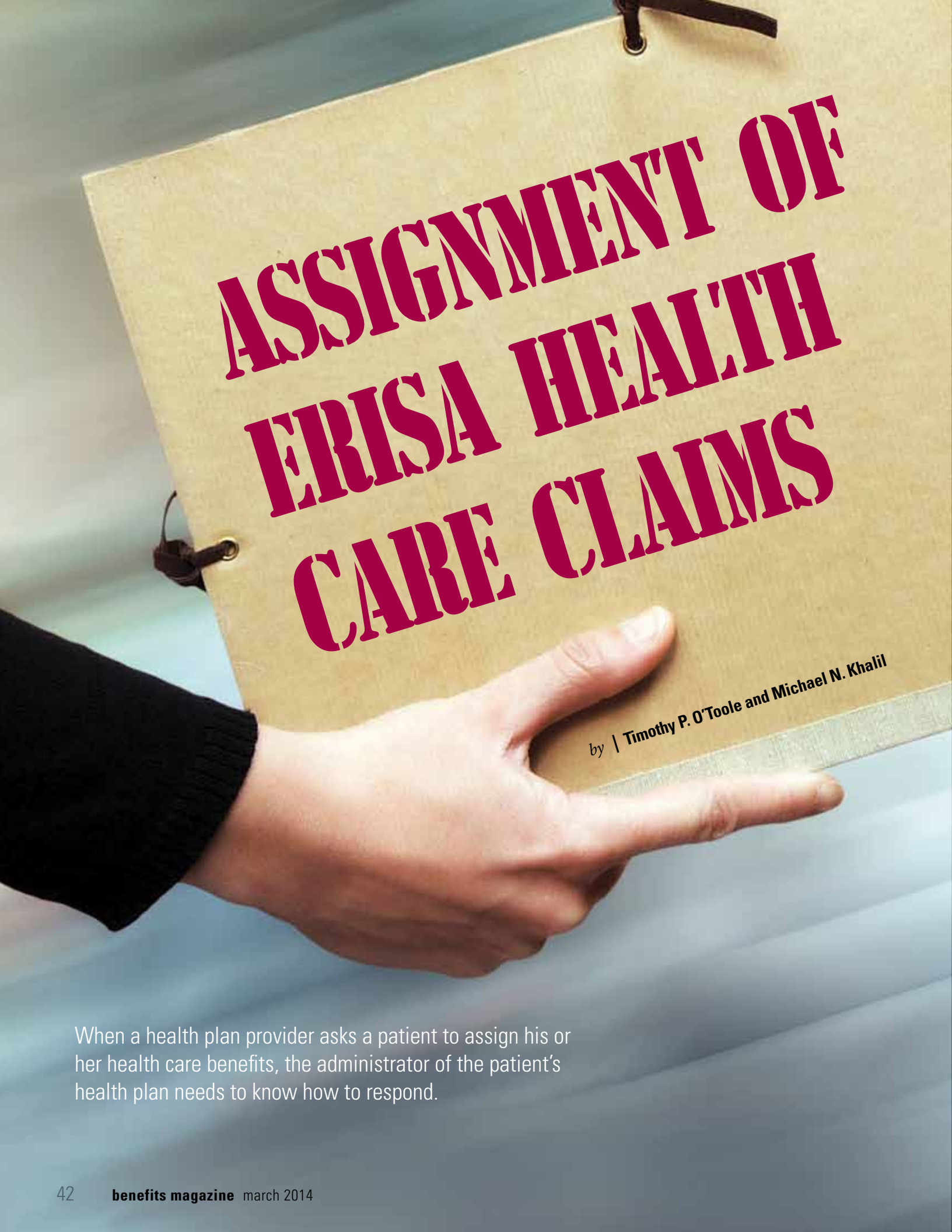

ASSIGNMENT OF ERISA HEALTH CARE CLAIMS

by | **Timothy P. O'Toole and Michael N. Khalil**

When a health plan provider asks a patient to assign his or her health care benefits, the administrator of the patient's health plan needs to know how to respond.

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The situation is a fairly routine one for administrators of health care plans governed by the Employee Retirement Income Security Act (ERISA).[1] A health care provider has rendered services to one of the plan's beneficiaries and, in doing so, had the beneficiary sign an "assignment form."

While they come in different shapes and sizes, these assignment forms almost always seek to "assign" the beneficiary's right for payment under their health plan directly to the provider, and sometimes they purport to transfer other rights as well. The provider then tries to use this assignment form to stand in the shoes of the beneficiary, both at the administrative level and, potentially, into federal court.

How is the administrator of the plan supposed to respond in these circumstances? Does the administrator treat the assignee just as he or she would the participant? Does the precise language of the assignment form matter in determining how the administrator should respond? Are all assignments valid or can a plan prohibit beneficiaries from assigning their claims? This article will address a few of the more common questions that arise in connection with these assignments.

Does ERISA Permit Participants to Assign Health Care Claims?

The short answer is "yes." While ERISA expressly states that pension benefits (i.e., retirement benefits) cannot be assigned, the statute has no such prohibition for welfare plans (i.e., health plans). Courts generally have interpreted this silence to mean that ERISA does not forbid beneficiaries from assigning their rights to reimbursement under a health care plan.[2] However, just because ERISA allows for assignments, that does not mean every assignment is enforceable.

Can a Plan Prohibit Assignments?

Even though nothing in ERISA prohibits assignments, neither does it mandate them, and a plan may prohibit the assignment of rights and benefits.[3] This is simply a corollary of the fact that ERISA's principal function is to "protect contractually defined benefits."[4]

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Because the statutory scheme "is built around reliance on the face of written plan documents,"[5] courts almost always honor a plan's antiassignment provisions. As the First Circuit has explained, "ERISA leaves the assignability or non-assignability of health care benefits under ERISA-regulated welfare plans to the negotiations of the contracting parties."[6] As providers have attempted to usurp the rights of plan participants, antiassignment provisions have become increasingly common in ERISA plan documents.

Moreover, just because a plan has a strict antiassignment provision, that does not mean that providers can't directly bill the plan or its insurer for services. Indeed, it is very common for a plan's insurer or administrator to have separate (non-ERISA-governed) contracts with "in-network" health care providers that allow for reimbursements to be made directly to the provider. Unlike the ERISA plan document, which provides benefits to plan participants and beneficiaries, these provider agreements are governed exclusively by state law and, typically, define the entire relationship between the in-network provider and the insurer.

Are Antiassignment Clauses Enforceable Under All Circumstances?

While courts uniformly recognize the enforceability of antiassignment clauses, there can be instances where an antiassignment clause will not be enforced because the court has determined that the plan has waived the right to enforce it through conduct. In other words, if the plan treats a provider as having a valid assignment (e.g., if the administrator allows providers to participate in the administrative appeals process), then a court might find that, through its conduct, the plan "waived" the right to contest assignment.

To bring some clarity to the idea of a waiver, courts have developed a number of tests for determining precisely what constitutes such a waiver. The tests vary by court. For example, one court has found that "[a] party may waive an anti-assignment provision by a written instrument, a course of dealing, or even passive conduct, i.e., taking no action to invalidate the assignment vis-a-vis the assignee."[7] Most courts actually require an "unequivocal action evidencing clear intent to forego contractual rights" in order to find a waiver.[8] Indeed, one court has held that only an affirmative misrepresentation by the plan could work to prevent enforcement of an antiassignment provision.[9]

The best thing a prudent plan administrator can do is to be careful to know what the plan says about assignments and be sure to act consistently with the plan language.

takeaways >>

- ERISA does not forbid beneficiaries from assigning their rights to reimbursement under a health care plan.
- A health plan may prohibit the assignment of rights and benefits, and antiassignment provisions have become increasingly common in ERISA plan documents.
- A court may decide that a plan, through its actions, has waived its right to protest an assignment of benefits.
- Although ACA doesn't impact the validity of an assignment, it changes the way plans have to deal with claimants and their authorized representatives. Some providers are using language in their assignment forms so that they'll be designated as authorized representatives in an appeal process.
- A plan administrator should act consistently to enforce either an assignment provision or a provision not to allow assignments.

Does ACA Change Any of These Rules?

Nothing in the Patient Protection and Affordable Care Act (ACA) or its implementing regulations changes the basic rules discussed above regarding the assignability of claims.

That said, it is worth noting that

ACA has made several changes to the claims-and-appeals process that follows an adverse benefit determination. Plans now have to meet more stringent rules in conducting their internal and external review processes for claimants. Moreover, where a plan fails to adhere to these new requirements, a claimant (including an authorized representative) may be deemed to have exhausted the internal review process, in which case a court reviewing an ERISA suit would not be bound to afford any discretion to the administrator's adverse benefit determination.[10]

Because most assignments are limited to a claimant's right to receive a benefit payment under the terms of the plan, these changes are largely irrelevant in thinking about how to deal with an assignment. However, some providers lately have been incorporating broader language into their assignment forms that purports to designate the provider as the claimant's "authorized representative" in the appeal process, in an effort to try to secure for themselves these new protections.

While a plan may freely prohibit assignments, it must have procedures that allow for claimants to designate authorized representatives. Thus, while ACA has not impacted the analysis of whether an assignment is valid, it has changed the ways plans have to deal with claimants and their authorized representatives. As such, it becomes even more important that administrators carefully review not only plan documents, but also any assignment forms, to ensure that they understand what rights exactly are at play.

Final Thoughts

As in many other areas, ERISA generally leaves to the contracting parties the decision of whether a participant should be able to assign health care claims. The parties should accordingly focus on this issue in drafting the plan and should expressly provide in the plan whether health care claims are assignable. Once this decision has been made, the plan administrator should act consistently to enforce it. For example, if the parties have determined that health care claims are assignable, the administrator should create and use consistently forms for assignments of rights for all participants so that the language of each assignment is clear and uniform.

Similarly, if the parties determine that health care claims are not assignable, the plan administrator should consistently enforce this rule in its administrative proceedings and in its dealings with purported assignees. Otherwise, a plan administrator risks waiving the antiassignment provisions or at least subjecting the plan to a waiver analysis whose outcome varies from jurisdiction to jurisdiction.

Endnotes

1. 29 U.S.C. A. §1001 et seq.
2. See, e.g., *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.,* 240 F.3d 982, 991 (11th Cir. 2001).
3. See, e.g., *Physicians Multispecialty Group v. Health Care Plan of Horton Homes, Inc.,* 371 F.3d 1291, 1294-95 (11th Cir. 2004); *LeTourneau Lifelike Orthotics & Prosthetics, Inc. v. Wal-Mart Stores, Inc.,* 298 F.3d 348, 352 (5th Cir. 2002); *City of Hope Nat'l Med. Ctr. v. Healthplus, Inc.,* 156 F.3d 223, 229 (1st Cir. 1998); *St. Francis Reg'l Med. Ctr. v. Blue Cross and Blue Shield of Kansas, Inc.,* 49 F.3d 1460, 1465 (10th Cir. 1995); *Davidowitz v. Delta Dental Plan of California, Inc.,* 946 F.2d 1476 (9th Cir. 1991).
4. See e.g., *US Airways, Inc. v. McCutchen,* 133 S. Ct. 1537, 1548 (2013) (citing *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U. S. 134, 148 (1985)).
5. *McCutchen,* 133 S. Ct. at 1548 (quoting *Curtiss-Wright Corp. v. Schoonejongen,* 514 U. S. 73, 83 (1995)).
6. *City of Hope Nat'l Med. Ctr. v. Health Plus Inc.,* 156 F.3d 223, 229 (1st Cir. 1998).
7. *Glen Ridge Surgicenter, LLC v. Horizon Blue Cross Blue Shield of New Jersey,* Civil Action No. 08-6160 (JAG), (D. N. J. Sept. 30, 2009).
8. *Cohen v. Independence Blue Cross,* 820 F.Supp.2d 594, 606-07 (D. N.J. 2011) (noting that the mere allegation that administrator dealt with assignee in claims and appeals process insufficient to state waiver claim).
9. *City of Hope Nat'l Med. Ctr. v. Health Plus Inc.,* 156 F.3d 223, 229 (1st Cir. 1998).
10. See 29 C.F.R. §2590.715-2719(b)(2)(ii)(F).

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