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Cross-Plan Offsetting: Efficient or Unethical?

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INTRODUCTION

Cross-plan offsetting is an emerging trend within the healthcare industry. It allows third-party administrators to offset overpayments paid to providers from one plan by withholding future payments to the same provider from a completely different health plan. This Note examines how the court system has analyzed cross-plan offsetting, whether cross-plan offsetting conflicts with the fiduciary duty established in ERISA, and possible ways to change the practice of cross-plan offsetting to better serve plan participants.

It cannot be disputed that the healthcare industry, which is expected to reach $6.0 trillion dollars a year spent by 2027,[1] plays a massive role in the economy of the United States. The U.S. spends more compared to other countries on healthcare, without necessarily obtaining better outcomes.[2] One reason for this may be the high administrative costs that are unique to the U.S. among its peer countries: "The United States spent 1.4 percent of GDP on hospital administrative costs in 2010, compared with 0.8 percent in the Netherlands and just 0.4 percent in Canada."[3] With healthcare being one of the largest categories of household expenditures[4] and rising levels of medical debt, it is critical to re-examine our healthcare system.

Overpayments for medical bills have become a prominent issue within the healthcare system. "An overpayment is defined as an erroneous payment made by the health insurance carrier to a healthcare provider or an insured individual, such that the amount paid exceeds appropriate, agreed to, service charges (reasonable and customary charges)."[5] There are a variety of reasons overpayments occur, including "duplicate payments, incorrect coordination of benefits, (in)eligibility of the insured, or a mis-interpretation of a contract between the healthcare provider and the insurance carrier."[6] The Improper Payments Information Act of 2002 was designed to introduce accountability by identifying instances of overpayment within Medicaid and Medicare and attempting to remedy those overpayments.[7] The Centers for Medicaid and Medicare Services estimated that in 2019, the percentage of improper payment was between seven and fourteen percent and accounted for $106 billion dollars between Medicare FFS, Medicare Part C, Medicare Part D, Medicaid, and CHIP.[8] The transparency in government programs is admirable; however, private-sector

1. *National Health Expenditure Projections 2018-2027*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/ForecastSummary.pdf [https://perma.cc/MA6H-JWD9] (last visited July 22, 2021).

2. RYAN NUNN ET AL, A DOZEN FACTS ABOUT THE ECONOMICS OF THE US HEALTH-CARE SYSTEM 1 (2020).

3. *Id.* at 16.

4. *Id.* at 1.

5. ABHINAV ANAND & DMITRIY KHOTS, DATA MINING FRAMEWORK FOR IDENTIFYING CLAIM OVERPAYMENTS FOR THE HEALTH INSURANCE INDUSTRY 1 (2008).

6. *Id.* at 1-2.

7. *2019 Estimated Improper Payment Rates for Centers for Medicare & Medicaid Services (CMS) Programs*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Nov. 18, 2019) https://www.cms.gov/newsroom/fact-sheets/2019-estimated-improper-payment-rates-centers-medicare-medicaid-services-cms-programs [https://perma.cc/5DEN-J2VA].

8. *Id.*

healthcare prices remain largely unregulated.[9] As a result, it is far easier for overpayments to go unnoticed.[10] Identifying these overpayments can be difficult.[11] By 2010, "[a]n insurance company covering 10 million lives approximately pa[id] medical providers in excess of $400 million a year in 'identified overpayments.' "[12]

One of the ways third party administrators have claimed to reduce overspending is through a system called cross-plan offsetting. Cross-plan offsetting is when third party administrators (TPAs) offset overpayments to a provider on one plan by withholding payments from an unrelated plan to the provider.[13] TPAs argue this system allows them to recover overpayments efficiently and actually saves plan holders money.[14] Regardless of whether cross-plan offsetting saves plan holders money, some plan holders argue that this practice violates the TPA's fiduciary responsibility by not acting in the sole interest of plan holders and knowingly putting plan holders at risk for payment deficiency.[15]

While it is important to further the goals of ERISA—including efficiency of practice through predictability, uniformity, and conservation of plan resources[16]—it is also important to protect the interests of individual plan holders. This Note addresses whether Third Party Administrators are permitted to use cross-plan offsetting, or if this practice violates the fiduciary duty owed to plan holders established under ERISA law. Given that federal courts have addressed this question in different ways, a new standard of reviewing ERISA would provide adequate protection to plan holders, as well as allow TPAs to form contracts which satisfy goals of efficiency. Part I of this Note defines important terms. Part II introduces the relationship between ERISA and cross-plan offsetting, then turns to the existing split between the Fifth and Eighth Circuit courts. Part III looks at whether it is possible to square cross-plan offsetting with ERISA, then proposes a new way to

9. Jeffrey Clemens & Joshua D. Gottlieb, *In the Shadow of a Giant: Medicare's Influence on Private Physician Payments*, 125 J. POL. ECON. 1, 4 (2017).

10. *See* ANAND & KHOTS, *supra* note 5, at 2.

11. *See id.*

12. *Id.* at 1.

13. Brief for the Sec'y of Lab. as Amicus Curiae in Support of Plaintiffs-Appellees at 4, Peterson v. UnitedHealth Grp. Inc., 913 F.3d 769 (8th Cir. 2019) (No. 17-1744) [hereinafter Brief for the Appellees].

14. Peterson v. UnitedHealth Grp. Inc., 913 F.3d 769, 772 (8th Cir. 2019) *petition for cert. filed*, 2019 WL 2339288 (U.S. May 30, 2019) (No. 18-1498) (petition for cert. dropped by UnitedHealth).

15. Class Action Complaint at 2, 18, Scott v. UnitedHealth Grp., Inc., No. 0:20-cv-01570 (D. Minn. filed July 14, 2020) [hereinafter Class Action Complaint].

16. Petition for Writ of Certiorari at 1, Peterson v. UnitedHealth Grp. Inc., 913 F.3d 769 (No. 18-1498) (citing Conkright v. Frommert, 559 U.S. 506, 513, 517 (2010)) [hereinafter Petition for Writ of Certiorari]

construct cross-plan offsetting which would satisfy the fiduciary responsibility. The final section concludes the argument and demonstrates why it is necessary to make such a change.

I. BACKGROUND KNOWLEDGE

The U.S. healthcare system is extremely complex and highly regulated. Many companies who provide healthcare plans for their employees choose to utilize a Third Party Administrator to ensure the plan is run well. Third Party Administrators (TPAs) are private businesses that "perform[] administrative services for a health plan such as billing, plan design, claims processing, record keeping, and regulatory compliance activities."[17] TPAs manage plan assets and often deal directly with healthcare providers when it comes to billing and services covered. In essence, TPAs manage the details of the plan.

Employee healthcare plans can be either self-funded or fully-insured.[18] Fully-insured plans are purchased through health insurance companies.[19] Fully-insured companies pay a flat price (a premium) to the insurance company in exchange for the insurance company paying all the healthcare expenses of employees.[20] The benefit of fully-insured plans is that any employee healthcare costs which exceed the premium are covered by the insurance company.[21] The downside is that the employer may overpay if the cost of healthcare is lower than the premium paid.[22] Businesses on a fully-insured plan know exactly how much the employee healthcare plan will cost every year.[23]

Conversely, self-insured plans do not pay a premium.[24] Instead, self-insured plans pay healthcare costs as they occur out of the company's pocket.[25] The benefit to this kind of insurance plan is that the company could save money if the cost of employee healthcare is regularly lower than the premiums often charged by insurance companies.[26] The risk to a self-insured company is large claims—which can easily reach into the millions of dollars—that come directly out of the employer's pocket.[27]

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17. *Third Party Administrator (TPA)*, ASS'N HEALTH PLANS, https://www.associationhealthplans.com/glossary/tpa/ [https://perma.cc/959N-QZWV] (last visited July 22, 2021).

18. Sena Meilleur, *Self-Funded vs. Fully-Insured: Weighing the Cost Savings for Your Business*, ONEDIGITAL (June 14, 2019), https://www.onedigital.com/blog/self-funded-vs-fully-funded-weighing-the-cost-savings-for-your-business/ [https://perma.cc/D95K-S5V7].

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

Plan participants are employees, or former employees, who are or may be eligible to receive benefits under the plan.[28] Plan beneficiaries are people, designated by plan participants or the terms of the plan, who are or may be eligible to receive plan benefits.[29] The relationship between the plan participants and TPAs is governed primarily by the Employee Retirement Income Security Act of 1974 (ERISA).[30] Title I of ERISA generally governs "rules for reporting and disclosure, vesting, participation, funding, fiduciary conduct, and civil enforcement."[31] The U.S. Department of Labor oversees compliance with Title I.[32]

ERISA generally preempts state law.[33] However, it is important to note that ERISA's "savings clause" makes it so that state insurance laws can extend to full-insured plans, but the "deemer clause" limitation prohibits state protections from extending to self-insured plans.[34] In other words, "employees in [fully] 'insured' plans receive protections of state law denied to employees in 'self-insured' plans."[35]

Plan participants and beneficiaries are entitled to certain protections, including access to plan information.[36] Participants are also ensured that plan assets will be used for the sole benefit of participants in the form of a fiduciary obligation.[37] A fiduciary has a duty to follow the plan language and must avoid any interests that conflict with those of plan participants.[38]

ERISA was enacted following a string of litigation about the labor and tax components of employee benefit plans.[39] The concern was that the funds of employee benefit plans were being mismanaged and abused without oversight or accountability.[40] Thus, the implicit goal was to protect the interests of plan participants. Other goals include:

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28. 29 U.S.C. § 1002(2)(C)(7).

29. 29 U.S.C. § 1002(2)(C)(8).

30. *Health Plans and Benefits*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/health-plans [https://perma.cc/QQ3N-8Y3V] (last visited July 22, 2021).

31. *History of EBSA and ERISA*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa [https://perma.cc/9NS2-EMQ9] (last visited July 22, 2021).

32. *Id.*

33. Russell Korobkin, *The Battle over Self-Insured Health Plans, or "One Good Loophole Deserves Another"*, 5 YALE J. HEALTH POL'Y, L., & ETHICS 89, 89 (2005).

34. *Id.*

35. *Id.* at 90.

36. *Health Plans and Benefits*, *supra* note 30.

37. *See infra* Part II.B.

38. *Fiduciary Responsibilities*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/health-plans/fiduciaryresp [https://perma.cc/424U-8NHB] (last visited July 22, 2021).

39. *History of EBSA and ERISA*, *supra* note 31.

40. *Id.*

efficiency of practice through predictability, uniformity, and conservation of plan resources.[41] This Note examines the extent to which disallowing cross-plan offsetting furthers those goals.

II. INTERSECTION OF ERISA AND CROSS-PLAN OFFSETTING

A. *Establishing the TPA as a Fiduciary*

Section 1002(21)(A) gives a clear picture of who is considered a fiduciary. Fiduciary status is determined based on the actions of the party.[42] To establish a fiduciary duty under ERISA, the fiduciary must fit into one of three categories:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.[43]

There are two main ways to establish a TPA as a fiduciary of a plan. The first is to establish that a TPA exercises discretionary control over the management of assets. One of the most significant cases to establish that TPAs do have a fiduciary responsibility toward plan holders is *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan*.[44] Hi-Lex alleged that Blue Cross Blue Shield (BCBSM) breached its fiduciary duty by inflating hospital claims in order to retain additional administrative fees.[45] The lower court found BCBSM was a fiduciary and did violate its fiduciary obligations established under 29 U.S.C. § 1104(a).[46] The Sixth Circuit affirmed.[47] The court reasoned that the statute "impose[d] fiduciary duties not only on those entities that exercise *discretionary* control over the disposition of plan assets, but also impose[d] such duties on entities or companies that exercise '*any*

41. *See* Petition for Writ of Certiorari, *supra* note 16, at 1 (citing Conkright v. Frommert, 559 U.S. 506, 513, 517 (2010)).

42. 29 U.S.C. § 1002(21)(A).

43. *Id.*

44. *See* Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich., 751 F.3d 740, 742 (6th Cir. 2014).

45. *Id.*

46. *Id.*

47. *Id.*

authority or control' over the covered assets."[48] The court had used this standard in a similar case, *Pipefitters IV*, where it found BCBSM was a fiduciary with respect to hidden fees.[49]

Specifically, in the case of cross-plan offsetting, the TPA is exercising its discretion over plan assets by withholding payments to providers. The TPA determined an overpayment was made and offset the overpayment by moving assets across multiple plans. This is done at the TPA's discretion. Like the hidden fees in *Pipefitters IV* and the inflated claims in *Hi-Lex Controls*, an objection to cross-plan offsetting is that the practice is self-dealing by using plan assets to financially benefit the TPA.

The second way to establish a TPA as a fiduciary is through the third prong of Section 1002(21)(A): The TPA has discretionary authority in the administration of the plan. A TPA is a plan administrator if so designated "by the terms of the instrument under which the plan is operated."[50] If the TPA is not specifically listed, the plan administrator is the plan sponsor.[51]

Another way the court could approach this issue is to ask whether the application of a fiduciary duty on TPAs furthers the goals of ERISA. If the court finds a weak connection between the TPA and a fiduciary duty, the court could strengthen the argument by asserting that finding a TPA owes a fiduciary duty serves a public policy purpose. Is the application of a fiduciary duty a predictable outcome for TPAs? According to the precedent established in *High-Lex* and *Pipefitters IV*, this could be considered a predictable outcome. A fiduciary duty certainly furthers the protection of plan participants from actions which are not in the participant's sole interest. However, an argument could be made that cross-plan offsetting, in some form, would satisfy the efficiency goal of ERISA and should be allowed. It is also assumed as settled law that the TPA in *Peterson*, the Eighth Circuit Court decision at issue, functioned as a fiduciary of the plan.[52] For the sake of this Note, it is assumed that the application of a fiduciary duty to TPAs is settled law and thus this Note will focus instead on defining the limits of such a fiduciary duty.

B. Duties of a Fiduciary

In order to determine whether cross-plan offsetting inherently violates the fiduciary duty owed to plan participants, it is important to

48. *Id.* at 744 (quoting Briscoe v. Fine, 444 F.3d 478, 490-91 (6th Cir. 2006)) (alterations in original).

49. *Id.* (referencing Pipefitters Loc. 636 Ins. Fund v. Blue Cross & Blue Shield of Mich. (*Pipefitters IV*), 722 F.3d 861, 865-67 (6th Cir. 2013)).

50. 29 C.F.R. § 2510.3-16(a).

51. *Id.*

52. Peterson v. UnitedHealth Grp. Inc., 913 F.3d 769, 776-77 (8th Cir. 2019).

establish what specific duties are mandated. It has already been established that the relationship between plan participants and TPAs is governed by ERISA. The most relevant clause of ERISA to cross-plan offsetting is the Exclusive Purpose Clause established in 29 U.S.C. § 1104:

> (a) Prudent man standard of care. (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and— (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;[53]

Under this clause, and assuming a fiduciary duty is owed to plan holders,[54] TPAs are required to act in the sole interest of plan participants while also defraying administration costs. In *Hi-Lex Controls*, BCBSM did not attempt to defray administrative costs and acted in a way that solely benefited the TPA at the expense of the plan holder.[55]

1. Defray Reasonable Costs

While the court system has not completely defined the limits of what defraying reasonable administrative expenses means, there are several cases from which we can derive a basic meaning. One case, *Sweda v. University of Pennsylvania*, suggests excessive expenses "decreas[e] [an account's] immediate value" and "depriv[e] the participant of the prospective value of funds that would have continued to grow if not taken out in fees."[56] *Sweda* also suggests that "[f]iduciaries must also understand and monitor plan expenses"; failure to do so is considered a breach of fiduciary duty.[57] High fees are not inherently excessive but should be evaluated "relative 'to the services rendered.' "[58]

Another suggested method to determine whether the TPA reasonably defrayed administrative costs when utilizing cross-plan offsetting is to establish if there was a cheaper alternative. In *Tibble v. Edison International (Tibble IV)*, the Ninth Circuit remanded the question of whether a fiduciary that chose a higher cost share class breached his fiduciary duty to the district court.[59] While this case dealt with purchasing investment products, the court's reasoning can be extended to

53. 29 U.S.C. § 1104(a).

54. *See supra* Part II.A.

55. *See Hi-Lex Controls*, 751 F.3d at 744.

56. Sweda v. Univ. of Pa., 923 F.3d 320, 328 (3d Cir. 2019).

57. *Id.*

58. *See, e.g.*, Young v. Gen. Motors Inv. Mgmt. Corp., 325 F. App'x 31, 33 (2d Cir. 2009) (unpublished).

59. Tibble v. Edison Int'l, 843 F.3d 1187, 1198-99 (9th Cir. 2016).

cover cross-plan offsetting as well. The court in *Tibble IV* found it suspicious that the trustee had chosen the more expensive out of two substantially identical investment products.[60]

2. *Exclusive Purpose Clause*

In *Cutaiar v. Marshall*, the court ruled that a fiduciary could not represent both parties in a transaction with each other because balancing the interests of both did not satisfy the duty to act "solely in the interest of the participants."[61] The court found that a plan "must be administered without regard for the interests of any other plan."[62] The principle behind this is that one cannot advocate for the maximum benefit of either plan when representing both sides of a commercial transaction.[63]

In *Shea v. Esensten*, the Eighth Circuit held a fiduciary must disclose any facts which would negatively affect plan members' interests, and failure to do so is a breach of ERISA's fiduciary duties.[64] At issue in *Shea* was whether the TPA's policy—which charged doctors for making referrals to specialists while at the same time requiring a referral in order for insurance to cover the costs—constituted a harm that should have been disclosed in the plan language.[65] This would have required patients in need of a specialist to pay out of pocket to receive necessary care.[66]

C. *The Circuit Court Split*

There are two alternate decisions on cross-plan offsetting at the circuit court level. The Eighth Circuit has generally held cross-plan offsetting to violate ERISA if not explicitly written into the plan and suggests that even if this language were present, the practice comes into tension with ERISA's fiduciary duty. The Fifth Circuit held the language of the plan did allow for cross-plan offsetting. The Supreme Court of the United States should make a ruling to resolve this circuit split. Additionally, the Court should make its determination based on whether cross-plan offsetting is at odds with the fiduciary duty established by ERISA. This would prevent further disagreement among lower courts and would give clarity to both TPAs and plan holders.

60. *See id.* at 1198.

61. Cutaiar v. Marshall, 590 F.2d 523, 530 (3d Cir. 1979); 29 U.S.C. § 1104(a)(1).

62. *Cutaiar*, 590 F.2d at 530.

63. *Id.* at 529.

64. Shea v. Esensten, 107 F.3d 625, 629 (8th Cir. 1997).

65. *Id.* at 627.

66. *Id.*

1. *The Eighth Circuit and* Peterson

The Eighth Circuit held in *Peterson* that the relevant plan documents did not authorize the practice of cross-plan offsetting.[67] "Dr. Peterson sued as an authorized representative of his patients."[68] Dr. Peterson alleged that while the plans may have explicitly allowed same-plan offsetting, "not one of those plans explicitly authoriz[ed] cross-plan offsetting."[69] The court applied the factors test[70] established in *Finley v. Special Agents Mutual Benefit Association, Inc.* to determine whether United's interpretation of the plan language was unreasonable:

> whether their interpretation is consistent with the goals of the Plan, whether their interpretation renders any language in the Plan meaningless or internally inconsistent, whether their interpretation conflicts with the substantive or procedural requirements of the ERISA statute, whether they have interpreted the words at issue consistently, and whether their interpretation is contrary to the clear language of the Plan.[71]

The court found "nothing in the plan document even [came] close to authorizing cross-plan offsetting."[72] The court expressed concern that allowing a practice not written into the plan would "undermine plan participants' and beneficiaries' ability to rely on plan documents to know what authority administrators do and do not have."[73]

The court also indicated that cross-plan offsetting comes into tension with ERISA.[74] The court clarifies that if such a practice were authorized, much clearer language is necessary to warrant permission.[75] The court explained that each plan is individual and must be treated with a fiduciary duty towards each plan separately.[76] Cross-plan offsetting is at odds with this duty "because it arguably amounts to failing to pay a benefit owed to a beneficiary under one plan in order to recover money for the benefit of another plan. While this benefits the latter plan, it may not benefit the former."[77]

67. Peterson v. UnitedHealth Grp. Inc., 913 F.3d 769, 772 (8th Cir. 2019).

68. *Id.*

69. *Id.* at 773.

70. *Id.*

71. *Id.* at 775 (quoting Finley v. Special Agents Mut. Benefit Ass'n, Inc., 957 F.2d 617, 621 (8th Cir. 1992)).

72. *Id.* at 776.

73. Peterson v. UnitedHealth Grp. Inc., 913 F.3d 769, 776 (8th Cir. 2019).

74. *Id.*

75. *Id.*

76. *Id.* (citing Standard Ins. Co. v. Saklad, 127 F.3d 1179, 1181 (9th Cir. 1997)).

77. *Id.* at 777.

Additionally, cross-plan offsetting could be viewed as a "transfer of money from one plan to another in violation of ERISA's 'exclusive purpose' requirement. 29 U.S.C. § 1104(a)(1)."[78] This analysis is reminiscent of *Cutaiar v. Marshall* where the court found a transfer of money between separate plan holders facilitated by the third-party administrator was a breach of fiduciary duty.[79]

2. *The Fifth Circuit and* Quality Infusion

The Fifth Circuit found in *Quality Infusion Care, Inc. v. Health Care Services Corp.* that cross-plan offsetting was allowable under the plan language.[80] This case was between a healthcare provider, Quality Infusion, and an insurance company, Health Care Service Corp.[81] The provider argued that the insurance company improperly offset overpayments made on one plan by underpaying subsequent patient claims regardless of whether the claim came from "the same patient or under the same insurance plan."[82] The insurance company argued that under all three plans, the company had a contractual right to deduct previously made overpayments from subsequent claims it was obligated to pay.[83]

Since there was no contractual relationship between the provider and the insurer, the right to offset stemmed from the assigned contract.[84] In essence, the plan participant assigned his or her rights under the contract with the insurer to the provider when he or she received services under the contract between the plan participant and the provider. Since an "assignee takes all of the rights of [an] assignor, no greater and no less,"[85] that assignee "is also subject to any defenses, limitations, or *setoffs* that could be asserted against the assignor's rights."[86] This means that if the plan participant is subject to cross-plan offsetting, so too is the provider.

The relevant language in the plan between plan participants and the insurer provided that:

> If and when the Plan determines that benefit payments under the Plan have been made erroneously but in good faith, the Plan reserves the right to seek recovery of such benefit payments from the Participant, or Provider of services to whom such payments were made. The plan

78. *Id.*

79. Cutaiar v. Marshall, 590 F.2d 523, 530 (3d Cir. 1979).

80. Quality Infusion Care, Inc. v. Health Care Serv. Corp., 628 F.3d 725, 725 (5th Cir. 2010).

81. *Id.* at 726.

82. *Id.*

83. *Id.*

84. *Id.* at 729.

85. *Id.* (quoting FDIC v. McFarland, 243 F.3d 876, 887 n.42 (5th Cir. 2001)).

86. Quality Infusion Care, Inc. v. Health Care Serv. Corp., 628 F.3d 725, 729 (5th Cir. 2010) (quoting Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 721 (Tex. App. 1988)).

reserves the right to offset subsequent benefit payments otherwise available by the amount of any such overpayments.[87]

The court found the last sentence, which allowed subsequent payments to be offset, was the most poignant piece of the plan: "The last sentence of the provision does not specify that the overpayment must be offset against the same patient's future claim, but rather states that BCBS reserves the right to offset subsequent benefit payment made to Participant or Provider."[88]

The second relevant plan contained the language, "[i]f no refund is received, BCBSTX may deduct any refund due it from any future benefit payment."[89] The court found this language did not limit the offset to future payments from the same payment.[90] It *specifically* mentioned any refund from any future payment, which suggested a broad meaning.[91]

Finally, the third relevant plan contained the language, "[i]f We make any overpayment, We can recover what We did not owe from the person to whom We made the payment or from any other appropriate person."[92] This also very clearly suggested that the payment can be recovered from any person, not just the same patient.[93]

Therefore, because the language of all three relevant plans allowed for cross-plan offsetting, the insurer had a contractual right to offset payments across multiple plans.[94]

3. *The DOL Amicus Brief*

The Department of Labor (DOL) is responsible for enforcing Title I of ERISA.[95] The DOL submitted an informative amicus brief following *Peterson*, which took a strong stance against cross-plan offsetting on the grounds that it is a breach of fiduciary duty.[96] The brief states that the practice violates ERISA by not acting in the sole interest of plan participants,[97] and by dealing in its own interest,[98] and that there is a conflict of interest between self-insured and fully-insured plans.[99]

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87. *Id.*
88. *Id.* at 729-30.
89. *Id.* at 730.
90. *Id.*
91. *See id.*
92. Quality Infusion Care, Inc. v. Health Care Serv. Corp., 628 F.3d 725, 730 (5th Cir. 2010).
93. *Id.*
94. *Id.*
95. *History of EBSA and ERISA*, *supra* note 31.
96. Brief for the Appellees, *supra* note 13, at 28.
97. *Id.* at 11.
98. *Id.*
99. *Id.* at 12.

The DOL found that there was concrete harm done to participants in the form of balance bill liability, which puts plan participants on the hook for medical bills not paid due to an offset.[100] As a result, the DOL argued the transaction could never be in the sole interest of plan participants,[101] especially since the fiduciary has a duty to protect from known harms.[102] The DOL found that United financially benefited from all of the offsets.[103] This was particularly egregious in the DOL's view because of the difference in treatment between self-insured and fully-insured plans.[104] In almost every case, the funds were offset from a self-insured plan's funds to recuperate overpayments made by fully-insured plans.[105] The significance is that overpayments from fully-insured plans come out of the TPA's pocket, whereas overpayments from a self-insured plan comes out of the employer's pocket. So, by compensating overpayments from fully-insured plans, the TPA is recovering its own lost money by taking payments from self-insured plans rather than the TPA being liable to repay overpayments to the fully-insured out of its own pocket.

The DOL cited two DOL Advisory Opinions (AOs), which also support this claim.[106] The first, AO 77-34, found that reducing benefits in one plan to remedy a failure to repay overpayments in a "sister plan" violated the fiduciary duty.[107] The DOL found "such reimbursement[s] would not constitute a use of plan assets for the exclusive purpose of providing benefits to participants in the plan."[108] The second, AO 81-62A, found separate employee benefit plans may be held within a common vehicle, however separate accounts of the interest accrual must be maintained "in order to avoid using the assets of one such plan to pay benefits to participants and beneficiaries of another such plan."[109]

The DOL also considered United's claim that the benefits to customers outweighed the violation.[110] It found that:

> Neither facts nor logic support this conclusion . . . . United cannot show that no plans or participants were burdened with a risk of harm by this

100. *Id.* at 11.

101. *Id.* at 11.

102. *Id.* at 12 (citing Shea v. Esensten, 107 F.3d 625, 628 (8th Cir. 1997); Chao v. Merino, 452 F.3d 174, 182 (2d Cir. 2006)).

103. *Id.* at 13.

104. *Id.* at 14.

105. *Id.*

106. *Id.* at 16.

107. *Id.*

108. *Id.*

109. *Id.* at 17.

110. *Id.* at 21.

> practice. . . . Nor is such a result likely as nothing in United's description of its cross-plan off-setting program ensures each plan or participant is guaranteed to only benefit from the practice.[111]

The DOL also found that United was the true financial beneficiary of cross-plan offsetting and that United deprived participants of benefits in order to receive a financial gain.[112] In addition, the DOL stated that "negative consent" was not relevant because "[a]s a fiduciary, United will always have the responsibility not to commit fiduciary breaches even if another fiduciary permitted the conduct whether by direct or negative consent."[113] The DOL took this idea a step further by explaining that even if cross-plan offsetting were explicitly written into the plan, it still violates ERISA because "[f]ull disclosure and consent cannot excuse the violation here because neither a fiduciary, a plan sponsor, nor anyone else can consent to ERISA violations and harm participants."[114]

The DOL brief mentions how *Quality Insurance* was decided and how it related to *Peterson*. The DOL correctly pointed out that *Quality Insurance* did not explicitly mention ERISA.[115] The Fifth Circuit Court instead chose to rely exclusively on state law.[116] The DOL agreed with the Eighth Circuit that "whatever the merits of the Fifth Circuit's approach, it is not the approach of the Eighth Circuit,"[117] which implies these two cases were decided using completely different standards. The DOL took the position that whether the Fifth Circuit recognizes it or not, cross-plan offsetting should be subject to ERISA's fiduciary duty standards.[118]

4. *How the Supreme Court Should Resolve the Circuit Court Split*

Considering the facts of both cases and the DOL amicus brief, the Supreme Court should make a ruling on whether or not cross-plan offsetting is allowable. Not only should the Court review whether cross-plan offsetting is allowable under the plan language, but it should also apply ERISA law to the plan, which aligns with the Eighth Circuit's decision. While the providers may not have standing to sue the TPA

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111. *Id.*
112. *Id.* at 21.
113. *Id.* at 24.
114. *Id.* at 27.
115. *Id.* at 18.
116. *Id.*
117. *Id.*
118. *Id.*

themselves, they may have standing under ERISA when a plan participant's rights have been assigned to the provider.[119] The Court should take the Eighth Circuit's *Peterson* decision one step further by ruling on whether cross-plan offsetting is at odds with the fiduciary duty established by ERISA. Additionally, the Court should adopt the proposal in Part III as a way to square cross-plan offsetting with ERISA.

III. IS IT POSSIBLE TO SQUARE CROSS-PLAN OFFSETTING WITH ERISA?

Cross-plan offsetting, as currently construed, most likely violates the fiduciary duty established under ERISA because it harms plan participants, usually is not explicitly written into the plan, is self-dealing, and the fiduciary is representing both sides of the transaction. Depending on how cross-plan offsetting is implemented, it is possible to cross-plan offset without violating ERISA. It is important to note that in order for cross-plan offsetting to satisfy ERISA, the recovered overpayments must be returned to plan participants in self-insured plans and the overpayment must not be used to calculate the premium for fully-insured plans. Instead, the premium should be determined by the correct cost and not the overpayment.

A. *Excessive Expenses and Exclusive Purpose Requirement*

1. *Excessive Expenses*

(a) *Prospective Value of Funds*

Sweda suggests that an excessive expense deprives the participants from the prospective value of funds.[120] Under this interpretation of defraying reasonable administrative expenses, cross-plan offsetting could be allowable. When the payment to the provider has been withheld, the TPA keeps the money and does not return the proceeds to the plan that made the overpayment.[121] An argument can be made that by failing to return overpayments, the TPA is depriving the participant of funds that would have continued to grow if not taken out in fees. By not returning out-of-pocket overpayments, the TPA is harming the plan participant's prospective value of funds.

119. The court in *Scott v. UnitedHealth Grp., Inc.* recently sustained a defendant's Motion to Dismiss on the grounds that the plaintiff lacked standing. No. 0:20-cv-01570, at 2 (D. Minn. May 20, 2021). The court held a plan participant who contributed funds to an employee benefit plan subject to cross-plan offsetting could only show how the plan was harmed and failed to show how the individual plaintiff was harmed. *Id.* at 11. The court went on to specify that the plaintiff himself failed to show that he personally incurred healthcare expenses potentially subject to cross-plan offsetting. *Id.* at 17. The court therefore granted the defendant's Motion to Dismiss without prejudice. *Id.* at 18.

120. Sweda v. Univ. of Pa., 923 F.3d 320, 328 (3d Cir. 2019.)

121. Brief for the Appellees, *supra* note 13, at 4.

While some of these payments may have come out of the TPA's pocket in fully-insured plans, the plan participant may have been overcharged in out-of-pocket expenses as well. For example, if the overpayment was used to determine the fully-insured plan's premium even though the overpayment was recovered, this would be considered an excessive expense. If the overpayment is not corrected when determining a fully-insured plan's premium and the premium is too high as a result, the TPA has harmed the plan participant's prospective value of funds. The plan participant could have used the extra money to invest back into the business instead. However, if the overpayment recovery is returned to the plan participants in self-insured plans and the overpayment is not used to charge a higher premium for fully-insured plans, the plan participant's prospective value is not harmed.

(b) High Fees

The TPA could argue that the administrative costs of the transaction cover payments that should have been returned and that these administrative costs were reasonable. High fees are not inherently excessive but should be evaluated "relative 'to the services rendered.' "[122] For a court to make the determination that the fees were not excessive, the TPA would need to demonstrate that the fees were reasonable with respect to the services provided. As a fiduciary, the TPA is obligated to:

> be vigilant in negotiating the formula or method by which fees are paid, and by which excessive fees will be credited back to the plan or participants; determine the exact amounts paid to a recordkeeper for services provided; evaluate whether pricing is competitive; consider a plan's power to obtain favorable investment products and fees; and assure that plan assets are used for the exclusive purpose of providing the benefit to participants and beneficiaries of reasonable plan expenses.[123]

The TPA may consider their own fees competitive. However, a self-insured plan sponsor may not agree. Without the explicit statement of administrative fees (which is required to be recorded by TPAs), it becomes much more difficult to evaluate the issue of defraying reasonable expenses of administering the plan.

(c) Cheaper Alternatives

Likewise, a court could find it suspicious if a TPA chose cross-plan offsetting to recover overpayments if a cheaper recovery option was available, especially since the financial beneficiary of cross-plan offsetting is usually the TPA. The alternative to cross-plan offsetting is to litigate or negotiate with the provider. This could easily prove to be a

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122. Young v. Gen. Motors Inv. Mgmt. Corp., 325 F. App'x 31, 33 (2d Cir. 2009).

123. Ramos v. Banner Health, 461 F. Supp. 3d 1067, 1132 (D. Colo. 2020) (citing Sweda v. Univ. of Pa., 923 F.3d 320, 328 (3d Cir. 2019)).

costlier way of recovering overpayments. However, simply withholding payments from providers without a chance for the provider to litigate could raise issues in and of itself. Cross-plan offsetting could also be seen as a way for TPAs to avoid liability to cover overpayments out of their own pockets.[124]

Depending on how the court interprets what is considered defraying reasonable costs, it is likely that the practice of cross-plan offsetting could still be considered a defrayment, especially since it has not been proven that the fees are excessive, it does not decrease the prospective value of plan funds, and it has not been proven that there is a cheaper method of recovery.

2. *Exclusive Purpose Clause*

In *Cutaiar v. Marshall*, the court ruled that a fiduciary cannot represent both parties in a transaction with each other because balancing the interests of both did not satisfy the duty to act "solely in the interest of the participants."[125] The court found that a plan "must be administered without regard for the interests of any other plan."[126] The principle behind this is that one cannot advocate for the maximum benefit of either plan when representing both sides of a commercial transaction.[127] While cross-plan offsetting may not be a direct transaction between the two plan holders, there is still a transfer of money being facilitated by the fiduciary: the TPA. Arguably, this constitutes a transfer of money and therefore violates ERISA. The transaction can also be seen as a harm to one or more of the plans involved. Therefore, the transaction of money from one account to the other is not acting in the sole interest of a plan holder.

Additionally, the court found in *Pilger v. Sweeney* that same plan offsetting was not a violation of the ERISA fiduciary duty because the plan participants could not bring suit for a harm to individuals that was not also suffered by the plan as a whole,[128] especially since the relief sought would take money away from the plan to give to individuals, which is not in the sole interest of the plan.[129] The court mentioned that a fiduciary must satisfy the duties of loyalty and prudence.[130] However, it failed to analyze whether or not same plan offsetting satisfies these conditions.

124. Class Action Complaint, *supra* note 15, at 17.

125. Cutaiar v. Marshall, 590 F.2d 523, 530 (3d Cir. 1979); 29 U.S.C. § 1104(a)(1).

126. *Cutaiar*, 590 F.2d at 530.

127. *Id.* at 529.

128. Pilger v. Sweeney, 725 F.3d 922, 926 (8th Cir. 2013).

129. *Id.*

130. *Id.* (citing Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009) (discussing 29 U.S.C. § 1104(a)(1))).

The TPA also has a duty to disclose negative facts. In *Shea v. Esensten*, the Eighth Circuit held that a fiduciary must disclose any facts that would negatively affect plan members' interests and failure to do so is a breach of ERISA's fiduciary duties.[131] Cross-plan offsetting, which many times is not explicitly mentioned in plan language, could negatively affect plan holders' interests by making the third-party plan holder, from whose account payments were withheld to providers, liable for the amount withheld. Not only does this harm the plan holders' credit scores, but it can also strain the doctor-patient relationship between providers and the affected participants and beneficiaries.[132] In order for cross-plan offsetting to be reconciled with the *Shea* court, the practice must be explicitly disclosed in the plan, and the plan must also disclose the negative effects cross-plan offsetting could have for plan participants.

B. Is it Possible for Cross-Plan Offsetting to Satisfy the Conditions of a Fiduciary Duty?

There are several provisions that cross-plan offsetting must include in order to satisfy the fiduciary duty. Those provisions include: an indemnity provision, cross-plan offsetting must be explicitly written into the plan, and recovered overpayment funds must be returned to plan participants. Additionally, the TPA must sufficiently cure the conflict of interest so that being on both sides of the transaction is no longer an issue.

1. What are the Benefits of Cross-Plan Offsetting?

The first question to answer is why it might be desirable to keep some form of cross-plan offsetting. With the prevalence and extent of overpayments within our healthcare system, it is no wonder many companies are trying to remedy this egregious issue, which costs Americans hundreds of millions of dollars every year.[133] While the current form of cross-plan offsetting attempts to remedy the issue by harming self-insured plans, there may be a way to fix the system to further the goals of ERISA. The major goal of ERISA is to protect plan holders' interests from mismanagement and abuse; it also increases transparency and the ability to request plan information.[134] Additional goals are to increase the efficiency of practice through predictability, uniformity, and conservation of plan resources.[135] There may be a form

131. Shea v. Esensten, 107 F.3d 625, 629 (8th Cir. 1997).

132. Class Action Complaint, *supra* note 15, at 15.

133. *See 2019 Estimated Improper Payment Rates for Centers for Medicare & Medicaid Services (CMS) Programs*, *supra* note 7.

134. *History of EBSA and ERISA*, *supra* note 31.

135. Petition for Writ of Certiorari, *supra* note 16, at 1 (citing Conkright v. Frommert, 559 U.S. 506, 513, 517 (2010)).

of cross-plan offsetting that is not harmful to plan participants and that also helps to conserve plan resources by giving the TPA a more efficient route to recover overpayments. Such a form would include an indemnity provision, a return of the funds recovered from overpayments, and cross-plan offsetting must be explicitly written into the plan. If such a policy exists, the benefits could be far reaching.

2. Indemnity Provision

One of the largest issues with cross-plan offsetting as currently construed is the clear harm to plan participants in the form of balance bill liability. Knowingly placing a client at risk of litigation is clearly not in the sole interest of the plan participants. However, there is a way to mitigate the harm to plan participants in the form of an indemnity clause.

The TPA could write an indemnity clause into the plan language that would cover any liability arising out of cross-plan offsetting. Indemnity clauses "shift potential costs from one party to the other."[136] In other words, instead of the plan participant being on the hook for the withheld payment, the TPA would be required to pay the difference withheld. This is consistent with current legislation, which requires the TPA to reimburse clients for overpayments out of their own pocket.[137] While this still leaves the issue of a fiduciary being on both sides of a transaction and a question of self-dealing, an indemnity clause gets cross-plan offsetting one step closer to being compatible with duties established in ERISA. In order for the indemnity clause to exist, cross-plan offsetting must be explicitly written into the plan.

3. Explicitly Written into the Plan Language

The courts in *Peterson* and *Quality Infusion* both support the idea that cross-plan offsetting must be a reasonable interpretation of plan language. The best way to ensure that cross-plan offsetting is a reasonable interpretation of plan language is to explicitly write it into the plan. Along with an indemnity provision, and assuming cross-plan offsetting is no longer in conflict with the TPA's fiduciary duty, the practice must still 1) be a reasonable interpretation of plan language, and 2) explicitly disclose any facts which might harm plan participants.

Following the court's ruling in *Shea*, it became very clear that a plan must explicitly disclose any facts which would negatively affect

136. Jennifer Paley, *Indemnification Provisions in Contracts: An Indemnification Provision Allocates the Risk and Expense in the Event of a Breach, Default, or Misconduct by One of the Parties*, NOLO (Feb. 5, 2021), https://www.nolo.com/legal-encyclopedia/indemnification-provisions-contracts.html#:~:text=An%20indemnification%20provision%20allocates%20the,by%20one%20of%20the%20parties.&text=The%20primary%20benefit%20of%20an,claims%20related%20to%20the%20contract [https://perma.cc/XEY3-7YBS].

137. Class Action Complaint, *supra* note 15, at 16.

the interests of plan participants.[138] Despite the indemnity clause removing financial risk from the equation, cross-plan offsetting could still pose a risk to plan participants in the form of straining the relationship between doctors and patients when the doctor knows payments may be withheld. However, the biggest harm to plan participants, balance bill liability, is no longer an issue with an indemnity clause.

The doctor-patient relationship could also be improved if the practice of cross-plan offsetting allowed doctors to challenge the withholding of payments. Providers have no standing under ERISA to sue TPAs, and it is questionable whether a provider whose rights were assigned is a fair representation of the class who can bring a class action suit. The indemnity clause relieves participants from liability, but it is still important for providers to have a method to challenge what is and is not an overpayment. With a fair method of recourse in place, providers will have a way to remedy disputed charges rather than be strong-armed by withheld funds. One way to accomplish this is to put the soon-to-be withheld funds in an escrow account and give providers a chance to dispute the original overpayment. This might start with negotiations between the provider and the TPA; then, if the two parties still cannot come to an agreement, some kind of arbitration court solution would be appropriate.

4. *Issue of Self-Dealing*

Self-dealing is another one of the major issues with cross-plan offsetting, especially due to the fact that it is not benefiting the plan whose funds are being withheld at all. It is even questionable whether the practice benefits the plan that overpaid. However, if the recovered overpayments are returned, the self-dealing issue is decreased. Even if a plan was used to offset another plan's overpayment this time, next time the first plan could be receiving the recovered overpayment. This is clearly in the interest of the plan participants. As long as the harm is decreased, there is a way for cross-plan offsetting to be beneficial. The indemnity provision also helps to prove that self-dealing would no longer be as big of an issue because the TPA, and not the plan participants, would bear the economic risk of withheld payments. In addition, transparent administrative fees for cross-plan offsetting would assuage fears of TPAs not defraying reasonable administrative costs.

The lower court in *Peterson* found that 100% of the offsets benefited the TPA.[139] With an indemnity provision in place, mandated return on

138. Shea v. Esensten, 107 F.3d 625, 629 (8th Cir. 1997).

139. Class Action Complaint, *supra* note 15, at 17 (citing Peterson v. UnitedHealth Group Inc., 242 F. Supp. 3d 834, 844 (D. Minn. 2017)).

payments, and transparent administrative fees, the benefit given to TPAs would likely decrease while the benefit to plan participants would increase.

5. Self-Insured vs. Fully-Insured Fairness Consideration

The biggest issue of self-dealing that cross-plan offsetting must address is the difference in the way self-insured versus fully-insured plans are treated. While fully-insured policies made up only 22% of United's insurance plan (the other 78% being self-insured plans),[140] a shocking number of cross-plan offsetting cases were to offset overpayments made by fully-insured plans.

> United reported that in 2018, it used cross-plan offsets to recover 53% of asserted overpayments by self-insured plans and 60% of asserted overpayments by fully-insured plans. See Ex. B at 4; Ex. C at 4. In 2019, those numbers jumped dramatically, to 81% and 91%, increases of more than 50%.[141]

To give a clearer picture of how much money is involved in cross-plan offsetting, "United used cross-plan offsets to seize $1.286 billion in Plan assets in 2018. *See* Ex. B. at 4; Ex. C. at 4. That number surged in 2019 to $1.354 billion, an increase of nearly seventy million dollars."[142] By offsetting overpayments made from fully-insured plans, the TPA is recuperating funds they would have lost out of their own pocket by transferring funds from self-insured plans. Through this method, the TPA is avoiding any payments by placing self-insured plans at risk. This is a clear example of self-dealing, which breaches fiduciary duty.

One possible remedy for this problem is to limit cross-plan offsetting to the same kinds of plans: for example, a plan that only allows offsets between two fully-insured plans or two self-insured plans, which would limit the obvious benefit given to the TPA and fully-insured plans at the expense of self-insured plans. By limiting self-dealing this way, the benefit to TPAs is reduced while the benefit to plan participants is increased.

6. Both Sides of the Transaction Enough to Qualify as a Breach of Fiduciary Duty?

Assuming that the above changes were implemented into the practice of cross-plan offsetting, it is possible that the practice would be beneficial to plan participants without the harm. However, the TPA (fiduciary) would still be representing both sides of the transaction.

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140. *Id.* at 16.

141. *Id.* at 12.

142. *Id.*

The court in *Cutaiar* already determined that mere balancing of interests was not enough to satisfy the sole interest requirement of ERISA's fiduciary duty.[143]

That being said, ERISA permits some conflict of interest as long as the fiduciary continues to act in the sole interest of each plan independently.[144] The major factor in permissible conflicts of interest is that the "fiduciar[y] must take practical actions to avoid acting on interests adverse to the plan."[145] If there is no harm done to plan participants with the above changes to the structure of cross-plan offsetting, this could be considered a permissible conflict of interest. As long as the plan participant can also benefit by having their own overpayments reimbursed from another plan's funds without the risk of balance bill liability, there is no interest adverse to the plan, and this conflict would be permissible.

CONCLUSION

While the circuit courts are split as to whether cross-plan offsetting is a permissible interpretation of plan language, the bigger question is whether cross-plan offsetting violates the fiduciary duty established by ERISA. Cross-plan offsetting is likely a reasonable defrayment of administrative costs, which is required of a fiduciary. However, cross-plan offsetting most likely is not in the sole interest of the plan, participants, and beneficiaries, and is therefore a breach of the TPA's fiduciary duty. The practice is not in the sole interest of plan participants because it is self-dealing, it has a fiduciary on both sides of a commercial transaction, it puts plan participants at risk of balance bill liability, and it does not explicitly disclose facts that would negatively affect plan members' interests.

There is a way for TPAs to alter cross-plan offsetting that would not breach the TPA's fiduciary responsibility and that would further the interests of plan participants. TPAs could alter the practice of cross-plan offsetting by explicitly writing cross-plan offsetting into the plan language, explicitly disclosing any foreseeable harms, creating an indemnity clause to shift balance bill liability off of plan participants and onto the TPA, providing a space for providers to adequately challenge the withholding of future payments, and, finally, limiting cross-plan offsetting to the same type of plan. This would bring the offset into the permissible conflict of interest, and while the fiduciary would still be on both sides of the equation, the TPA would not be acting on any interests adverse to the plan while still allowing the plan to benefit by having its overpayments offset.

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143. Cutaiar v. Marshall, 590 F.2d 523, 530 (3d Cir. 1979).

144. Brief for the Appellees, *supra* note 13, at 20 (quoting Leigh v. Engle, 727 F.2d 113, 132 n.29 (7th Cir. 1984)).

145. *Id.*

In light of the prevalence of medical overpayments in the United States, it is important to provide an effective and efficient remedy to correct these overpayments. By altering cross-plan offsetting, TPAs could further their own goals as well as the goals of their clients while also satisfying the language and goals of ERISA.