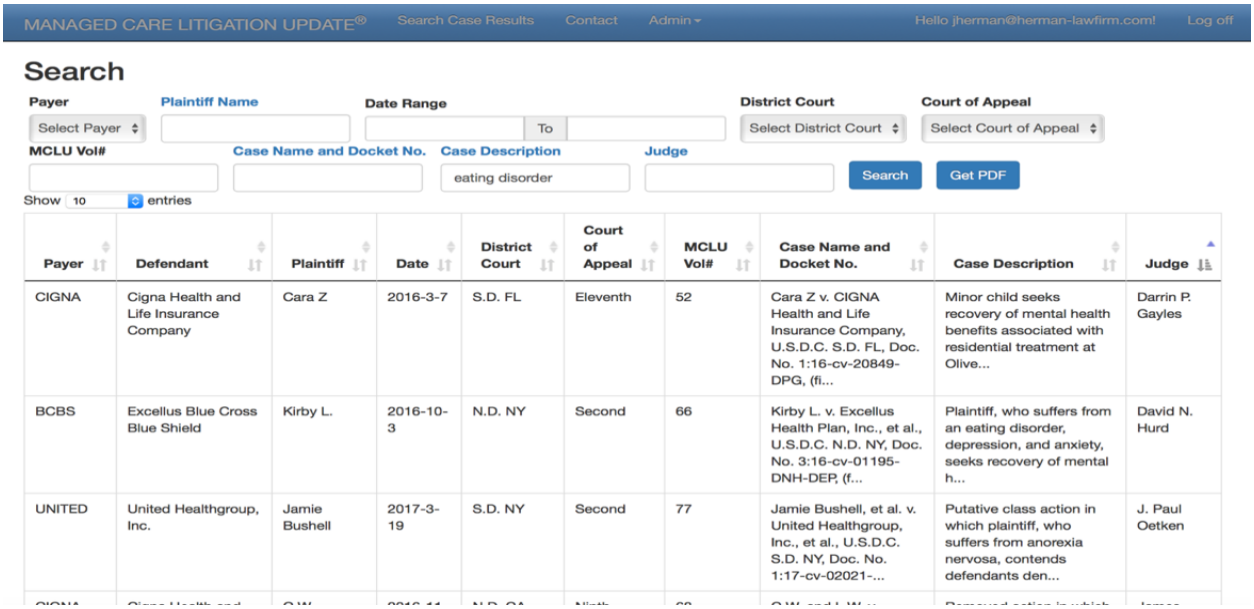
- DECREASING CLAIMS UNDER MENTAL HEALTH PARITY LAWS: Of the 44 new case filings in 2021 involving disputes over mental health benefits, 5 alleged a violation of federal and/or state mental health parity laws. Of the 74 new case filings in 2020 involving disputes over mental health benefits, 18 alleged a violation of federal and/or state mental health parity laws. Of the 110 new case filings in 2019 involving disputes over mental health benefits, 63 alleged a violation of federal and/or state mental health parity laws. Of the 87 new case filings in 2018 involving disputes over mental health benefits, 39 alleged a violation of federal and/or state mental health parity laws. Of the 77 new case filings in 2017 involving disputes over mental health benefits, 17 alleged a violation of federal and/or state mental health parity laws. Of the 76 new case filings in 2016 involving disputes over mental health benefits, 14 alleged a violation of federal and/or state mental health parity laws.



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.

Access requires an upgrade to a **Premium Subscription**.



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, (fi...	Minor child seeks recovery of mental health benefits associated with residential treatment at Olive...	Darrin P. Gayles
BCBS	Excellus Blue Cross Blue Shield	Kirby L.	2016-10-3	N.D. NY	Second	66	Kirby L. v. Excellus 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. He is also on the Roster of Arbitrators for the American Arbitration Association (Healthcare, Commercial) and a Neutral for the American Health Lawyers Association.

Herman Law Firm
TEXAS • LOUISIANA • MISSISSIPPI • MASSACHUSETTS