

Cross-Plan Offsetting Practice is Challenged in Class Action Lawsuit

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This class action lawsuit, styled *Scott, et al. v. UnitedHealth Group, Inc., et al.*, was filed in the U.S. District Court for the District of Minnesota on July 14, 2020. This lawsuit follows the decision of the U.S. Court of Appeals for the Eighth Circuit in *Peterson v. UnitedHealth Group Inc.* that was issued last year. In *Scott*, the plaintiffs, who were participants in the plans at issue in *Peterson*, filed, on behalf of a class of plaintiffs (the “**Class**”), a class action against UnitedHealth Group, Inc. and its wholly-owned subsidiaries (collectively, “**UHC**”), in their capacities as an insurer and/or third-party claims administrator of employer-sponsored group health plans. The lawsuit alleges the breach of UHC’s fiduciary duties under ERISA as related to UHC’s practice of “cross-plan offsetting.” The Class consists of participants and beneficiaries in all group health plans that are administered by UHC and contain “cross-plan offsetting” (collectively, the “**Plans**”).

Cross-plan offsetting is a practice that is used by UHC and other third-party administrators (“**TPAs**”) as a means of recouping a benefit payment that was purportedly overpaid to an out-of-network health care provider under *one plan* by reducing the benefit payment owed to the same provider under *another entirely separate plan*. For example, assume that a TPA performs claims administration services for group health plans sponsored by Employer A and Employer B. Assume further that the TPA erroneously overpaid a health care provider by \$1,000 for a participant claim under Employer A’s plan, while a participant in Employer B’s plan incurred a \$2,000 claim with that same provider. Under the cross-plan offsetting methodology, the TPA would offset the \$2,000 payment owed to the provider under Employer B’s plan by the \$1,000 overpayment under Employer A’s plan, thus netting a \$1,000 payment to the provider for the \$2,000 claim submitted under Employer B’s plan.

In *Peterson*, the Eighth Circuit did not decide the permissibility of cross-plan offsetting under ERISA, but instead made its ruling against UHC on the basis that the terms of the plans in question did not authorize UHC to engage in cross-plan offsetting. Notably, the DOL, which enforces ERISA, had filed an amicus brief in *Peterson* in which it expressed its view that cross-plan offsetting does violate ERISA. See our previous blog post regarding *Peterson* [here](#).

In *Scott*, the plaintiffs asserted the following causes of action against UHC:

1. As a fiduciary of the Plans, UHC breached its duty of loyalty under ERISA when it used assets of the Plans for the non-Plan purpose of resolving a disputed debt to another Plan and not providing benefits to the first Plan’s beneficiaries.
2. UHC’s use of self-insured plan assets to recoup alleged overpayments by fully-insured Plans constituted a breach of fiduciary duty and a “prohibited transaction” under ERISA based on “self-dealing” because UHC took plan assets for its own account and in its own interest, instead of paying benefits to a Plan’s beneficiaries.
3. UHC engaged in a prohibited transaction in violation of ERISA when it diverted one Plan’s assets to another Plan to resolve an asserted overpayment because UHC cannot represent both sides of that transaction.

4. UHC was a "party in interest" (under ERISA's prohibited transaction rules) with respect to the Plans because it was a fiduciary and service provider to those Plans. UHC's use of self-insured Plans' assets to offset overpayments by fully-insured Plans was both a breach of fiduciary duty and a prohibited transaction under ERISA because UHC caused the Plans to transfer plan assets designated for benefit payments to UHC as a "party in interest."
5. UHC owed plaintiffs and the Class a duty to provide adequate notice and a full and fair review of cross-plan offsets in accordance with ERISA's claims regulations. UHC breached this duty by failing to provide adequate notice or a full and fair review of cross-plan offsets, in violation of ERISA and its claims regulations.

Among other forms of relief, the Class requested that the district court (i) issue a declaration that UHC's cross-plan offsets against plaintiffs' Plans and the other Plans in the Class did not constitute payment of their claims for covered services under their Plans; (ii) order UHC to provide all accountings as necessary to determine the amounts that UHC must remit to the Plans under ERISA to restore losses and to disgorge any profits that UHC impermissibly obtained from the use of plan assets or other violations of ERISA; and (iii) permanently enjoin UHC from taking cross-plan offsets.

Employer Next Steps in light of *Scott*

In anticipation of what could be a successful challenge in *Scott* to the practice of cross-plan offsetting, employers/plan sponsors should consider the following actions:

1. Review TPA service agreements and any benefit booklets issued by the TPA that are incorporated into the group health plan documents to determine whether the TPA uses cross-plan offsetting;
2. If cross-plan offsetting is used by the TPA, determine whether the employer can opt out of that practice; and
3. Ensure that any service agreements with a TPA that uses cross-plan offsetting contains adequate indemnification against any losses or damages that the employer may incur in the event that cross-plan offsetting is determined to be in violation of ERISA, thus triggering claims that could be brought directly against the employer, such as, for example, for a breach of fiduciary duty to the plan and its participants.