

# Managed Care Litigation Update®

## NEWSWORTHY

District court grants member's cross MSJ finding that OON targeted narrative language treatment of member diagnosed with ASD should be approved pursuant to plan term providing "where there is no network Provider available for the Covered Services, the Plan may authorize the network cost share amounts ... to apply to a claim...from an out-of-network Provider." Court determined that Plan's assertion that it had network providers who could provide the services was not supported by substantial evidence. *Mark Zucca v. [redacted], Community Insurance Company*, USDC ND OH, No. 5:21-cv-1345-CEH, 2022 WL 17092803, (Doc. 40, filed Nov. 21, 2022).

District court grants preliminary approval of class action settlement, awarding families \$5,000 to \$88,875 associated with treatment at mental health residential programs, where plaintiffs allege administrator mislead families by citing "so-called exclusions in coverage denial letters rather than the true specific bases for the denial." *Brent S., et al. v. Blue Cross and Blue Shield of Massachusetts, Inc., et al.*, USDC D MA, No. 1:17-cv-11569-ADB, (Doc. 240, filed Nov. 30, 2022).

Washington state appellate court affirms in part and reverses in part summary judgment in favor of plan affirming administrator's denial of residential treatment claim pursuant to a wilderness therapy exclusion. Court concluded that genuine issues of material fact existed as to whether the exclusion of wilderness programs is a separate treatment limitation that applies to only mental health services, precluding summary judgment in favor of plan. *P.E.L., et al. v. Premera Blue Cross*, WA Ct. App., No. 82800-2-1, 2022 WL 17087861, (filed Nov. 21, 2022).

## RECENTLY FILED ACTIONS

United seeks recovery of overpayments made on behalf of its Medicare beneficiaries for the prescription drug Copaxone, where it alleges an illegal scheme of waiving the cost-sharing amount in violation of the Anti-Kickback Statute.

Member seeks ERISA benefits from self-funded plan associated with inpatient treatment at NeuLife Rehabilitation in Florida to treat Guillian Barre Syndrome, Nurogenic Bladder and Pleural Effusion w/ PluerX Cath. After a period of coverage, further treatment was denied as not medically necessary.

**PLEASE MAKE PLANS** to attend the [American Bar Association Managed Care Institute](#), on December 14-15, 2022 in Washington, D.C. [Mitch Hasenkampf](#) and [Joel Mintzer](#) will be speaking, joined by Richard Sherburne, Senior Litigation Counsel, Blue Cross and Blue Shield of Louisiana. Their presentation is titled, **Five Microbursts on Managed Care Litigation**, with "bursts" including Anti-assignment clauses, "Full and Fair Review," Scope of the NSA and Determination of QPA, claims purchased from OON provider's bankruptcy estate, and "right to payment" versus "rate of payment."



## RECENTLY FILED ACTIONS

Removed action in which physician group seeks \$7,400,000 in ERISA damages and alleges underpayment. Plaintiff asserts causes of action for breach of contract, promissory estoppel, and unjust enrichment.

Removed action in which OON physician group seeks \$190,608.81 in benefits associated with emergency care provided to member. Billed charges were \$195,100 and the amount paid was \$4,491.19. Other actions by this provider reported at *MCLU Vol. 162, 191, 202, 206, 208, 212*.

OON plastic surgeon seeks benefits and alleges underpayment associated with bilateral breast reduction. Billed charges were \$150,000 for each of the providers, and the amounts paid were \$6,491.80 and \$1,038.70, respectively. Other actions by this provider reported at *MCLU Vol. 187, 188, 192, 194, 203, 204, 206, 207, 208, 209, 211*.

Network compounding pharmacy and provider of home infusion therapy seeks over \$525,000 in benefits and alleges improper recoupments. Plaintiff asserts [ ] provided inconsistent and constantly changing claims submission guidance.

Removed action in which OON plastic surgeon seeks benefits associated with emergency services performed. Billed charges for the initial visit were \$54,784 and the amount paid was \$5,660.49, and billed charges for the subsequent services were \$47,310 and the amount paid was \$2,116.37. Plaintiff asserts payment levels at the 90th percentile of Fair Health.

Removed action in which OON orthopedic surgeon seeks ERISA benefits and alleges underpayment associated with "left wrist arthroscopy with TCFF repair; left flexor carpi ulnaris excision left extensor carpi ulnaris stabilization with G3 construction; and left thumb collateral ligament repair." Billed charges were \$80,353 and \$0 was paid by the plan.

Removed action in which plastic surgeon seeks \$303,604.27 in benefits and alleges underpayment associated with bilateral breast reduction. Billed charges were \$155,092 for one provider and \$150,000 for the other. The amounts paid were \$1,025.76 and \$461.97, respectively. Other actions by this provider reported at *MCLU Vol. 187, 188, 192, 194, 203, 204, 206, 207, 208, 209, 212*.

Removed action in which member seeks ERISA benefits for treatment at Arrowhead Regional Medical Center following accident. Plaintiff was transferred to Arrowhead following an authorization for the transfer. Plaintiff asserts that she had been mistakenly assigned to the wrong medical group at the time of the authorization based on a technical error by Aetna, yet the Arrowhead claims were subsequently denied for lack of authorization by the proper medical group.

Member seeks approximately \$300,000 in ERISA benefits and alleges that the failure to timely pursue administrative remedies should be excused because member is not fluent in English and did not receive an EOB or other notice containing information about appeal rights.

Removed action in which physician seeks benefits and alleges underpayment associated with emergency surgeries performed to repair spinal fractures following horse riding accident. Total billed charges were \$285,000 and the amount paid was \$1,533.45. Other actions by this provider reported at *MCLU Vol. 162, 191, 202, 206, 208, 212*.

Member seeks over \$190,000 in ERISA benefits associated with residential treatment at Triumph Youth Services and alleges violations of MHPAEA. The claim was denied on the grounds the provider was OON.

Member seeks over \$330,000 in ERISA benefits associated with residential treatment at Solacium Sunrise and alleges violations of MHPAEA. The claim was denied on the grounds the facility did not have a 24/7 nursing presence.

Removed action in which plastic surgeon seeks benefits and alleges underpayment associated with unspecified treatment. Plaintiff asserts that billed charges were \$132,28.72, that the plan agreed in a written contract to pay \$79,368.43, and that the amount paid was \$13,638.14. Plaintiff asserts breach of contract.

Member seeks over \$130,000 in ERISA benefits associated with residential treatment at Second Nature Blue Ridge and Alpine Academy and asserts violations of MHPAEA. The Blue Ridge claim was denied pursuant to a wilderness therapy exclusion and the Alpine claim was denied on the grounds it did not have a licensed behavioral health provider available 24/7.

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## ADDITIONAL NEWSWORTHY (REGULATORY)

Washington Insurance Commissioner amends rules pertaining to telehealth to permit and govern the use of audio-only telehealth services, amending WAC 284-170-130. WSR 22-22-104, 2022 WA Reg Text 618610 (issued Nov. 16, 2022).

[Mitchell Hasenkamp](#) 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.

## 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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