

## PENNSYLVANIA HIGH COURT EXEMPTS HMO's FROM ANTI-SUBROGATION STATUTE

Wirth v. Aetna U.S. Healthcare, 2006 WL 2408747 (Pa. 2006).

The ability of HMOs to subrogate in Pennsylvania actually got a little easier last month. While Pennsylvania recognizes both the equitable and contractual rights of subrogation, Holloran v. Larrieu, 637 A.2d 317 (Pa. Super. 1994); Daley-Sand v. West American Ins. Co., 564 A.2d 965 (Pa. Super. 1989) (holding that even with contractual subrogation language, subrogation is equitable in nature); Allstate Ins. Co. v. Clarke, 527 A.2d 1021 (Pa. Super. 1987), and while a health insurer is entitled to enforce its subrogation and reimbursement clauses, Chow ex rel. Chow v. Rosen, 812 A.2d 587 (Pa. 2002); Metropolitan Life Ins. Co. v. Bodge, 560 A.2d 175 (Pa. Super. 1989); Roudebush v. Wolfe, 1999 WL 1539802 (Ct. of Common Pleas of Pa. 1999), Section 1720 of the Pennsylvania Motor Vehicle Financial Responsibility Act, 75 P.S. § 1720 (1990), provides as follows:

*“In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant’s tort recovery with respect to workers’ compensation benefits, benefits available under § 1711 (relating to required benefits), § 1712 (relating to availability of benefits) or § 1715 (relating to availability of adequate limits) or benefits paid or payable by a program, group contractor or other arrangements whether primary or excess under § 1719 (relating to Coordination of Benefits).”* Id.

One would hope that, like New Jersey, Pennsylvania would recognize that ERISA preempts such a destructive piece of legislation when it comes to subrogation. Unfortunately, one Pennsylvania federal court has confirmed that § 1797 of Pennsylvania’s Motor Vehicle Financial Responsibility Law (“MVFRL”) does regulate insurance, Benefits Concepts v. Macera, 413 F.2d 404 (E.D. Pa. 2005), which means that it is saved from preemption under ERISA and does apply to the health insurance subrogation rights of HMOs. It notes that unlike **New Jersey’s** anti-subrogation law, which appears in the state’s general laws on civil actions, Pennsylvania’s anti-subrogation provision appears in the insurance laws themselves. In *Benefit Concepts v. Macera*, the court found that § 1797 of the MVFRL did regulate insurance, but because the plan involved there was self-funded, the deemer clause prevented the law from being “saved” from preemption – and it was preempted by ERISA. Another federal court, in an unreported decision, also indicates that § 1720 *does* regulate insurance, and therefore will be saved from preemption where the plan is fully-insured. Medlar v. Regence Group, 2005 WL 1241881 (E.D. Pa. 2005). The court in the unreported *Medlar* decision notes that while the **3<sup>rd</sup> Circuit** has held that **New Jersey’s** anti-subrogation provisions did not “regulate insurance” for purposes of the saving clause, New Jersey’s anti-subrogation law appeared in that state’s general section on civil actions, while the Pennsylvania anti-subrogation law appears in the MVFRL and is specifically designed to regulate the escalating costs of motor vehicle insurance. The *Medlar* court ultimately found that § 1720 was not preempted like **New Jersey’s** anti-subrogation statute. Although § 1720 regulates insurance and was “saved” from preemption as a result, the fact

that it was a fully-insured plan meant that the deemer clause would not prevent it from being “saved” from preemption. Because the law was held not to be preempted due to the plan being fully-insured and not self-funded, § 1720 was not preempted.

There had, however, been some confusion with regard to HMOs in Pennsylvania. A Pennsylvania statute appears to exempt HMOs from the laws of Pennsylvania which are enforced with regard to insurance corporations or to any law enacted relating to the business of insurance unless such law specifically and in direct terms applies to such HMOs. 40 P.S. § 1560 (1998). This is because HMOs operate within and must comply with certain statutes governing HMOs. 40 P.S. § 1551 (1998) (*Health Maintenance Organization Act*). This summer, the 3<sup>rd</sup> Circuit Court of Appeals took notice of the conflict between § 1720 and § 1560, and certified this issue to the Pennsylvania Supreme Court. Wirth v. Aetna U.S. Healthcare, 137 Fed. Appx. 455 (3<sup>rd</sup> Cir. 2005). On August 22, 2006, the Pennsylvania Supreme Court answered the question in the affirmative, and held that an HMO is exempt from the anti-subrogation provision of the MVFRL. Wirth v. Aetna U.S. Healthcare, 2006 WL 2408747 (Pa. 2006).

The Supreme Court noted that § 1720 does not provide “specifically and in exact terms that it applies to a health maintenance organization.” On the other hand, the Court took notice of the fact that the purpose of § 1560(a) was to permit and encourage the formation and regulation of HMOs. It declared that § 1560(a) of the Act, which provides that an HMO operating pursuant to the Act shall not be subject to “the laws of this State now in force relating to insurance corporations engaged in the business of insurance nor to any law hereafter enacted relating to the business of insurance unless such law specifically and in exact terms applies to such Health Maintenance Organization”, took preference over the conflicting § 1720.

This means that HMOs which are not ERISA-covered and self-funded may still subrogate in Pennsylvania free of the anti-subrogation provisions of § 1720. The General Assembly recognized that the anti-subrogation provisions of § 1720 alone do not cover “every conceivable type of healthcare arrangement,” as Wirth contends, absent additional language that overcomes the statutory exemptions for certain types of benefits. Similar to HMOs, hospital plan corporations and professional health care service corporations are exempt from insurance statutes that do not “specifically refer and apply” to them. See, Pa. C.S. § 6103(a) (*Hospital Plan Corporations*), 40 Pa. C.S. § 6307 (*Professional Health Service Corporations*).