Cross Plan Offsetting May Draw ERISA Litigation

April 24, 2019 Micah Skidmore, Neil Issar

PRACTICES ERISA and Other Benefits Litigation, False Claims Act and Qui Tam Defense, Healthcare and Life Sciences

In an opinion issued by the Eighth Circuit on a matter of first-impression, the court in *Peterson v. UnitedHealth Group Inc.* left insurers rushing to revise plan documents to preserve their ability to offset overpayments on one plan by withholding payments on another.[1]

On January 15, 2019, the Eighth Circuit affirmed the partial summary judgment decision of a district court in Minnesota, which held that UnitedHealth Group Inc.'s ("United") interpretation of its plan documents to allow cross-plan offsetting was improper. Cross-plan offsetting is a common insurer practice that recoups overpayments made to providers from one plan by withholding or reducing another plan's subsequent payments to the same provider. Without cross-plan offsetting, insurers such as UnitedHealth stand to lose millions of dollars per year in uncollectible claims overpayments. Read on for a summary of the opinions and an analysis of their impact for healthcare companies in the Eighth and other circuits going forward.

Two healthcare providers brought ERISA claims against United on behalf of several patients alleging that United wrongfully failed to pay them and other providers under its plans.[2] Through a practice known as cross-plan offsetting, United would withhold some or all payments to a healthcare provider on one plan to offset overpayments United believed to have overpaid on other plans to the same provider. Both the district and circuit court opinions noted the fact that the plans alleged to be overpaid were fully insured by United, while the plans from which payments were withheld were often self-insured by the patients. The plaintiffs argued that this practice unfairly benefitted United and violated ERISA's requirements for employee welfare benefit plans and the actual terms of the United plans.

No Decision on Summary Judgment or Appeal as to Whether ERISA Was Violated

The district court declined to rule on the general permissibility of cross-plan offsetting under ERISA. Instead, the court reviewed United's specific use of cross-plan offsetting under the plans at issue. Where United insured some, but not all, of the plans used in the offsetting arrangement, the district court found this type of offsetting presented "a grave conflict of interest."[3] At a minimum, the court held ERISA would require an administrator to conduct a plan-by-plan analysis of whether cross-plan offsetting was in the best interest of a plan before choosing to engage in the practice.[4] On appeal, the Eight Circuit similarly declined to address whether cross-plan offsetting violated ERISA *per se*. But the court described United's practice as "push[ing] the boundaries of what ERISA permits."[5] United Healthcare has requested an *en banc* rehearing of the panel's decision.

United's Interpretation of Its Plans Was Improper

Before analyzing the ERISA arguments, the district court analyzed United's interpretation of its plan documents that United argued justified its practice of cross-plan offsetting. The court held that the interpretation was improper.[6] United argued that while none of its plans expressly mentioned cross-

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plan offsetting, generic provisions in its plans "that require United to pay benefits and that grant United discretion to interpret and administer the plans" implicitly allowed United to recover overpayments to self-insured plans from other plans. This authorization allegedly gave United broad discretion to use self-insured plans to recoup overpayments made to other plans.[7] But, the court held that such an interpretation would strip meaning from the overpayment and recovery provisions of the self-insured plans and was overall an unreasonable interpretation.[8] On appeal, the Eighth Circuit agreed, holding that United's proposed interpretation would "be akin to adopting a rule that anything not forbidden by the plan is permissible."[9]

Cross-Plan Offsetting in Other Circuits

Litigation regarding cross-plan offsetting is relatively new, but at least one case in the Fifth Circuit has relied on the arguments in *Peterson* in a similar case against United.[10] In *Omega*, a healthcare provider, Omega Hospital brought ERISA claims against United on behalf of patients whose plans had allegedly been overpaid. The provider argued that United had violated ERISA by recouping overpayments allegedly made to the represented patients by withholding payments on unrelated patient accounts. Significantly, Omega did not attempt to bring its claims on behalf of those unrelated patients. The court held that the provider's argument "may create the inference that 'unrelated patients' are entitled to those benefits recouped through cross-plan offsetting[, but] fail to state a plausible claim that the patients on whose behalf [the provider] brings this lawsuit . . . are entitled to such benefits under ERISA."[11]

The court distinguished *Peterson* and *Omega* by noting that the *Peterson* plaintiffs brought claims on behalf of patients whose plans were used to execute the offsets, while the *Omega* plaintiffs brought claims on behalf of the patients whose plans had allegedly been overpaid. In other words, the *Omega* plaintiffs were attempting to recover on behalf of patients who, "in effect, actually reaped the benefit of United's use of offset."[12] This distinction led the court to reject Omega's reliance on *Peterson* in its dismissal of Omega's claims.

Conclusion

The Eighth Circuit decision is limited to its facts as the court declined to determine whether cross-plan offsetting violates ERISA *per se*. Nevertheless, given the novelty of this issue, both administrators and providers should review plan documents and provider agreements to ensure whether the practice of cross-plan offsetting is a practice that is expressly authorized for any particular beneficiary or plan.

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[1] 913 F.3d 769 (8th Cir. 2019).

[2] *Peterson v. UnitedHealth Group Inc.*, 242 F. Supp. 3d 834, 836 (D. Minn. 2017), *aff'd*, 913 F.3d at 769.

[3] *Id.* at 845.

[4] *Id.*

[5] *Peterson*, 913 F.3d at 777.

[6] *Peterson*, 242 F. Supp. 3d at 842.

[7] *Id.* at 845.

[8] *Id.* at 846.

[9] *Peterson*, 913 F.3d at 776.

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[10] See *Omega Hosp., LLC v. United Healthcare Servs., Inc.*, No. 16-cv-00560, 2018 WL 4343411, at *20 (M.D. La. Sept. 11, 2018).
[11] *Id.* at *18.
[12] *Id.* at *18 n.135.

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