IslerDare PC

EMPLOYEE BENEFITS UPDATE

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Court Decisions Highlight the Need for Plan Sponsors to Review Recovery and Anti-Assignment Provisions

Executive Summary

- The Supreme Court recently held in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan* that an ERISA benefit plan could not enforce its right to be reimbursed for medical expenses it had paid on behalf of an injured participant when the participant had spent other funds that he received in his personal injury settlement on "non-traceable" items such as food or travel.
- Plan sponsors of self-funded medical plans should also be aware of a growing trend where out-of-network medical providers such as ambulatory surgery centers or chiropractors allege that medical plans have systematically underpaid the providers for out-of-network claims. These providers take the position that they have a right to bring a lawsuit because their patients have assigned their rights to payment under the plan to the provider through a general assignment of rights. Valid anti-assignment provisions will help protect a plan against these types of claims.

What You Should Do

- Review your benefit plan's subrogation and reimbursement provisions to ensure that they are as robust as possible in light of the Montanile decision. You should also consider whether sufficient internal processes are in place to track participant claims and potential third-party lawsuits so that your benefit plan can assert its rights to any recovery on a timely basis, before a plan participant has the opportunity to deplete the recovery.
- Consider whether you need to adopt or enhance "no assignment" language in your self-funded health plan to address potential claims for benefits from medical service providers, and be careful not to effectively waive the anti-assignment provisions through inconsistent dealings with a provider.
- Work with your plan's record keeper to ensure that appropriate controls are in place to monitor and process any benefit claims or appeals.

Recent litigation highlights the need for employee benefit plan sponsors to make sure that language in their plans provides a strong basis for asserting the plans' rights with regard to any third party recovery amounts that they may be entitled to. Plans should also contain anti-assignment language in order to address lawsuits that are being brought by medical providers claiming to stand in the shoes of their patients as ERISA beneficiaries.

Right of Recovery: Subrogation and Reimbursement Rights

In January, the Supreme Court issued its decision in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*[1], which involved a drunk driving accident that seriously injured a participant in the National Elevator Industry Health Benefit Plan (the "Plan"). In connection with injuries sustained by Mr. Montanile, the Plan paid approximately $121,000 for medical expenses. Pursuant to the Plan's terms, the Plan had a subrogation right to receive benefits paid to Mr. Montanile from any third-party settlement or award related to his injury. In addition, Mr. Montanile had signed a written reimbursement agreement that specifically acknowledged his obligation to repay the Plan should he receive such a settlement or award. Mr. Montanile received a $500,000 personal injury settlement relating to the accident, but his attorney argued that the Plan was not entitled to reimbursement for any of the expenses it had paid. Mr. Montanile's attorney made the decision to distribute the remaining funds to Mr. Montanile when the Plan Administrator failed to object by the deadline set by the attorney. Months later, the Plan Administrator sued Mr. Montanile for recovery of the approximately $121,000 spent by the Plan in medical expenses, but by then Mr. Montanile had spent all of the funds. The district court held, and the Eleventh Circuit affirmed, that the Plan was entitled to reimbursement from Mr. Montanile's general assets because the settlement funds were no longer available.

Based on ERISA Section 502(a)(3), which authorizes plan fiduciaries to file suit to obtain appropriate equitable relief to enforce the terms of an ERISA-covered plan, the Supreme Court overturned the lower courts' decisions and held that the type of remedy sought by the Plan was not appropriate because a lien against Mr. Montanile's general assets was not an equitable remedy. This is because equitable remedies are, as a general rule, directed against a specific thing rather than the more general right to recover a sum from a defendant's general assets. This meant that if Mr. Montanile used the settlement funds on non-traceable items such as food or travel, the Plan Administrator had no further recourse. However, if he had used the funds to purchase identifiable property, such as a house, or if he had commingled the settlement amounts with other money, the Plan Administrator may have been able to pursue reimbursement.

The case is a good reminder for plan sponsors to make sure that at a minimum, their plan contains strong and clear subrogation and reimbursement rights, including language that the plan has a right of recovery regardless of any "make-whole" doctrine or similar concepts that could potentially reduce the amount a plan ultimately recovers. Similarly, plan sponsors should consider having plan participants specifically acknowledge the plan's subrogation and reimbursement rights through a reimbursement agreement. In light of the ruling, employers will want to work closely with any subrogation vendors they utilize to help ensure that they are tracking potential claims and lawsuits so that they can react quickly to any developments that could affect their subrogation or reimbursement rights, before the third party recovery is depleted.

[1] 577 US ____ (2016).

Valid Anti-Assignment Provisions Provide Effective Protection Against Certain Claims

In recent years, out-of-network providers have increasingly brought lawsuits targeting self-funded health plans, claiming that they are entitled to higher reimbursement rates because the plan terms and related explanations of benefits do not utilize an appropriate reimbursement schedule or do not provide enough detail about how the reimbursement rates are determined.[2] In these lawsuits, the providers also claim that the employees sponsoring the plan have breached their fiduciary duties. While ERISA does not include medical providers in the eligible classes of persons who may bring an ERISA claim, the providers contend that they have a right to pursue payments as ERISA beneficiaries by virtue of assignment of benefits agreements executed by their patients. Thus, they argue that they are standing in the shoes of their patients through the assignment of benefits.

Fortunately for plan sponsors, courts in a number of cases have held that anti-assignment provisions in ERISA-governed health plan are enforceable. Consistent with other cases, the court in the recent case *University of Wisconsin Hospitals v. Aetna Health & Life Ins. Co.*[3] held that since the plan contained an unambiguous anti-assignment provision, a patient assignment of rights to a provider was not a valid assignment of rights. Therefore, the University of Wisconsin hospital was not a proper ERISA beneficiary entitled to pursue a legal claim against Aetna. A Georgia dermatologist was denied his ability to sue the Verizon health plan for similar reasons in *Griffin v. Verizon Communications, Inc.*, 2016 BL 7142 (11th Cir. 2016).

In addition, another group of recent cases have ruled against out-of-network providers on the grounds that even if they have standing to pursue their claims, they failed to exhaust the administrative claims process under ERISA.[4]

The key takeaways from these cases are (1) that since anti-assignment clauses in ERISA employee welfare benefit plans are generally enforceable, plan sponsors should ensure that their plan documents or "wrap plans" contain clear anti-assignment clauses that would prevent a medical provider from successfully asserting higher reimbursement claims against the plan, and (2) that plan sponsors must ensure that their third-party administrators are being vigilant in tracking and processing benefit claims under ERISA's administrative procedures. With valid anti-assignment provisions, medical providers in these lawsuits would lack standing to bring a claim for greater reimbursement against a health plan, and claims appeal procedures that are rigorously controlled may help to defeat other claims even if a provider is determined to have appropriate standing.

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[2] *See e.g. Torpey v. Blue Cross Blue Shield of Tex.*, 2014 U.S. Dist. LEXIS 11412, 2014 WL 346593 (D.N. J. Jan. 30, 2014).

[3] 2015 WL 6736983 (W.D. Wis., November 3, 2015).

[4] *Biohealth Med. Lab v. Conn.*, 2016 BL 26846 (S.D.Fla. 2016); *Riverview Health Institute v. United Health Group, Inc.*, 2015 BL 431920 (D. Minn. 2015).

If you have any questions about how the recent Supreme Court case or litigation trends impact your employee benefit plans, or about your benefit plan design more generally, please contact us.

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