

Managed Care Litigation Update®

YEAR END REFLECTIONS

This is the 215th issue of Managed Care Litigation Update® as it enters its **ninth** year of publication. A heartfelt “thank you” to all who have contributed to the continued success of my newsletter, which reaches about 2,000 lawyers in the managed care space every two weeks.

My firm’s practice is dedicated to solely representing **Payers** and I have extraordinary respect and admiration for the in-house counsel who tirelessly devote their energies to resolving the intellectually sophisticated problems that arise daily. Whether in the context of litigation or compliance, the genuine pursuit of “the right answer” is a constant and I feel privileged to be a part of these challenges.

But I take a special delight when I see certain counsel for **Providers** on the opposite side of a dispute. These individuals are also in search of “the right answer” for their clients and I genuinely appreciate the opportunity to reach resolution of our dispute, through trial or compromise, with counsel who force us to think through every avenue as we collectively navigate the problem. My hat’s off to you as well, for you are what make both our profession and our practice area so rewarding.

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 2023. *JMH*

RECENTLY FILED ACTIONS

Member seeks over \$275,000 in ERISA benefits from self-funded plan associated with residential treatment at Uinta Academy. The claim was denied for lack of pre-authorization, though plaintiff asserts that the plan provides for a \$200 penalty rather than a denial of benefits for lack of PA.

Member seeks ERISA benefits associated with noninvasive outpatient prostate surgery. Member asserts the procedure was medically necessary but denied nonetheless.

Member seeks ERISA benefits from fully insured plan associated with an unspecified claim. Plaintiff asserts the plan wrongfully excluded important evidence from its review of the appeal.

Upgrade to a Premium Subscription and receive case caption and court information to the cases discussed in this Basic Subscription version. A Premium Subscription also includes access to the searchable Managed Care Litigation Database®. For more information, visit

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RECENTLY FILED ACTIONS

Putative class action in which members of self-funded ERISA plans assert TPA improperly profited at the expense of members by repricing OON claims and retaining a percentage of any difference between billed charges and the repriced amount.

Trans-gender member seeks marketplace benefits associated with gender-affirming surgeries. Plaintiff asserts the procedures were covered but that the network was inadequate to provide the services and that the plan refused to approve any OON providers.

Removed action in which member seeks benefits from a city government plan associated with implantation of a permanent spinal cord stimulator where a trial stimulator had been pre-approved and relieved pain.

Removed action in which member seeks ERISA benefits associated with prescription for Ozempic for use as a weight management medication to treat pre-diabetic. Plaintiff asserts "it was denied because it was being used off label."

Member and plastic surgeon seek ERISA benefits and asserts underpayment of claims associated with post-mastectomy reconstruction. Billed charges on the first procedure were \$130,000 and the amount paid was \$33,374.10. Billed charges on the second procedure were \$149,200 but the second claim was denied as not medically necessary.

Putative class action in which group of OON laboratories challenge reimbursement rates for Covid testing. Plaintiffs seek to enforce a private right of action under the FFCRA and CARES Act.

Member seeks ERISA benefits associated with residential inpatient treatment at Monuments Residential Treatment Center and alleges violations of MHPAEA. The claim was denied as not medically necessary.

Removed action in which OON physician seeks ERISA benefits and alleges underpayment of pre-approved "decompressive laminotomy, discectomy L5-S1 on left side with foraminotomy of the L5 nerve root." Billed charges were \$80,041 and the amount paid was \$2,244.

Removed action in which member seeks ERISA benefits associated with hospital fee of surgery. Plaintiff asserts that he signed a document saying he did not have insurance coverage because his plan denied pre-approval. Even though the plan's decision was later reversed with respect to the physician fee, the hospital has refused to release records and the plan refuses to pay the hospital fee.

Member seeks over \$200,000 in ERISA benefits associated with residential treatment at Blue Ridge Therapeutic Wilderness and Vista Sage and alleges violations of the MHPAEA. Both claims were denied as not medically necessary.

Removed action in which OON plastic surgeon seeks benefits and asserts underpayment of claim for bilateral breast reduction. Billed charges were \$150,000 for each of the providers and the amounts paid were \$1,856.97 and \$287, respectively.

Removed action in which OON plastic surgeon seeks benefits and asserts underpayment of claim for bilateral breast reduction. Billed charges were \$150,000 for each of the providers and the amounts paid were \$2,192.23 and \$544.06, respectively.

Removed action in which OON plastic surgeon seeks benefits and asserts underpayment of claim for bilateral breast reduction. Billed charges were \$85,134 for each of the providers. The amounts paid were \$1,219.75 and \$1,263.12, respectively.

Member seeks ERISA benefits associated with residential treatment at Sedona Sky Academy, Second Nature Blue Ridge, and Innercept LLC and alleges violations of MHPAEA. All three claims were denied on the grounds services at the respective facilities was not covered.

NEWSWORTHY

District court grants summary judgment in favor of class finding that plan exclusions denying gender affirming care violated Section 1557 where the class included “all individuals who have been ... beneficiaries in an ERISA self-funded ‘group health plan’ ... and that contains a categorical exclusion of some or all Gender-Affirming Health Care services.” *C.P., et al. v. Blue Cross Blue Shield of Illinois*, USDC WD WA, No. 3:20-cv-6145-RJB, 2022 WL 17788148, (Doc. 146, filed Dec. 19, 2022). Previously reported at *MCLU Vol. 165*.

District court grants motion to dismiss claims of OON surgeon who alleged underpayment of a pre-authorized claim, finding that the complaint failed to state sufficient facts to establish a claim for breach of contract, promissory estoppel, or account stated. *East Coast Spine Joint and Sports Medicine v. Aetna Life Insurance Company, et al.*, USDC D NJ, No. 2:22-cv-1768-KM-AME, 2022 WL 17582561, (Doc. 14, filed Dec. 12, 2022). Previously reported at *MCLU Vol. 197*.

Arkansas Supreme Court grants motion for summary judgment in favor of municipal health plan where member challenged plan exclusion contained in policy booklet where “the charges claimed exceed those that are ‘reasonable and customary,’” finding that the plan was permitted to adopt the rules and regulations contained in the policy booklet. *Hendrix, et al. v. Municipal Health Benefit Fund, Ark.*, No. 22-cv-138, 2022 Ark. 218, (filed Dec. 8, 2022).

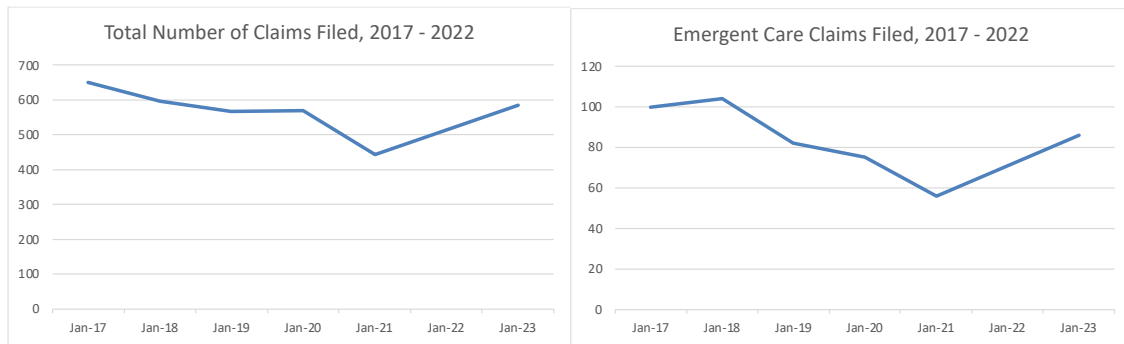
ADDITIONAL NEWSWORTHY (REGULATORY)

US Department of Health and Human Services issues proposed rule to impose a standing request for translated or accessible-formatted material upon the plan learning of the beneficiary’s preference if the beneficiary’s preference is a language in which at least 5% of the individuals in a plan service area use that language as the primary non-English language. The proposal would modify 42 CFR §§ 422.2267, 423.2267, and 45 CFR § 92.102(b). Medicare Program; Contract Year 2024 Policy and Technical Changes to the Medicare Advantage Program, 87 Fed. Reg. 79452-01, (published Dec. 27, 2022).

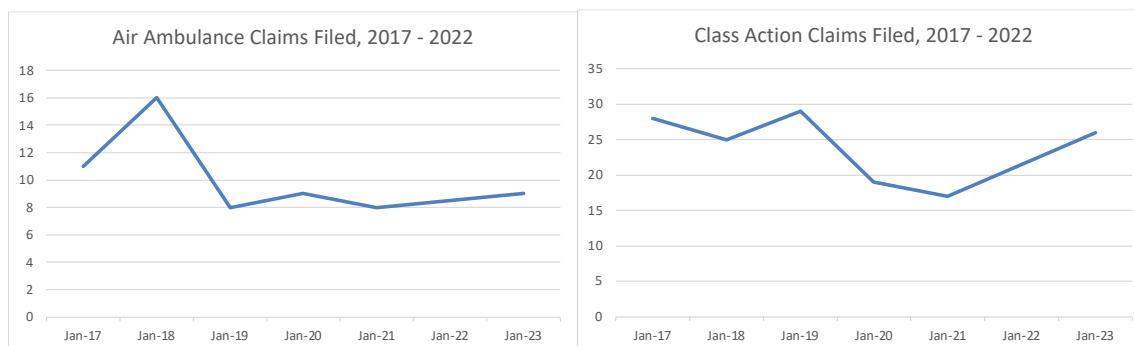
[Mitchell Hasenkampf](#) leads the firm’s compliance practice group, which advises clients on matters including utilization review and prompt pay requirements for government and commercial plans, Member incentives, marketing and member communications, and Grievance and Appeal processes.

SIX YEAR TREND OF CLAIMS (2017 - 2022)

- Managed Care Litigation Update® covered 584 new case filings in 2022, 444 new case filings in 2021, 569 new case filings in 2020, 566 new case filings in 2019, 597 new case filings in 2018, and 646 new case filings in 2017.

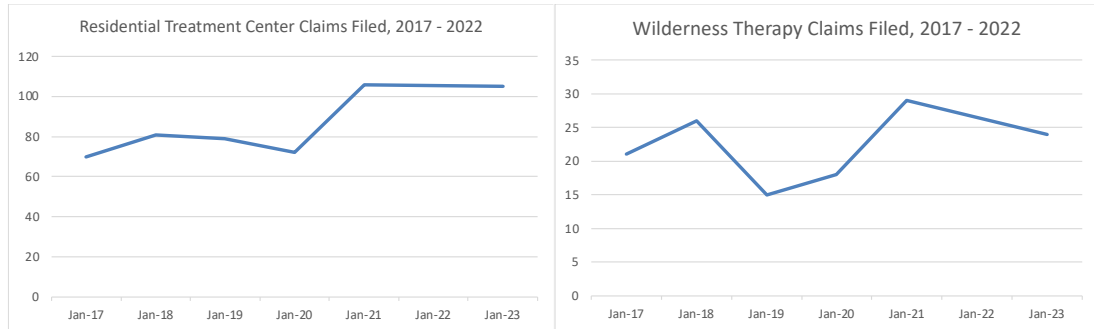


- **INCREASING EMERGENT CARE CLAIMS:** there was an increase in case filings over whether the services rendered fall under coverage for emergent care versus other health plan benefit provisions. There were 86 such cases in 2022, 56 such cases in 2021, 75 such cases in 2020, 82 such cases in 2019, 104 such cases in 2018, and 100 cases in 2017.
- **STEADY AIR AMBULANCE CLAIMS:** There were 9 new cases filed in 2022 involving coverage disputes over air ambulance transport, 8 such cases filed in 2021, 9 such cases were filed in 2020, 8 such cases were filed in 2019, 16 such cases were filed in 2018, and 11 such cases were filed in 2017.

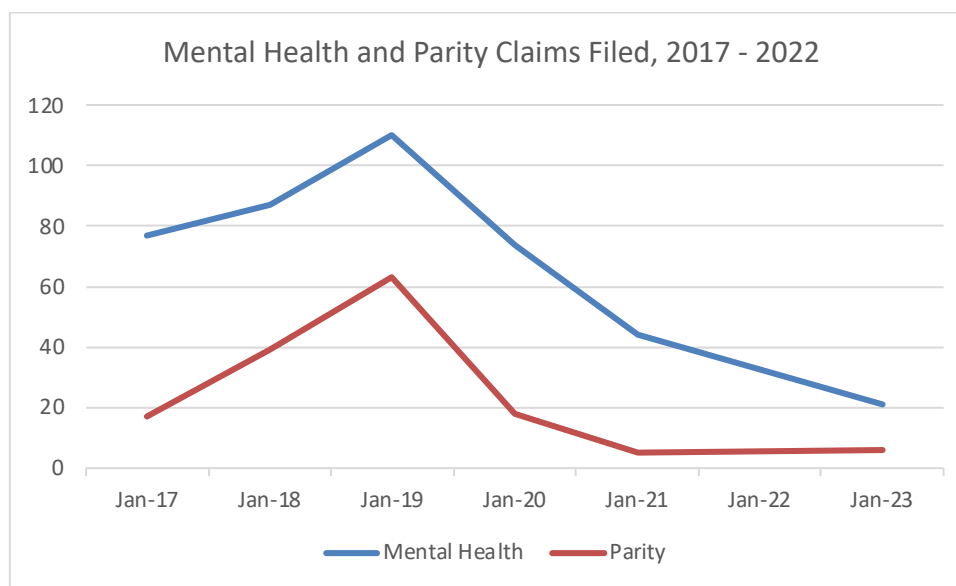


- **INCREASING CLASS ACTIONS:** There were 26 new putative class actions filed in 2022, 17 such cases filed in 2021, 19 such cases filed in 2020, 29 such cases filed in 2019, 25 such cases filed in 2018, and 28 such cases filed in 2017.
- **Dustin B. Pead**, U.S. District Judge for the District of Utah, presided over the highest number of cases reported in this publication from 2016 – 2022 (88). **Esther Salas**, U.S. District Judge for the District of New Jersey presided over the second highest number of cases in the same period (64).

- **STEADY CLAIMS FOR RESIDENTIAL TREATMENT CENTERS:** there were 105 new cases were filed in 2022 seeking coverage for treatment rendered at residential treatment centers, 106 new cases were filed in 2021, 72 new cases were filed in 2020, 79 new cases were filed in 2019, 81 such cases were filed in 2018, and 70 such cases were filed in 2017.



- **DECREASE IN CLAIMS FOR WILDERNESS THERAPY PROGRAMS:** there were 24 new cases filed in 2022 seeking coverage for wilderness therapy programs, 29 new cases filed in 2021, 18 new cases were filed in 2020, 15 new cases were filed in 2019, 26 such cases were filed in 2018, and 21 such cases were filed in 2017.
- **DECREASING CLAIMS UNDER MENTAL HEALTH PARITY LAWS:** Of the 21 new case filings in 2022 involving disputes over mental health benefits, 6 alleged a violation of federal and/or state 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.



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.

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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 | 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 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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