

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

## NEWSWORTHY

First Circuit reverses dismissal of ERISA claim asserting that plan violated the MHPAEA by denying speech therapy to treat Autism Spectrum Disorder. The Court concluded that plaintiff alleged the habilitative services exclusion only applies to the treatment of mental health ailments, which "could make for a successful Parity Act claim." *N.R. v. Raytheon Company, et al., USAC 1<sup>st</sup> Cir., No. 20-1639, 2022 WL 278537* (Doc. 00117837754, filed Jan. 31, 2022).

Ninth Circuit affirms dismissal of plan's assertions that OON hospital's promise to balance bill members violates Hawaii's balance billing law, Haw. Rev. Stat. § 432D-8, ruling that the law only applies to in-network providers. *Kaiser Foundation Health Plan, Inc. v. The Queen's Medical Center, Inc., et al., USAC 9<sup>th</sup> Cir., No. 19-17283, 2022 WL 385522* (Doc. 63, filed Feb. 8, 2022).

District court determines self-funded ERISA plan abused its discretion both in (1) inconsistently determining the maximum amount payable for residential treatment at Fulshear Ranch and (2) denying coverage at Fulshear Transition. The court determined that where the plan agreed that treatment at a less restrictive level of care was appropriate, it should have provided coverage at the lesser amount rather than denying the claim altogether. *Alan R., et al. v. [ ], Aetna Life Ins. Co., USDC WD NC, No. 3:20-cv-441-RJC-DSC*, (Doc. 68, filed Feb. 9, 2022). Previously reported in *MCLU Vol. 151*.

## RECENTLY FILED ACTIONS

Member seeks ERISA benefits on behalf of minor child for Applied Behavioral Analysis to treat Autism Spectrum Disorder. Member seeks pre-approval of 15 hours per week, but the plan has only approved 4 hours per week on grounds of medical necessity.

Please join me on March 30 – 31, 2022 at the ACI Managed Care Disputes and Litigation Conference, where I will be co-presenting "How to Navigate Client Expectations: The Top Do's, Don'ts and Ethical Considerations for In-House and Outside Counsel." It promises to be an unparalleled learning experience. <https://www.americanconference.com/managed-care-disputes-litigation/>

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## RECENTLY FILED ACTIONS

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Removed putative class action in which member seeks COBRA benefits. Plaintiff alleges that the employer changed third-party administrators but did not provide his COBRA enrollment to the new TPA, causing member to be without coverage and incur costs.

Removed action in which OON physician seeks benefits associated with “procedure to repair the right phrenic nerve” and alleges underpayment. Billed charges \$173,348.10 and the amount paid was \$34,669.62. Other actions by this provider reported in *MCLU Vol. 77, 89, 95, 96, 99, 178*.

OON ER group seeks ERISA benefits and alleges underpayment. Billed charges were \$401,669 and the amount paid was \$58,721.38. Other actions filed by this provider are reported in *multiple MCLU Vols*.

Removed action in which member seeks ERISA benefits for right hip arthroplasty. Plaintiff alleges wrongful denial and delinquent responses to appeal and request for external review.

Member seeks \$82,985 in ERISA benefits for unspecified treatment. The basis for denial is not stated in the complaint.

Removed action in which member seeks FEHBA benefits associated with surgery to repair a “malfunctioning artificial ankle joint ... and to stretch her Achilles tendon and remove excess bone.” Plaintiff complains that the plan “mistakenly coded the procedure as ‘Medical Day Bed’ (outpatient) and charged Plaintiff 40% of costs.”

[ ] files petition to vacate interim arbitration award finding liability on breach of contract claim. The dispute involves the meaning of [ ] “usual and customary” prices.

Dentist challenges removal from network and alleges breach of contract. Plaintiff asserts retaliatory report to “IDPFR, which organization constitutes a regulatory body within the State of Illinois that oversees the practice of dentistry.”

Removed putative class action in which member challenges assertion of ERISA subrogation lien and alleges the assertion of the lien violates NJ law, particularly NJSA 2A:15-97 and NJAC 11:4-42.10.

Plan seeks enforcement of settlement agreement with laboratory asserting underpayment of fees pursuant to the CARES Act.

Member seeks ERISA benefits from self-funded plan associated with residential treatment at Evoke at Entrada and Vista Adolescent Treatment Center. Plaintiff asserts violations of MHPAEA. The Evoke claim was denied on the grounds the wilderness therapy was experimental, and the Vista claim was denied for lack of medical necessity pursuant to the Cigna Behavioral Health Medical Necessity Criteria for Residential Mental Health Treatment for Children and Adolescents.

Member seeks ERISA benefits from self-funded plan associated with residential treatment at Chrysalis School Montana. Plaintiff asserts violations of MHPAEA. The claim was denied as not medically necessary pursuant to the [ ] level of care guidelines, particularly the Mental Health Residential Treatment Services Level of Care.

Putative class action in which member alleges [ ] “discriminates on the basis of sex, by denying those individuals assigned female sex at birth who cannot engage in coitus by reason of their sexual orientation, equal access to infertility treatments.”

Removed action in which purchaser of OON ER claims seeks \$4,023,632.45 pursuant to a book account claim. Plaintiff asserts it is seeking “the reasonable value of goods sold and delivered, and/or services rendered by the Plaintiff to [ ] upon the promise of [ ] to pay a reasonable price for the same.” Other claims by these providers reported at *MCLU Vol. 191, 193*.

Removed action in which member seeks benefits associated with hip surgery. Basis for denial is not stated in underlying complaint.

Removed action in which OON physician seeks benefits and alleges underpayment associated with Reduction Mammoplasty for which provider asserts he received a GAP exception. Billed charges were \$116,840 and the amount paid was \$38,808.30. Other actions by this provider reported at *MCLU Vol. 187, 188, 192*.

OON plastic surgeon and purported attorney in fact seeks benefits from self-funded ERISA plan associated with post-cancer bilateral mastectomies and associated procedures. Billed charges were \$76,626.42 and the amount paid was \$5,339.09. Other action by this provider reported at *MCLU Vol. 179*.

OON hospital and alleged assignee seek ERISA benefits and asserts underpayment associated with surgical care provided. Billed charges were \$80,913.68 and the amount paid was \$34,004.02. Plaintiff asserts a “significant portion of Plaintiff’s claim” was denied because “the treatment provided exceeded fee schedule or fee agreement rates.”

Member seeks over \$130,000 in ERISA benefits from self-funded plan associated with residential treatment at Elevations Residential Treatment Center and New Focus Academy and asserts violations of MHPAEA. The Elevations claim was denied as not medically necessary pursuant to the MCG guideline Residential Behavioral Health Level of Care. The New Focus claim was denied on the grounds the facility was OON and lacks accreditation.

Member seeks over \$200,000 in ERISA benefits from self-funded plan associated with residential treatment at Solstice RTC, LLC and asserts violations of MHPAEA. The Solstice claim was denied on the ground it lacks accreditation.

Member seeks over \$70,000 in ERISA benefits from self-funded plan associated with residential treatment at New Haven and alleges violations of MHPAEA. Coverage was approved by United from February 15, 2019 through March 5, 2019 but denied thereafter as not medically necessary pursuant to the [ ] Level of Care Guidelines. When [ ] became the TPA, it denied the claim as not medically necessary.

Removed action in which OON neurosurgery practice alleges wrongful denial and underpayment of ERISA claim. Billed charges were \$73,400 and the amount paid was \$0.

Member seeks benefits associated with residential treatment for alcohol/substance abuse at Farley Center at Williamsburg where plaintiff was ordered by the Louisiana Judges Lawyers Assistance Program to obtain treatment.

## ADDITIONAL NEWSWORTHY (REGULATORY)

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Oklahoma Health Care Authority issues emergency rules updating and implementing Medicaid rules pertaining to network adequacy standards, prior authorization requirements, and appeals. General Provisions; General Program Information; Requirements for Managed Care Organizations and Dental Benefits Managers, 39 Ok Reg. 450 (adopted Feb. 1, 2022).

[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 approximately 5,000 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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