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Third Circuit Sides With Out-of-Network Providers on ERISA Standing, But Holding Narrow

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With the exception of a fortunate few medical providers who are able to sustain their practices on a fee-for-service basis without having to participate with insurance companies, nary a provider exists who does not require his patients to sign an "assignment of benefits" before providing medical services. Some assignments are more detailed than others, but most tend to say something like: "I hereby authorize my insurance company to make payments for medical services provided to me directly to my provider. I further authorize my provider to pursue any appeals of coverage decisions to my insurance company on my behalf. I am aware that I am responsible for any provider charges not covered by insurance." And while some assignments are detailed enough to expressly provide for the patient's assignment of his or her standing as a plan "beneficiary" or "participant" for purposes of prosecuting an ERISA enforcement action to recover benefits, most assignments are not so detailed.

For the last several years New Jersey District Courts have offered differing thoughts as to whether an assignment of benefits is limited to a provider's right to receive payment, which does not speak to legal standing, nonetheless implies a right to pursue an ERISA enforcement action for benefits in the patient's name. The Third Circuit recently answered this question in the affirmative in the September 2015 companion opinions of *North Jersey Brain & Spine Center v. Aetna, Inc.* and *American Chiropractic Association v. Cigna Corporation*. A detailed commentary on these opinions and the new questions they have raised can be found here. Read full article...

But while the Third Circuit may have clarified (for most factual scenarios at least) provider standing to bring an ERISA enforcement action for the recovery of insurance benefits, it is important to clarify two things which the *Aetna* and *Cigna* Opinions did *not* do, and to which the Third Circuit has not yet spoken.

First, while an out-of-network provider may acquire derivative ERISA standing through a valid assignment of benefits, that does not mean that the health benefit plan must allow such assignments. Like most federal district and circuit courts to have taken up the issue, New Jersey District Court precedent holds that unambiguous anti-assignment clauses in group health benefit plans, which have not been waived by conduct, are valid and enforceable. *Cohen v. Independence Blue Cross*, 820 F.Supp.2d 594 (D.N.J. 2011); *Advanced Orthopedics and Sports Medicine v. Blue Cross Blue Shield of Massachusetts*, 2015 W.L. 4430488 (D.N.J. Jul. 20, 2015). If a plan contains such a clause, a health insurance company faced with an ERISA enforcement action by an out-of-network provider may still challenge provider standing on well-founded anti-assignment case law – case law which the Third Circuit's *Aetna* and *Cigna* Opinions did not disturb.

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Second, while the *Aetna* and *Cigna* Opinions may have conclusively decided that an assignment of benefits limited to the collection of payments is sufficient to establish derivative standing to prosecute an ERISA enforcement action to recover the *payment assigned*, the Third Circuit did not extend its holding to other patient rights and benefits under ERISA, such as the right to seek injunctive or other equitable relief, the right to assert a breach of fiduciary duty claim against a plan administrator for mismanagement, or the right to assert a claim for statutory penalties against a plan fiduciary for certain statutory disclosure violations. This is so because such remedies are generally not considered "benefits" for ERISA purposes, a term which the federal statute does not expressly define. "Benefits," for ERISA purposes, are generally considered bargained-for goods such as medical, surgical, or hospital care prescribed by a plan. *See Rojas v. Cigna Health and Life Ins. Co.*, 793 F.3d 253 (2d Cir. 2015); *Kolasinski v. Cigna Healthplan of CT, Inc.*, 163 F.3d 148 (2d Cir. 1998).

Courts in New Jersey – even those who had, prior to the Third Circuit's Opinions, taken the same expansive view of assignments of benefits limited to the collection of payments – and elsewhere have declined to read such assignments as encompassing the "full gamut" of a patient's non-benefit related ERISA rights and remedies absent express language in the assignment stating otherwise. *See, e.g., See Spine Surgery*, 50 F.Supp.3d at 654-655 ("[The Assignment…transferred…the right to pursue this action *for benefits owed for its services*….The motion to dismiss will therefore be denied to the extent that it challenges [plaintiff's] standing to bring a claim for ERISA *benefits*."); *Premier Heath Center, PC v. United Health Group*, 292 F.R.D. 204, 220-221 (D.N.J. 2013) (assignment of benefits confers standing to sue only for payment for medical services, and not for the pursuit of injunctive relief or other non-benefit remedies); *Eden Surgical Ctr. v. B. Braun Med., Inc.*, 420 Fed.Appx. 696, 697 (9th Cir. 2011) (affirming dismissal of non-disclosure claims under § 1132(c) because only the right to collect benefits had been assigned); *Surgical Centre, Inc. v. Aetna, Inc.*, 546 Fed.Appx. 846, 852 (11th Cir. 2013) ("Plaintiffs contention stretches beyond its breaking point the plain meaning of the agreement, which assigns only the right to receive benefits and not the right to assert claims for breach of fiduciary duty or civil penalties").

Thus, while the Third Circuit's *Aetna* and *Cigna* Opinions have made it easier for out-of-network providers to prosecute derivative ERISA enforcement actions as assignees, they did not impact a carrier's ability to prohibit assignments of benefits outright, nor did they expand the scope of relief to which a provider may be entitled in an enforcement involving a plan where assignments are permitted. The Third Circuit will presumably speak to these issues eventually, but until then these carrier defenses remain sound.

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