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Protecting Healthcare Providers' Rights to Benefits Under ERISA: Assignment of Benefits and Right to Sue

Lessons from Inconsistent Court Treatment, Dealing With Anti-Assignment Clauses, Ensuring Standing

THURSDAY, DECEMBER 8, 2016

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

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December 8, 2016 | 1:00 - 2:30 p.m. EST

Protecting Healthcare Providers' Rights to Benefits Under ERISA: Assignment of Benefits and Right to Sue

Presented by:

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PROVIDERS' RIGHTS TO ERISA BENEFITS

In-network vs. Out-of-network Providers:

In-network		Out-of-network
Provider agreement or other written contract with payer	Written contract?	No provider agreement or written contract
Pre-negotiated reimbursement rates	Rates?	No pre-negotiated reimbursement rates
Contract law	Basis for challenging payer reimbursement decisions?	Increasingly, ERISA

Provider Standing Under ERISA:

- Frequently-litigated issue in payer-provider reimbursement disputes
- WHY?
  - Providers do not have independent standing under ERISA:
    - They are not a plan "participant" or "beneficiary"
    - They are not mentioned in the statute
- CAN PROVIDERS GET STANDING? HOW?
    - Yes, through an assignment of benefits (AOB)
    - A valid and enforceable AOB is critical to a provider's ability to challenge payer reimbursement decisions under ERISA
    - Careful drafting of the AOB is important

The AOB

- Patient will execute at or before the time that services are provided.
- Typically executed together with other intake forms, such as a consent for treatment and privacy policies/releases.
- Purpose is to allow the provider to get payment directly from the insurance company.

ASSIGNMENT AND ANTI-ASSIGNMENT CLAUSES

DOES ERISA PERMIT ASSIGNMENT?

- ERISA Section 206(d)(1) (29 U.S.C. 1056(d)(1))
  - "Each *pension plan* shall provide that benefits provided under the plan may not be assigned or alienated."
- Statute is silent as to treatment of welfare plans, including health plans
- However, courts have held that assignment of welfare benefits is permitted
  - Assignment of welfare benefits is not prohibited
  - No apparent legislative intent to prohibit assignment
  - Congress was so specific about pension plans that it must have meant something different with respect to welfare plans

DOES THE PLAN PROHIBIT ASSIGNMENT?

- Some health plans will, by their terms, expressly prohibit assignment of benefits
  - Example (complete prohibition): “The benefits of the Contract or Certificate are personal to the Subscriber and are not assignable by the Subscriber in whole or in part to a Non-Member Hospital *** or to any other person or entity.”
  - Example (assignment only if consent): “You may not assign your Benefits under the Plan to a non-Network provider without our consent.”

PRO TIP: It’s Important to Understand the Plan Terms! A provider’s rights under an ERISA plan may depend on the specific terms of that plan, and plan terms may be different from plan to plan.

DOES THE PLAN PROHIBIT ASSIGNMENT?

- Are anti-assignment clauses permissible?
  - As a general rule, yes
    - Generally considered a matter for agreement between the "contracting parties" and not contrary to public policy
    - See, e.g., *Physicians Multispecialty Group*, 371 F.3d 1291 (11th Cir. 2004) (unambiguous anti-assignment provision in an ERISA plan is valid and enforceable)
  - But some jurisdictions will construe an anti-assignment clause narrowly
    - See, e.g., *Lutheran Medical Center of Omaha*, 25 F.3d 616 (8th Cir. 1994) (prohibition on assignment of participant's "rights or benefits" did not prohibit assignment of post-denial causes of action)

DOES THE PLAN PROHIBIT ASSIGNMENT?

- Are anti-assignment clauses always enforceable?
  - No! Possible reasons for non-enforcement include:
    - Anti-assignment provision is vague or ambiguous (e.g., generic "spendthrift" language may not apply to prohibit assignment to provider of services the plan is designed to furnish)
    - Scope of anti-assignment provision does not cover the rights at issue (e.g., prohibits assignment of right to payment but not assignment of right to sue)
    - Waiver (e.g., course of dealing between payer and provider indicates routine waiver of anti-assignment provision)
    - Estoppel (e.g., payer's failure to timely raise anti-assignment defense)

SCOPE OF THE ASSIGNMENT

- Assuming there is no anti-assignment provision or the anti-assignment provision is unenforceable, will the assignment itself be valid and effective?

PRO TIP: The Language of the Assignment Matters! Not all assignments are created equal. It is important to make sure the scope of the assignment is broad enough to cover all rights the provider wants or needs to have to pursue enforcement in the event of non-payment.

SCOPE OF THE ASSIGNMENT

- Potential issues regarding the scope of the assignment
  - Right to receive payment v. right to enforce non-payment
    - Compare *Productive MD v. Aetna*, 969 F. Supp. 2d 901 (M.D. Tenn. 2013) (assignment of right to payment included right to enforce non-payment)
    - With *Touro Infirmary v. American Maritime Officer*, No. 07-1441, 2007 WL 4181506 (E.D. La. Nov. 21, 2007) (assignment of right to receive payment did not include right to enforce non-payment)

SCOPE OF THE ASSIGNMENT

- Potential issues regarding the scope of the assignment
  - Right to pursue all ERISA claims v. right to pursue only a claim for benefits under ERISA
    - Compare *Spinedex Physical Therapy v. United Healthcare of Arizona*, 770 F.3d 1282 (9th Cir. 2014) (assignment of "rights and benefits under this policy" did not include assignment of right to sue for breach of fiduciary duty under ERISA)
    - With *Care First Surgical Center v. ILWU-PMA Welfare Plan*, No. CV 14–01480 MMM (AGRx), 2014 WL 6603761 (C.D. Cal. July 28, 2014) (assignment of "right to bring claims under the civil enforcement provisions of ERISA" included assignment of the right to sue for breach of fiduciary duty under ERISA)
    - Other ERISA claims might include right to pursue civil penalties and right to demand documents, in addition to fiduciary claims

SCOPE OF THE ASSIGNMENT

- Potential issues regarding the scope of the assignment
  - Right to pursue administrative appeals v. right to pursue only litigation
  - Right to pursue all payers v. right to pursue only "insurers"
  - Assignment applies to provider and its affiliates and assignees v. assignment only applies to the provider
  - Assignment applies to multiple providers v. assignment applies to a single provider

BOTTOM LINE: Courts may construe assignment provisions narrowly. Providers should take this into account when drafting and reviewing assignment provisions.

PROVIDERS' RIGHTS TO SUE

Purpose of AOB:

- Assigns benefits otherwise payable to patients to the provider
- Helps to ensure payment is made to the provider
- Depending on language, provides certain rights to the provider to pursue payment:
  - Permits provider to submit information related to claim
  - Right to submit claim
  - Right to appeal claim
  - Right to pursue all available avenues to secure payment

Securing Payment Under an AOB

- AOB secures payment from health insurance or other payor for services provided
- Common AOB language
  - Patient authorizes payment to be made to provider
  - Patient gives provider the right to receive reimbursement directly
  - Patient assigns the right to receive benefits to provider
  - Patient authorizes provider to submit a claim and receive payment directly, as well as submit any necessary appeals to pursue payment
  - Patient assigns the right to pursue all causes of action to pursue payment from the payor
  - Patient assigns right to provider to file any and all claim submission and appeals rights and any other claims or causes of action to provider, as well as right to receive benefits directly.

Effect of AOB Language

Assignment of Benefits, Alone	Assignment of Right to Pursue Benefits	General Assignment of Rights
Patient assigns benefits to provider.	**Patient assigns right to pursue benefits to provider (e.g. right to file claim and appeal).**	**Patient assigns any and all claims and causes of action that s/he may have against Payor to provider.**
Runs the risk of Provider being afforded only right to submit a claim and any administrative appeals.	Provider has more protection, as it will likely be allowed to file suit to pursue the payment	Provides most protection for provider to file suit.
Provider may be able to collect benefits directly	Provider may be able to collect benefits directly	Provider may be able to collect benefits directly
Provider may have to pursue payment from patient if payor pays patient directly.	If Provider files suit, may be limited to payment and no other causes of action.	Claims may include breach of contract and other fiduciary claims against ERISA plan (e.g. failure to provide information and a full and fair review or violations of claims procedure regulations)
*Note: Some protections are also afforded under the PPACA, 29 C.F.R. 2590.715-2719, which defines a claimant to include a patient's authorized representative, but this likely would not affect a Provider's right to file suit.		

RECENT COURT TREATMENT

North Jersey Brain & Spine Center vs. Aetna, 801 F.3d 369 (3d Cir. 2015)

- The AOBs at issue authorized North Jersey Brain & Spine Center (NJBSC) to "appeal to [the patient's] insurance company on [his/her] behalf" and assigned to NJBSC "all payments for medical services rendered" to the patients.

- AOBs did not expressly assign to NJBSC the right to *enforce* the patients' rights to benefits through a lawsuit.

- The issue for the court, therefore, was whether the AOB gave the North Jersey Brain & Spine the right to file suit and challenge Aetna's non-payment.

North Jersey Brain & Spine Center vs. Aetna (cont'd)

- The U.S. District Court for the District of New Jersey said no and drew a distinction between the right to payment and the right challenge non-payment through a lawsuit.

- The Third Circuit reversed:
  - "An assignment of the right to payment logically entails the right to sue for non-payment." Thus, "when a patient assigns payment of insurance benefits to a healthcare provider, that provider gains standing to sue for that payment under ERISA § 502(a)."
  - "The value of such assignments lies in the fact that providers, confident in their right to reimbursement and ability to enforce that right against insurers, can treat patients without demanding that they prove their ability to pay upfront. Patients increase their access to healthcare and transfer responsibility for litigating unpaid claims to the provider, which will ordinarily be better positioned to pursue those claims. These advantages would be lost if an assignment of payment of benefits did not implicitly confer standing to sue."

Am.Chiropractic Ass'n. v. Am. Specialty Health, Inc. (625 Fed. Appx. 169 (3rd Cir. 2015))*

- On the same day that the Third Circuit issued the decision in *New Jersey Brain & Spine Center*, the Court issued a decision in American Chiropractic Association
- American Specialty Health, Inc. challenged the provider's right to pursue benefits, claiming that the AOB was invalid.
- AOB authorized payment of medical benefits to the provider, but the patient remained "financially responsible for all charges whether or not they are paid by insurance."
- Court held that a AOB language that assigns benefits to the provider, but continues a patient's financial responsibility does not invalidate an otherwise enforceable assignment.

*Note: Not precedential.

BioHealth Medical Laboratory, Inc. vs. CIGNA, No. 1:15-cv-23075-KMM (S.D. Fla. Feb. 1, 2016)

- AOB provided that the participant agreed to "irrevocably assign to [the provider]… all benefits under any policy of insurance, indemnity agreement, or any collateral source as defined by statute for services provided," including "all rights to collect benefits directly from [the participant's] insurance company and all right to proceed against [the participant's] insurance company in any action, including legal suit, if for any reason [the participant's] insurance company fails to make payment of benefits due."

- Providers sued under ERISA both for benefits due and for breach of fiduciary duty.

- CIGNA argued that the AOB was not broad enough to encompass those claims.

BioHealth Medical Laboratory, Inc. vs. CIGNA (cont'd)

- The Court determined that:
  - The providers did have standing to pursue the breach of fiduciary duty claims.
  - The providers did not have standing to assert claims for benefits due relating to self-funded plans.
    - The Court focused on the AOBs reference to the right to recover benefits "owed under any policy of insurance" and to pursue any rights to collect from the insurance company if for any reason the "insurance company fails to make payments due."
    - Because a self-funded plan is not a form of insurance, the Court granted the insurer's motion to dismiss with respect to those claims.

Peacock Med. Lab., LLC v. UnitedHealth Group, Inc. (2015 U.S. Dist. LEXIS 61306 (S.D. Fl. May 11, 2015))

- Peacock Medical Labs filed suit against UnitedHealth for non-payment of ERISA benefits and ERISA violations, including:
  - Failing to provide the criteria used to deny claims;
  - Failing to provide a full and fair review of denied claims;
  - Breach of fiduciary duties; and
  - Failing to provide requested plan documents.

- Peacock Medical Labs submitted AOBs in support of its claims:
  - "I [insert patient name] hereby make, constitute and appoint Ambrosia Treatment Center [m]y true and lawful attorney-in-fact to act severally in my name, place and stead to do and perform all and every act and thing whatsoever requisite and necessary in any way which I could or might do, if personally present, with respect to obtaining payment end/or [sic] reimbursement for hospital, medical, chemical dependency treatment and other health care services rendered to the Principal by Ambrosia Treatment Center […] including, but not limited to obtaining insurance, making of claims against insurers, or other third-party payers[,] [i]nstituting and prosecuting and/or defending litigaiton, arbitration and/or other dispute resolution proceedings, compromise and/or statement of claims and/or disputes, [...] as well as all other acts which may be helpful and appropriate to the accomplishment of such purposes, for the ultimate objective of Ambrosiate Treatment Center collection for such services."

Peacock Med. Lab., LLC v. UnitedHealth Group, Inc. (cont'd.)

- Court held, first, that Peacock Medical Labs did not have standing to bring suit under the AOB because Ambrosia Treatment Center, an affiliate of Peacock Medical Labs, was the assignee.

- Court went on to state that even if Peacock Medical Labs was a proper assignee, the assignment only conferred limited standing to receive benefits, without conferring standing for other ERISA claims, including breach of fiduciary duty or civil penalties.

Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc. (2014 U.S. Dist. LEXIS 184550 (N.D. Tex. July 21, 2014)

- Innova Hospital filed suit against BCBS for several causes of action, including:
  - Claim for benefits
  - Failure to comply with requests for information
  - Failure to provide a full and fair review
  - Violations of claims procedure regulations

- Per Innova, AOB included "the right to receive reimbursement benefits directly and the right to 'pursue all causes of action'…"

- BCBS moved to dismiss the claims, alleging that Innova lacked standing to file suit because the AOB was insufficient to confer standing for causes of action not related to payment, but failed to provide support for this position.

- Court found that, at this stage in proceedings, Innova's allegations were sufficient to pursue relief for non-payment ERISA violations

Brown v. BCBS of Tennessee, 827 F.3d 543 (6th Cir. 2016)

- Key Facts
  - Blue Cross conducted an audit and identified overpayments to a physician for non-covered lab tests
  - Blue Cross began recouping overpayments through offset of future reimbursements pursuant to the participating provider agreement
  - Physician sued Blue Cross under ERISA, seeking an injunction against future recoupment and payment of amounts previously recouped
  - Blue Cross moved to dismiss for lack of standing

Brown v. BCBS of Tennessee, 827 F.3d 543 (6th Cir. 2016) (cont.)

- Court's Analysis of Standing and Assignment Issues
  - Physician did not have direct standing (not a "beneficiary")
  - Patient's assignment of right to obtain direct payment could give the physician derivative standing to sue under ERISA to obtain payment
    - "There is now a broad consensus that when a patient assigns payment of insurance benefits to a healthcare provider, that provider gains standing to sue for payment under ERISA § 502(a)."
  - BUT . . . the assignment only allows the provider to "stand in the shoes" of the patient, and the patient did not have right to challenge recoupment under the provider agreement

Brown v. BCBS of Tennessee, 827 F.3d 543 (6th Cir. 2016) (cont.)

- Result
  - Provider's case under ERISA dismissed!
- Takeaway
  - A valid assignment is a good first step, but it may not be an all-access pass to litigation under ERISA. It only gives the provider the ability to enforce rights that the patient itself had.

Gables Insurance Recovery v. BCBS of Florida, 813 F.3d 1333 (11th Cir. 2015)

- Issue
  - Does a sub-assignee of a healthcare provider have standing to sue under ERISA?
- Result
  - In this case, yes. The sub-assignee (debt collector) was held to have standing under ERISA, resulting in removal of the case from state court to federal court under *Aetna v. Davila* analysis.
- Caveat
  - The court limited it's decision to the facts of the case and noted that several courts have reached the opposite result as to a sub-assignee's standing under ERISA.

QUESTIONS?

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