# Anti-Assignment Clause Upheld Against Out-Of-Network Provider

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Another recent court case highlights how self-insured group health plans should ensure their plan documents contain strong language that prohibits third parties, particularly out-of-network health providers, from being assigned rights to pursue claims against such plans on behalf of a member. Such anti-assignment clauses can reduce some litigation risks.

## Background

Self-insured group health plans frequently provide members with coverage when using out-of-network medical providers. Generally, claims for such providers' services are susceptible to denial and "offset." When a plan denies a claim, out-of-network providers may be left trying to collect the balance of billed charges from members, who often do not have the resources to pay. Thus, out-of-network providers routinely require patients to sign assignment-of-benefit forms, and/or other related forms, such as authorized-representative-designation forms, and forms granting power of attorney. With such forms, providers take the position that they stand in the shoes of the member, can demand payment, and can directly sue the plans when they refuse to pay alleged amounts due.

Group health plan sponsors and fiduciaries generally desire to limit the risk of such actions by out-of-network providers, and well-drafted health plan documents typically include strong anti-assignment language. Historically, numerous courts, including the First, Second, Third, Fifth, Ninth, Tenth, and Eleventh Circuits have consistently upheld anti-assignment clauses whereby providers are generally denied standing to bring legal action against plans. However, on occasion, courts have held that plans have waived such clauses through actions involving providers in the claims process.



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## Anti-Assignment Clause Case

In The Medical Society of the State of New York et al v. UnitedHealth Group Inc. et al, various out-of-network surgeons, surgical practices, and associations of which they were members sued United Health Group ("United") in the U.S. District Court for the Southern District of New York for refusing to pay for certain services, primarily facility fees for office-based surgeries. Nineteen United plans were involved, and each plan had an anti-assignment clause, but did give the plans discretion to pay out-of-network providers directly for services. While various plans had slight variations on anti-assignment language, six of them included the following language:

> You may not assign your Benefits under the Policy to a non-Network provider without our consent. When an assignment is not obtained, we will send the reimbursement directly to you (the Subscriber) for you to reimburse them upon receipt of their bill. We may, however, pay a non-Network provider directly for services rendered to you. In the case of any such assignment of Benefits or payment to a non-Network provider, we reserve the right to offset Benefits to be paid to the provider by any amounts that the provider owes us.

While United often did pay these providers directly, it also would: (a) provide providers with denial-of-claim explanations, (b) remain silent when providers asked about anti-assignment provisions, (c) allow providers to proceed in the internal claims appeal process when an authorized representative, and (d) seek repayment from providers for overpayments, or effect offsets. The plaintiffs argued that these actions resulted in a waiver of the anti-assignment clause. However, the court rejected those arguments and concluded that "no reasonable jury could find ... that United clearly manifested an intention to relinquish its right to enforce the anti-assignment clauses." Thus, the court upheld the clauses, and United was granted partial summary judgment.

The plaintiffs further argued that they nonetheless had standing to sue as the members' authorized representative or attorney-in fact, and United's appeal notification letters that were sent to providers indicated that a patient's authorized representative could file an appeal on the patient's behalf. However, the court observed that the plaintiffs did not bring the suit in their roles as authorized representatives, and were seeking damages on its own behalf, which could only be done through a valid assignment.

## Employer Action

While this case is related to United and fully-insured plans, the same concepts apply to self-insured group health plans. Plan Sponsors and/or fiduciaries of such plans should consider the following:

- Review both the formal health plan document and the Summary Plan Description (SPD) with respect to an anti-assignment clause. Consider confirming, where possible, that the clause seems consistent with clauses that have been upheld in the plan's jurisdiction, and if there is no clause, or it appears the clause is inadequate, consider enhancing the provisions in these documents.

- Use caution when engaging in a plan's appeals process with a provider to avoid giving the provider an argument that the plan has waived its right to enforce an anti-assignment clause.

- Watch for further developments on providers using authorized-representative-designation forms, and/or forms granting power of attorney in order to assert standing in seeking recovery of amounts they are allegedly owed.



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