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NO JUDGEMENT? NO SETTLEMENT? NO ASSIGNMENT: THE SUPREME COURT OF OHIO'S ABROGATION OF THIRD-PARTY ASSIGNMENTS IN *WEST BROAD CHIROPRACTIC v. AMERICAN FAMILY INSURANCE*

I. INTRODUCTION

Traditionally, assignments provided a means for medical providers to treat personal-injury patients prior to resolution of the patient's claim. In exchange for necessary and timely medical treatment, a personal-injury patient could assign his or her rights to settlement or judgment proceeds to the medical provider.

Such assignments also provided potential stumbling blocks for attorneys practicing in the personal-injury field. Plaintiffs' attorneys were left wondering how to address such assignments in closing a client's claim, especially when settlement funds were insufficient to cover all of a client's medical bills. Defense attorneys were also left wondering how to deal with the medical providers once a lawsuit was filed; many added the providers as parties in the personal-injury suits on the grounds that the assignees appeared to be real parties in interest under Civil Rule 19.

"Caution must be exercised by an attorney presented with an assignment to a medical provider...."

In *West Broad Chiropractic v. American Family Insurance* (2009), 122 Ohio St.3d 497, the Supreme Court of Ohio has provided some clarity in this area by ruling that an assignment of proceeds from a patient's future settlement or judgment is invalid against a third-party insurer unless there has been a stipulation of liability or judgment before the assignment is perfected. As discussed below, however, attorneys must continue to exercise caution and diligence in dealing with such assignments for a variety of reasons.

Generally, an assignment is a transfer of rights or property to another. To create a valid assignment, the assignor must have an actual or constructive appropriation of the right or property, so as to confer a complete and present right to the assignee *Hsu v. Parker* (1996), 116 Ohio App.3d 629, 632. In the context of a personal-injury claim, an assignment is a legal document, signed by the patient, promising to pay his or her treating physician from insurance coverage or proceeds of future settlement or judgment.

In the recent past, a number of District Courts of Appeals in Ohio held that such assignments were 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. *See Akron Square Chiropractic v. Creps* (2004), Summit App. No. 21710, 2004-Ohio-1988, unreported; *Roselawn Chiropractic v. Allstate* (2005), 160 Ohio App.3d 397; *Gloekler v. Allstate* (2007), Ashtabula App. No. 2007-A-0040, 2007-Ohio-6163, unreported; *Cartwright Chiropractic v. Allstate* (2008), Butler App. No. CA2007-06-143, 2008-Ohio-2623, unreported; and, *Hsu*, *supra*.

The above-referenced cases based their holdings on the principal that "the law should encourage settlement." *Roselawn*, 16. The First District further explained that assignments of this type are "commonly" used:

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> Many times an assignment is the only way the doctor can secure payment. And assignments are often signed prior to the making of a formal claim. We see no reason to force a person to file a lawsuit before he or she can assign the right to potential proceeds from a claim. Allowing the creation of a valid assignment in such a situation gives some assurance to medical-care providers that they will eventually be compensated. This fits with one of the purposes of assignments – to encourage the assignees to trust that an assignor who may not have cash in hand will be able to cover his or her debts.

Roselawn, 19 -20.

Under these cases, the first and third party assignments were most likely a "valid legal claim" that triggered an Ohio attorney's ethical duties under Ohio Rule of Professional Responsibility 1.15(D), and an attorney could be subject to disciplinary sanctions for failing to recognize the assignment and following procedures set forth in the subject rule. It is interesting to note that *West Broad Chiropractic case* probably does not affect the legal status of first party assignments and liens or guarantees provided by the patient.

II. THE ABROGATION OF THIRD-PARTY ASSIGNMENTS

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 of 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. The Franklin County Court of Common Pleas held the assignment enforceable and entered judgment in its favor. The Tenth District Court of Appeals reversed, finding the assignment unenforceable. *See West Broad Chiropractic v. American Family Insurance* (2008), Franklin App. No. 07AP721, 2008-Ohio-2647.

The Tenth District adopted the reasoning and holding of the Fifth District Court of Appeals' decision in *Knop Chiropractic, Inc. v. State Farm* (2003), Stark App. No. 2003CA00148, 2003-Ohio-5021, which found that R.C. 3929.06 required an injured party to first obtain a judgment against a tortfeasor before bringing an action against the tortfeasor's insurance. *Knop* found that because an injured party cannot file an action against a tortfeasor's insurance until after an action has been filed against the tortfeasor, an assignment is not enforceable against the tortfeasor's insurance because the assignment was created prior to the existence of a judgment against the tortfeasor, and the Tenth District agreed. *Id.*

The Tenth District Court of Appeals, however, found its decision in *West Broad* to be in conflict with other appellate decisions, and, therefore, certified two questions to the Supreme Court of Ohio:

> May a person who has been injured in an automobile accident but who has not yet established liability for the accident and a present right to settlement proceeds, but who may have that right in the future, even if the future existence of the proceeds is conditional, assign that right, in whole or part, to another under Ohio law?

> Does R.C. 3929.06 preclude an assignee of prospective settlement proceeds from bringing a direct action against a third party insurer who had prior notice of such written assignment, after the insurer distributed settlement proceeds in disregard of that written assignment.

In a 4 to 3 decision, the Supreme Court of Ohio answered the first question in the negative, holding that "[a] person who has been injured in an accident but who has not yet established liability for the accident and a present right to settlement proceeds may not assign the right to future proceeds of a settlement if the right does not exist at the time of assignment." The Court explained that an injured party has no present right to 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.

The Supreme Court answered the second question in the affirmative, holding that "R.C. 3929.06 precludes an assignee of prospective settlement proceeds from bringing a direct action against a third-party insurer after the insurer distributed the settlement proceeds."

The odds that a patient seeking treatment for a personal injury has obtained the requisite stipulation of liability, settlement, or judgment are slim to none. Traditionally, an injured individual 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. On a practical level, therefore, an assignment of settlement proceeds against a third-party insurer will most likely not be enforceable.

Although not addressed by the Supreme Court, 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. Such assignments, therefore, likely qualify as "valid legal claims" under Rule of Prof. Cond. 1.15, and an attorney must continue to recognize such when a client's personal-injury claim is settled if any monies have been recovered from either med-pay coverage or health insurance.

III. WHAT OBLIGATIONS, BOTH LEGALLY AND ETHICALLY, DOES AN ATTORNEY HAVE IN REGARDS TO AN ASSIGNMENT, LETTER OF PROTECTION, OR GUARANTY?

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." In a case where a patient disputes the amount owed to the third party, this rule requires an attorney to hold the funds in trust until the dispute is resolved.

Because *West Broad* holds that a third party assignment is not enforceable if a settlement or stipulation of liability is not entered before the assignment is perfected, such an assignment is likely not a "valid legal interest" under Ohio R. Prof. Cond. 1.15(d). This issue, however, has not been directly addressed by any court in Ohio. Regardless of the legal ramifications of ignoring such an assignment, we suggest that attorneys should continue to honor such assignments to promote a good relationship with local medical providers. This will also serve an attorney's clients in the long run, allowing them to continue to seek treatment for a personal injury before any settlement or stipulation is reached.

Further, caution must be exercised by an attorney presented with an assignment to a medical provider. We recommend that an attorney read an assignment and its language clearly before making any determination as to its validity. Many assignments contain guaranties of payment that, as discussed below, will probably trigger the attorney's duty under Rule of Prof. Cond. 1.15. An attorney must also look carefully at the date of any assignments. Informed medical providers may wait for a determination of liability or a judgment to be entered before having a patient sign an assignment. Under *West Broad*, such an assignment would be valid and enforceable.

In light of *West Broad Chiropractic*, it is likely that informed medical providers will now request either letters of protection from an attorney or a guaranty of payment from a client before proceeding with lien-based treatment.

If a patient instructs their attorney to ignore a valid assignment, letter of protection, or guarantee of payment, the attorney cannot follow such an instruction under Rule of Prof. Cond. 1.15. In such a case, the attorney must hold the disputed funds in trust until both parties agree to resolution of the dispute. We recommend that any such resolution be memorialized in writing to protect the attorney from any future claims. If the dispute cannot be resolved, the attorney may have to file an interpleader action and abide by the court's judgment thereupon.

Further, several Ohio Courts of Appeals have held that a letter of protection, depending on its language, can create a suretyship under which the attorney can be held liable for any outstanding bill. *See Manor Care Nursing & Rehab. Ctr. v. Thomas (1997)*, 123 Ohio App.3d 481 (abrogated on other grounds); *Shiepis Clinic of Chiropractic, Inc. v. Stevenson* (July 8, 1006), Stark App. No. 1995CA00343, unreported; and *Sharon Regional Physician Services v. Giannini* (March 28, 2001), Mahoning App. No. 00CA41, unreported. An attorney must be cautious with the language in a letter of protection and be aware of its consequences.

When a patient signs a guaranty of payment, it is our opinion that a valid legal claim has probably accrued. Because a guaranty is a contract between the patient and the medical provider, an attorney's ethical obligation does not automatically vest at the guaranty's execution. An attorney's ethical obligation under Rule of Prof. Cond. 1.15 probably triggers at the time he has knowledge of the guaranty. Therefore, if a guaranty is made, and an attorney has knowledge of the guaranty, the attorney should hold those funds pursuant to the guidelines under Rule 1.15.

Interestingly, prior to the Supreme Court's holding in *West Broad*, defense attorneys used Ohio Civil Procedure Rule 19 as a tool to join the medical provider as a necessary party to the dispute. Section (A) (3) of the Rule allows joinder of a party that has an interest relating to the subject of the action as an assignee. Since the Supreme Court has determined an assignment of future proceeds from a settlement against a third-party insurer is not valid absent a judgment or stipulation of liability, a medical provider is not an assignee, and does not qualify as a necessary party under Rule 19. OT

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