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What Now? How Does A Doctor Get Paid in a Personal-Injury Case? The Supreme Court of Ohio's Abrogation of Third-Party Assignments In *West Broad Chiropractic v American Family Insurance*

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I. INTRODUCTION

When treating a personal-injury patient, assignments can be a valuable tool for a medical provider to ensure that the patient promptly receives necessary medical attention, while also ensuring that the provider will receive compensation for treatment rendered if and when a settlement or judgment is attained. An assignment is a legal document, signed by a patient, as a promise to pay the treating physician from insurance coverage or proceeds from a future settlement or judgment in a personal injury claim.

In the recent past, several District Courts of Appeals in Ohio have held that such assignments are enforceable against both first-party insurers (med-pay or health insurance) and third-party insurers (the at-fault individual's automobile insurance) if the insurer received notice of the assignment. Third-party insurers were bound to follow such assignments, and a provider could sue the insurer if the insurer ignored the assignment and paid the patient directly.

II. THE ABROGATION OF THIRD-PARTY ASSIGNMENTS

The Ohio Supreme Court recently held that, where there has been no stipulation of liability or a judgment in favor of the patient, assignments are unenforceable as a matter of law against a third-party insurer. As such, the provider cannot bring an action against the third-party insurer if the assignment was ignored. West Broad Chiropractic v. American Family Insurance (2009-Ohio-3506).

In 2004, West Broad Chiropractic, located in Columbus, Ohio, provided treatment to an individual who had been injured in a motor-vehicle collision. Prior to receiving treatment, the patient executed an assignment assigning her right to compensation from the at-fault insurer to West Broad Chiropractic in exchange for treatment. West Broad Chiropractic notified the at-fault insurer of the assignment and requested that the insurer either name West Broad as a co-endorser on any disbursement check or issue a check directly to West Broad for the value of the medical treatment rendered. The at-fault insurer subsequently settled the patient's claims and disbursed the settlement proceeds directly to the patient, ignoring the assignment.

West Broad then filed suit against the at-fault insurer seeking enforcement of the assignment. Although the trial court held the assignment to be enforceable, the Tenth District Court of Appeals reversed the holding, finding that the assignment was unenforceable. The Tenth District's decision was in direct conflict with holdings from the First, Ninth, Eleventh, and Twelfth District Courts of Appeals, and therefore the Supreme Court accepted the appeal to resolve this conflict.

In a 4 to 3 split decision, the Supreme Court of Ohio held that such an assignment is unenforceable against a third-party insurer where a patient does not have a present right to the settlement funds assigned, even if the insurer has notice of the assignment. The Court explained that a patient does not have a present right to the settlement proceeds unless: (1) the insurance company has stipulated to liability, (2) the insurance company has agreed to a specific settlement, or (3) a judgment has been rendered in favor of the insured. Further, the Supreme Court held that the assignee (the provider) cannot bring an action directly against the at-fault insurer to enforce the assignment where the insurer disburses settlement proceeds directly to the patient, even if the insurer has notice of the assignment.

The odds that a patient seeking treatment for a personal injury has obtained a stipulation of liability, a settlement, or a judgment are slim to none. Traditionally, a personal-injury patient needs and seeks medical attention long before such a stipulation, settlement, or judgment is reached. This is true even in cases where liability is clear, such as a rear-end motor-vehicle collision where the at-fault party is issued a traffic citation for causing the collision. Therefore, on a practical level, as assignment of settlement proceeds against a third-party insurer will almost never be enforceable. In such a case, the provider's sole remedy is against the patient.

It appears that personal-injury assignments remain valid against first-party insurers, such as a patient's med-pay or health insurance, because the right to this coverage is a complete and present right. First-party insurance is contractually guaranteed, subject to certain qualifications, and is not based upon a future settlement or judgment. A provider should still require a patient to sign such an assignment to safeguard his or her rights to payment from the first-party insurer.

Worth noting is that not all med-pay coverages are the same. Insurers now provide "category 2 med-pay," which is contractually subordinate to a patient's own health insurance and any other sources of coverage. If a patient has this slightly less-expensive coverage, the provider must bill the patient's health insurance first.

III. WHAT SHOULD A PROVIDER DO TO TREAT PATIENTS AND ENSURE PAYMENT?

Problems may arise for a provider when a patient lacks adequate med-pay coverage or health insurance. In such a case, the provider's source of compensation is from future settlement or judgment proceeds from a third-party insurer. But, as discussed above, this right cannot be assigned to a provider. The physician must then rely on either the patient or his or her attorney to deliver settlement or judgment proceeds to compensate for treatment rendered.

Any provider familiar with personal-injury claims knows that there are no guarantees in this regard. If a patient fails to compensate a provider after receiving a settlement, collection can be an expensive and costly undertaking. Further, some attorneys refuse to acknowledge the value of a physician's treatment, and often request that the provider agree to accept compensation far below the value of the services rendered. However, a physician has options to ensure that they can continue to provide treatment for injured persons while ensuring that they will receive compensation for the treatment they provide.

Ohio Rule of Professional Responsibility 1.15 requires an attorney to distribute portions of a settlement to any third party holding a "valid legal claim." Further under this Rule, an attorney is required to hold funds in trust is a patient and provider disagree to the amount owed. Prior to *West Broad Chiropractic*, an

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assignment could be construed as a "valid legal assignment," triggering the attorney's ethical duty to distribute the funds to the provider. However, it is unclear whether an assignment remains a "valid legal interest" since *West Broad*'s holding that a patient cannot assign a right that has not accrued.

In light of such uncertainty, the provider should require the patient's attorney to issue a letter of protection, an acknowledgment of the assignment, or a consent to pay proceeds. Further, it is imperative that the physician create a relationship with their patient's attorney and be knowledgeable of how certain attorneys handle settlement fund distributions.

IV. LIGHT AT THE END OF THE TUNNEL?

In a dissenting opinion to the *West Broad Chiropractic* case, Chief Justice Moyer argues that an assignment of a future settlement or judgment is enforceable in equity. Equity is a basic concept of fairness, and can be used by a court to reach a just result. The Chief Justice reviewed several Ohio cases dealing with the assignment of a contingent interest, and found that these cases supported a patient's right to assign his or her settlement proceeds to a medical provider. Chief Justice Moyer also found that West Broad Chiropractic should not be prohibited from filing an action directly against the third-party insurer to enforce the assignment.

If the makeup of the Supreme Court were to change, the 4 to 3 division present in the *West Broad* case could shift. If Chief Justice Moyer were to hold the majority on this issue, he would likely reach a different conclusion. However, medical providers should not hold their breath for such a change.

V. WHAT CAN A MEDICAL PROVIDER DO TO ENSURE PAYMENT FOR TREATMENT RENDERED TO A PERSONAL-INJURY PATIENT?

Personal-injury patients continue to deserve and require timely medical treatment while waiting for monetary relief. This is especially true for the innocent individuals that lack the means or insurance coverage to pay for necessary treatment. Forewarned with the implications of *West Broad Chiropractic*, medical providers must be more diligent than ever to ensure that they receive compensation for treatment rendered to these personal-injury patients. To do so, a physician should probably take the following steps:

- consult with the patient's automobile insurance to determine if med-pay coverage is available;
- consult with the patient's health insurance to determine if coverage is available;
- have the patient sign an assignment of benefits for any and all first-party insurance benefits including the following information:
    - indicate that the account has been assigned;
    - direct that they payment is to be made to the assignee rather than the assignor;
    - identify the rights assigned;
    - have proof of notice to the first party insurance carrier and the patient's attorney.
- have the patient sign a guaranty of medical payment, regardless of any settlement or judgment against the third-party insurance;
- refer patients to an attorney that is known to uphold his or her ethical obligations; and, either:
    - have the attorney provide a written acknowledgement of the guaranty of medical payment; or,
    - have the patient's attorney provide a letter of protection.

Providers need to be remember that they are not financial institutions providing loans to their patients without any protection of their necessary and reasonable

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medical bills associated with a personal injury claim. Chiropractic offices need to be vigilant in reviewing the insurance coverages relating to each personal injury patient. Otherwise, without appropriate review mechanisms, the provider may be left with holding a medical chart of empty promises.

The information in this article is the opinion of the author and is not intended to constitute legal advice. The author advises all physicians and medical providers to consult with independent legal counsel in regards to issues discussed herein. The author would like to thank David Culley, attorney with Karr & Sherman, and Justin Cousino, Capital University Law student, for all of their valuable assistance.