MATTHIESEN, WICKERT & LEHRER, S.C.

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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER NOVEMBER 2011

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

*This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on or removed from our e-mail mailing list, please provide their e-mail addresses to Jamie Breen at **jbreen@mwl-law.com**. We appreciate your friendship and your business.*

****HEALTH INSURANCE SUBROGATION SPECIAL EDITION****

RECENT FEDERAL COURT DECISIONS THREATEN HEALTH SUBROGATION ACROSS THE BOARD: ERISA, FEHBA AND MEDICARE ADVANTAGE SUBROGATION RIGHTS AT A PERILOUS JUNCTURE

HEALTH INSURANCE AND ERISA SUBROGATION

3RD CIRCUIT THROWS OUT PRIOR PRECEDENTS AND HOLDS FULL REIMBURSEMENT TO AN ERISA PLAN MAY NOT BE "APPROPRIATE" UNDER THE CIRCUMSTANCES

By Ryan L. Woody

Just this past week, the 3rd Circuit Court of Appeals, based in Philadelphia and covering the states of Pennsylvania, Delaware and New Jersey, planted what could be the seed which grows into the eventual death blow to ERISA reimbursement actions under § 502(a)(3). In *U.S. Airways, Inc. v. McCutchen*, 2011 WL 5557411 (3rd Cir. 2011), the Court was asked to strike a U.S. Airways ERISA Health Benefits Plan's request for reimbursement from a personal injury settlement as not "appropriate" relief under § 502(a)(3). As many of you are aware, ERISA allows a fiduciary to enforce Plan terms under § 502(a)(3) by seeking "appropriate equitable relief".

This case stems from a tragic car accident in which a young driver lost control of her car, crossed the median of the road, and struck a car driven by 51-year-old James McCutchen. The truck traveling behind McCutchen also slammed into his car. The accident killed one person and left two others with severe brain injuries. McCutchen himself was grievously injured and survived only after emergency surgery. He spent several months in physical therapy and ultimately underwent a complete hip replacement. Since

the accident, McCutchen, who had a history of back surgeries and associated chronic pain, has also become unable to effectively treat that pain with medication. The accident has rendered him functionally disabled. McCutchen's Health Benefit Plan (the "Plan"), administered and self-financed by U.S. Airways, paid medical expenses in the amount of $66,866 on his behalf.

After the accident, McCutchen, through his attorneys at Rosen Louik & Perry, P.C. filed an action against the driver of the car that caused the accident. Because she had limited insurance coverage, and because three other people were seriously injured or killed, McCutchen settled with the other driver for only $10,000. However, with his lawyers' assistance, he and his wife received another $100,000 in underinsured motorist coverage for a total third-party recovery of $110,000. After paying a 40% contingency attorneys' fee and expenses, his net recovery was less than $66,000. U.S. Airways demanded reimbursement for the entire $66,866 that it had paid for McCutchen's medical bills. Soon after, Rosen Louik & Perry, P.C. placed $41,500 in a trust account, reasoning that any lien found to be valid would have to be reduced by a proportional amount of legal costs. The record on appeal does not establish what amount was disbursed to McCutchen.

When McCutchen did not pay, U.S. Airways, in its capacity as administrator of the ERISA benefits Plan, filed suit in the District Court under § 502(a)(3) of ERISA, seeking "appropriate equitable relief" in the form of a constructive trust or an equitable lien on the $41,500 held in trust and the remaining $25,366 personally from McCutchen. U.S. Airways claims that this language permits it to recoup the $66,866 it provided for McCutchen's medical care out of the $110,000 total that he recovered regardless of his legal costs. It argued that *"[t]he Plan language specifically authorized reimbursement in the amount of benefits paid, out of any recovery."* Conversely, McCutchen argued that it would be unfair ergo not "appropriate" for the Plan to be reimbursed without paying its fair share of attorneys' fees. The district court held in favor of the Plan and McCutchen appealed.

On appeal, the 3rd Circuit framed the case as presenting the question that *Sereboff* left open: whether § 502(a)(3)'s requirement that equitable relief be "appropriate" means that a fiduciary like U.S. Airways is limited in its recovery from a beneficiary like McCutchen by the equitable defenses and principles that were "typically available in equity," including the Made Whole Doctrine and Common Fund Doctrine. The Court agreed with McCutchen and held that the phrase "appropriate equitable relief" means something less than all available equitable relief. Essentially, courts are free to exercise their discretion to limit the requested relief to what is "appropriate" under traditional equitable principles. Accordingly, the Court went on to hold that U.S. Airways would be unjustly enriched were it to retain its entire lien without paying attorneys' fees and costs. The Court deemed this a "windfall" for U.S. Airways.

Of course, this panel's analysis squarely throws out over a decade's worth of authority within the 3rd Circuit that held that a Plan was not "unjustly enriched" where its Plan Document requires full reimbursement. After all, the Plan pays the benefits and the member does not object despite the fact that the benefits, a product of collective bargaining, are conditioned on reimbursement where the member goes out and seeks recovery from a third party for the same loss. The opinion, if upheld, will throw out the consistency and certainty of the Plan Document. Members would presumably be able to argue that benefit exclusions do not apply where it is unfair for that individual and, accordingly, a suit for "appropriate equitable relief" would reinstate those excluded benefits. Moreover, a member could argue that they should not be required to even pay premiums where that would provide a hardship. In the end, the 3rd Circuit has tossed out the entire basis for a written Plan Document where it can be modified based upon the exigencies of individual circumstances.

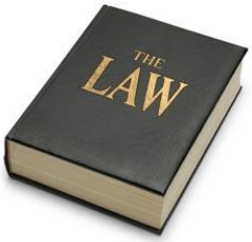
The *McCutchen* decision is a clear win for trial lawyers and changes the landscape of ERISA subrogation. It allows plaintiffs' attorneys to back door into the equitable defenses which had previously

been preempted by an ERISA Plan with clear language. The *McCutchen* case will hopefully be appealed to the U.S. Supreme Court. It is also possible that U.S. Airways will seek a rehearing from the entire 3rd Circuit in light of the amount of legal precedents overruled by this panel's decision. However, keep in mind that an identical case remains pending before the 9th Circuit Court of Appeals, *CGI v. Rose*. Matthiesen, Wicket & Lehrer, S.C. represents the National Association of Subrogation Professionals (NASP) as an amicus party in this 9th Circuit case and will continue to keep you informed as this case develops. If you should need guidance on how to handle the *McCutchen* decision or if you are facing this argument in another circuit, please feel free to contact Attorney Ryan Woody at **rwoody@mwl-law.com**.

HEALTH INSURANCE AND ERISA SUBROGATION

NEW YORK FEDERAL COURT GUTS FEHBA PREEMPTION CLAUSE

Many of you will recall the U.S. Supreme Court's decision in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006). In that case, the Supreme Court held that there was no federal question jurisdiction for FEHBA Plans' reimbursement claims. Unlike the ERISA statute, the FEHBA statute did not include an express grant of exclusive jurisdiction to the federal courts. As a result, FEHBA subrogation must be litigated in the state courts. Although not the best forum for subrogation, state courts would still be able to apply principles of conflict preemption to override state anti-subrogation defenses. FEHBA's preemption provision was left intact, which provides that "*the terms of any [FEHBA] contract which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State ... law which relates to health insurance or plans*." 5 U.S.C. § 8902(m)(1). That provision would defeat any State law that relates to health insurance. But not for long.



In the case of *Calingo v. Meridian Resources Co. LLC*, 2011 WL 3611319 (S.D. N.Y. Aug. 16, 2011), the District Court handed down a surprising decision that brings into doubt FEHBA subrogation in many states. The case involves a class action lawsuit against Meridian, which administers FEHBA benefits for the United States government in the State of New York. The class plaintiffs sought damages arising out of Meridian's wrongful recoupment of subrogation after the implementation of § 5-335 of the New York General Obligations Law. Section 5-335 is New York's recently passed anti-subrogation provision, which precludes subrogation except where there is a statutory right of reimbursement.

The Federal Court in this decision was facing a motion by Meridian to dismiss the action. Meridian argued that the class plaintiff's claims are preempted under FEHBA's preemption provision, because New York's anti-subrogation statute conflicts with the terms of the federal contract. Conversely, the class plaintiffs argued that New York's anti-subrogation statute is not preempted because it does not relate to "the nature, provision, or extent of coverage or benefits" as stated in the FEHBA preemption provision. In other words, the class plaintiffs argued that a claim for reimbursement or subrogation does not relate to the coverage and benefits of a health care Plan.

The District Court reviewed this in light of the *McVeigh* decision by the Supreme Court. It noted that prior to *McVeigh,* courts routinely held the Master Contract preempts state law subrogation principles because the state subrogation laws related to coverage and benefits. However, the Court noted that the landscape changed after *McVeigh*. *Citing, Haw. Disability Rights Ctr. v. Cheung,* 513 F.Supp.2d 1185, 1196 (D. Haw. 2007) ("FEHBA's preemption clause only displaced state law on issues relating to

'coverage or benefits,' not subrogation or reimbursement rights in general."); *Southerland v. Liberty Mut. Fire Ins. Co.,* 152 P.3d 260 (Okla. Ct. App. 2006) (holding state law requiring insured to be made whole by settlement before obligation to subrogate arises was not preempted by FEHBA). So while it was uncontroverted that § 5-335 is directed at health insurance policies, the Court went on to hold that following *McVeigh,* subrogation and reimbursement pursuant to a health insurance policy does not relate to the coverage and benefits under such a policy, and FEHBA does not preempt the New York law.

This decision is troubling for those seeking to enforce FEHBA subrogation in anti-subrogation states, made whole states or equitable apportionment states. It states that there is no federal preemption for the subrogation and reimbursement provisions in a FEHBA contract. Apparently, this Court believed that subrogation did not relate to benefits. However, quite to the contrary, subrogation is a condition placed upon all benefits paid in the policy. While this certainly won't be the last word on FEHBA preemption in this particular case, we expect that this decision will spread like a virus across the country. Matthiesen, Wickert & Lehrer, S.C. has strong recommendations for distinguishing this decision or even administering the claim from the beginning. Frankly, we suspect some FEHBA administrators will consider whether to change from the "pay and chase" model to the "deny" model where there is liable third-party liability since they will not be able to fully enforce their subrogation provisions. If you are in a troublesome subrogation state, please feel free to contact Attorneys Ryan Woody at **rwoody@mwl-law.com** and Doug Lehrer at **dlehrer@mwl-law.com** for assistance.

HEALTH INSURANCE AND ERISA SUBROGATION

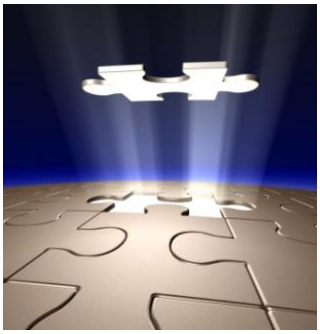
Courts Hold That Medicare Advantage Plans Have No Subrogation Rights In New York

Things continue to get worse for Medicare Advantage Plans. Medicare Advantage Plans are a creature of statute. Title VXIII of the Social Security Act establishes Medicare, a federally-funded health insurance program for the elderly and disabled. 42 U.S.C. §§ 1395 *et seq.* Under Medicare Part C, there are health Plan options that allow individuals qualified for Medicare to enroll with a private insurance company, Medicare Advantage (MA) Plans. 42 U.S.C. §§ 1395w–21 to 1395w–29. Any MA Plan must enter into a contract with the Secretary of Health and Human Services, 42 U.S.C. § 1395w–27, and the Plan agrees to provide the same benefits an individual is eligible to receive under Medicare, 42 U.S.C. § 1395w–22(1)(A). While the statute clearly provides the United States with the authority to seek reimbursement, it does not provide clear guidance for MA Plans. The statute does allow MA Plans to "charge" third parties, liability carriers or workers' compensation carriers to pay. 42 U.S.C. § 1395mm(e).

In construing these statutory provisions, the federal courts have essentially concluded that, like FEHBA Plans, there is no grant of exclusive federal jurisdiction. Accordingly, suits by MA Plans seeking reimbursement belong in state court not federal court. *Parra v. PacifiCare of Arizona, Inc.*, CV-10-008-TUC-DCB, 2011 WL 1119761 (D. Ariz., Feb. 4, 2011) *report and recommendation adopted*, CV 10-008-TUC-DCB, 2011 WL 1119736 (D. Ariz., Mar. 28, 2011) ("Defendant's arguments, that specific Arizona laws are preempted by a federal law or regulation, such as the anti-subrogation law and wrongful death statute, may be litigated in state court.")

As such, following *Parra,* MA Plans have turned to state court to resolve their subrogation and reimbursement claims only to be let down. Recently, two New York trial courts have held that MA Plan's have no subrogation rights in New York! See *Ferlazzo v. 18th Ave. Hardware, Inc*., 33 Misc.3d 421, 929 N.Y.S.2d 690 (Kings County, Aug. 22, 2011) and *Trezza v. Trezza*, 32 Misc.3d 1209(A) (Kings County,

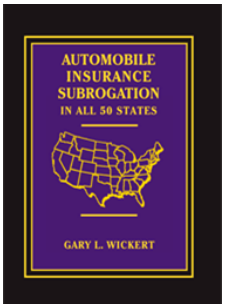
June 23, 2011). Recall that § 5-335 of the New York General Obligations Law precludes subrogation except where there is a statutory right of reimbursement. Accordingly, the Courts looked to the Medicare Statute and determined that the statute permitted but did not require that MA Plans include a subrogation provision in their contracts. As such, the Courts reasoned that "the Medicare Advantage insurer's right to reimbursement does not stem from the statute but rather from the private contract made with the enrollee. There is no statutory right to reimbursement in favor of Medicare Advantage insurers, but rather only 'statutory permission' to include recovery provisions in their contracts." Therefore, the Courts concluded that New York's anti-subrogation statute applied to bar any reimbursement to the MA Plan.



These Medicare Advantage Plan decisions combined with the recent FEHBA decisions strike major blows to the U.S. Government, as the ultimate sponsors of these Plans. With the projected loss of subrogation revenues for these two programs, the federal government will be forced to raise revenues to pay for the losses. Given the involvement of the federal government, we can hope for possible legislative solutions to these court decisions. However, in the meantime, if you are facing problems with your MA Plans, please feel free to contact Attorneys Ryan Woody at **rwoody@mwl-law.com** or Gary Wickert at **gwickert@mwl-law.com** for assistance. At MWL, we are at the cutting edge when it comes to formulating new arguments for preservation of subrogation and reimbursement rights. We look forward to hearing from you.

UPCOMING EVENTS

October 26-28, 2011 - MWL exhibited at the *Self-Funding Employer Healthcare and Workers' Compensation Conference* in Chicago, Illinois. Jamie Breen enjoyed meeting everyone who attended this event. We would like to congratulate the two winners who each won an autographed copy of our treatise entitled *ERISA and Health Insurance Subrogation In All 50 States* at the prize drawing we had at our exhibit booth. The winners were selected from the business cards placed in the basket at our booth. Those winners were Brad Cohen, with Insurance Care Direct, and Allen Keehler, with Avert Risk Management Group, LLC.



December 2011 - MWL's *Automobile Insurance Subrogation: In All 50 States* will soon be released. It is the last and most anticipated of the subrogation trilogy, and a book which will serve as the "Bible" for any insurance company writing personal lines or commercial automobile insurance. There is no other book, resource, or authority like it - anywhere. It is a complete treatment - A to Z - of virtually every issue which the insurance claims or subrogation professional will face in the area of automobile insurance. The myriad of subrogation topics addressed in this treatise were carefully selected by the author as the most frequently-asked-about areas of automobile insurance subrogation. MWL is very proud of the work which went into this book and looks forward to the feedback and symbiosis with the claims/recovery industry which has helped make its other subrogation resources the leaders in the industry. You can pre-order the book or learn more about this book from our publisher, Juris Publishing, or by clicking **HERE**. The publisher is offering a 20% pre-publishing discount for the book if it is pre-ordered by December 15, 2011.

December 7, 2011 – Timothy Pagel will be presenting a live webinar entitled *"Illinois Workers' Compensation and Employer Contribution*" from 10:00 - 11:00 a.m. (CST). Heath Sherman, with Leahy, Eisenberg & Fraenkel, Ltd., one of our Illinois local counsel, will be a guest co-presenter. This webinar is approved for 1.0 Texas CE credits and is free to clients and friends of MWL. A registration link can be found on our website homepage but you can register now by clicking on the "Register Now" button to the right.

May 9-12, 2012 - MWL will be exhibiting at the *7th Annual Claims Education Conference* in Napa Valley, California. Jamie Breen will be at Exhibit Booth 12 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please go to **www.claimseducationconference.com**.

INDUSTRY NEWS

HEALTHSMART ACQUIRES TPA WELLS FARGO

HealthSmart Holdings Inc. announced recently that it will be acquiring Wells Fargo Third Party Administrators, Inc., the medical third-party administration (TPA) business of Wells Fargo Insurance Services USA, Inc. – part of Wells Fargo & Company. The terms of the transaction, which are expected to be completed by the end of the year, have not been disclosed. Wells Fargo TPA offers employee benefits and claims administration services for employers. HealthSmart will acquire all of the operating assets and related liabilities of the TPA. HealthSmart will take on nearly 600 Wells Fargo TPA employees. The combination of Wells Fargo TPA and HealthSmart creates the second-largest non-carrier owned TPA in the country. The acquisition creates a beachhead in the Eastern U.S. to complement HealthSmart's current Texas, Colorado, Ohio, and California locations and increases service and distribution capability not easily available through most non-carrier managed care companies.

LIBERTY MUTUAL ACQUIRES QUINN INSURANCE OF IRELAND

Liberty Mutual has acquired Irish property and casualty carrier, Quinn Insurance, Ltd. The acquisition is intended to help Liberty Mutual expand its insurance products in both personal and commercial lines. The acquired company will be known as Liberty Mutual Direct Insurance Co., Ltd., and all 1,500 employees will continue to operate from Ireland. Liberty Mutual already has a presence in Ireland through Liberty International Underwriters in Dublin.