ERISA Litigation Update for Health Plans

This roundtable discussion is brought to you by the Payors, Plans, and Managed Care (PPMC) Practice Group.

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Introduction

- ACA Enforcement Provisions
- Possible Discrimination Claims
- Determining reimbursement rates for out-of-network providers

  - Direct claims by providers
  - Claims as assignee

- Calculating UCR
ACA Express Enforcement Provision

- Fines of $100 per day per participant for discriminating in favor of highly paid workers.


- No other new and express private rights of action.
Claims Under Prior Law

- ACA compliance shortfalls may give rise to claims for equitable reformation of plan documents.

- Claims for benefits due under plan terms (possibly as reformed).

- HIPAA portability violations – ERISA § 701.

- Discrimination claims under § 510 and/or Title VII.
Unlawful to discriminate against a participant “for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan….”

Plaintiffs may argue that limiting workers to 30 hours per week, if they used to work more, is discrimination for the purpose of keeping them from getting health care benefits.
Courts have been clear that plan design decisions are not discrimination.

Ok to have different benefits for full-time and part-time workers.

Uniform employment policies typically not considered discriminatory.
Good Case – Employer always had policy of limiting part-time to 30 hours, but not strictly enforced. New enforcement policy applies to everyone.

Bad Case – No prior policy and new policy results in a significant reduction in hours for part-time workers. Full-time hourly workers not restricted. Plaintiff was consistently working > 30 hours per week when plan amended. Suit brought in California.
Title VII

- Neutral employment policies can be problematic if they have a disparate impact on minorities.

- Decisions to “play” for one category of employees, but pay the penalty for another, could have a disparate impact on minorities.

- Possible, but less likely, that strict limit on hours for part-time workers, but not full-time, could raise an issue.

- Involve employment lawyer in decision-making process.
UCR Litigation

- What is UCR? How is it calculated?
- ACA impact?
- Provider suing as assignee
- Provider suing under direct claim
Affordable Care Act

- Must cover emergency services without prior authorization. 45 C.F.R. § 147.138(b).
- Balance billing permitted, but, for non-grandfathered plans, same copayment as in-network.
- Rates for out-of-network emergency services are greater of:
  - Medicare
  - Median in-network
  - UCR under Plan
  45 C.F.R. § 147.138(b)(3)
Direct Claims

- Out-of-network provider has no direct privity of contract with payor

- Implied contract?

- Quantum meruit

- Misrepresentation/estoppel
Representation-Based Claims

- Theory is that representations made while confirming coverage induced provider to render services.

- Classic case is insurer represents that patient is covered during admission, but denies claim because patient not covered.

- Current trend to try to expand this theory to re-pricing.
Direct Claims

- Advantage is no ERISA preemption, and can avoid plan’s UCR language.

- If no ERISA, compensatory and punitive damages and jury trial in state court.

- Draw back is some untested theories and challenge to establish direct obligation.
Claims As Assignee

- Provider “stands in the shoes” of the participant.


- Plan may contain anti-assignment provision.

- Anti-assignment provision can be waived.
Assignee Procedure

- Must exhaust administrative remedies – just as participant would, but maybe not to challenge a general policy.

- Does assignment include right to demand documents and seek penalties?

- Must beneficiary be released? In other words, can a provider sue as assignee and still balance bill?
Proper Defendants

- Circuits vary as to whether Plan and insurer (or both) are proper defendants in any benefits claim.

- Some authority that TPAs can be proper defendants.

- What if TPA made UCR decision, but has no funding responsibility?
UCR Calculation

- Most cases have looked to prevailing out-of-network rates in the geographic area.

- Payors have struggled to explain methodology for calculating lower amount.

- Must be making an apples to apples comparison.
Geddes United Staffing, 469 F.3d 919 (10th Cir.)

- Emergency situation and only a fraction of bill paid.

- Suit by participant.

- Court not happy with using in-network rate to pay out-of-network provider.

- Cited 11th Circuit case for proposition that in-network rate should not even be considered.
Schwartz v. Oxford Health Plans

- Plaintiff patient at cancer center.
- Plan paid for years without complaint.
- Started paying at UCR for in-office treatment.
- Prior payments a problem.
- Not truly apples to apples.
Krauss v. Oxford Health Plans

- Provider charging double for bilateral mastectomy.

- Court says it’s not arbitrary and capricious to conclude bilateral procedure should not cost double a single procedure.

- Affirmed on appeal.
Ingenix

- Schwartz involved a UCR determination using a database known as Ingenix.

- Created by insurers.

- Questions as to integrity of data.

- NY AG sued insurers, and settlement shut down Ingenix, but created a non-profit to perform same function.
Recent Trends

- FAIR Health now provides type of information formerly provided by Ingenix.
- CMS recently released comparative hospital charge data.
- ACA provides money for states to compile data.
- News coverage.
Questions?