



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

September 24, 2010

The Honorable Bill Janis
Member, House of Delegates
Post Office Box 3703
Glen Allen, Virginia 23058-3703

Dear Delegate Janis:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether assignments of medical benefits payable under automobile insurance policies are enforceable where the policyholder assigns these benefits to a chiropractor who provided treatment covered by the policy. You also inquire whether clauses in automobile insurance policies that seek to bar these kinds of assignments are enforceable.

Response

It is my opinion that assignments of medical benefits payable under automobile insurance policies where the policyholder assigns these benefits to a chiropractor who provided treatment covered by the policy are enforceable. It is further my opinion that provisions of insurance contracts seeking to limit or preclude this kind of assignment are unenforceable so long as the assignment does not materially alter the risk or obligation of the insurer.

Applicable Law and Discussion

Generally, to effect a valid assignment, the assignor must not retain any control over the fund, property or other chose in action assigned or retain any right to revoke the assignment.¹ An assignment of a contractual right will be enforced unless it materially changes the duty of the obligor, is forbidden by statute, is contrary to public policy, or is validly precluded by contract.²

¹ *Kelly Health Care, Inc. v. Prudential Ins. Co. of Am., Inc.*, 226 Va. 376, 379, 309 S.E.2d 305, 307 (1983) (quoting *Nusbaum & Co. v. Atlantic Realty*, 206 Va. 673, 681, 146 S.E.2d 205, 210 (1966)). *See also* *Lataif v. Com. Indus. Const., Inc.*, 223 Va. 59, 62, 286 S.E.2d 159, 160 (1982) (explaining that, to effect a valid assignment, an assignor's right to performance is extinguished and the assignee acquires the right to such performance).

² Restatement (Second) of Contracts § 317(2) (1981).

With regard to your first inquiry, assignments of the benefits you describe do not materially increase the insurer's obligation, because the costs of services remain the same regardless of whether the insured or the chiropractor is paid. Moreover, such assignments are not forbidden by any statute or case in Virginia. The Code expressly recognizes assignments of contractual rights,³ including payments under certain insurance contracts.⁴ As such, because Virginia law provides for these assignments, they cannot be deemed inoperative on grounds of public policy.⁵ I therefore conclude that, unless the assignment is validly precluded by the insurance agreement itself, the assignment you describe is enforceable under Virginia law.

You next inquire whether a clause in an insurance contract prohibiting the assignment of benefits would be enforceable under Virginia law. A distinction traditionally has been made between an assignment of an insurance policy *before* a loss is sustained and an assignment of benefits after the loss occurs. Courts have enforced contractual provisions prohibiting pre-loss assignments because pre-loss assignments involve a transfer of a contractual relationship that in most cases would materially increase the risk to the insurer, are enforceable.⁶ By contrast, assignments of post-loss benefits usually are found to be valid regardless of any non-assignment clause in the policy.⁷ This rule is explained by the fact that (1) post-loss assignments of the benefits due under the policy are viewed as transfers of a chose in action and public policy favors the free alienability of choses in action, and (2) such assignments would not materially increase the insurer's risk or obligation under the policy.⁸

Conclusion

Accordingly, it is my opinion that assignments of medical benefits payable under automobile insurance policies where the policyholder assigns these benefits to a chiropractor who provided treatment covered by the policy are enforceable. It is further my opinion that provisions of insurance contracts that

³ VA. CODE ANN. §§ 8.01-13 (2007) (allowing an assignee to bring an action in his own name that the assignor could have brought had he not made the assignment); 8.01-26 (2007) (allowing assignments for actions arising under contract).

⁴ See VA. CODE ANN. § 38.2-321 (2007) (stating that an insurer shall be fully discharged from all claims under a life insurance policy or an accident and sickness insurance policy when it makes payments in accordance with any written assignment to the person designated by the assignment as being entitled to the proceeds or payments).

⁵ Virginia law does limit the assignments of causes of action to those arising from damage to real or personal property and contracts, but there is no prohibition against assigning contractual rights under insurance policies. Section 8.01-26.

⁶ 3 STEVEN PITT, DANIEL MALDONADO & JOSHUA D. ROGERS, COUCH ON INS. 3rd § 35:7 (2009) ("... the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments thereof except with the consent of the insurer apply only to assignments before loss ... the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim."); § 35:8 (contractual prohibition on assignment after loss is "generally regarded as void, in that it is against public policy to restrict the relation of debtor and creditor by restricting or rendering subject to the control of the insurer and absolute right in the nature of a chose in action.").

⁷ *Id.* See also *Aetna Ins. Co. v. Aston*, 123 Va. 327, 333, 96 S.E. 772, 774 (1918). See also *Crothall Hosp. Servs., Inc. v. Barham*, 1 Va. Cir. 403, 406-07 (Henrico Cir. 1983). Some courts, in the context of health insurance litigation, have upheld prohibitions on the assignment of benefits. See *Parrish Chiropractic v. Progressive Cas. Ins. Co.*, 874 P.2d 1049 (Colo. 1994) (citing cases). Your inquiry relates to automobile insurance and, therefore, the distinct considerations that apply to the assignment of benefits with certain health insurance policies are not implicated.

⁸ *Aston*, 123 Va. at 333, 96 S.E. at 774.

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seek to limit or to preclude this kind of assignment are unenforceable as long as the assignment does not materially alter the risk or obligation of the insurer.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General