Strafford

Presenting a live 90-minute webinar with interactive Q&A

Cross-Plan Offsetting and ERISA Compliance: Avoiding Participant Claims, Ramifications of Recent Court Decisions

THURSDAY, MAY 30, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Rebecca W. Foreman, Attorney, **Arent Fox**, Washington, D.C.

J. Christian Nemeth, Partner, **McDemott Will & Emery**, Chicago

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-869-6667** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Arent Fox

Cross-Plan Offsetting and ERISA Compliance: Avoiding Participant Claims, Ramifications of Recent Court Decisions

Presented by

J. Christian Nemeth, *Partner*, McDermott Will & Emery

Rebecca W. Foreman, *Attorney*, Arent Fox LLP

Arent Fox

Overview

1. Legal risks of cross-plan offsetting to employers and insurers
2. The recent decision in *Peterson v. UnitedHealth Group Inc.*: a critical look at cross-plan offsetting practices
3. Fiduciary duties of plan sponsors and oversight of TPAs engaging in cross-plan offsetting
4. Addressing cross-plan offsetting in administrative service agreements and tips in avoiding claims

Arent Fox

What is Cross-Plan Offsetting?

- Large insurance companies both administer and insure health-insurance plans.
  - Self-funded: health care claims paid using the plan sponsor's funds
  - Insured: insurer pays the claims with its own funds
- Insurers and administrators occasionally overpay providers when paying health care claims on behalf of their beneficiaries and seek to recoup the overpayments.
- How do they recoup?
  - Submit a refund request to the provider
  - Offset future claims by withholding benefits that otherwise would be payable
  - Pursue legal or administrative action against the provider

Arent Fox

What is Cross-Plan Offsetting?

- Typical offsets are limited to future claims in connection with the same patient, or a patient that is covered by the same health plan.
- Insurers are less likely to recover
  - No guarantee the provider will treat the same patient or a patient covered by the same plan again.
  - Recoupment lawsuits not practical given the amount in dispute per treatment.
- Cross-plan offsetting solves that problem: the insurer can withhold payment due to a provider when *any* patient covered by a plan that the insurer administers and/or insures sees that provider for treatment.

Arent Fox

What is Cross-Plan Offsetting?

Illustration: Andy and Betsy

- Andy is a participant in health plan that is both fully insured and administered by United ("Plan A"). Andy receives treatment from Dr. Peterson, who submits a bill to United (the "A claims"). United pays $350 and discovers later that it should have only paid $200. United asks Dr. Peterson for a $150 refund but Dr. Peterson contests that he was overpaid and refuses to repay the alleged debt.
    - Under same-plan offsetting, United would need to wait until Andy or another person covered by his health plan receives treatment from Dr. Peterson and withhold $150 from that person's claims.
- Using cross-plan offsetting, United can recover its $150 when anyone covered by any United-administered health plan sees Dr. Peterson.

Arent Fox

What is Cross-Plan Offsetting?

Illustration: Andy and Betsy

- After Andy's treatment, Dr. Peterson treats Betsy, who is a participant in a self-funded health plan that United also administers("Plan B"), and submits a bill to United (the "B claims").
- When United pays the B claims, it withholds the $150 that it believes Dr. Peterson owes United for the A claims and that Betsy's self-funded plan would otherwise have paid.
    - The benefit due to Betsy is not actually paid to the provider, and Plan B's plan sponsor's assets are used to satisfy the provider's alleged debt owed to Plan A (whose claims are funded by United).
- Shifts the recovery burden from United to the provider and potential financial liability on the patient

Arent Fox

What is Cross-Plan Offsetting?

- Note that cross-plan offsetting is only potentially an issue in the out-of-network setting. When the provider and the health plan are in-network, the rules of recoupment are governed by the network contract, which typically permits cross-plan offsetting.
  - In-network providers typically prohibited from balance billing patients
  - Out-of-network providers not prohibited from pursuing patients for amounts their health plans did not pay

Arent Fox

Peterson v. UnitedHealth Group

The Eighth Circuit struck down United's national cross-plan offsetting practice

- Main takeaways:
  - Whether cross-plan offsetting is permissible in an out-of-network setting depends on the terms of the applicable plan documents
  - Plan terms interpreted in the context of the Plan Administrator's fiduciary obligations under ERISA.

Arent Fox

Peterson v. UnitedHealth Group

United's cross-plan offsetting practice

- Two out-of-network providers, Dr. Louis Peterson and Riverview Health Institute, brought claims (as authorized representatives and assignees of their patients, respectively) against United, challenging United's cross-plan offsetting under ERISA.
- Plaintiffs alleged that the practice was not permitted by the applicable plan documents and conflicted with United's fiduciary obligations as a plan administer. *Peterson ex rel. Patients E, I, K, L, N, P, Q, & R v. Unitedhealth Grp., Inc.*, 242 F. Supp. 3d 834, 836 (D. Minn. 2017), *aff'd*, 913 F.3d 769 (2019).

Arent Fox

Peterson v. UnitedHealth Group

United's cross-plan offsetting practice

- United had focused on withholding payment on claims for patients covered by self-funded health plan claims (using plan sponsor funds) to recoup overpayments made by plans that United fully insured (using United's own funds).
- In our Andy and Betsy example, the Plan As—the plans that make the overpayments—are fully insured, meaning that the overpayments came from United's own funds, and the Plan Bs—the plans that send money to the Plan As to reimburse the overpayments—are self-funded, meaning that the money that reimburses United comes from the Plan B plan sponsor's funds.
- In this litigation, every plan that made an overpayment was a fully insured Plan A, and the majority of the plans from which overpayments were recovered were self-funded. In other words, "every one of the cross-plan offsets at issue in this litigation put money in United's pocket, and most of that money came out of the pockets of the sponsors of self-insured plans." *Peterson*, 242 F. Supp. 3d at 840.

Arent Fox

Peterson v. UnitedHealth Group

United's cross-plan offsetting practice

- When United informed its self-funded plan clients of its cross-plan offsetting practice, it only highlighted the plans' ability to recover a higher percentage of overpayments than they would otherwise reasonably expect to receive, but did not advise of the potential benefits of cross-plan offsetting to United itself.
- United also gave existing clients two weeks to decide whether to opt out of the program, but new clients did not have that option and were required to participate in cross-plan offsetting in order to have a United-administered health plan.

Arent Fox

Peterson v. UnitedHealth Group

Relevant Plan Language

- The issue before the Court was whether the Plan Bs at issue permitted United to engage in cross-plan offsetting.
- Of the 46 plans in issue:
  - All granted United authority to interpret plan terms
  - 40 contained some kind of overpayment and recovery provision

Arent Fox

Peterson v. UnitedHealth Group

Relevant Plan Language

- Each of the Plan Bs "authorize[d] the recovery of overpayments made *by the Plan B* but "not one Plan B authorizes recovery of an overpayment made *by a Plan A*." *Peterson*, 242 F. Supp. 3d at 841.
  - E.g., *"[i]f the Plan* pays for *Benefits . . . on account of a Covered Person . . . FINRA* may recover the amount in the form of salary, wages or *Benefits payable under any Company-sponsored Benefit plans, including this Plan. The Company* also reserves the right to recover any overpayment by legal action or *offset payments on future Eligible Expenses*."
  - "*If the plan pays more than necessary under the plan provisions*, it has the *right to deduct the excess from future benefits . . . .*"
    - *Peterson*, Case No. 17-1744, Pls.'-Appellee's Br. at 12-13 n.2 (8th Cir. 2017)

Arent Fox

Peterson v. UnitedHealth Group

Relevant Plan Language

- 36 of the 46 Plan Bs explicitly mentioned offsetting, but only permitted the administrator to offset "from other benefits payable under that plan or from other benefits or compensation paid by the plan's sponsor."
  - E.g., plan says that it "may reduce the amount of any future Benefits for the Covered Person that are payable under the Policy."
  - "If we pay Benefits for expenses incurred on account of a Covered Person, that Covered Person, or any other person or organization that was paid must make a refund," and if they do not do so promptly, the plan "may reduce the amount of any future Benefits for the Covered Person that are payable under the policy." *Id.*

Arent Fox

Peterson v. UnitedHealth Group

Relevant Plan Language

- United interpreted the Plan Bs at issue to permit cross-plan offsetting because the plans granted United broad authority to administer the plan and interpret its terms.
- The issue before the court on summary judgment was whether that interpretation was reasonable, applying the factors set forth in *Finley v. Special Agents Mutual Benefit Association, Inc.*, 957 F.2d 617, 621 (8th Cir. 1992).
    - Court applies a deferential, abuse of discretion standard of review when an ERISA plan grants discretion to the plan administrator. *See Wengert v. Rajendran*, 886 F.3d 725, 727 (8th Cir. 2018).

Arent Fox

Peterson v. UnitedHealth Group

Application of the *Finley* Factors

Finley, 957 F.2d at 621, requires courts to consider whether an administrator's interpretation:

- Is consistent with the goals of the plan;
- Renders any language in the plan meaningless or internally inconsistent
- Conflicts with the substantive or procedural requirements of ERISA
- Interprets the words at issue consistently
- Is contrary to the clear language of the Plan

Arent Fox

Peterson v. UnitedHealth Group

Application of the *Finley* Factors

- The Court's analysis focused on the third and fifth factors—whether the plan interpretation conflicts with ERISA or is not supported by the plain language of the plan:
- First, the Court concluded that "nothing in the plan documents even comes close to authorizing cross-plan offsetting," and United's generic authority to administer the plan and interpret plan document was insufficient because it "would be akin to adopting a rule that anything not forbidden by the plan is permissible." *Peterson*, 913 F.3d at 776. ("United's assertion that it has the authority to engage in cross-plan offsetting can hardly be called an interpretation because it has virtually no basis in the text of the plan documents.").

Peterson v. UnitedHealth Group

Application of the *Finley* Factors

- Second, the court concluded that "the practice of cross-plan offsetting is in some tension with the requirements of ERISA" and "at the very least it approaches the line of what is permissible." *Id.*
- Plan administrators are fiduciaries of plan assets, which are required to be held in trust.
- Two of a plan administrator's fiduciary duties are implicated by cross-plan offsetting:
  - The "exclusive purpose" requirement
  - The "prohibited transactions" requirement

Arent Fox

Peterson v. UnitedHealth Group

The "Exclusive Purpose" Requirement

- Plan administrators must discharge their duties "solely in the interest of the participants and beneficiaries'" and "for the exclusive purpose of . . . providing benefits to participants and beneficiaries; and . . . defraying reasonable administrative expenses." 29 U.S.C. § 1104(a)(1).
- Despite that insurers like United may be fiduciaries of many plans, "'each plan is a separate entity' and a fiduciary's duties run separately to each plan." *Peterson*, 913 F.3d at 776 (citation omitted).
- The Court held that "[c]ross-plan offsetting is in tension with this fiduciary duty because it arguably amounts to failing to pay a benefit owed to a beneficiary under one plan in order to recover money for the benefit of another." *Id.* at 776-77.
    - This "may constitute a transfer of money from one plan to another in violation of ERISA's 'exclusive purpose' requirement." *Id.* at 777.

Arent Fox

Peterson v. UnitedHealth Group

The "Prohibited Transactions" Requirement

- "ERISA also prohibits a plan fiduciary from dealing with the assets of the plan in the fiduciary's own interest and from acting in any capacity on behalf of a party whose interests are adverse to those of the plan or plan participants." *Peterson*, 242 F. Supp. 3d at 843 (quoting 29 U.S.C. § 1106(b)(1), (b)(2)).
    - For example, causing one plan to make a loan to another, *see Cutaiar v. Marshall*, 590 F.2d 523, 529 (3d Cir. 1979), or using a participant release in relation to one plan to deny benefits to the participant under a different plan, *see Barron v. UNUM Life Ins. Co. of Am.*, 260 F.3d 310, 316 (4th Cir. 2001), may run afoul of this requirement because an insurer's duty as an administrator of one plan "must not be confused with its duties of other plans and must not be compromised by its interest in administering other plans." *Peterson*, 242 F. Supp. 3d at 844 (internal quotation marks omitted).

Peterson v. UnitedHealth Group

Application of the *Finley* Factors

- Because the reasonableness of a plan administrator's interpretation must be viewed in light of the substantive and procedural requirements of ERISA, and United's practice "is questionable at the very least," particularly in the absence of clear language permitting United to engage in cross-plan offsetting, the Court held that United's interpretation of the relevant plans was unreasonable and affirmed summary judgment on liability in the plaintiffs' favor.

Arent Fox

Peterson's Key Takeaways

Administrator's discretion to interpret plan terms is tempered by its fiduciary obligations under ERISA

Administrator policy decisions should be keyed to discrete provisions in the plan documents

Providers need strong assignments of benefits to pursue ERISA claims for actions inconsistent with plan terms

Arent Fox

Questions?