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New in Name Only: The Ninth Circuit Reaffirms Derivative Standing to Sue Under ERISA, While Relabeling It Derivative "Authority to Sue"

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DERIVATIVE STANDING TO BRING OUT-OF-NETWORK CLAIMS: A RECAP

As the authors discussed in a previous column, a large number of claims against health insurance companies and ERISA plan entities are brought by out-of-network medical providers as opposed to patients or beneficiaries.[1] In the typical case, the medical provider seeks to recover benefits allegedly due to the patient for treatment provided on an out-of-network basis under ERISA § 502(a), which provides a cause of action "to recover benefits due . . . under the terms of [an ERISA] plan," and sometimes under state laws."[2]

Although ERISA § 502(a) grants a cause of action to recover benefits due only to "a participant or beneficiary" of an ERISA plan,[3] the out-of-network provider may assert so-called "derivative standing" to bring ERISA claims on behalf of the patient "by obtaining a written assignment from a 'participant' or 'beneficiary' of his right to payment of medical benefits."[4] Indeed, all federal circuits to have decided the issue have agreed that "when a patient assigns payment of insurance benefits to a

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healthcare provider, that provider gains standing to sue for that payment under ERISA § 502(a)."[5]

At the same time, all but two federal circuits have drawn the line at medical providers directly assigned a patient's or beneficiary's right to payment of benefits, disallowing sub-assignees from bringing ERISA claims on behalf of a patient or beneficiary.[6] In *Simon v. Value Behavioral Health, Inc*., for example, the U.S. Court of Appeals for the Ninth Circuit held that an individual who had aggregated claims of over 600 mental health patients as the medical providers' sub-assignee could not assert derivative standing.[7]

At the same time, a recent Ninth Circuit case, *Bristol SL Holdings, Inc. v. Cigna Health and Life Insurance Co.*, narrowly expanded the scope of derivative standing to "the first assignee as a successor-in-interest through bankruptcy proceedings who owns all of one healthcare provider's health benefit claims."[8]

THE NINTH CIRCUIT REAFFIRMS A MEDICAL PROVIDERS DERIVATIVE AUTHORITY TO SUE PURSUANT TO AN ASSIGNMENT OF BENEFITS

The Ninth Circuit recently revisited the issue of derivative standing in *South Coast Specialty Center, Inc. v. Blue Cross of California*.[9] Much as in the typical case, the plaintiff in *South Coast* was a medical provider (almost certainly an out-of-network provider, although the decision did not explicitly say so) that brought a claim under ERISA § 502(a) against an insurance company based on the insurer's alleged failure to fully reimburse the costs of medical services provided to the plaintiff's patients.[10]

Specifically, South Coast operated an ambulatory surgery center that required patients to sign an "Assignment of Benefits" form stating, inter alia, "I hereby authorize my Insurance Company to pay by check made payable and mailed directly to: South Coast for the medical and surgical benefits allowable, and otherwise payable to me under my current insurance policy, as payment toward the total charges for the services rendered."[11] South Coast alleged that Blue Cross had instituted a "prepayment review" process that significantly curtailed its coverage for the costs of South Coast's treatment and failed to provide appropriate benefits for approximately 150 medical claims.[12]

The district court dismissed South Coast's complaint for lack of "standing to bring ERISA claims as the assignee of its patients."[13] The court held that South Coast lacked standing because, in its view, "a patient's assignment that conveys to a health care provider only the right to directly receive payment from the patient's health insurance company for services rendered does not convey the patient's right to ERISA benefits or the right to sue to enforce those benefits," generally citing to the Ninth Circuit's decision in *DB Healthcare, LLC v. Blue Cross Blue Shield of Arizona, Inc.* for support.[14]

The Ninth Circuit reversed, holding that South Coast had "authority to sue" under ERISA.[15] As a threshold matter, the court observed that the term "standing" is a "misnomer when considering whether Congress has authorized a plaintiff to bring suit," as opposed to the Article III context of constitutional standing.[16] Instead, the court used the term "derivative authority to sue."[17]

On the merits, the court then held that South Coast had derivative authority to bring suit via its assignments of its patients' rights to benefit payments. Reaffirming past precedent, the court explained that while "under ERISA's clear terms, South Coast lacks direct authority to enforce its protections," ERISA "permits the assignment of health and welfare benefits to a healthcare provider, and it allows such a provider to bring derivative claims on behalf of patients."[18] The court thus turned to consider whether the district court erred when it concluded that "South Coast's 'Assignment of Benefits' form conveyed only the right to receive direct payment from Anthem, and not the right to sue for non-payment of plan benefits."[19]

First, the court concluded that the assignment form was clearly intended to operate as a valid assignment of a patient's right to payment of insurance benefits.[20] The court relied on the presence of the word "assignment" in the title of the documents and the fact that they authorized a patient's insurance company to pay South Coast for allowable medical benefits, noting that such language tracked text the court had found to convey a valid assignment in prior cases.[21]

Second, the court concluded that the form encompassed the right to sue for non-payment of the benefits, even though the form did "not expressly state that South Coast may sue insurers on its patients' behalf."[22] Looking again to its prior decisions – including *DB Healthcare* – for guidance, the court reasoned that "an assignment of the right to benefits generally includes the right to sue for nonpayment of benefits."[23] The court explained that *DB Healthcare* and another prior case, *Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.*,[24] each involved similar assignments of the right to benefit payments, and each noted that the right encompassed the right to right to bring suit for payment of benefits.[25] The court also pointed to the consensus amongst its sister circuits that "when a patient assigns payment of insurance benefits to a healthcare provider, that provider gains standing to sue for that payment under ERISA § 502(a)."[26]

Finally, the court reasoned that its conclusion furthered "Congress's purpose in enacting ERISA" by incentivizing medical providers, which are better positioned to pursue claims in the first place, to "'front[]'" the costs of their care, thereby increasing patients' access to care.[27] To construe South Coast's Assignment of Benefits otherwise, the court stressed, would result in numerous small lawsuits against the insurer by plan participants—an "inefficient result."[28]

At the same time, the Ninth Circuit reiterated that not "*all* assignments of the right to benefits – regardless of who made the assignment and who received it – necessarily confer the right to sue under ERISA."[29] Citing its decision in *Simon*, the court stressed that "permitting "third parties with no relationship to the beneficiary to acquire claims solely for the purpose of litigating them" would "transform[] health benefit claims into a freely tradable commodity" involving the "endless reassignment of claims," which Congress surely did not contemplate.[30]

THE NINTH CIRCUIT FURTHER CONFIRMS ADDITIONAL SUCCESSORS-IN-INTEREST DO NOT HAVE DERIVATIVE AUTHORITY TO SUE

Although *Bristol* expanded the scope of derivative "standing" or "authority to sue" slightly, to direct successors-in-interest through bankruptcy, the Ninth Circuit has thus far held the line. In a recent case, the court declined a plaintiff's invitation to expand derivative standing under *Bristol* to apply to sub-assignees more broadly, as two circuits have done under certain circumstances.[31]

The plaintiff in *ABC Services* was a non-provider that had received the right to payment by sub-assignment from the medical provider in order to bring claims "for the benefit of [the providers'] creditors," but not in connection with a bankruptcy.[32] The court explained that derivative standing is an "exception" to the rule of ERISA § 502(a)(1)(B) that "only a 'participant or beneficiary' has authority to sue to recover ERISA benefits" that is limited to medical providers (and direct successors-in-interest through bankruptcy), and that "where . . . a health care provider reassigns its patients' claims to a non-provider third party that has no relationship to the patients, the third party cannot file those claims on behalf of the patients."[33] The court reiterated that "allowing this type of transaction "would be tantamount to transforming health benefit claims into a freely tradable commodity."[34]

It appears from *ABS Services* that the Ninth Circuit has no intention of expanding the scope of authority to bring ERISA claims to entities other than medical providers that are direct assignees or their successors-in-interest by bankruptcy. Nor have any other circuits expanded the scope of authority to include other types of assignees.

KEY TAKEAWAYS

The Ninth Circuit's decision in *South Coast* reaffirms derivative "authority to sue" under ERISA, and confirming that patients need only assign the right to benefits payments to provide such authority, in line with the majority of federal circuits. The upshot is that insurance companies and

ERISA plan entities should continue to see a relatively large number of ERISA claims asserted by medical providers seeking payment for services provided to plan participants, especially with respect to reimbursement for out-of-network claims.

However, as discussed in the authors' previous column, plan sponsors can take steps to minimize litigation from out-of-network providers.

First, plan sponsors should ensure their plans have vast networks of providers, so that participants have in-network options, avoiding the desire or need for participants to secure out-of-network care. (This also has the added benefit of positive employee relations.)

Plans should also consider putting an anti-assignment provision in their ERISA plans, which courts in many jurisdiction have held defeat derivative authority to sue via assignment when unambiguous.

At the same time, in most jurisdictions, derivative standing will likely be limited to medical providers who provided the treatment and were directly assigned the right to payment – and, in rare circumstances, a provider's successor-in-interest by reason of bankruptcy, to the exclusion of all other downstream assignees.

Notes

1. See Joseph J. Torres, Jennifer T. Beach and Jacob P. Wentzel, Maybe There's a Leg to Stand on After All: U.S. Court of Appeals for the Ninth Circuit Allows Non-Health Care Providers to Assert Derivative Standing to Bring Out-of-Network ERISA Claims, 48 Employee Relations L. J. 1, 1–3 (Spring 2023).

2. 29 U.S.C. § 1132(a)(1)(B).

3. Id. § 1132(a)(1).

4. Conn. State Dental Ass'n v. Anthem Health Plans, Inc., 591 F.3d 1337, 1347 (11th Cir. 2009).

5. See N. Jersey Brain & Spine Ctr. v. Aetna, Inc., 801 F.3d 369, 373 (3d Cir. 2015) (noting unanimous authority amongst federal circuit courts as of 2015).

6. See Torres et al., supra note 1, at 4 & nn. 31–32.

7. 208 F.3d 1073, 1080-81 (9th Cir. 2000), cert. denied, 531 U.S. 1104 (2001).

8. Bristol SL Holdings, Inc. v. Cinga Health and Life Ins. Co., 22 F.4th 1086 (9th Cir. 2022).

9. S. Coast Specialty Surgery Ctr., Inc. v. Blue Cross of Cal., 90 F.4th 953 (9th Cir. 2024).

10. Id. at 955.

11. Id. (alteration adopted).

12. Id. at 956.

13. Southcoast Specialty Surgery Ctr., Inc. v. Blue Cross of Cal., No. SACV2101944TJHKESX, 2022 WL 3009129, at *2 (C.D. Cal. July 19, 2022), rev'd and remanded sub nom. S. Coast Specialty Surgery Ctr., Inc. v. Blue Cross of Cal., 90 F.4th 953 (9th Cir. 2024).

14. Id. at *1. (citing DB Healthcare, LLC v. Blue Cross Blue Shield of Arizona, Inc., 852 F.3d 868, 873 (9th Cir. 2017)).

15. S. Coast, 90 F.4th at 962.

16. Id. at 957 (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014)).

17. Id. at 960.

18. Id. at 958–59.

19. Id. at 956.

20. Id. at 960.

21. Id.

22. Id.

23. Id.

24. 770 F.3d 1282, 1289 (9th Cir. 2014).

25. Id.

26. Brown v. BlueCross BlueShield of Tenn., Inc., 827 F.3d 543, 547 (6th Cir. 2016) (quoting North Jersey Brain and Spine Ctr. v. Aetna, Inc., 801 F.3d 369, 372 (3d Cir. 2015)).

27. 90 F.4th at 961.

28. Id.

29. Id. at 962.

30. Id.

31. ABC Servs. Grp., Inc. v. Aetna Health & Life Ins. Co., No. 22-55631, 2023 WL 6532648, at *1 (9th Cir. Oct. 6, 2023); see supra note 6 and associated text.

32. ABC Servs. Grp., Inc. v. Health Net of California, Inc., No. 819CV00243DOCADS, 2022 WL 2348062, at *1 (C.D. Cal. June 13, 2022), aff'd sub nom. ABC Servs. Grp., Inc. v. Aetna Health & Life Ins. Co., No. 22-55631, 2023 WL 6532648 (9th Cir. Oct. 6, 2023).

33. 2023 WL 6532648, at *1.

34. Id.