

Managed Care Litigation Update®

NEWSWORTHY

District court grants summary judgment in favor of Pharmaceutical Research and Manufacturers of America in challenge to Medicaid Accumulator Adjustment Rule, agreeing with PhRMA that the rule exceeds HHS authority. *Pharmaceutical Research and Manufacturers of America v. Xavier Becerra, et al.*, USDC D DC, No. 1:21-1395-CJN, (Doc. 37, filed May 17, 2022).

Second Circuit affirms judgments in favor of ERISA plans concerning payment of EffexorXR, where member alleged the copay was inappropriately calculated due to plan terms and the ACA annual limitation on cost sharing. *Jacqueline Fisher v. Aetna Life Insurance Company*, USAC 2d Cir., No. 20-3148, 20-3804, 21-1, (Doc. 92-1, filed Apr. 22, 2022). Previously reported at *MCLU Vol. 48*.

District court grants plan's motion to dismiss state law claims as preempted by ERISA, holding that the preauthorization itself was not an agreement to reimburse at provider's UCR fee. *Advanced Orthopedics and Sports Medicine Institute, P.C. v. Oxford Health Ins.*, USDC D NJ, No. 21-cv-17221-FLW, (Doc. 18, filed May 27, 2022). Previously reported at *MCLU Vol. 185*.

State appellate court affirms dismissal of member suit against state governmental plan seeking coverage for residential psychiatric care, finding that the member failed to exhaust the administrative remedies. *Birchard v. Blue Cross and Blue Shield of North Carolina, Inc.*, No. 21-729, 2022 WL 1548068 (N.C. Ct. App. May 17, 2022).

RECENTLY FILED ACTIONS

Removed action in which provider seeks \$1,113,926.95 in ERISA benefits for unspecified services under implied contract and quantum meruit claims. Billed charges were \$113,926.95 and the amount paid was \$321.12.

Putative class action in which OON laboratory alleges violations of FFCRA and CARES act and alleges underpayment of Covid-19 tests. Other claims by this provider reported at *MCLU Vol. 197*.

Putative class action in which member of ERISA plan seeks reimbursement for Covid-19 test. Member paid \$250 billed charges but was reimbursed \$51.31 based on the Maximum Reimbursable Charge.

Removed action in which OON freestanding emergency center seeks benefits and alleges underpayment that was not resolved through the Texas statutory mediation process. Billed charges were \$20,126.48 and the amount paid was \$605.43.

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RECENTLY FILED ACTIONS

Member seeks ERISA benefits associated with "traumatic dislocation and avulsion injury to her right femur and hip" associated with water skiing accident. An orthopedic surgeon performed a surgery and billed \$38,080.88, which was denied as not medically necessary.

Removed action in which member of marketplace plan seeks wrongful death damages associated with death of daughter due to adrenocortical carcinoma where member alleges plan was negligent in timely approving OON oncologist to treat or remove the tumors.

Removed action in which members challenge the credentialing practices of [] where individual who had not graduated college held herself out as a licensed and qualified psychologist and treated members. Plaintiffs assert claims for negligence and "Medical and Related Expenses and Loss of Services."

Removed action in which OON neurosurgeon seeks ERISA benefits and alleges underpayment with respect to emergency services. Billed charges were \$72,330 and the amount paid was \$7,198.41. Other actions by this provider reported at **MCLU Vol. 161, 176. DISCLOSURE – I am defense counsel of record.**

Removed action in which in-network hospital system challenges a payment policy titled "Hospital Reference Lab Protocol Effective 10/1/20" in which "[] would no longer pay MUHA for non-patient lab tests." Plaintiff alleges the impact of the new policy is approximately \$1.3 million per year and that the policy is a breach of the parties' provider agreement.

Putative class action in which member alleges a "discriminatory health insurance policy that, on its face, engages in sex discrimination by denying LGBTQ ... individuals equal access to fertility treatment." Plaintiff alleges her policy requires those who cannot conceive through intercourse due to sexual orientation to pay out of pocket for 1 year before receiving plan benefits for fertility treatments.

Member seeks ERISA benefits from self-funded plan associated with residential treatment at RedCliff Ascent and Novitas Academy and alleges violations of MHPAEA. The RedCliff claim was denied as excluded outdoor therapy. The Novitas claim was denied because "Based on a review of the licensure on file, the facility does not meet the requirements of a residential treatment."

Member seeks over \$90,000 in ERISA benefits associated with residential treatment at Elements Wilderness Program and Catalyst Residential Treatment and alleges violations of MHPAEA. The Elements claims was denied pursuant to a wilderness camps exclusion, and the Catalyst claim was denied as not medically necessary pursuant to the [] guideline Residential Behavioral Health Level of Care, Child or Adolescent.

Member seeks over \$80,000 in ERISA benefits from self-funded plan associated with residential treatment at ViewPoint Center and Forest Heights Lodge and alleges violations of MHPAEA. Coverage was provided at ViewPoint from June 22, 2018 through July 20, 2018 but denied through August 3, 2018 for lack of medical necessity pursuant to the [] Level of Care Guidelines. The Forest Heights claim was denied as not medically necessary.

Member seeks benefits for unspecified treatment and asserts exhaustion of administrative remedies. Member asserts that she elected COBRA continuation coverage upon reaching 26 years old.

Member seeks ERISA benefits from self-funded plan associated with residential treatment at Catalyst Residential Treatment Center and alleges violations of MHPAEA. The claim was denied as not medically necessary pursuant to the [] Behavioral Medical Necessity Criterial for Residential Mental Health Treatment for Children and Adolescents.

County hospital seeks \$535,423.35 in benefits and alleges underpayment of claims associated with emergency treatment of members. Billed charges were \$843,863.73. Plaintiff's assert causes of action for breach of implied contract and quantum meruit.

Member seeks ERISA benefits associated with residential treatment for two daughters at Blue Fire Wilderness Therapy and alleges violations of MHPAEA. The claims were denied pursuant to a wilderness therapy exclusion.

Member seeks ERISA benefits associated with residential treatment at Elevations RTC and alleges violations of MHPAEA. The claim was denied as not medically necessary pursuant to the LOCAT criteria.

Removed putative class action in which member challenges \$42,245.56 subrogation lien following successful lawsuit against manufacturer of prosthetic hip replacement. Plaintiff asserts plan failed to do a made whole analysis.

Member seeks ERISA benefits associated with hyperbaric oxygen therapy treatments as treatment for long COVID. Plaintiff asserts the treatments were effective but denied. The basis of denial is not specified.

OON vascular surgeon seeks \$90,931.25 in ERISA benefits associated with co-surgeon services involving "invasive surgical treatment to repair injuries to his lumbar spine and middle sacral artery and vein" with a primary CPT code of 22558. Billed charges were \$260,000.

OON plastic surgeon seeks ERISA benefits and alleges underpayment associated with pre-approved post-mastectomy reconstructive surgery. Billed charges were \$123,396 for the DIEP flap procedure and \$19,716 for the vessel exploration, and the amounts paid were \$13,705.75 and \$1,083.50, respectively. **DISCLOSURE – I am defense counsel of record.**

Removed action in which OON surgeon seeks ERISA benefits and alleges underpayment associated with back surgery. Billed charges were \$203,000 and the amount paid was \$6,820.69.

Member seeks ERISA benefits associated with residential treatment for two daughters at Blue Fire Wilderness Therapy and alleges violations of MHPAEA. The claims were denied pursuant to a wilderness therapy exclusion. Substantially similar claim by this member reported in this issue.

Member seeks ERISA benefits associated with Roux-en-Y Gastric Bypass where the pre-authorization was denied on the grounds the procedure is experimental and/or investigational.

Removed action in which hospital outpatient department seeks ERISA benefits and alleges underpayment associated with emergency services. Billed charges were \$17,215.57 and the amount paid was \$902.66.
DISCLOSURE – I am defense counsel of record.

OON outpatient surgery center seeks ERISA benefits and alleges underpayment associated with “hosting/facility services.” Billed charges were \$255,000 and the paid amount was \$14,548.43. Additionally, plaintiff received a recoupment request of \$13,654.90.

Member seeks ERISA benefits associated with skilled nursing care to assist in treatment of daughter’s Aromatic L-amino Acid Decarboxylase Deficiency. Member asserts 12 hours per day of skilled nursing care had been approved and provided until January of 2021 when the claims were denied as custodial care.

Removed action in which pro se member challenges denial of claims pertaining to himself and family members where “[] states ‘We are unable to process the claim until we receive information from you concerning other insurance.’”

Removed action in which OON physician and alleged assignee seeks ERISA benefits from self-funded plan and asserts underpayment associated with emergent two-part back surgery. Billed charges were \$623,152.65 and the amount paid was \$4,387.16.

OON surgery center and alleged assignee seeks ERISA benefits and alleges underpayment associated with treatment of 20 members. Total billed charges were \$1,669,920.01 and the amount paid was \$199,392.20. Other actions by this provider reported in **MCLU Vol. 47, 69, 92, 113, 114, 154, 159.**

Member seeks ERISA benefits from self-funded plan associated with residential treatment at Evoke at Entrada and alleges violations of MHPAEA. The claim was denied on the grounds Evoke is “not licensed as an inpatient mental health facility” but instead is an “outdoors wilderness therapeutic camp.”

Removed action in which OON orthopedic surgeon seeks ERISA benefits and alleges underpayment. Total billed charges for primary surgeon and assistant surgeon were \$273,244 and the amount paid was \$18,523.

ADDITIONAL NEWSWORTHY (REGULATORY)

Illinois legislature updates its balance billing prohibitions and associated regime concerning arbitration of out-of-network billing disputes and adds an EOC disclosure requirement. The revisions are codified at 215 ILCS 5/356z.3 et al. 200 ILL. Legis. Serv. P.A. 102-901 (H.B. 4703) (approved May 26, 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.

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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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