ERISA’s Diminishing Right to Direct Recovery

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The Letter:

Third-party liability insurers (and other clients who actively negotiate or adjust third-party liability claims), are frequently faced with the letter. Yes, there are many of those letters, but this one is somewhat unique: it is a threatening letter from a subrogation company, claiming to represent an ERISA (Employee Retirement Income Security Act) plan insurer, seeking to recover the cost of medical benefits it paid on behalf of its insured. The letter states that the liability insurer must pay the subrogation company directly, or face direct liability even after settling with the third-party. The letter often cites a case or two in support of the claim for direct repayment, and will usually excerpt subrogation language from the plan. The letter, however, and the threat of direct liability for value of the lien, appears to have much less “teeth” than it did prior to a series of recent Federal court decisions.

The Law:

ERISA-funded insurance plans, unlike Medicare (or even state funded hospitals) do not have statutory rights to direct actions against insurers or third-parties for monies paid out for medical treatment. Up until recently, the ERISA plans would claim that their contractual assignment of benefits from their plan members entitled them to directly assert claims against third-parties for the medical treatment they paid for, claiming that the rights to recovery for the medical bills had been assigned from the plan members to the plan. The argument is that the ERISA plan claims must be settled directly, or the ERISA plan would directly pursue the monies it paid out. The ERISA plan would seek to be paid directly, and not as a part of a general settlement to a third-party. This could and would cause significant challenges when settling third-party claims, often causing delay or even potentially undoing settlements when notification of the ERISA plan’s payment was brought to the attention of a carrier after a settlement was reached with a third-party. However, recent judicial determinations have called into question the validity of the direct action rights of the ERISA plan – to a point where it is not likely that a direct action could be maintained by the ERISA plan.

Beginning in late 2013 and continuing into 2014, several Federal Courts were presented with cases in which an ERISA qualified insurer claimed that it was entitled to directly recover monies it paid out on behalf of insureds who were also insured or provided coverage by a second insurer. In each case, the courts found

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1 The case often cited to is Atteberry v. Mem’l Hermann Healthcare Sys., 405 F.3d 344 (5th Cir. 2005), which allowed a plan to assert a claim on behalf of the estate of a deceased plan insured. Even Atteberry may no longer be considered good law. Its holding was implicitly (though not explicitly) rejected by the court in Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Health Special Risk, Inc., No. 3:11-CV-2910-D, 2013 WL 2656159, at *3 (N.D. Tex. 2013) aff’d sub nom. Cent. States, Se. & Sw. Areas Health & Welfare Fund ex rel. Bunte v. Health Special Risk, Inc., 756 F.3d 356 (5th Cir. 2014), where the Fifth Circuit affirmed a case that held that ERISA plans were limited to equitable claims.

2 These cases were: Central States Southeast and Southwest Areas Health and Welfare v. General Life Ins. Inc., 984 F.Supp.2d 246 (S.D. N.Y. 2013); Central States Southeast and Southwest Areas Health and Welfare v. Student Assurance Services, Inc., 56 Employee Ben. Cas. 1897 (D.Minn. 2014); Central States Southeast and Southwest Areas Health and Welfare v. Health Special Risk, Inc., 756 F.3d 356 (5th Cir. 2014); Central States Southeast and Southwest Areas Health and Welfare v. First Agency, Inc.
that the ERISA insurer could not recover monies from the insurers because the ERISA statute does not permit the insurers to sue for damages.

The analysis for each of the cases varied slightly but was essentially that, based upon a 1993 U.S. Supreme Court case, the ERISA enabling statute limited the plans’ right to recovery. The courts found the ERISA statute to be “carefully crafted and detailed enforcement scheme,” that resulted in not only complete preemption of state claims; but also prevented the plans from exercising rights outside of the scope granted by the Congress. The courts then looked to the statutory language: ERISA section 502(a)(3), which authorized an ERISA participant, beneficiary, or fiduciary: “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” 29 U.S.C. § 1132(a)(3)(emphasis added).

Because the plans were limited to seeking equitable relief, the courts found that the plans could not sue for payment or reimbursement of monies from other insurers because the suits or claims would not be claims for equity – they would be claims for recovery of money. Because the ERISA statute only provided equitable relief, the suits were dismissed.

The plans sought to creatively argue that at the very least there should be a “constructive trust” against monies held by third-parties for the plan beneficiaries. In essence, the third-party liability carrier was essentially holding the monies for the ERISA insurer. However, this argument was generally rejected. The reasons provided from the courts have been varied, including that there is no statutory right for a constructive trust or lien: “ERISA-plan provisions do not create constructive trusts and equitable liens by the mere fact of their existence; the liens and trusts are created by the agreement between the parties to deliver assets.” Courts have also found that they cannot impose a constructive trust where there is: (1) no contract between the plan and the recipient; or (2) no identified location of funds – such as account or specified location.

THE TAKEAWAY:

The holdings of the cases appear to severely limit a plan’s options for recovery of medical benefits paid – essentially to suit against its insured once payment is recovered. There is a question, however, as to whether plans could conceivably be able to file suit for the imposition of constructive trusts against monies held by third-parties for the benefit of their plan members. This issue is not as clear cut. This area of law is developing and may be subject to modification, although this would most likely require Congressional changes to the ERISA statutes. As noted by the Second Circuit Court of Appeals: “the Supreme Court has made its reading of section 502(a)(3) clear: “[i]t is ... not our job to find reasons for what Congress has plainly

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4 “[O]ther appropriate equitable relief” had previously been defined to mean only “those categories of relief that were typically available in equity (not suits for money damages).” Great–West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002).

5 It deserves stating that ERISA recovery rights are not the same as Medicare reimbursement, which is governed under 45 USC. § 1395y(b)(2)(B)(ii), and does have the right to recover money when a "conditional payment" has been made.

6 Gerber supra, 771 F.3d at 157.
done.” . . . [W]e are bound to apply the law as interpreted by the Supreme Court, hoping that it (and that Congress) will revisit this tangled web sooner rather than later.”

In the end, the takeaway is that (in most cases) subrogation for ERISA plans may not be a stumbling block to settlement with third-party claimants. At the very least, based upon these recent Federal cases, there is a good faith basis for liability carriers to resolve claims with the third-parties and direct the ERISA plans to look for recovery from their plan members.

Each and every claim, including ERISA subrogation claims, carries with it a unique set of circumstances and issues. For that reason, it is recommended that liability carriers faced with ERISA plan subrogation strongly consider retention of legal counsel for evaluation of the legal effect of both Federal and state statutes upon the claims being asserted therein.

CAVEAT: THE FOREGOING DOES NOT CONSTITUTE LEGAL ADVICE. PLEASE CONSULT AN ATTORNEY FOR INDIVIDUAL ADVICE REGARDING INDIVIDUAL SITUATIONS.

7 Id., 771 F.3d at 159.