

Subrogation and Reimbursement Under Health Plans: Lessons Learned from Case Law

ABA Health Law Section
Employee Benefits & Executive Compensation
Interest Group

June 27, 2007

Eugene M. Holmes, Esquire
McDermott Will & Emery LLP
600 Thirteenth Street, NW
Washington, DC 20005

Subrogation and Reimbursement Under Health Plans: Lessons Learned from Case Law

Background

- ◆ Control costs associated with providing benefits to plan participants
- ◆ Implementing Subrogation or Reimbursement Provisions
- ◆ ERISA Section 502(a)(3) – A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title 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 title or the terms of the plan.

Subrogation and Reimbursement Under Health Plans: Lessons Learned from Case Law

- ◆ Great-West Life & Annuity Insurance Co. v. Knudson (2002)
 - Supreme Court ruled that ERISA Section (a)(3) allows only traditional equitable remedies and that plan reimbursement provisions results in a claim for monetary damages.

Subrogation and Reimbursement Under Health Plans: Lessons Learned from Case Law

- ◆ **Sereboff v. Mid Atlantic Medical Services, Inc. (May 2006)**
 - Supreme Court ruled that a plan could assert and enforce a reimbursement provision under ERISA for proceeds obtained by a participant in connection with a third-party lawsuit for damages related to injuries sustained in an accident
 - Decision based on the fact that the Plan was able to identify a particular fund, distinct from the participant's general assets, against which it could assert an equitable lien.
 - Court rejected the strict tracing principles.

Subrogation and Reimbursement Under Health Plans: Lessons Learned from Case Law

- ◆ Beveridge v. Benefit Recovery, Inc. (July 21, 2006)
- ◆ Popowski v. Parrott (August 24, 2006)
- ◆ Moore v. CapitalCare, Inc. (August 29, 2006)
- ◆ Admin. Comm. Of the Wal-Mart Stores, Inc. v. Shank (August 31, 2006)

Subrogation and Reimbursement Under Health Plans: Lessons Learned from Case Law

Good Language

- ◆ ... in any event, 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.

Subrogation and Reimbursement Under Health Plans: Lessons Learned from Case Law

Bad Language

- ◆ If, however, 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.

Subrogation and Reimbursement Under Health Plans: Lessons Learned from Case Law

Next Steps

- ◆ Review current health plan reimbursement provisions for appropriate language
- ◆ Actively identify and monitor claims involving acts of third parties
- ◆ Review overall strategy with respect to subrogation and reimbursements
 - Subrogation language in summary plan description
 - Make sure that language in SPD aligns with any separate agreements
 - Consider whether to require attorney signature on subrogation agreements
 - Consider whether to include subrogation language which requires participant to sue third-party