



ERISA Subrogation 101: Back to Basics



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INTRODUCTION

- **ERISA - (Employee Retirement Income Security Act)**

- 29 U.S.C. Sections 1001-1461 (1974)
- ERISA sought to protect employee benefit Plan participants by establishing minimum standards, “providing appropriate remedies” and providing “ready access to the federal courts.”

- **Scope and Purpose**

- Applies to any employee benefit Plan established or maintained by any employer organization engaged in commerce or in any industry or activity affecting commerce.
- Protect employees from unfair practices and guarantee appropriate federal remedies.

WHAT IS AN ERISA PLAN?

- **General Rule**
- **Safe Harbor Provisions (Think AFLAC)**
 1. The Employer makes no contributions.
 2. Employee participation is voluntary.
 3. Employer does not endorse.
 4. Employer receives no compensation for the program.
- **Exempt Plans**
 - Governmental, Church and Tribal (With Exceptions)

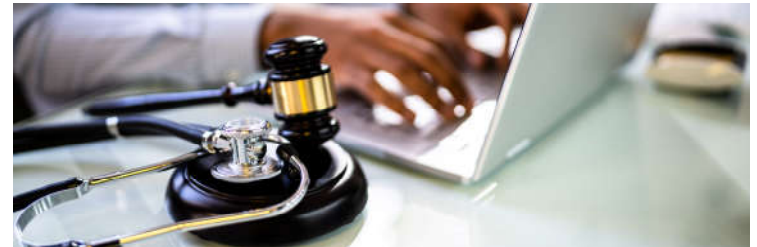


THE LANGUAGE OF ERISA

- **Plan Administrator** – Designated in the Plan document to process claims and interpret Plan.
- **Plan Sponsor** – Usually the employer.
- **Plan Participant/Beneficiary** – Those who receive benefits under the Plan.
- **What is a fiduciary? What is a Claims Administrator?**
- **Plan Document – Controlling Document. (*Cigna v. Amara*)**
- **SPD – Summary Plan Description** – summary of the key terms.
- **Where to look?**

SELF FUNDED VS. FULLY INSURED

- “Self Funded” or “Self Insured” means: The employer pays the benefits directly from its general assets or through a trust fund established for that purpose.
- “Fully Insured” means: The employer does not pay the benefits, but that the employer has purchased an insurance policy via the Plan, and an insurance company pays the losses.
- What then is stop loss insurance?
- ERISA Preemption
- Key Case to Know: *FMC v. Holiday*



IMPORTANCE OF PLAN LANGUAGE TO SUBROGATION

- ERISA neither authorizes nor prohibits subrogation and reimbursement.
- Instead, a Plan's rights are dictated by the Plan's written provisions.
- The Make Whole Rule – *i.e.*, plan member recovers first – is the default rule in most federal circuits and states. *Cagle v. Bruner*, 112 F.3d 1510, 1521 (11th Cir. 1997).
- An ERISA plan overrides the Make Whole Doctrine only if it includes language “*specifically allow[ing] the Plan the right of first reimbursement out of any recovery [the participant] was able to obtain even if [the participant] were not made whole*”. *Cagle* at 1522.

TYPES OF CASES

- **MVAs**
- **Other Motor Vehicles**
- **Workers' Compensation**
 - Is the Plan self-funded for WC and health?
- **Product Liability**
- **Premises Liability/Homeowners**
- **Medical Malpractice**
 - What's related?
 - Is the plan the provider?



SOURCES OF INFORMATION

- **Dockets (PACER, WestLaw, State Systems)**
- **GoFundMe**
- **Police Reports**
- **News Reports**



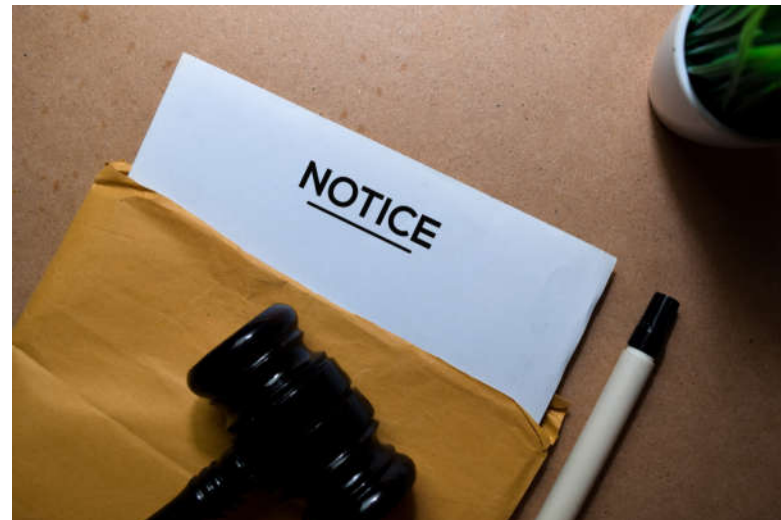
NOTICE LETTER

- **Patient (and/or Parents and Guardians) or their Attorney**
- **Adverse Parties**
 - Insurers
 - Defendant or Defense Counsel
- **Lien Resolution Groups**



NOTICE LETTER IF YOU REPRESENT STOP LOSS

- TPA
- Subrogation Vendor
- The Plan Itself



WHAT GOES IN A NOTICE LETTER?

- **Patient, Date of Loss, Injury Basics**
- **Type of Plan**
 - Do not guess.
- **Plan Language/Source of Rights**
 - If you don't have it, get it!
- **Specifics about any information you need.**
 - COB Information
 - Adverse Information
 - Status of Claims
 - Concerns That Might Reduce Recovery
 - Limited Limits
 - Questionable Relatedness
 - Issues With Liability
- **Specifics about what you will seek at the time of settlement.**

RED FLAGS

- Is there a criminal attorney involved?
- Does the Plan need to consult with someone regarding exclusions?



HOW TO SECURE COOPERATION

- **Pick Up The Phone**
- **Explain Any Issues With COB**
- **Get An E-Mail Address**
- **Use forms they can check a box and send back to you once your file is established.**



ISSUES WITH CLAIMS LIST

- Gaps in treatment?
- No treatment on DOA?
- When and how was it updated?
- Questions about relatedness?
- Denied or pending claims?
- RPB Claims? Balance Billing?
- “Final” Lists
- Claims List Disclaimers



REDUCTION REQUESTS

- **Final Lien?**
 - Termed? Is the patient termed or did the group term?
- **Get It In Writing**
 - Out of Pockets
 - Fees
 - Costs
 - Other Medical Liens
 - **Should those liens be there? Do they match the OOPs?**



MAKE THEM EXPLAIN EXPRESSLY EVERY SOURCE OF COVERAGE

- **Rule 4.1: Truthfulness in Statements to Others**
 - In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

MAKE THEM CONFIRM FUNDS WILL BE IN TRUST

- **ABA Model Rule 1.15 (Safekeeping Property)**

- (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (e) When in the course of representation, a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

WEBINAR ANNOUNCEMENT

- **Fully-Insured and Non-ERISA Plans: Advanced Topics in Preemption and Anti-Subrogation Exceptions**
- July 26 @ 12:00 (Eastern)
- Email questions to rwoody@mwl-law.com



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