EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

# EMPLOYERS WITH SELF-INSURED HEALTH PLANS SHOULD REVIEW THEIR PLAN OVERPAYMENT RECOVERY PROVISIONS IN LIGHT OF COURT DECISION

Authors: Thomas J. Hurley, John W. Brill, and Amanda M. Karpovich

On January 15, 2019, the United States Court of Appeals for the Eighth Circuit (the "Eighth Circuit") ruled against UnitedHealth Group ("United") in a case[1] involving a health plan overpayment recovery practice that has become known as "cross-plan offsetting." Employers[2] with self-insured health plans should review the United case and the overpayment recovery practices employed by their claims administrator. Employers who decide to continue cross-plan offsetting practices will likely need to revise their plans' overpayment recovery language to support the practice.

## What Is Cross-Plan Offsetting?

Cross-plan offsetting involves using a claim payment that is payable to a provider from one health plan ("Plan B") to repay a different health plan ("Plan A") for an overpayment that Plan A previously made to the provider. An example helps to illustrate the process: employee X is covered by Plan A and receives treatment from ABC Medical Group. Plan A pays ABC Medical Group $10,000. Plan A should have paid ABC Medical Group $4,000, resulting in a $6,000 overpayment. Employee Y is covered by Plan B and receives treatment from ABC Medical Group. Plan B determines that the amount payable for Y's treatment is $7,000. However, rather than paying $7,000 to ABC Medical Group, Plan B sends $6,000 to Plan A and $1,000 to ABC Medical Group. The $6,000 paid to Plan A recoups Plan A's overpayment to ABC Medical Group.

In some situations, claim offsetting can be a non-controversial, efficient way for a group health plan to recover overpayments to providers. Where the healthcare provider agrees that a plan has made an overpayment, there is little chance for controversy. For example, if a provider agrees that an employer's group health plan has overpaid the provider on a claim for services, the provider may very well prefer to have a subsequent claim payment from that plan (or even from an unrelated plan) reduced by the amount

---

[1] *Peterson v. UnitedHealth Group Inc., No. 17-1744, 2019 U.S. App. LEXIS 1270, at *2 - 15 (8th Cir. Jan. 15, 2019)*

[2] We refer to employers generally in this article. The appropriate plan fiduciary should be involved in reviewing the United case. For plans subject to ERISA, an employer/plan sponsor generally has plan design authority and is the default plan administrator. Many employers delegate the plan administrator role (a fiduciary role) to a committee or individual. Plan administration, including a plan's overpayment recovery process, is a responsibility of the plan administrator and, for plans subject to ERISA, is subject to ERISA's fiduciary responsibility requirements. While an employer/plan sponsor does not act in a fiduciary capacity when it designs a plan's provisions, a plan administrator or other plan fiduciary may not administer a plan's provisions if that administration would violate ERISA.

of the overpayment, rather than the provider having to separately process a repayment to the plan. Many insurance carriers/claims administrators have claim offset provisions in their network participation agreements with healthcare providers ("in-network" providers). Claim offsetting can create controversy with providers who do not have an agreement with the insurance carrier/claim administrator ("out-of-network" providers) and who do not agree that they have been overpaid on a claim. While providers may be unhappy, ERISA concerns generally don't arise when a single plan offsets its future payments to a provider to recover the plan's prior overpayments to that provider, or where an in-network provider's agreement with the insurance carrier/claims administrator permits offsetting. In the latter case, even if the offsetting is cross-plan (i.e., Plan B's payment being reduced to recover Plan A's overpayment), because it is permitted contractually, it can be characterized as the plan (Plan B) paying the provider and the provider repaying Plan A (with the claims administrator facilitating and expediting the exchange of funds).

Claim offsetting can also create issues for the covered individual, who might be "balance-billed" by a provider whose claim payment from the plan was reduced to recover a prior overpayment that the provider disputes. For example, using the numbers in the above example, ABC Medical Group might bill Employee Y for the $6,000 that was withheld from Plan B's payment and sent to Plan A. Balance-billing for the offset amount is a particular concern when the provider is an out-of-network provider. In-network providers frequently are prohibited from balance billing patients under the terms of the provider's agreement with the carrier/claims administrator.

### The United Case

The United case involved two out-of-network healthcare providers who started separate class action lawsuits against United in 2014 and 2015 on behalf of some of their patients whose claim payments from self-insured health plans had been subject to United's cross-plan offsetting practice. The United States District Court for the District of Minnesota consolidated the two lawsuits and granted partial summary judgment to the providers in March 2017[3] on the basic question of whether the governing health plan documents that covered the patients permitted cross-plan offsetting. The providers alleged that United's practice not only violated the terms of the plan documents, but also violated ERISA, because the practice furthered United's interest at the expense of the covered individuals and self-insured plans.

<u>District Court Decision.</u> The District Court decision contained an interesting discussion of the background details of United's implementation of cross-plan offsetting with existing self-insured employer clients in 2007 and with employers who became United clients after that date. Based on the Court's description of the process, many employers may not have been aware of United's practice. The District Court noted that United sent a letter to existing clients in 2007 that described the new process and offered clients about two weeks to opt-out of the process, but that "called no attention to the potential benefits of cross-plan offsetting to United itself." According to the District Court, for employers who contracted with United after 2007, United did not offer an opt-out from the cross-plan offsetting practice, and United's disclosure of the practice was not detailed and may have been made on an ad hoc basis by United's banking and account funding set-up team, rather than in the sales and contracting process. Other facts in the case did not paint a

[3] *Peterson v. UnitedHealth Group Inc., 242 F. Supp. 3d 834 (D. Minn 2017).*

good picture for United. The District Court noted that in many cases, the Plan Bs (the plans whose funds were paid to another plan rather than being paid to a provider) were self-insured plans, while the Plan As (the plans that received the funds from the Plan Bs) were insured plans, meaning that United's insured business benefited from the practice—United simply retained the funds deducted from the Plan B payments. On that point, the District Court noted that "[s]everal internal United documents emphasize this point and gush about how cross-plan offsetting will allow United to take money for itself out of the pockets of sponsors of self-insured plans."

On the basic question of whether the relevant plan documents authorized cross-plan offsetting, the District Court concluded that the none of the Plan B documents contained language sufficient to permit United to use Plan B assets to recoup overpayments made by Plan As. The offset language described by the District Court was typical offset language that would permit a plan to offset its future payments to a provider to recover that plan's prior overpayment to the provider. None of the plans contained language that would permit a plan's claim payment to be reduced and applied to recover an overpayment made by *another* plan. The District Court did not agree with United's argument that United had implicit authority to engage in cross-plan offsetting pursuant to other plan provisions that granted United discretion to interpret and administer the plans, concluding that United acted unreasonably in interpreting the plans to permit cross-plan offsetting.

Importantly, the District Court expressly <u>did not</u> rule on the question of whether cross-plan offsetting would ever be permissible under ERISA, noting that it did not need to rule on that important question because, in the case at hand, even if the practice were permissible under ERISA, the language in the plans in question did not authorize the practice. Although it didn't rule on the issue, the District Court's characterization of cross-plan offsetting clearly indicates that the Court had its doubts as to its permissibility under ERISA. The District Court stated: "[i]t is fairly debatable whether cross-plan offsetting is ever permissible under ERISA" and later "[i]t would have been easy for the authors of these plans to authorize cross-plan offsetting—and any prudent fiduciary asked to engage in cross-plan offsetting would insist on such authority, given the tension between engaging in that practice and fulfilling the fiduciary duties imposed by ERISA." The District Court acknowledged the importance of a quick resolution of the case, given United's large share of the national health insurance/administration market, and certified the case for immediate appeal to the Eighth Circuit.

<u>U.S. Department of Labor Weighs In</u>. If the District Court's characterization of the permissibility of cross-plan offsetting was skeptical, the U.S. Department of Labor's characterization of the practice in its *amicus* ("friend of the court") brief filed with the Eighth Circuit was crystal clear: "United violated its duty of loyalty under ERISA section 404 and engaged in a prohibited transaction in violation of ERISA section 406 by cross-plan offsetting."

<u>Eighth Circuit Decision</u>. Despite the urgency expressed by the District Court in its March 2017 decision, the Eighth Circuit did not issue its decision on the appeal until January 2019. Not surprisingly, the Eighth Circuit agreed that the language in the relevant documents did not authorize cross-plan offsetting: "…nothing in the plan documents even comes close to authorizing cross-plan offsetting…." Like the District Court, the Eighth Circuit also declined to rule on the fundamental question of whether cross-plan

offsetting would ever be permissible under ERISA. Its characterization of that question seems as skeptical as the District Court's: "…the practice of cross-plan offsetting is in some tension with the requirements of ERISA. While we do not decide here whether cross-plan offsetting necessarily violates ERISA, at the very least it approaches the line of what is permissible." It is not clear how the parties will resolve the dispute, or what United will do with respect to any other pending challenges to the cross-plan offsetting practice, or other claims that were subject to cross-plan offsetting (whether or not challenged by a provider). As described in the District Court's ruling, the Eighth Circuit ruling that the plans do not permit cross-plan offsetting means that "…the parties and the Court will face *years* of extraordinarily complex and expensive discovery, non-dispositive motion practice, litigation over class certification, dispositive-motion practice, trial, and litigation over remedies." (emphasis in original).

**Next Steps for Employers**

Employers with self-insured health plans should review their administrative service agreement and contact their claims administrator to determine whether the claims administrator uses cross-plan offsetting. Employers who use United should review their records to determine what information they may have regarding cross-plan offsetting (as noted by the District Court, employers may not have been fully aware of the practice or even given chance to opt out).

Employers whose claims administrator uses cross-plan offsetting will need to analyze the fundamental question of whether cross-plan offsetting is permissible under ERISA and the circumstances under which it could be permissible. The analysis is a complicated one that may yield no clear answer. What is clear from the District Court and Eighth Circuit decisions in the United case is that, if an employer decides that cross-plan offsetting is permissible for its plan, the language in the relevant plan documents must clearly authorize the practice, in order to avoid the result from the United case. In addition to a clear description of the cross-plan offsetting practice, other changes to plan language may be helpful to support the practice.

If you need additional assistance, please contact any member of our Employee Benefits and Executive Compensation Group at 716.853.1616, 585.232.6500, or visit [www.hselaw.com](http://www.hselaw.com).

Thomas J. Hurley, 716.844.3732, thurley@hselaw.com
John W. Brill, 716.844.3742, jbrill@hselaw.com
Amanda M. Karpovich, 716.844.3746, akarpovich@hselaw.com