

## Purported Assignment and Power of Attorney Held Invalid in Provider's Suit to Recover Health Benefits

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On December 4, 2018 United States District Judge Noel L. Hillman dismissed a suit for unpaid medical bills by a healthcare provider against its patient's ERISA-governed health benefits plan, finding the assignment/power of attorney proffered by the provider deficient and invalid, while agreeing with the plan that its anti-assignment provision was both valid and enforceable. Citing and expanding upon Third Circuit precedent from earlier in the year, the court particularly scrutinized the document alleged to be a power of attorney signed by the patient, finding it wanting under New Jersey law.

In *Enlightened Solutions, LLC v. United Behavioral Health*, No. 18-6672, 2018 U.S. Dist. LEXIS 205799 (D.N.J. Dec. 4, 2018), the plaintiff-provider had provided detox and rehab treatment to a patient for his addiction. The provider submitted claims to the plan pursuant to an Assignment of Benefits entered into between the provider and the patient. Some claims were paid, though others were not. The defendants (the plan and its administrator) moved to dismiss the provider's unpaid claims asserting the operative ERISA plan's anti-assignment provision as precluding the provider's attempts to seek reimbursement on behalf of its patient. This, they contended, was so even in instances where the plan had paid some of the claims, like here, given the plan's explicit language that such payments *do not* constitute a waiver of the anti-assignment provision. The plan further argued that the provider lacked standing for breach of fiduciary duty and similar claims because such are only available to the patient himself.

### THE PLAN'S ANTI-ASSIGNMENT PROVISION

The subject anti-assignment provision states:

Non-Assignment of Claims.

A Claimant may not assign his/her Claim under the Plan to a Nonparticipating Provider without the Plan's express written consent. Regardless of this prohibition on assignment, the Plan may, in its sole discretion, pay a Nonparticipating Provider directly for Covered Expenses rendered to a Claimant. Payment to a Nonparticipating Provider does not constitute a waiver, and the Plan retains a full reservation of all rights and defenses.

### PROVIDER'S ARGUMENTS

Admittedly, the patient did not get the plan's written consent to assign his claims. Despite this explicit condition, the provider nonetheless sought to make the anti-assignment provision unenforceable by arguing waiver and estoppel since some of their claims had been paid. The provider also alleged ambiguity in the plan language and that the assignment

signed by the patient constitutes a power of attorney. Each of these theories was ultimately found unavailing by the court, as having been squarely addressed by the Third Circuit earlier this year in *American Orthopedic & Sports Medicine v. Independence Blue Cross and Blue Shield*, 890 F.3d 445, 453 (3d Cir. 2018).

### **THIRD CIRCUIT'S TEACHINGS**

The court summarized the guidance of the Third Circuit in *American Orthopedic* as follows:

1. the terms of an unambiguous private contract must be enforced;
2. unambiguous anti-assignment clauses in ERISA-governed health benefit plans are enforceable;
3. routine processing of claims does not amount to an insurer's waiver to enforce an anti-assignment clause; and
4. a valid anti-assignment clause does not preclude a medical provider who holds a valid power of attorney from asserting the participant's claims against the ERISA plan.

Applying these precepts to the case at hand, the court found that the clear and unambiguous language of the plan precludes a participant from assigning his claims to a nonparticipating provider without the plan's written consent. Moreover, the explicit, clear and unambiguous language of the plan states that payment to a nonparticipating provider does not constitute a waiver and that this is an enforceable contract term. The court also ruled that the assignment of benefits document signed by the patient did not constitute a valid power of attorney under New Jersey law, carefully analyzing the applicable statutes.

### **POWERS OF ATTORNEY UNDER NEW JERSEY LAW**

While noting that *American Orthopedics* held that a valid anti-assignment of benefits clause does not preclude a plan beneficiary's medical provider from advancing claims against a plan pursuant to a power of attorney, the court emphasized that in order to do so the provider *must actually hold a valid power of attorney*. The patient's signed document under review simply did not satisfy the requirements of a power of attorney under New Jersey law. The court explained that in New Jersey,

"power of attorney" "means a duly signed and acknowledged written document in which a principal authorizes an agent to act on his behalf." N.J.S.A. 46:2B-10. "A power of attorney must be in writing, duly signed and acknowledged in the manner set forth in R.S. 46:14-2.1." N.J.S.A. 46:2B-8.9. The maker of the power of attorney "shall appear before an officer specified in R.S. 46:14-6.1 and acknowledge that it was executed as the maker's own act." N.J.S.A. 46:14-2.1. "The officer taking an acknowledgement or proof shall sign a certificate stating that acknowledgement or proof," and the certificate must also state: "(1) that the maker or the witness personally appeared before the officer; (2) that the officer was satisfied that the person who made the acknowledgement or proof was the maker of or the witness to the instrument; (3) the jurisdiction in which the acknowledgement or proof was taken; (4) the officer's name and title; (5) the date on which the acknowledgement was taken." *Id.*

**POWER OF ATTORNEY REQUIREMENTS NOT SATISFIED**

The document the provider wished to construe as a power of attorney in *Enlightened Solutions* was titled "Assignment of Benefits/Release of Medical Information." The formalities of a valid power of attorney were held not met on multiple grounds. To start, the content of the document the patient signed was found to relate only to permission for the provider to release his medical information to, and seek payment from, his insurance company, not to act on his behalf in any broader capacity. Further, the staff member whose name was typed—not signed—on the document underneath the patient's signature as merely being "present" when it was signed, was not identified as an "officer" under N.J.S.A. 46:14-6.1 and the other requirements of a proper acknowledgement under N.J.S.A. 46:14-2.1 were absent. The plain language of the New Jersey statute clearly requires acknowledgement by a designated officer for a power of attorney to be valid. The court concluded that the document the provider sought to rely upon simply did not satisfy the requirements of a power of attorney under New Jersey law and that amendment of the complaint to assert claims based on this document as a power of attorney would be futile.

Consequently, having found a valid anti-assignment provision and an invalid assignment of benefit claims and invalid power of attorney, the provider's complaint was dismissed.

If you have any questions or would like more information, please contact Elizabeth A. Venditta (vendittae@whiteandwilliams.com; 215-864-6392) or Timothy A. Carroll (carrollt@whiteandwilliams.com; 215-864-6218).

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