

The Erosion of ERISA

Subrogation Rights

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Those of us who recall the original days of ERISA and health insurance subrogation may recall the overall confusion and chaos which surrounded all ERISA litigation, including subrogation. Over time, ERISA and health insurance subrogation rights were gradually strengthened, as were its preemption provisions. Virtually every state bowed to the preemptive language of ERISA group benefit plans. The logic behind this was the different state laws would provide different results, and uniformity of results was desired.

Over the last several years, however, the once impenetrable subrogation rights which fell under the ERISA umbrella have been victimized by a process of court-sponsored erosion. Federal trial and appellate courts have taken chinks out of the ERISA subrogation armor to the point where it is now incumbent upon subrogation professionals to recognize ERISA issues vis-à-vis the various venues they are being handled in.

We start with the basic premise that when medical expenses have been paid by an employer's group medical benefits plan, the rights of the plan are governed by the Employee Retirement Income Security Act of 1974 (ERISA). This act generally preempts state law from applying when that state law is "related" to ERISA plans. The effect of ERISA preemption is that the provisions of the plan are allowed to control, rather than provisions of state law.

For subrogation purposes, this ERISA preemption has historically protected subrogors from the harsh effects of several subrogation defenses used prolifically by plaintiffs' attorneys and others attempting to circumvent your subrogation rights. These include the Common Fund Doctrine which usually entitles a plaintiff's attorney to a portion of fees or costs out of the subrogated recovery, the Made Whole Doctrine, which prevents a subrogor from recovering a subrogated amount where the insured has not been "made whole", as well as other equitable and statutory subrogation-busters such as anti-subrogation statutes and the like.

Recent court decisions have begun chipping away at ERISA subrogation rights in the area of the Made Whole Doctrine. Some courts have held that the plan language must expressly claim recovery priority in order to be entitled to first dollar recovery. These decisions look at the language of the plan to determine if the plan specifies whether the Made Whole rule applies, whether there is a pro rate sharing of proceeds or whether the plan gets paid "off the top." If the plan does not clearly specify an allegation scheme, recent court decisions have held that the Made Whole Doctrine may apply. This is true in such venues as the 11th Circuit, Ohio and Oklahoma, where state courts have decided cases accordingly. On the other hand, many courts have declined to apply the Made Whole Doctrine to ERISA subrogation cases. These courts, which include the 5th Circuit and the State of Texas, view the Made Whole Doctrine as preempted because it is a state law rule, or because the plan does not specify a priority allegation of the proceeds.

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ERISA requires a disclosure document to make a plan available and comprehensible to covered persons. Known as the Summary Plan Description (SPD), if this document contains a subrogation right that differs from the plan language, the SPD may be held to be controlling. This is another area where courts have attempted to continually chip away at ERISA subrogation rights. For example, where the plan gives reimbursement rights against the recovery from a "liable" person, but the SPD refers only to recovering from someone whose "negligence" caused the injury, the SPD language may kill subrogation rights against uninsured motorist coverage, where the plan language would not have. Many plans vest their administrators with broad discretion to interpret plan language, which can help subrogation efforts. But for plans which do not, reimbursement provisions, which do not claim priority for repayment may be held to be ambiguous and subrogation recoveries may be denied. Obviously, language such as "the plan is entitled to 100% reimbursement regardless of whether you have been fully compensated" is much preferable to plans which do not mention priority of recoveries at all.

Where the plan is silent about costs and attorneys' fees, some courts have held that the plan is responsible for paying a portion of the plaintiffs' attorneys' fees and costs. Other courts have held that a plan need not contain express language about such matters. Again, venue matters. In the 3rd Circuit, the Common Fund Doctrine does not apply if the plan claims subrogation rights against "all rights of

recovery" or reimbursement out of "any monies paid." In addition, the 3rd Circuit disallows application of the Common Fund Doctrine whenever there is "full reimbursement" language in the plan. The 4th Circuit disallows application of the Common Fund Doctrine whenever the plan calls for repayment of "the lessor of the total recovery or the amount paid by the plan."

On the other hand, the 6th and 8th Circuits allow the application of the Common Fund Doctrine and charge the plan for costs and attorneys' fees where the plan does not address it and the plan administrator has no discretion to interpret the plan language. These same decisions mention that the Common Fund Doctrine will not apply if the plan language clearly prohibits its application.

On the far end of the spectrum, the 7th Circuit seems destined to apply the Common Fund Doctrine under almost any circumstances, unless the plan specifically and categorically rejects the application of the Common Fund Doctrine. The cases in the 7th Circuit seem to apply the logic that the Common Fund Doctrine is not "related to" insurance and, therefore, should not be preempted.

Further erosion of the ERISA subrogation rights occurs with regard to the issue of how an ERISA plan goes about recovering its lien. Some cases in the 11th Circuit hold that the ERISA statute does not provide a cause of action for a plan to sue an employee to recover its subrogated interest. Courts in Kentucky and Louisiana have held that a plan cannot sue in state

court because of federal preemption. The 9th Circuit and the State of North Carolina both seem to protect a plaintiff's attorney from having to pay back a portion of the plan where he settles without repayment of the lien, despite the fact that he knew about the ERISA plan subrogation rights. The 6th Circuit has held that a plan cannot make a third-party insurance carrier pay your subrogated interest directly where the carrier has already paid the covered employee in settlement, even though the third-party carrier knew about the plan's claim.

While the volume of law applicable to these issues is far more extensive than can be covered in this newsletter article, it is important to remember that ERISA is not the bastion of subrogation safety it once was. Health insurance carriers and subrogation personnel must now zealously act timely and effectively to protect subrogation rights in the face of weak plan language or creative arguments from plaintiffs' attorneys. The best advice continues to be getting significant subrogation matters into the hands of subrogation counsel as soon as is practicable and continually improving and strengthening your Plans' subrogation-related language. 🐾