



ERISA Subrogation

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Common Sense “Legal” Analysis

- ◆ *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886.
 - Health plan paid \$85,000
 - Insured recovered \$250,000
 - Insured claimed she was not “made whole” and public policy prohibited an insurer from recovering when insured not made whole.



ERISA \neq Common Sense

- ◆ Federal Preemption
- ◆ All remedies must fit within the statute
- ◆ The statute provides for only equitable remedies.



Federal Preemption

- ◆ 29 USC §1144(a): Supercedure
- ◆ 29 USC §1144(b)(2)(A): Savings Clause
- ◆ 29 USC §1144(b)(2)(B): “Deemer” Clause



Federal Preemption: Supercedure

- ◆ 29 USC §1144(a): Supercedure
 - Except as provided in subsection (b) of this section [the savings clause], **the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan**



Federal Preemption: Savings Clause

- ◆ 29 USC §1144(b)(2)(A): Savings Clause
 - Except as provided in subparagraph (B) [the deemer clause], **nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.**



Federal Preemption: Deemer Clause

- ◆ 29 USC §1144(b)(2)(B): “Deemer” Clause
 - (B) **Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.**



Federal Preemption: Plan Funding

- ◆ State anti-subrogation laws are preempted for **self-funded plans** because 1) such laws relate to the plan and 2) the plan cannot be “deemed” to be an insurance company.
- ◆ State anti-subrogation laws are not preempted for **fully insured plans** because an insurance company is being regulated, not the plan.
- ◆ *See FMC Corp v Holliday* 498 U.S. 52, 111 S.Ct. 403 (1990); *Smith v Life Ins Co.*, 2006 WL 2842529 (N.D. Ga., 2006).



Federal Preemption: Plan Funding

- ◆ When might this make a difference in Ohio?
 - Political Subdivision Liability -- R.C. 2744.05(A)
 - A political subdivision is entitled to a set-off for amounts paid by collateral sources
 - Collateral sources may not exercise subrogation rights against a political subdivision
 - Collateral sources may not require reimbursement. Is this preempted for self-funded ERISA plans?



Side Note: Does ERISA preempt insurance bad faith?

- ◆ ERISA certainly preempts bad faith claims for self-funded plans because such claims “relate to the plan”
- ◆ Bad faith claims are not “saved” from preemption because they do not “regulate insurance”. *Pilot Life Ins. Co. v. Dedeaux* 481 US 41 (1987)



ERISA Remedies

- ◆ 29 USC § 1132. Civil enforcement
 - To recover benefits by a participant or beneficiary
 - To recover for breach of fiduciary duty by a participant, a beneficiary, or the Secretary of Labor
 - To enjoin an act or practice that violates the statute or the plan or to obtain **appropriate equitable relief . . .**



The Power of ERISA?

- ◆ Most Third Party Administrators proclaim “WE ARE ERISA”
- ◆ Be careful what you wish for!



Knudson

- ◆ Settlement allocated to a special needs trust
- ◆ Held: ERISA does not authorize an action for money damages.



Qualchoice v. Rowland

- ◆ Reimbursement rights are unenforceable regardless of the “equitable” remedies plead.
 - “the source of the claim asserted by QualChoice is a contract to pay money, and that the procedural mechanisms of constructive trust and equitable lien are not proper mechanisms for enforcing this right . . .”



Sereboff to the Rescue

- ◆ ERISA plan notified Participant of lien for reimbursement -- \$75,000
- ◆ Participant settled the tort suit for \$750,000, and did not reimburse the plan.
- ◆ The parties agreed to set aside \$75,000 in a special account pending litigation



Sereboff Holdings

- ◆ Plan was not preempted from bringing a claim for equitable restitution.
- ◆ Funds must be specifically identifiable, but it does not matter that the funds were not in existence when the contract was executed.



Popowski: A Tale of Two Plans

- ◆ Plan B
 - If the Covered Person receives a settlement, judgment, or other payment relating to the accidental injury or illness from another person, firm, corporation, organization or business entity paid by, or on behalf of, the person or entity who allegedly caused the injury or illness, the Covered Person agrees to reimburse the Plan in full, and in first priority, for any medical expenses paid by the Plan relating to the injury or illness.



Popowski: A Tale of Two Plans

- ◆ Plan A
 - The Plan has a lien on any amount recovered by the Covered Person whether or not designated as payment for medical expenses. This lien shall remain in effect until the Plan is repaid in full. The Covered Person ... must repay to the Plan the benefits paid on his or her behalf out of the recovery made from the third party or insurer. These rights provide the Plan with a priority over *any* funds paid by a third party to a Covered Person relative to the Injury or Sickness, including a priority over any claim for non-medical or dental charges, attorney's fees, or other costs and expenses.”



Shank: Show Me the Money (Part I)

- ◆ Plan paid \$469,000 in medical expenses for Shank
- ◆ Shank settled with tortfeasor for \$700,000
- ◆ Shank received \$417,000 after fees and expenses. Deposited into a Special Needs Trust.
- ◆ The Plan sued the **Trustee**



Shank: Show Me the Money (Part I)

- ◆ Held:
 - “Unlike the plaintiff in *Great-West*, the Administrative Committee has sued the trustee of the special needs trust, the individual who has possession of the funds.”



Reichert: Show Me the Money (Part II)

- ◆ The plan paid the participant short term disability benefits.
- ◆ The participant received retroactive Social Security disability benefits which should have off-set the disability benefits.
- ◆ The plan sought reimbursement for the overpayment
- ◆ The participant claimed “I spent the money”



Reichert: Show Me the Money (Part II)

- ◆ Held:
 - Under the terms of the plan, she owes the plan for the overpayment; however,
 - If she does not have the money, the funds are no longer specifically identifiable and subject to equitable restitution.



The Make-Whole Rule

- ◆ In order to avoid the make whole rule, the plan must establish a priority over recovered funds and specify whether the plan has a right to full or partial recovery.
 - *Copeland Oaks v Haupt* (6th Cir. 2000):
 - *Qualchoice v Williams* (6th Cir. 2001):
 - *Hiney Printing v. Brantner* (6th Cir. 2001)
 - *Rodriguez v Tennessee Laborers* (6th Cir. 2004)



Ahlborn: A Last Appeal to Fairness

- ◆ Medicaid, Not ERISA
- ◆ Medicaid is limited to reimbursement from that portion of a settlement attributable to medical expenses.
- ◆ Does “appropriate” equitable relief mean the same thing?



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