

Daily Labor Report ®

Ruling Gives Ammunition in Fights Over Health Insurer Clawbacks

By Lydia Wheeler

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- Billing practice violates ERISA, judge says
 - Ruling may lead to changes in plan language
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Doctors, hospitals, and other medical providers now have a loaded arsenal to fight back with when health insurers try to claw back money they overpaid in claims for one patient by withholding payment for another in a separate health plan.

Benefits attorneys say a recent ruling from a federal district court in New Jersey gives ammunition to providers fighting to stop insurers from engaging in this routine billing practice, known as cross-plan offsetting. The court ruled the practice violates the Employee Retirement Income Security Act. It's a decision that could lead to more lawsuits, but also prompt changes to plan documents.

"I think the momentum legally is beginning to move against allowing this kind of conduct," said Brian Hufford, a partner at Zuckerman Spaeder LLP, who represented the providers in this case before the U.S. District Court for the District of New Jersey.

"The Department of Labor has taken the position that it violates ERISA, this court made the decision it's violating ERISA, the Eighth Circuit already held the plans wouldn't allow it, but yet the insurance companies are continuing to do it," Hufford said.

In cross-plan offsetting, the insurer withholds a payment under one plan in order to recover an amount that's believed to have been overpaid on another plan. Aetna Inc., which is at the center of this dispute, said recovering overpayments is critical to managing and lowering health-care costs.

"In the course of promptly adjudicating millions of claims each day, it is inevitable that Aetna will overpay some providers that submit incorrect, inaccurate, improper, or even fraudulent claims," the company said in a case filing.

Judge Brian Martinotti ruled the practice violates the provision of ERISA that prohibits plan fiduciaries from taking any action that's adverse to the interests of plan participants.

Far More Damning

This decision was far more damning than the U.S. Court of Appeals for the Eighth Circuit's 2019 ruling in *Peterson v. United Healthcare*, said Judith Wethall, a partner at McDermott Will & Emery, who represents large self-funded employer plans.

The Eighth Circuit focused on whether the plan documents allowed for cross-plan offsetting and found it didn't.

"I understand the administrative ease of cross-plan offsetting," Wethall said. "But you can't violate ERISA in the name of administrative ease, and I think that's what's happening here."

In a statement, UnitedHealthcare spokeswoman Maria Gordon Shydlo said overpayment recovery is an important tool to reduce the cost of health care, which the company is committed to doing.

"Care providers do not have the right to keep over payments while continuing to collect full payment for other care services," she said. "We will continue to enhance this process for our customers, who support our efforts to recover these funds on their behalf."

Neither Aetna nor its attorney responded to a request for comment.

Explicit Language

While the decision was a win for providers, some attorneys say it could make it harder for them to bring similar claims.

The court held that provisions in health plan documents that prevent patients from allowing a provider to sue on their behalf over an unpaid benefit are enforceable. But the court hasn't ruled yet on whether the anti-assignments in the plan documents involved in this case prevent the providers from suing on some of their claims.

"Almost all insurers that do cross-plan offsetting have also urged the employers they work with to change their plan language to not allow assignments," said Julie Selesnick, who represents plan participants and is of counsel at Cohen Milstein. "That avenue is going to be closed soon because those will be enforced."

But other attorneys say anti-assignment provisions have always been an obstacle for providers in challenging cross-plan offsetting. What the ruling could do is change how health plans are written, one attorney said.

If this is the way courts are going, insurers may have to alter the language of plan documents to more explicitly allow cross-plan offsets, said Andrew Hamelsky, who represents insurers, and chairs the life, health, disability and ERISA group at White & Williams LLP.

"Courts have in the past given a lot of deference to plan documents," he said. "If this is affirmed and it's the way courts are going to go across circuits, it may be required that plan documents be changed in order to allow for this."

The case is Lutz Surgical Partners PLLC v. Aetna, Inc., D.N.J., No. 3:15-cv-02595, 6/21/21.

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Documents

Decision

[Summary judgment ruling](#)

Docket

[District of New Jersey docket](#)

[Peterson v. UnitedHealthcare ruling](#)

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