

Managed Care Litigation Update®

NEWSWORTHY

Eighth Circuit affirms summary judgment in favor of Blue Cross Blue Shield of North Dakota in air ambulance dispute, ruling that BCBS' use of 150% of Medicare rate as maximum allowable charge was within plan's discretion. *Ivan Mitchell, et al., v. Blue Cross Blue Shield of North Dakota, et al.*, USAC Eighth Circuit, No. 18-2890, (Doc. 4893607, filed Mar. 20, 2020).

BCBS entities sue Walgreens asserting over \$100 million in damages arising from "scheme to overcharge Plaintiffs for prescription drugs by submitting claims for payment at artificially inflated prices." *Blue Cross Blue Shield of Minnesota, et al., v. Walgreens Co.*, USDC ND IL, No. 1:2020-cv-1853, (Doc. 1, filed Mar. 18, 2020). A second near-identical lawsuit by a separate group of BCBS entities was also filed. *Healthnow New York, Inc., et al. v. Walgreens Co.*, USDC ND IL, No. 1:20-cv-1929, (Doc. 3, filed Mar. 23, 2020).

Fifth Circuit affirms grant of summary judgment in favor of Cigna in suit alleging \$40 million in underpayments by general acute care hospital. After determining hospital was typically charging \$100 coinsurance, Cigna prospectively implemented payment protocol determining the cost of the procedure based on coinsurance charge rather than billed charge. The court determined implementing protocol was within Cigna's ERISA discretion. *North Cypress Medical Center Operating Co. Ltd., et al. v. Cigna Healthcare, et al.*, USCA 5th Cir., No. 18-20576, (Doc. 00515350925, filed Mar. 19, 2020).

RECENTLY FILED ACTIONS

Piney Woods ER III, LLC, et al., v. Blue Cross and Blue Shield of Texas, a Division of Health Care Service Corporation, U.S.D.C. E.D. TX, Doc. No. 1:20-cv-112-MJT, (filed Mar. 19, 2020). Putative class action in which group of free-standing emergency centers and associated physician groups assert underpayment of "tens of thousands of claims" associated with emergency services. Plaintiffs assert "Count One: Violations of ERISA Payment Obligations;" "Count Two: Breach of Contract;" "Count Three: Bad Faith Insurance Practices;" "Count Four: Negligent Misrepresentation;" "Count Five: Quantum Meruit / Unjust Enrichment;" "Count Six: Tortious Interference with Prospective Business Relations;" and "Count Seven: Declaratory Judgment."

Orthopaedic Care Specialists, P.L. v. United Healthcare Services, Inc., U.S.D.C. S.D. FL, Doc. No. 9:20-cv-80433, (filed Mar. 16, 2020). Removed action in which OON "emergency medicine group practice" and alleged assignee seeks benefits associated with alleged underpayment for treatment provided to a plan member at St. Mary's Medical Center and Children's Hospital. Plaintiff alleges "United has not paid the Plaintiff either their billed charges, the fair market value of the services rendered or the reasonable value of the services rendered by Plaintiff." Neither the billed charges nor basis for payment are identified in the underlying complaint. Other cases filed by this provider against United reported in *MCLU Vol. 130, 138, and 139*, against Aetna reported in *MCLU Vol. 139 and 143*, against Blue Cross reported in *MCLU Vol. 139, 147, and 148*, and against Cigna reported in *MCLU Vol. 141*.

See also:

Orthopaedic Care Specialists, P.L. v. Cigna Global Holdings, Inc., U.S.D.C. S.D. FL, Doc. No. 9:20-cv-80466-DMM, (filed Mar. 20, 2020).

RECENTLY FILED ACTIONS

Aton Center, Inc. v. Blue Cross and Blue Shield of North Carolina, et al., U.S.D.C. S.D. CA, (Doc. No. 3:20-cv-492-WQH-BGS, (filed Mar. 16, 2020). Removed action in which OON substance abuse treatment facility asserts underpayment associated with residential inpatient treatment. Plaintiff alleges an “unpaid balance of \$219,893.89.” “Plaintiff is informed and believes ... that at the time benefits were verified Defendants had information regarding the different/lower daily payment amounts but withheld that information from Plaintiff.” Grounds for payment/partial payment are not stated in underlying complaint.

See also:

- **Aton Center, Inc. v. Blue Cross and Blue Shield of South Carolina, et al.**, U.S.D.C. S.D. CA, Doc. No. 3:20-cv-496-BEN-AHG, (filed Mar. 16, 2020).
- **Aton Center, Inc. v. Blue Cross and Blue Shield of Illinois, et al.**, U.S.D.C. S.D. CA, Doc. No. 3:20-cv-500-WQH-BGS, (filed Mar. 16, 2020).
- **Aton Center, Inc. v. Carefirst Bluecross Blueshield, et al.**, U.S.D.C. S.D. CA, Doc. No. 3:20-cv-541-BEN-BGS, (filed Mar. 23, 2020).
- **Aton Center, Inc. v. Premera Blue Cross, et al.**, U.S.D.C. S.D. CA, Doc. No. 3:20-cv-501-WQH-BGS, (filed Mar. 16, 20).
- **Aton Center, Inc. v. Regence Blue Shield of Washington, et al.**, U.S.D.C. S.D. CA, Doc. No. 3:20-cv-498-AJB-MDD, (Mar. 16, 2020).
- **Aton Center, Inc. v. Regence Blue Cross Blue Shield of Oregon, et al.**, U.S.D.C. S.D. CA, Doc. No. 3:20-cv-497-WQH-BGS, (filed Mar. 16, 2020).

Amber Newkirk and Waymon Newkirk v. [], Cigna Health and Life Insurance Company, et al., U.S.D.C. D. NJ, Doc. No. 1:20-cv-3055-NLH-JS, (filed Mar. 19, 2020). Removed action in which member seeks ERISA benefits following automobile collision and asserts defendant “refused and neglected to pay the full benefits to which Plaintiff is entitled.” Neither the amount nor character of denied claims are identified in the underlying complaint.

Atlantic Shore Surgical Associates v. United Healthcare Insurance Company, et al., U.S.D.C. D. NJ, Doc. No. 3:20-cv-3065-FLW-ZNQ, (filed Mar. 19, 2020). OON provider and alleged assignee seeks ERISA benefits and asserts “under-reimbursement of Atlantic Shore for specialized abdominal surgery procedures.” Total billed charges were \$271,193.27 and the amount reimbursed was \$5,678.54. The CPT codes for the initial surgery were 44154, 44005, 49000, 44603, 58850, and 44955, and the CPT codes for the additional surgeries were 44145-78, 44005-78, 49000-78, and 44603-78, and separately 58150-62-78 and 44955-62-78. Many of the claims were denied as “part of global service.”

E & J Healthcare, LLC, et al., v. United Healthcare of Texas, Inc., U.S.D.C. W.D. TX, Doc. No. 1:20-cv-292-RP, (filed Mar. 19, 2020). Group of “post-acute care, intensive, neurological rehabilitation facilities” asserts its lawsuit is based on “349 medical claims for medical services provided to 69 patients.” Plaintiffs became in-network on May 1, 2019 but provided services to UHC members at agreed rates pursuant to the “Gap Exception” authorization. “Expected and agreed reimbursement for those services ... was \$1,191,805.10;” the amount paid is \$929,095.63; and an overpayment of \$98,066 has been asserted. Thus, \$262,709.49 is at issue in the first set of claims. \$142,882.08 is in dispute on the second set of claims, based on an “expected and agreed reimbursement” of \$492,229.90. \$8,260.94 is in dispute on the third set of claims. In total, plaintiffs assert a variance of \$413,852.51 between the agreed rates and the amounts paid.

Sallye Turley v. Anthem Blue Cross Life and Health Insurance Company, U.S.D.C. W.D. AR, Doc. No. 5:20-cv-5050-PKH, (filed Mar. 20, 2020). Member seeks \$195,846.40 in ERISA benefits associated with ICD implant. The claim was denied as not medically necessary because “[t]his type of device is not approvable under the plans clinical criteria when there is not a serious heart problem that puts a person at risk for dangerous heart beat patterns.” Plaintiff asserts “a history of cardiomyopathy and low ejection fraction.”

Surgery Center of Viera, LLC v. Cigna Health and Life Insurance Company, et al., U.S.D.C. M.D. FL, Doc. No. 6:20-cv-500-CEM-DCI, (filed Mar. 20, 2020). Removed action in which OON medical provider and alleged assignee seeks ERISA benefits associated with back surgery. Billed charges were \$362,875 and amount paid was \$138,466.38. The basis for payment was maximum allowable charge. Other actions filed by this provider are reported in *MCLU Vol. 122, 126, 129, 130, 132, 133, 134, 135, 140, 144, 146, 148.*

Tamar Lowell, et al., v. United Behavioral Health, et al., U.S.D.C. N.D. CA, Doc. No. 4:20-cv-1989-YGR, (filed Mar. 20, 2020). Members seek ERISA benefits associated with treatment at a residential treatment center for Plaintiffs’ 11-year-old son at Intermountain. Treatment was covered from August 16, 2018 to August 28, 2018, but further residential in-patient treatment was denied. Grounds for denial are that “your child’s condition no longer meets Guidelines for further coverage of treatment in [a residential] setting...” (brackets in original). Plaintiffs allege United relied on 2018 Level of Care Guidelines which “were much more restrictive than generally accepted standards of care.”

Marco Z. v. Unitedhealthcare Insurance Company, et al., U.S.D.C. W.D. TX, Doc. No. 5:20-cv-351-JKP-RBF, (filed Mar. 20, 2020). Member seeks ERISA benefits from self-funded plan associated with alleged “emergency hospitalization that the subject insured (M.Z.) underwent in the Summer of 2017 at the Hospital Regional Del Rio in Mexico.” The billed charges for the over one-month hospitalization were \$557,974.35. The claim was denied on the basis “[w]e have not received all the requested information needed to process your claim.”

M.H. v. Aetna Life Insurance Company, U.S.D.C. W.D. WA, Doc. No. 3:20-cv-5268-RBL, (Mar. 20, 2020). Member seeks ERISA benefits on behalf of child seeking “an additional [8] hours per day of in-home skilled nursing care” as “Aetna presently authorizes only 16 hours per day ... based upon its determination that her parents are responsible for the remaining 8 hours per day of skilled nursing care.” In addition to ERISA, Plaintiff seeks recovery under Section 1557 of the ACA for disability discrimination.

NTR Resources, LLC v. Anthem Blue Cross Life and Health Insurance Company, et al., U.S.D.C. C.D. CA, Doc. No. 8:20-cv-578-DOC-ADS, (filed Mar. 23, 2020). Removed action in which OON clinical laboratory associated with alcoholism and addiction services asserts wrongful denial pertaining to 15 claims filed with BCBS entities. Plaintiff asserts, “Defendants were obligated – under the law and the policies – to pay Plaintiff 70% of its billed charges (minus any cost-sharing amounts) for the laboratory services that Plaintiff rendered to Defendants’ insureds/members, all 15 of them, until the deductible/out-of-pocket maximum is met at which time Defendants pay 100%.” Defendants paid 0% of the billed charges.

12 South, LLC v. Anthem Blue Cross Life and Health Insurance Company, et al., U.S.D.C. C.D. CA, Doc. No. 8:20-cv-577-JLS-DFM, (filed Mar. 23, 2020). Removed action in which OON alcoholism and substance use disorder treatment facility asserts underpayment pertaining to 94 claims filed with BCBS entities. Plaintiff asserts, “Defendants were obligated – under the law and the policies – to pay Plaintiff 70% of its billed charges (minus any cost-sharing amounts) for the mental health and substance use disorder treatment services that Plaintiff rendered to Defendants’ insureds/members, all 94 of them, until the deductible/out-of-pocket maximum is met at which time Defendants pay 100%.” Defendants paid 13.7% of the billed charges. Another action filed by this provider and reported in *MCLU Vol. 147*.

Stephany Robinson v. [], Blue Cross Blue Shield of Massachusetts, Inc., U.S.D.C. D. AZ, Doc. No. 4:20-cv-132-JR, (filed Mar. 23, 2020). Member seeks \$79,965 in ERISA benefits associated with newborn medical expenses, where parties dispute whether newborn was properly added to policy within the thirty-day period for doing so.

Aviation West Charters, LLC v. BlueCross BlueShield of Illinois, U.S.D.C. D. AZ, Doc. No. 2:20-cv-599-MTL, (filed Mar. 24, 2020). Air ambulance provider and alleged assignee seeks ERISA benefits and asserts underpayment. In response to the appeal, BCBS asserted “the claim was processed correctly according [to] the member’s benefits at 100% of the eligible amount.”

Ann D. v. Blue Cross and Blue Shield of Wyoming, U.S.D.C. D. UT, Doc. No. 2:20-cv-197-PMW, (filed Mar. 25, 2020). Member seeks ACA benefits on behalf of two children associated with residential in-patient treatment. One child was treated at Visions Adolescent Treatment Center (“Visions”), and the other child was treated at Cherry Gulch Residential Care Facility (“Cherry Gulch”) and Evoke at Entrada (“Evoke”). The stated reasons for denial were simply that the benefits were not covered. Plaintiff seeks reimbursement of “over \$300,000” and asserts violations of MHPAEA.

Kayla Phifer v. Bluecross Blueshield of Tennessee, Inc., et al., U.S.D.C. E.D. AR, Doc. No. 4:20-cv-310-LPR, (filed Mar. 25, 2020). Member seeks \$229,380.94 in ERISA benefits on behalf of newborn child. Grounds for denial were that the child was not timely added to the policy.

Robert Trilling v. Blue Cross and Blue Shield of Florida, Inc., et al., U.S.D.C. S.D. FL, Doc. No. 0:20-cv-60649-WPD, (filed Mar. 27, 2020). Member seeks \$29,916 in benefits associated with alleged emergency care provided to daughter. “Florida Blue denied payment of the affiliated bills, alleging that the treatment billed was not medically necessary or reasonable and therefore not covered by the applicable policy.”

Texienne Oncology Centers, P.L.L.C., et al., v. Unitedhealthcare Insurance Company, et al., U.S.D.C. S.D. TX, Doc. No. 4:20-cv-1100, (filed Mar. 27, 2020). Removed action in which pair of hospitals seek in excess of \$4 million as a result of alleged breaches to separate facility participation agreements. Neither the number of claims nor the bases for payment are identified in the underlying complaint.

Margaret G.T., et al., v. Oxford Health Plans (NJ), Inc., et al., U.S.D.C. D. UT, Doc. No. 2:20-cv-211-DBB, (Mar. 30, 2020). Mother on behalf of daughter seeks ERISA benefits associated with in-patient residential treatment at Boulder Creek Academy and ViewPoint Center. The patient received 9 months of treatment at Boulder Creek under her father's insurance, but the remainder of the stay from January through November was denied when coverage switched to the mother's plan. The mother's plan provided coverage at ViewPoint from November 12, 2017 through November 27, 2017, but the remainder of the treatment through December 22, 2017 was denied. The denials were based on the asserted failure to meet the Optum level of care guidelines.

Sharon Prolow, et al., v. Aetna Life Insurance Company, et al., U.S.D.C. S.D. FL, Doc. No. 9:20-cv-80545-KAM, (filed Mar. 31, 2020). Putative class action in which member challenges "Aetna's uniform application of an unlawful medical policy to deny as experimental or investigational [Proton Beam Radiation Therapy] treatment for cancer." Plaintiff asserts Aetna's PBRT coverage policies are contained in "Clinical Policy Bulletin No. 270, "Proton Beam, Neutron Beam, and Carbon Ion Radiotherapy."

Kevin Bernzott v. Blue Shield of California Life & Health Insurance Company, et al., U.S.D.C. C.D. CA, Doc. No. 2:20-cv-3016, (filed Mar. 31, 2020). Removed action in which member seeks ERISA benefits pertaining to second opinion and subsequent cancer treatment. "The improved diagnostic scan substantially altered the recommended treatment, from surgery and removal of the prostate, to radiation coupled with hormone therapy." Grounds for denial are not stated in the underlying complaint.

David Bain, et al., v. Oxford Health Insurance, et al., U.S.D.C. N.D. CA, Doc. No. 3:20-cv-2190, (filed Mar. 31, 2020). Members seek ERISA benefits following prior litigation in which "the District Court held that the Defendants had abused their discretion by denying the subject benefits, and by way of remedy, remanded the benefit claim to the Defendants' for a new determination of benefits." Plaintiffs allege "Defendants have neither issued a determination of the Plaintiffs' entitlement to benefits, nor have they notified Plaintiffs of any need for an extension of time to do so." Prior litigation reported in *MCLU Vol. 37*.

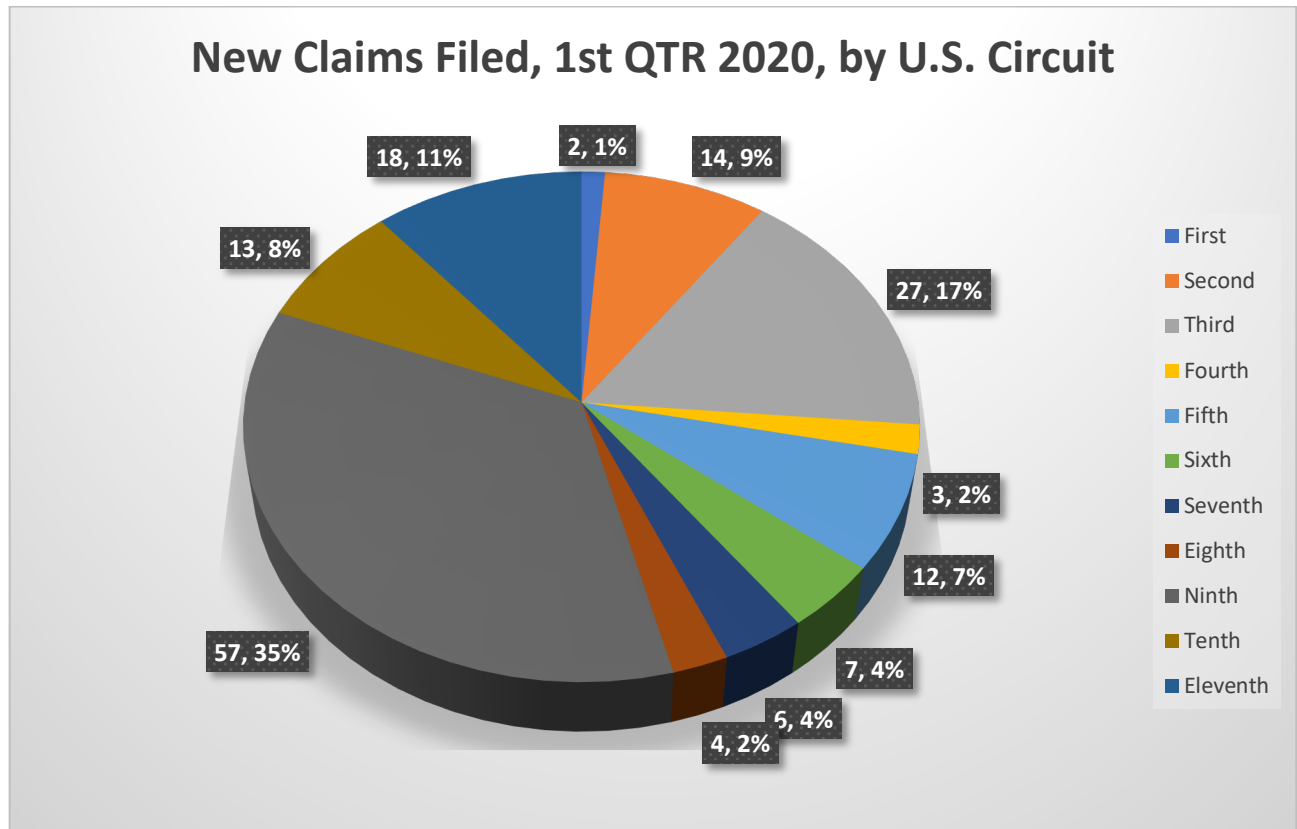
ADDITIONAL NEWSWORTHY (REGULATORY)

Illinois DHFS issues final rule creating a dispute resolution process whereby a provider may submit a payment dispute challenging the payment of a Medicaid Managed Care Organization. Under the process described at 89 IL Admin. Code 140.75, the decision of DHFS is final. 44 Ill. Reg. 4616, (adopted Mar. 20, 2020).

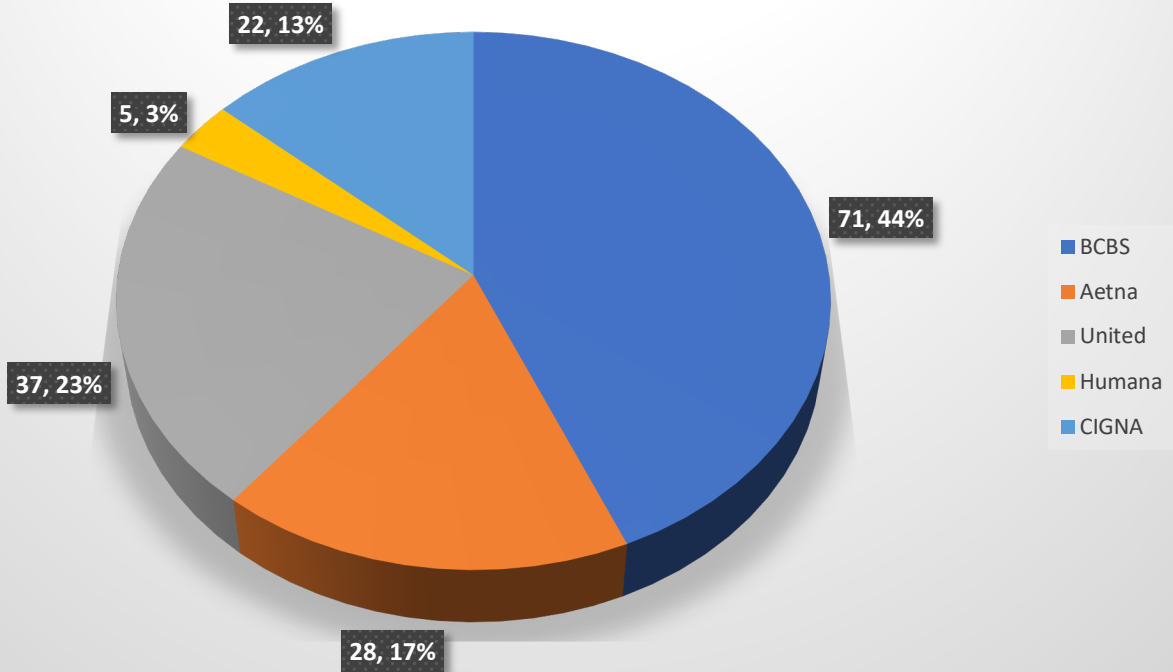
AND

Please take a moment to read [Medicare Advantage and Part D Advance Notice and Proposed Rule, Part I, II, or III](#). Parts II and III were co-authored by [Mitch Hasenkampf](#), who provides regulatory and legal compliance to the firm’s clients on Medicare, Marketplace, and Medicaid issues.

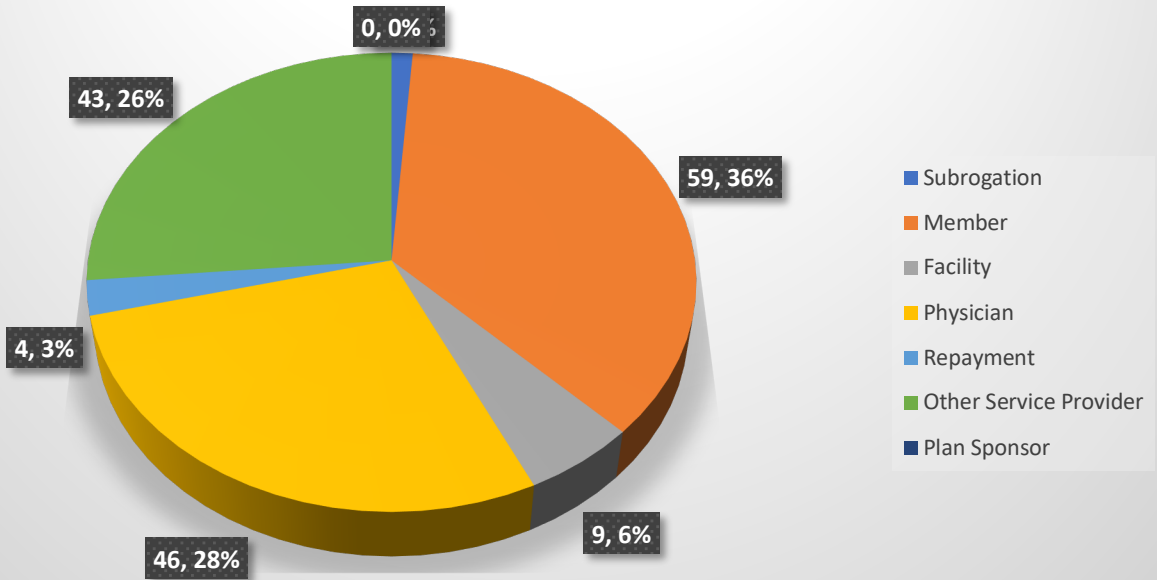
FIRST QUARTER 2020 STATISTICS



New Claims Filed, 1st QTR 2020, by Health Insurer



New Claims Filed, 1st QTR 2020, by Claim Type



SUMMARY:

- 163 new claims filed the First Quarter, 2020.
- The largest concentration of new claims was in the Ninth Circuit (57), followed by the Third Circuit with 27 new claims.
- BCBS (all plans) received the largest number of new claims (71), followed by United with 37 new claims, then Aetna with 28 new claims.
- Member claims were the largest type of claims (59), followed by Physician claims (46), then Other Service Provider claims (43).
- **TO DATE:** U.S. District Court **Judge Ester Salas**, D. NJ, has presided over the largest number of cases reported in this publication (51). U.S. District Court **Judge Dustin B. Pead**, D. UT, has presided over the second largest number of reported cases (47).

Compared to **last quarter**, Fourth Quarter, 2019:

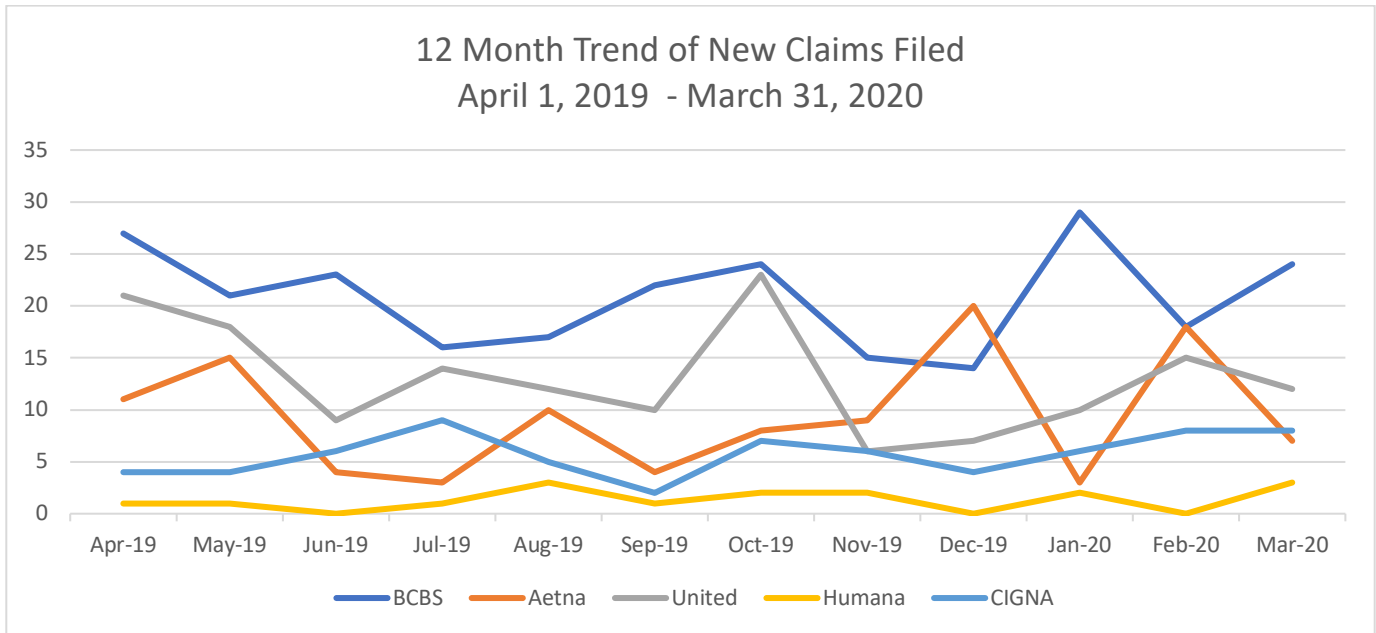
- 147 new claims filed the Fourth Quarter, 2019.
- The largest concentration of new claims was in the Ninth Circuit (24), followed by the Second Circuit with 23 new claims.
- BCBS (all plans) received the largest number of new claims (53), followed by Aetna with 37 new claims, then United with 36 new claims.
- Member claims were the largest type of claims (62), followed by Other Service Provider claims (40), then Physician claims (28).

Compared to **one year ago**, First Quarter, 2019:

- 125 new claims filed the First Quarter, 2019.
- The largest concentration of new claims was in the Tenth Circuit, with 27 new claims, followed by the Ninth Circuit with 26 new claims.
- BCBS (all plans) received the largest number of new claims (55), followed by United with 28 new claims.
- Member claims were the largest type of claims (63), followed by Physician claims (33), then Other Service Provider and Facility claims (10 each).

TRENDING OF CASE FILINGS

Twelve Month Trend of Case Filings



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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