

# **AAHAM LEGISLATIVE UPDATES**

**OCTOBER 12, 2021**

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# SCOTT S. LONDON BIOGRAPHY

- President of London Eligibility, Inc.
- Attorney since 1996
- Certified Application Counselor
- AAHAM (American Association of Healthcare Administrative Management) Board Member and Legislative Liaison- MD Chapter
- NOSSCR (National Organization of Social Security Claimants' Representatives) – Member
- Former District 11 Team Slate Treasurer
- Licensed Health Insurance Agent



# GUSTAVO MATHEUS BIOGRAPHY

- Gustavo Matheus represents providers of healthcare services in areas involving reimbursement, including appealing denied claims and litigation.
- Gustavo enjoys gardening and homemade margaritas.
- He believes the COVID-19 pandemic must end before Superbowl LVI.

# ***HUNSTEIN V. PREFERRED COLLECTION MANAGEMENT SERVICES, INC.***

On April 21, 2021 The U.S. Court of Appeals for the Eleventh Circuit, covering Alabama, Florida, and Georgia, decided in *Hunstein v. Preferred Collection and Management, Inc.*, that a debt collector's communication with its third-party vendor violated section 1692c(b) of the Fair Debt Collection Practices Act ("FDCPA"), which prohibits a debt collector for communicating, in connection with the collection of any debt, with an unauthorized third party.

# ***HUNSTEIN BACKGROUND***

Lawsuit originated from unpaid bills for medical treatment at a hospital. The hospital assigned the unpaid bills to a debt collector that had contracted with a third-party vendor for printing and mailing its collection letters. The collector electronically transmitted to its vendor certain information about the plaintiff/debtor such as: (1) his status as a debtor, (2) the exact balance of his debt, (3) the entity to which he owed the debt, (4) that the debt concerned his son's medical treatment, and (5) his son's name. The vendor then used that information to generate and send a dunning letter to the debtor. The debtor received the dunning letter and then filed a lawsuit in the Middle District of Florida alleging violations of both the FDCPA and the Florida Consumer Collection Practices Act. The district court dismissed the lawsuit for failure to state a claim by concluding that the debtor had not sufficiently alleged that the collector's transmittal of information to the letter vendor was a communication "in connection with the collection of a debt." The debtor then appealed to the Eleventh Circuit.

# ***HUNSTEIN ANALYSIS***

Standing- 11th Circuit held that a violation of 1692c(b) gives rise to a concrete injury even if intangible

Communication- Was the communication “in connection with the collection of any debt” such that it violated 1692c(b). The parties agreed that YES, the collector’s transmittal of information to the letter vendor was a “communication”. The debt collector’s transmittal of a consumer’s personal information to its dunning vendor constituted a communication.

Plain Language of Statute 1692c(b) guided 11th Circuit to conclude that Plaintiff properly stated a claim, had standing, and violated 1692c(b)

Gravity of decision not lost on 11th Circuit. Baiting Congress to change or clarify 1692c(b).

# ***REQUEST FOR REHEARING EN BANC FILED MAY 25, 2021***

- The transmission was an automatic, ministerial, electronic transmission of data privately to an agent of a debt collector for the sole purpose of facilitating a communication to the consumer by the debt collector so that a letter could be mailed to Mr. Hunstein. The data was not viewed by human eyes nor published to the public.
- The decision was contrary to decisions from the U.S. Supreme Court and previous precedent set by the 11th Circuit Court of Appeals.
- There is no connection between the electronic transmission of data to a private server maintained by an agent of the debt collector and the tort of public disclosure of private facts since a private server does not pertain to or affect the community or the people as a whole.
- The electronic transmission of data to a private server of an agent of a debt collector is not a harm congress identified when it enacted the FDCPA.
- The FDCPA explicitly allows telegrams which are the 1977 equivalent of letter vendors.
- In a similar case, *Flood v. Mercantile Adjustment Bureau*, 176 P.3d 769 (Colo. 2008), the Colorado Supreme Court analyzed a state provision equivalent to 15 USCA 1692c(b) and held that use of a letter vendor presents no harm to consumers.
- The CFPB has found no consumer injury in the use of letter vendors, and the ruling is contrary to Regulation F, which will go into effect on November 30, 2021.

***TRANSUNION V. RAMIREZ NO. 20-297,  
2021 WL 2599472, -- S. CT. -- (2021)  
JUNE 25, 2021***

- Supreme Court held that although TransUnion technically violated Fair Credit Reporting Act by reporting inaccurate information on credit reports, over 75% of the class members did not suffer a “concrete injury” and therefore lacked standing.
- If a plaintiff does not suffer a real harm and the risk of future harm never materializes, there is no concrete harm and no standing to assert a damages claim.
- Footnote 6: “American courts have (not) necessarily recognized disclosures to printing vendors as actionable publications”

# SUPPLEMENTAL AUTHORITY

- Preferred Collection (defendant in Hunstein) filed a notice of supplemental authority with the 11th Circuit Court of Appeals in Florida relying on the Supreme Court decision.

# JUDGE BROWN

- Judge Gary Brown dismisses 6 “Hunstein” cases in the Eastern District of NY based on the Supreme Court ruling in *Transunion v. Ramirez*.

# ***DURLING V. CREDIT CORP SOLUTIONS 0:21-CV-61002 (S.D.FL. JUL. 8, 2021)***

- The Southern District of Florida refused to stay a case pending the outcome of the Hunstein en banc petition.
- The Court held directly that under Circuit Rule 36, “[u]nder the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect the result.” So the fact that a mandate was withheld pending the outcome of the rehearing petition did not impact the precedential value of Hunstein.

# **WHAT'S NEXT FOR “HUNSTEIN” CASES ?**

***DEMOCRATIC SENATORS SEND LETTER  
TO CFPB (CONSUMER FINANCIAL  
PROTECTION BOARD)  
JUNE 25, 2021***

- Re-Examine Medical Debt Collections
- Prohibiting providing medical debt to credit reporting agencies
- Creditors must advise consumers about charity care, Medicare, Medicaid, and the ACA
- Limiting the number of phone calls
- Comprehensive data collection: lawsuits, garnishments, liens, and zip codes
- Senators: Van Hollen (MD), Murphy (CT), Blumenthal (CT), Warren (MA), Booker (NJ)

# **MEENA SESHAMANI, MD, PHD NAMED CMS DEPUTY ADMINISTRATOR AND DIRECTOR OF CENTER FOR MEDICARE**

- Former HHS Office of Health Reform Director under Obama
- Medstar VP of Clinical Care Transformation
- Designed and implemented population health and value based care initiatives
- Move away from healthcare in silos move to integrating medical issues in a seamless manner

**REVAMPING MARYLAND'S  
MANAGED CARE LAWS**

**MD. INS. ART. SEC. 15-1009  
PRIOR AUTHORIZATION**

# PRIOR AUTHORIZATION

“Prior authorization is not a guarantee of payment and is subject to plan provisions and exclusions.”

Aka:

- precertification
- prior approval

# DEFINITION

[A] health plan **cost-control process** by which . . . providers must obtain **advance approval** from a health plan before a **specific service** is delivered to the patient to qualify for **payment coverage**.

<https://www.ama-assn.org/practice-management/sustainability/prior-authorization-practice-resources> (accessed 8/24/21).

# PURPOSE

- *The right member*
- *In the right place*
- *At the right time*



Only “Medically Necessary” services can be pre-authorized



Think: “Chevy Rule”

# MEDICAID DEFINITION

- A service is *Medically Necessary* if:
  - Directly related to treatment of illness or condition,
  - Consistent with currently accepted standards of good medical practice,
  - Not primarily for the convenience of the consumer, family, or provider, and
  - The most cost efficient service that can be provided without sacrificing effectiveness or access to care





\$75,000+



\$52,000+

# AUTHORIZATION

- Need for Uniformity
  - Efficiency and expediency
  - Trends and tracking
- ‘Age of Big Data’
  - How is the data used?
  - “I will not be indexed, punch-carded, filed, stamped, briefed, debriefed, or numbered.”

# AUTHORIZATION

- Utilization Management tools
  - - *e.g.*, retrospective authorization
- Retro-authorization not always allowed by health plans
- What's the harm in not employing prior auths?
  - *e.g.*, UHC's updated medical necessity policy
  - *c.f.*, "a contract is a contract is a contract"
  - How are damages calculated?

# GUIDING PRINCIPLES

- Clinical Validity
- Continuity of Care
- Transparency
- Fairness & Timeliness
- Administrative Efficiency
- Alternatives & Exemptions

<https://www.ama-assn.org/practice-management/sustainability/prior-authorization-reform-initiatives>  
(accessed Aug. 28, 2021).

# AUTHORIZATION FACTORS

- Cost – reasonable & efficient
  - reducing premiums
  - “Chevy Rule”
- Access & Timing – continuum of care
- Quality – preserved?

# AUTHORIZATION FACTORS

- Fairness
  - to patient
  - to provider
  - to health plan
- Dignity of the person
  - is healthcare a right?
  - is healthcare a utility?
  - patient vs. consumer / life-enhancing
  - uniformity of care: similarly situated

# IMPACT ON PROVIDERS

- Risk allocation
- Dollars risked to “free” care
  - written-off as cost of business?
  - where shifted?

# HOLD HARMLESS CLAUSES

(1) The terms of the agreements between a health maintenance organization and providers of health services shall contain a “hold harmless” clause.

Md. Health-Gen. Art. § 19-710(i)

# HOLD HARMLESS CLAUSES

(2) The hold harmless clause shall [state that] **the provider may not, under any circumstances . . . charge . . . seek compensation, . . . or have any recourse against the subscriber, member, enrollee, patient, or any person other than the health maintenance organization [for covered services].**

Md. Health-Gen. Art. § 19-710(i)

# EXAMPLES

## Gestational diabetes counseling

- not in provider manual
- not in online lookup tool
- telehealth (remote/virtual) session
- during COVID pandemic
  
- *right patient/time/place* analysis

# EXAMPLES

## Hysterectomy

- weight-based coding
- estimated via ultrasound imaging
- ancillaries paid except for procedure
  
- *right patient/time/place* analysis

# EXAMPLES

## Hiatal hernial repair (diaphragm)

- add-on procedure
  - gastric bypass: primary procedure
  - hospital charged 1¢
  - all charges denied
  - surgeon paid in full
- 
- *right patient/time/place* analysis

# **REVAMPING MARYLAND'S MANAGED CARE LAWS**

# MD HMO PRIOR AUTH LAW

Md. Ins. Art. § 15-1009:

- Preauthorized services must be paid
- Even if info given or provided was wrong, or
- Planned treatment was not substantially followed
- If HMO would have otherwise approved

# MD HMO PRIOR AUTH LAW

Md. Ins. Art. § 15-1009:

- Does not apply to MCOs
- § 15-1005 applies to MCOs (Prompt Pay)
- § 15-1008 applies to MCOs (Retroactive denials)
- If HMO would have otherwise approved service

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