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Considering the Fiduciary Implications of Cross-Plan Offsetting

Following a federal appeals court rejection of a TPA's "cross-plan offsetting," some insurers and TPAs have sought to have SPDs and other plan materials updated to explicitly authorize this practice. While the court's decision did not directly implicate the plan sponsor, cross-plan offsetting may raise fiduciary issues generally; plan sponsors should consult with counsel about potential risks before agreeing to amend plan documents to explicitly authorize the practice.

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Authors

Julia Zuckerman, JD

Leslye Laderman, JD, LLM

Background

When an insurer or third party administrator (TPA) erroneously overpays a claim for services rendered by an in-network provider, the agreement with that provider typically allows the insurer or TPA to recover the overpayment by withholding that amount from future payments to the provider. This recourse is not available when an insurer or TPA overpays an out-of-network provider. As a way of offsetting overpayments to out-of-network providers, some insurers and TPAs engage in "cross-plan offsetting" — where the insurer or TPA recovers a disputed overpayment to an out-of-network provider by offsetting (i.e., deducting) the amount from a payment owed to that provider by a different health plan sponsored by a different employer. Cross-plan offsetting can occur both in the insured and self-funded plan context.

Here's an example of how cross-plan offsetting works: ABC, Inc. sponsors a medical plan administered by a TPA. Pat, an ABC plan participant, has an office visit with Dr. Smith, who is not in the ABC plan provider network. The TPA determines that the plan's share of Dr. Smith's bill is \$200, and the TPA pays Dr. Smith that amount. The TPA subsequently determines that it overpaid Dr. Smith because the usual and customary charge for the services Dr. Smith provided to Pat is \$150. The TPA also administers the medical plan sponsored by XYZ Company. When Jan, a participant in the XYZ plan, visits Dr. Smith, the TPA determines that the XYZ plan's share of the cost is \$300.

Why do insurers and TPAs sometimes overpay providers?

In processing millions of benefit claims, overpayments to service providers occur because of errors or due to issues like subrogation and coordination of benefits.

However, it reduces its payment to Dr. Smith for Jan’s claim by \$50 (i.e., it only pays Dr. Smith \$250) to offset its overpayment of Pat’s claim. Dr. Smith maintains that the plan should have paid \$200 for Pat’s visit and \$300 for Jan’s visit. Dr. Smith therefore balance bills Jan for the \$50 the TPA did not pay in connection with Jan’s visit.

Buck Comment. Some insurers and TPAs “batch” all the claims together for a given out-of-network provider and then offset any overpayments against the payment to that provider.

Not permitted under plan documents (or under ERISA, maybe)

The Eighth Circuit Court of Appeals recently ruled in favor of a group of out-of-network providers litigating on behalf of their patients. United Health Group Inc. and its affiliates (collectively "United") did not pay these providers the full amount due them for services rendered to participants in one of the plans United administered. Instead, United offset overpayments to these same providers by reducing payments for services rendered to participants in other plans that United administered. The providers maintained that the applicable plan documents did not authorize United to engage in this cross-plan offsetting — and the court agreed.

Holding that the plan document did not explicitly permit this practice, the court further reasoned that cross-plan offsetting is “in tension with [United’s] fiduciary duty because it arguably amounts to failing to pay a benefit owed to a beneficiary under one plan in order to recover money for the benefit of another plan.” Although a single TPA may serve as a fiduciary for many different plans, as United here did here, the court emphasized that its fiduciary duties “run separately to each plan.” While stopping short of a finding that cross-plan offsetting violates ERISA, the court said that this practice “is questionable at the very least” and may also constitute an impermissible transfer of assets from one plan to another in violation of ERISA’s exclusive benefit requirement.

Buck Comment. The DOL has taken the position that cross-plan offsetting violates ERISA’s exclusive benefit rule.

Reaction from insurers and TPAs

Since the Eighth Circuit’s ruling, at least two major insurers/TPAs (Aetna and United) have updated plan material to explicitly authorize cross-plan offsetting of payments to out-of-network providers. One added this language to its template SPD — and requested that plans that produce their own SPD add the language as well. Another inserted language authorizing cross-plan offsetting in its insurance certificates and administrative services agreements.

ERISA’s Fiduciary Duties.

ERISA requires plan fiduciaries to administer the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses.

Insurers and TPAs that engage in cross-plan offsetting maintain that this practice ultimately decreases costs for the employer — either by lowering claim amounts through offsets or lowering administrative costs by obviating the need to match errors against claims paid under the same contract.

Plan sponsor considerations

With some insurers and TPAs taking action to update plan materials to authorize this practice, plan sponsors should be aware of potential fiduciary issues involved with cross-plan offsetting. We recommend that plan sponsors consult with ERISA counsel about potential fiduciary risks before agreeing to amend plan documents, SPDs, and/or administrative service agreements to provide for cross-plan offsetting.

Plan sponsors that have not yet been contacted about this issue may want to determine if their TPAs or insurers engage in cross-plan offsetting — and, if so, take the steps necessary to ensure that TPAs not do so with respect to their plans. Whether a TPA engages in cross-plan offsetting is also a good question to ask vendors when a plan is thinking about changing TPAs.

In closing

It remains to be seen if other courts will find that cross-plan offsetting is impermissible under ERISA. In the meantime, given the Eighth Circuit's ruling, plan sponsors should be aware of the possible fiduciary implications of this practice.

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