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A False Advantage: Can an Anti-Assignment Clause Negate ERISA Standing?

By Christopher J. Tellner, Abbye E. Alexander and Henry E. Norwood

In this article, the authors explain that anti-assignment clauses that allow insurers to preclude non-members from bringing suit against them may also keep litigation out of federal court and preclude insurers from relying on their health plan defenses.

In healthcare reimbursement litigation, plaintiff-providers overwhelmingly seek to have their claims heard in state court, while defendant-insurers just as eagerly seek to have the claims heard in federal court. In fact, whether a case proceeds in state or federal court can have significant consequences for the litigation overall. This is because health plans are often governed by the Employee Retirement Income Security Act of 1974 (ERISA), which provides for federal court jurisdiction. If a case arises under an ERISA plan, it belongs in federal court and the insurer can take advantage of the defenses often built into the health plan itself.

Christopher J. Tellner (ctellner@kaufmandolowich.com) is a co-managing partner of Kaufman Dolowich's Blue Bell, Pennsylvania, office and co-chair of the firm's Health Care & Managed Care Practice Group. Abbye E. Alexander (aalexander@kaufmandolowich.com) is co-managing partner of the firm's office in Orlando, Florida, and co-chair of the firm's Health Care & Managed Care Practice Group. Henry Norwood (henry.norwood@kaufmandolowich.com) is an associate at the firm.

One such defense is an anti-assignment clause. Patients often elect to have their providers seek reimbursement for their medical care on their behalf. This is done through an assignment of benefits (AOB).

However, many health plans include clauses, referred to as anti-assignment clauses, that prohibit the assignment of a member's right to sue. These clauses are generally upheld and can provide health insurers with a major advantage in healthcare reimbursement litigation.

An anti-assignment clause may, however, be a false advantage. The same clauses that allow insurers to preclude non-members from bringing suit against them may also keep the litigation out of federal court and preclude the insurer from relying on their health plan defenses.

REIMBURSEMENT OF HEALTH INSURANCE CLAIMS

When a patient decides to undergo medical care, a series of legally significant events occur prior to the rendition of care. The provider collects the patient's health insurance information and, frequently, requests that the patient sign an AOB form, permitting the provider to seek reimbursement directly from the patient's health insurer, i.e., "assigning" the patient's right to sue for plan benefits to the provider. Once care is rendered, the patient or their provider will submit claims for reimbursement to the insurer. Once the insurer receives the submitted claims, the insurer will consider and render a decision regarding the requested reimbursement, by applying the terms of the patient's health plan to the services received. Health plan terms that may impact whether care is covered or the degree of coverage include the covered services list, plan exclusions, prior authorization requirements, cost-sharing and deductible provisions, and anti-assignment clauses.

STANDING TO ENFORCE ERISA RIGHTS

ERISA authorizes civil actions to recover benefits due under a health plan to be brought by plan participants and beneficiaries.[1] Healthcare providers are generally not authorized under ERISA to sue on their own behalf, even if they are entitled to direct payment from the plan administrator because the provider is not itself a plan participant or beneficiary.[2] For a provider to sue under ERISA § 1132, it must do so through an assignment or as a representative of a plan beneficiary.[3] When a medical provider pursues the claims of a patient via an AOB, the provider stands in the shoes of the patient, with the ability to raise the same claims and being subject to the same defenses as the patient.[4]

Courts have recognized a narrow exception to the ERISA standing requirements when a healthcare provider is assigned the beneficiaries'

claim via an AOB in exchange for health care.[5] If the court determines that the health plan allows for such an assignment, healthcare providers are granted standing to bring claims under Section 502(a)(1)(B) for a recovery of benefits as the patient's assignee. ERISA § 502(a)(1)(B) states that a participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[6]

However, providers asserting an action to recover benefits as an assignee must also establish that the ERISA beneficiary "assigned his right [to reimbursement] in accordance with the terms of the ERISA plan."[7] In determining whether an ERISA plan's anti-assignment renders such assignment unenforceable, courts will look to the plan provisions and "where plan language unambiguously prohibits assignment, an attempted assignment will be ineffectual"[8] and the healthcare provider purporting to be an assignee will lack statutory standing to sue for benefits.

ANTI-ASSIGNMENT CLAUSES

An anti-assignment clause in an ERISA health plan will render an AOB to a healthcare provider invalid and deprive the provider from standing to sue under the plan.[9] Anti-assignment clauses are interpreted narrowly, and the clauses will only be held to prohibit assignment of the rights explicitly provided for in the anti-assignment provision. Thus, an anti-assignment clause could prohibit assignment of a member's right to sue, right to payment, or both. A valid anti-assignment clause can deprive a provider-assignee of standing to bring suit against an insurer in federal court.

Without standing to enforce the terms of a patient's health plan, providers must find other, non-ERISA causes of action to seek reimbursement for their claims. Frequently, plaintiffs seek relief under common law causes of action, such as unjust enrichment, breach of implied contract, and, when representations by the insurer have been made to the provider, promissory estoppel or negligent misrepresentation. When providers raise these non-ERISA, common law causes of action, insurers typically argue the action really falls under ERISA and the provider is simply trying to circumvent federal law and, in particular, avoid removal to federal court or dismissal via ERISA preemption.

REMOVAL TO FEDERAL COURT

In ERISA litigation, defendants often seek removal of plaintiffs' state court actions to federal court. Civil actions that arise under the

U.S. Constitution, treaties, or laws of the United States are removable pursuant to federal question jurisdiction.[10] The well-pleaded allegations of the complaint are examined to determine if federal question jurisdiction exists.[11] However, when a federal statute, such as ERISA, completely preempts state or common law causes of action, the well-pleaded complaint rule does not apply and the complaint is viewed as stating causes of action under federal law, making removal to federal court proper.[12]

ERISA Section 502(a)(1)(B) permits an ERISA plan beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[13] In *Aetna Health Inc. v. Davila*,[14] the U.S. Supreme Court set forth the well-recognized test to determine whether a plaintiff's purported state law causes of action are preempted by ERISA.[15] Under the *Davila* test, a plaintiff's claims are preempted by ERISA: (1) if the plaintiff would have standing to bring their claims under 502(a)(1)(B), and (2) there is no other independent legal duty raised by the plaintiff's complaint.[16]

The anti-assignment clause issue implicates the first prong of the *Davila* test. Without an AOB between the provider and the patient, the provider generally cannot sue the insurer for plan benefits under ERISA and the provider must bring alternative, common law claims in state court.

Plaintiff-providers often prefer bringing common law claims in state court and allege the lawsuits are not actually based on their patients' health plans, but rather arise from some independent obligation owed to them by the health plan, such as a breached promise of coverage, an implied contract based on prior dealings, or some other equitable theory of relief. If the provider obtains an AOB, signed by the patient, standing is established and the suit may proceed in federal court under ERISA. This approach is often favored by defendant-insurers.

However, if the health plan includes an anti-assignment clause that would otherwise negate the AOB between the provider and the patient, does the plaintiff still have standing for purposes of the first prong of *Davila*? Several courts have ruled on this issue in recent years with varying results dependent on the circumstances of each case.

DOES AN ANTI-ASSIGNMENT CLAUSE OUTWEIGH ERISA STANDING?

The U.S. Court of Appeals for the Second Circuit weighed in on the anti-assignment standing issue in *McCulloch v. Orthopaedic Surg. Servs., PLLC v. Aetna, Inc.*[17] The case involved an out-of-network surgical provider who performed two surgeries on the patient. Prior to surgery, the provider contacted the patient's insurer to confirm coverage.

According to the provider, the patient's insurer represented that the plan would cover the two surgeries at a certain rate. Following the surgeries and the patient's assignment of their rights to the provider, the insurer allegedly reimbursed the provider in an amount less than the guaranteed rate. The provider sued the insurer in state court, raising one cause of action for promissory estoppel to enforce the insurer's promised reimbursement rate. The insurer removed the case to federal court pursuant to ERISA and the provider moved to remand the case back to state court. The provider argued that, under the *Davila* analysis, it had no standing to sue under ERISA despite its AOB with the patient because the patient's plan included an anti-assignment provision. The insurer acknowledged the anti-assignment provision but countered that it would be improper for the court to consider the provision when determining standing.

The Second Circuit disagreed and found the anti-assignment provision nullified the provider's AOB, thus depriving the provider of ERISA standing and requiring the case move forward in state court.

In *Bailey v. Blue Cross & Blue Shield of Tex., Inc.*,[18] the U.S. District Court for the Southern District of Texas considered another case turning on the question of whether an anti-assignment clause precludes ERISA standing. The plaintiff in *Bailey* was a surgical provider who sought reimbursement from several defendant-insurers for services provided to the insurers' members. The provider alleged the insurers underpaid for several of the submitted claims and filed suit in state court, raising state statutory and common law causes of action. The case moved between state and federal court until the federal court was faced with the provider's second motion to remand the case to state court. Applying the *Davila* test, the court found that, while the provider would otherwise have standing to sue under the plan, this standing was nullified by the anti-assignment clauses in the members' health plans. The court remanded the case back to state court and the plaintiff was permitted to bring its state law causes of action.

The U.S. District Court for the Middle District of Louisiana has also considered the anti-assignment ERISA standing issue and ruled in favor of the insurer under the circumstances presented in *Sadeghi v. Aetna Life Ins. Co.*[19] The case involved out-of-network plastic surgeons who provided services to several members of the defendant-insurer. The providers sought reimbursement and alleged the insurer underpaid various submitted claims. The providers filed suit, raising common law causes of action. The providers sought summary judgment on the basis of ERISA preemption. The court applied the *Davila* test. Regarding the first prong, the providers argued, in relevant part, that the anti-assignment clauses in the members' health plans invalidated the AOBs signed by the members at issue and, therefore, the providers had no standing to sue under ERISA. The insurers countered that

the providers had held themselves out as assignees throughout the entire claims process prior to filing suit and only sought to disregard the AOBs at the present time to avoid ERISA preemption. The insurer also communicated with the providers as though they were assignees during the claims and appeal processes. The court found the insurer's argument persuasive, reasoning:

> . . . Plaintiffs cannot have their cake and eat it, too. It is disingenuous at best to now claim that the assignments obtained from their patients could not have been valid based on the Plans' anti-assignment provisions after Plaintiffs presented evidence of the purportedly valid assignments, which [the insurer] accepted, and then utilized the administrative appeals process under the Plans partly on that basis.[20]

The *Sadeghi* court's ruling that the anti-assignment provision did not bar standing appears to be heavily influenced by the fact that the providers held themselves out as assignees to the insurer, which operated as a waiver of their anti-assignment standing argument in the eyes of the court.

Finally, the U.S. District Court for the Middle District of Florida also has considered the issue and ruled in favor of the position that an anti-assignment provision deprives a provider-assignee of ERISA standing. In *Surgery Ctr. of Viera, LLC v. Meritain Health, Inc.*,[21] the Middle District of Florida heard a typical health plan reimbursement case involving a provider who sought reimbursement for services rendered to a patient from the patient's insurer. The provider filed suit in state court, and, of note, it was unclear whether the provider had obtained an AOB from the patient, but the provider alleged it was not relying on an AOB or seeking reimbursement under the health plan directly. The court primarily ruled in favor of the provider on the basis that there was no clear AOB between the provider and patient. The court noted, however, that even if there was a clear AOB, the anti-assignment provision in the patient's health plan would render the AOB a nullity, requiring the case to be remanded to state court.

CONCLUSION

The majority of jurisdictions considering the impact of an anti-assignment clause on ERISA standing have found the provisions negate standing and require a remand to state court. This being said, there are certain cases, such as the *Sadeghi* case, reaching the opposite conclusion. This should inform interested parties that there are circumstances when the pre-litigation conduct of the provider and insurer

may result in courts looking past an anti-assignment clause for ERISA standing purposes if the provider held themselves out as an assignee. Understanding this key distinction can help parties put themselves in the best position possible before litigation ensues.

NOTES

1. See 29 U.S.C. § 1132(a)(1).

2. See Grasso Enters., LLC v. Express Scripts, Inc., 809 F.3d 1033, 1040 (8th Cir. 2016).

3. Id. at 1039-41.

4. Connecticut State Dental Assoc. v. Anthem Health Plans, Inc., 591 F.3d 1337, 2009 WL 512636, at *12 (11th Cir. 2009).

5. See Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272, 1277 (6th Cir. 1991).

6. 29 U.S.C. § 1132(a)(1)(B).

7. See Neurological Surgery, P.C. v. Travelers Co., 243 F. Supp. 3d 318, 325-26 (E.D.N.Y. 2017).

8. See Neurological Surgery, P.C. v. Aetna Health Inc., 511 F. Supp. 3d 267, 282 (E.D.N.Y. 2021).

9. Dialysis Newco, Inc. v. Cmty. Health Sys. Gro. Health Plan, 938 F.3d 246, 251 (5th Cir. 2019).

10. 28 U.S.C. § 1441(b).

11. Beneficial Nat. Bank, et al. v. Anderson, 539 U.S. 1, 6 (2003).

12. Id. at 8.

13. 29 U.S.C. § 1132(a)(1)(b).

14. 542 U.S. 200 (2004).

15. Id. at 209.

16. Id. at 201.

17. 857 F.3d 141 (2d Cir. 2016).

18. 2022 WL 1216308 (S.D. Tex 2022).

19. 564 F. Supp. 3d 429 (M.D. La. 2021).

20. Id. at 455-56.

21. 2020 WL 7389987 (M.D. Fla. 2020).

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