ERISA Liens and Negotiations in the Post- *McCutchen* and *Amara* World[1]

Scott B. Cooper, Esquire
SCHMIDT KRAMER P.C.

209 State Street
Harrisburg, PA 17101

27 South 34th Street
Camp Hill, PA 17011

scooper@schmidtkramer.com
Phone: 717-888-8888 or 717-232-6300
Fax: 717-232-6467

Evaluating insurance issues, particularly subrogation and reimbursement claims, in personal injury/wrongful death cases is important for both the Plaintiff and Defense attorneys. It is very important to understand and know whether a third party has a subrogation/reimbursement interest in the case. These outside claims greatly impact the damages which can be pled, proven and recovered.

In all motor vehicle accident cases, subrogation is limited by the Pennsylvania Motor Vehicle Financial Responsibility Law (hereinafter "MVFRL"), 75 Pa.C.S.A. §1720. *However, there is one major exception.* In FMC v. Holliday, 498 U.S. 52 (1990), the Supreme Court of the United States held that sections 1720 and 1722 of the MVFRL are preempted by a self-funded ERISA plan. Therefore, when dealing with a self-funded ERISA plan, there is reimbursement or subrogation, even if you are dealing with a car accident case under the MVFRL.

Also, the changes to medical malpractice cases in Act 13 several years ago make certain payments not recoverable, but some are allowed. ERISA liens are considered "super liens" and are one such exception. Also, due to the way courts apply the ERISA law, the Plan may sometimes be very reluctant to negotiate reductions so it is extremely important to try and find any way to present your client's case to the Plan.

A self-funded, or partially funded, ERISA plan under 29 U.S.C. §514 preempts Pennsylvania law. Traditional health plans do not preempt Pennsylvania law. This is probably one of the most important areas of personal injury insurance reimbursement in motor vehicle accident cases in the last several years.

[1] Materials will be posted on the Schmidt Kramer PC web site at www.schmidtkramer.com.

As previously noted, in FMC v. Holliday, 498 U.S. 52 (1990), the Supreme Court of the United States held that sections 1720 and 1722 of the PaMVFRL are preempted by a self-funded ERISA plan. The Supreme Court ruled that section 1720 of the PaMVFRL relates to an employee benefit plan and any law that "relates" to a plan is subject to ERISA. Since the ERISA plan preempts state law, the provisions of the plan are followed. If they provide for subrogation then subrogation applies.

One of the most important items to research and investigate is the validity of the plan itself, and the contract language. Determining whether the ERISA plan even applies is paramount to anything you want to look into because not only do you want to ask for the Form 550 and Summary Plan Description, but you also want to ask for the actual Plan document and the new summary mandated by the Affordable Care Act. The reason is because if there is an inconsistency between the Summary Plan Description and the Plan itself, then you may be able to defeat ERISA subrogation entirely. Cigna v. Amara, -- U.S. --, 131 S. Ct. 1866 (2011); Mull v. Motion Picture Industry Health Plan and Board, LA CV 12-06693- VBF (U.S. Dist. Central Cal. Sept. 30, 2014).

Also, under Section 2715 of the Public Health Services Act which was implemented by Section 1001 of the Affordable Care Act a plan is required to provide a written summary of benefits and coverages. This is in addition to the Summary Plan Description. Now there are possible two areas of conflict. The Plan and the Summary Plan Description and the Plan and the Summary mandated by the new law.

Also, review the Summary Plan Description to make certain is meets the required mandates of the law under 29 U.S.C. Section 1022(b). Some items to looks for are the name and type of administrator of the plan; the name and address of the designated agent; the name and address of the plan administrator; circumstances that may lead to disqualification; and a statement of ERISA rights.

The precise terms of the Plan dictate how the subrogation claim is applied. In fact, certain plans may take away their subrogation right if they include a provision which states that the provision does not apply if not allowed by local or state law.

Traditional state law concerning reimbursement and reductions for attorney's fees and costs are different for ERISA plans. The amount of the ERISA plan's subrogation interest may not be subject to any reduction for a proportionate share of attorney's fees and costs. The issue has given rise to significant litigation and emerging conflict around the United States in its various circuit courts.

Under Pennsylvania law, in Bollman Hat Co. v. Root, 112 F.3d 113 (3d Cir. 1997), the Court of Appeals for the Third Circuit specifically held that unjust enrichment does not apply, and that a plan's requirements to be reimbursed for "any payments" and subrogation of "all rights of recovery" unambiguously precluded reduction for a proportionate share of attorney's fees. Bollman Hat, 112 F.3d at 117. Bollman Hat basically affirms the Third Circuit decision in Ryan v. Federal Express, 78 F.3d 123 (3rd Cir. 1996), where the Third Circuit held that the language of the subrogation provision unambiguously required that the plaintiffs pay back all of the money they received. In Silcot v. Walmart, 1998 WL 422032 (E.D. Pa. July 24, 1998) (mem.), the District Court of Pennsylvania concluded it was bound by Ryan and Bollman, although it led to an unfair result.

The courts have also noted that the fact that a claimant cannot recover medical expenses from a tortfeasor is irrelevant to subrogation by an ERISA plan, or even whether or not liability is contested. Travitz v. Northeast Department ILGWU Health and Welfare Fund, 13 F.3d 704 (3d Cir. 1994). In Travitz, the plaintiff argued that there was no subrogation interest because under section 1722, she cannot recover medical expenses for which reimbursement was sought. Travitz's case with the tortfeasor had been settled for $125,000 cash, plus a structured settlement. The fund expended $55,000 after the first $10,000 was paid by automobile insurance. She attempted to argue that the entire settlement was for pain and suffering. The Court ruled that section 1722 was preempted; therefore she could not have recovered medical expenses from the tortfeasor. The Court also noted in Austin v. Dionne, 909 F. Supp. 271 (E.D. Pa. 1995) that ERISA does not require that the terms of the plan contain a subrogation clause. The parties never argued that the benefit plan was entitled to subrogation, and the defendant asserted section 1722. The Court granted the defendant's motion in limine on introducing medical expenses.

The Supreme Court of the United States in Great-West Life v. Knudson, 534 U.S. 204 (2002) held that an ERISA plan or its administrator cannot file a lawsuit to enforce the plan's subrogation provisions where the plan or its assignee seeks to impose personal liability on a participant or beneficiary for a contractual obligation to pay money. In Great-West, the plan sought to enforce its subrogation provision under ERISA's civil enforcement provisions. Knudson argued that there was no remedy for the plan pursuant to equitable restitution under the ERISA statute, Section 502 (a) (3).

Knudson was insured by an ERISA plan. The plan had a subrogation/reimbursement provision which allowed the plan to recover medical expenses it paid on behalf of Knudson or dependents for injuries sustained as a result of a third party. Knudson's spouse was seriously injured in a car accident. Great-West paid medical expenses in excess of $400,000. The plan contained a reimbursement provision and the plan assigned its right of

reimbursement to Great-West, the insurance company which provided stop-loss coverage for the plan.

The personal injury lawsuit was filed and settled in state court. Great-West had no notice of the lawsuit and sued the employee in federal court under the ERISA statute to enforce its reimbursement rights under the plan. The carrier sought an injunction and order requiring the participant of the trust fund to receive the settlement proceeds to pay Great-West the amount of the medical expenses the plan had paid.

The Supreme Court held that although ERISA authorizes suits "to enjoin any act or practice which violates the terms of a plan or to obtain other appropriate equitable relief" to enforce any provisions of the terms of a plan, the suit was improper. Justice Scalia reasoned that the insurance company was seeking the repayment of money and was not really seeking non-money or "equitable relief" permitted by ERISA. The Court said the suit was really for money damages and suggested that if the insurance carrier or plan wanted to enforce its rights, it should have intervened in the employee's state court personal injury lawsuit or should have sued for money damages in state court for reimbursement under the contract.

Self-funded plans have started to implement procedures and place provisions in contracts which help monitor litigation filed by plan participants. Also, plans may start to intervene in cases to preserve their ability to be reimbursed for medical expenses. A key to Knudson is that the plan participant was not in possession of the proceeds recovered from a third party tortfeasor. In Wal-Mart v. Varco, 2002 WL 47159 (Northern District of Illinois, January 14, 2002), a court ruled that an equitable trust can be imposed if the monies have not been recovered and distributed.

In Sereboff v. Mid-Atlantic Medical Services Inc., 547 U.S. 1015 (2006), the United States Supreme Court determined that monies placed in a special needs trust are still subject to the ERISA claim. The claim is not equitable and seems to have defeated a lot of the Knudson argument.

Another issue which has been addressed by a trial court is whether a Plaintiff can present evidence of medical bills that will be paid by an ERISA plan. In Roberts v. Brytczuk, 65 Pa. D. & C. 4th 510 (Centre Co. March 16, 2004) the trial court held that because ERISA pre-empts Section 1797 of the MVFRL the Plaintiff is permitted to present evidence that a part of any damage award received will have to be repaid to the self-funded ERISA plan that paid medical expenses.

One important issue resolved in favor of the ERISA plans is stop loss coverage. In Bill Gray v. Gourley, 248 F.3d 206 (3rd. Cir. 2001) the Court of Appeals for the Third

Circuit held that the purchase of stop loss coverage does not relinquish the ERISA plan claim for subrogation or reimbursement. Also, the court held that the third party insurance carrier is not liable is the claim is unpaid.

In Mills v. London Grove Township, 2007 U.S. Dist. LEXIS 52536 (E.D. Pa July 19, 2007) the adult plaintiffs and their minor child suffered severe and permanent injuries in an automobile accident. The accident allegedly occurred because a stop-sign for which the Defendant Township was responsible was obscured by shrubbery.

Plaintiffs sued the Township, the owner of the property in question, and the other driver, all of whom asserted claims against the wife-plaintiff. The wife-plaintiff was seven months pregnant at the time of the accident, and her injuries caused the premature birth of the plaintiff-minor (now aged 2 1/2 years). The minor-plaintiff sustained serious head injuries which have resulted in cerebral palsy, a permanent condition for which the minor will require constant medical attention. Although each of the potentially liable parties could properly assert that they were not at fault, all concerned--or, more accurately, their liability insurance carriers-have agreed to settle the case, by payments substantially equal to the total of available liability insurance. Plaintiffs have now petitioned for approval of the compromise settlement, insofar as the minor is concerned. It is proposed that the minor's portion of the settlement be placed in a "self-funded special needs trust" (under Maryland law, and approved by the Attorney General of Maryland, where the plaintiffs now reside). Under the terms of the settlement, the minor's share would be $ 500,000, her father's share would be $ 125,000, and her mother's share would be $ 275,000. After deduction of attorneys' fees (reduced to 25%) and the compromised amount of certain liens, the net settlement payable to the special needs trust for the minor would be $ 357,170.21.

All parties agree that the proposed settlement of the minor's claim is reasonable under the circumstances--doubtful liability and limited insurance coverage. There is, however, opposition to the proposed distribution of the settlement proceeds. It appears that the plaintiffs were beneficiaries under an **ERISA** health and welfare plan as a result of the father's employment. The Plan has made significant payments on account of the minor's medical expenses. The insurance company which made those payments now asserts that the petitioners should first reimburse it (ACS Recovery Services) in the amount of $ 123,690.12 because of the benefits it paid on account of the minor's injuries.

The pertinent language of the Plan was as follows:

"If you or a dependent are injured because of the negligence or wrongdoing of someone else, the Plan Administrator has the right,

> subject to any applicable law, to recover benefits paid by the third-party medical plan from any amount you receive from the other person or his or her insurance company, whether by lawsuit, settlement or otherwise and without regard to attorney fees you may have incurred to collect such amounts. *In this situation, you must sign a* ***reimbursement*** *agreement before benefits will be paid under the Wyeth health care plans*. You also are responsible for taking any necessary actions to protect the Wyeth health care plans' right of recovery." (emphasis added)

At the hearing on the pending petition, counsel for plaintiffs asserted, without contradiction, that the plaintiffs have never been asked to sign any such **reimbursement** agreement, and have not done so. Thus, it may be that ACS Recovery Services should be deemed to have waived its right to assert a lien. Stated otherwise, it may be that, by paying the medical benefits without first obtaining plaintiffs' agreement to recognize the lien now claimed, ACS Recovery Services may have impaired its right to assert such a lien. The Court held that the claim for reimbursement was no valid under the facts of the case.

In order to confirm the status of a self-insured plan the Form 5500, Summary Plan Description, and a letter from the plan itself seeking the reimbursement pursuant to its self-insured status is recommended to be obtained. Under Section 29 U.S.C. Section 1132 the Plan only has 30 days to provide the documents or a fine of $110 a day can be imposed, absent good cause being shown for not complying.

However, as the attorney you need to be careful. The Sixth Circuit, in Longaberger Co. v. Kolt, 586 F.3d 459 (6th Cir 2009), holds that ERISA lien holder can recover that portion of a recovery in tort that was the attorneys net fee from the attorney for the plaintiff, despite the fact that the money in his IOLTA account had already been disbursed.

To determine if there is a subrogation/reimbursement claim, you should take the following steps:

A. Determine the type of case (i.e. motor vehicle/non-motor vehicle);

B. Determine what potential type of lien there may be;

C. Determine if a claim has been made by an outside source and if it is valid which includes asking for the Summary Plan Description, Plan itself and Form 5500;

D. Remember to utilize the remedy provision of ERISA Section 502(c)(1) and 29 U.S.C. Section 1032(c)(1), if you do not get cooperation;

E. Make sure the Plan document and Summary Plan Description complies with Section 104 of the ERISA statute; and

D. If no subrogation claim has been made, determine whether or not you have an obligation to notify a source of a third party claim, or if you only need to advise your client of the possible claim.