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Eighth Circuit Decision On “Cross-Plan Offsetting” Illustrates Importance Of Careful Plan Drafting

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The U.S. Court of Appeals for the Eighth Circuit recently weighed in on a practice for recovering health plan overpayments known as “cross-plan offsetting.” In addition to shining a light on the controversial (but potentially useful) practice, the decision offers an important lesson in plan drafting that extends beyond the particular case. The case is *Louis J. Peterson, D.C., et al. v. UnitedHealth Group Inc., et al.*, no. 17-1744 (8th Cir. Jan. 15, 2019).

From time to time, group health plans inadvertently pay the wrong amount to doctors, clinics, and other providers. When the amount paid is more than what the plan allows (an “overpayment”), the plan generally must be made whole; to make this happen, administrators typically try to recover the overpayment from the provider. But what happens when the provider refuses to return the overpayment?

Plans often authorize the administrator to recover the overpayment by offsetting it against future payments owed by the same plan to the same provider. This approach works well if another plan participant uses the same provider, but it is not helpful if the plan does not have other bills from the provider from which it can recover. Enter “cross-plan offsetting,” where a third-party administrator with multiple clients collects the overpayment by offsetting it against another plan’s bills from the same provider. If the amount of the offset is credited back to the first plan, then both plans, the provider, and the affected participants can get back to where they would have been had the error not occurred. But the practice exposes the offsetting plan and its participants to some risk, and it raises questions under ERISA’s prohibited transaction and fiduciary rules because assets of one plan are being used to solve a problem for another plan.

In a 2017 amicus brief, the U.S. Department of Labor ("DOL") took the position that cross-plan offsetting violated ERISA's prohibited transaction and fiduciary rules, at least where overpayments from a plan insured by the administrator are recovered from amounts owed by a separate self-insured plan. DOL reasoned that cross-plan offsetting imposed on "innocent participants a financial risk and potential harm in order to recoup an alleged, unrelated overpayment for another plan." DOL concluded that the insurer received an improper benefit, because recoveries out of the self-insured plans' assets flowed back to plans for which the insurer was financially responsible.

In the *Peterson* decision, the Eighth Circuit stated that cross-plan offsetting was "questionable at the very least," in "tension with the requirements of ERISA," and straddling the "line of what is permissible." But the court did not actually reach the merits on the legal question of cross-plan offsetting. Instead, the court concluded that the practice was not authorized by the plan that was seeking recovery.

The third-party administrator argued that its use of cross-plan offsetting was authorized general language that gave the plan administrator discretion to interpret and implement the plan's terms. The Eighth Circuit held that this language was not specific enough to authorize cross-plan offsetting, reasoning that such an interpretation would be "akin to adopting a rule that anything not forbidden by the plan is permissible."

The Eighth Circuit's holding leaves the legal status of cross-plan offsetting unresolved. The practice might be permissible under certain circumstances but it raises important considerations for plan sponsors and fiduciaries. The immediate lesson is that if a plan sponsor wants cross-plan offsetting to be available as a remedy for overpayments (even if the remedy might rarely be pursued), the plan must expressly authorize the practice.

More generally, plan sponsors and fiduciaries should consult with counsel to consider options for addressing overpayments. Under appropriate circumstances, cross-plan offsetting might be desirable, but it is important to be careful about how and when the practice is used.

In short, the Eighth Circuit's decision offers two important take-aways:

1. Plan language matters. It is important to review and update plan documents to ensure that they authorize the latest approaches for recovering overpayments; and care should be taken in drafting to avoid authorizing non-compliant remedies.

2. Understand how cross-plan offsetting is used. Plan fiduciaries should review their administrative service agreements to understand whether and when cross-plan offsetting might be used. In particular, it is important to review risks to the plan and participants if the third-party administrator refuses to pay legitimate claims in order to recover another plan's overpayments.

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