

AMERICAN ORTHOPEDIC — THIRD CIRCUIT ADDRESSES ANTI-ASSIGNMENT CLAUSES AND POWERS OF ATTORNEY IN ERISA-GOVERNED HEALTH INSURANCE PLANS

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U.S. Insurance Coverage Alert

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Recently, the U.S. Court of Appeals for the Third Circuit handed the insurance industry a small victory by holding that, in *American Orthopedic & Sports Med. v. Indep. Blue Cross Blue Shield*, unambiguous anti-assignment clauses in health insurance plans governed by the Employee Retirement Income Security Act ("ERISA") are enforceable as a general matter. [1] But while a win for insurers, *American Orthopedic* does not represent a major departure in the state of the law governing the enforceability of anti-assignment clauses. At the same time, the court recognized that such clauses could be waived through an extended course of dealing. Perhaps most importantly, the *American Orthopedic* court concluded that such clauses would not prevent a patient from granting a limited power of attorney to the health care provider to assert that claim on the patient's behalf.

ENFORCEABILITY OF ANTI-ASSIGNMENT CLAUSES AS A GENERAL MATTER

In *American Orthopedic*, the plaintiff, an out-of-network health care provider, sued two health insurers based on the insurers' failure to adequately reimburse the provider for medical services covered by a health insurance plan issued by the insurers. The health insurance plan was an employee benefit plan covered by ERISA. It contained an anti-assignment clause that stated, in pertinent part, that "[t]he right of a Member to receive benefit payments under this Program is personal to the Member and is not assignable in whole or in part to any person, Hospital, or other entity." Based on this anti-assignment clause, the U.S. District Court for the District of New Jersey concluded that the health care provider lacked standing to sue under ERISA. The Third Circuit affirmed. The court considered ERISA's text, congressional policy, and authority from other jurisdictions. Predictably, the court concluded that none justified a departure from the general rule that courts will enforce the terms of an agreement that was freely negotiated between contracting parties.

The court in *American Orthopedic* considered the impact of its prior decision in *North Jersey Brain & Spine Center v. Aetna, Inc.*, [2] which held that a valid assignment of benefits transfers to a health care provider both the right to payment under an ERISA plan and the right to sue for that payment. However, the *American Orthopedic* court also noted that the court in *North Jersey Brain & Spine* had no occasion to address the effect or enforceability of an anti-assignment clause. The *American Orthopedic* court found ERISA's text and congressional policy inconclusive on the question of whether it prohibited anti-assignment clauses. As to congressional policy in particular, the *American Orthopedic* court noted that neither party had pointed to any empirical data or congressional findings relevant to whether anti-assignment clauses promote or impede ERISA's goals. Thus, the

court turned to decisions from other U.S. Circuit Courts of Appeals. Noting that every circuit to have considered the issue has concluded that ERISA does not prohibit plan administrators from freely negotiating anti-assignment clauses, among other terms, the court found no reason to depart from those decisions. Thus, while a win for the insurers in that case, *American Orthopedic* does not represent a significant departure from the existing state of the law regarding anti-assignment clauses in ERISA plans.

WAIVER AND OTHER DEFENSES

Notably, *American Orthopedic* recognized that anti-assignment clauses are subject to traditional contract defenses, such as fraud, misrepresentation, and unconscionability. The court noted, for example, that if a clause was buried in illegible "fine print" or if it was plainly neither intended nor likely to be read by the other party, those circumstances might support an inference of fraud. However, in the plan at issue in *American Orthopedic*, there was no burying, as the clause appeared in the "introduction" page of the plan.

The court also implicitly recognized the availability of the defense of waiver but found it inapplicable to the facts of the case. Because the insurance plan at issue contained an unambiguous Pennsylvania choice-of-law provision, the court applied Pennsylvania law in determining whether the insurer had waived the anti-assignment clause. The court noted that, under Pennsylvania law, a waiver requires a clear, unequivocal, and decisive act of the party with knowledge of such right and an evident purpose to surrender it. The court found that the facts relied upon by the plaintiff in *American Orthopedic* — the routine processing of a claim form, issuing payment at the out-of-network rate, and summarily denying the informal appeal — did not, by themselves, demonstrate an evident purpose to waive the insurer's right to enforce the anti-assignment clause.

POWER OF ATTORNEY

Perhaps most importantly, the court in *American Orthopedic* offers health care providers an alternative basis to acquire standing to proceed in court when an ERISA plan contains a valid and enforceable anti-assignment clause — a limited power of attorney. The insurers in that case had argued that an anti-assignment clause prevents plan beneficiaries from granting powers of attorney to their health care providers to pursue claims on the beneficiaries' behalf. The court rejected this argument, noting that "[a]ssignments and powers of attorney differ in important respects with distinct consequences for the power of a plan trustee to contractually bind an insured." Whereas a plan can limit a beneficiary's ability to assign claims as a matter of contract law, the court explained, an anti-assignment clause does not prevent the beneficiary from assigning the health care provider to act as the beneficiary's agent, any more than it would strip the beneficiary of his or her own interest in the claim.

The court found that the insurers' argument that anti-assignment clauses preclude principals from granting a power of attorney to their agents "not only lacks support, it also seems particularly ill-suited for the health care context." The court cited as examples situations where "patients must rely on their agents when they anticipate even short-term incapacitation after medical procedures" and where "those who anticipate longer-term unavailability, like deployed service members or those suffering from progressive conditions, depend on their designated agents to handle their medical claims and other affairs in their absence."

While finding that beneficiaries can grant powers of attorney to health care providers as a general matter, the limited power of attorney at issue in *American Orthopedic* was invalid under state law because it was not

witnessed, and the court found that the plaintiff had waived its argument in the Third Circuit for a remand. Accordingly, the court affirmed the district court's dismissal of the case for lack of standing.

CONCLUSION

While a win for insurers, *American Orthopedic* does not depart from the existing state of the law on enforceability of anti-assignment clauses. The Third Circuit has now joined other U.S. Circuit Courts of Appeals in holding that unambiguous anti-assignment clauses in ERISA plans are generally enforceable as a matter of contract law, subject to the traditional contract defenses, such as waiver, fraud, misrepresentation, and unconscionability. Perhaps more significantly, however, the Third Circuit has recognized an alternative basis under which health care providers may obtain standing to sue in federal court. Where a patient grants a limited power of attorney to a health care provider allowing it to sue on the patient's behalf, the Third Circuit has now recognized that a health care provider may pursue the claim in federal court, even if the ERISA plan contains a valid and enforceable anti-assignment clause. To ensure that they may take advantage of this alternative basis for standing, health care providers should carefully review with their counsel their patient intake forms, including their assignments of benefits, and their procedures for the completion of those forms.

[1] *Am. Orthopedic & Sports Med. v. Indep. Blue Cross Blue Shield*, No. 17-1663, 2018 U.S. App. LEXIS 12637 (3d Cir. May 16, 2018).

[2] 801 F.3d 369 (3d Cir. 2015).

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