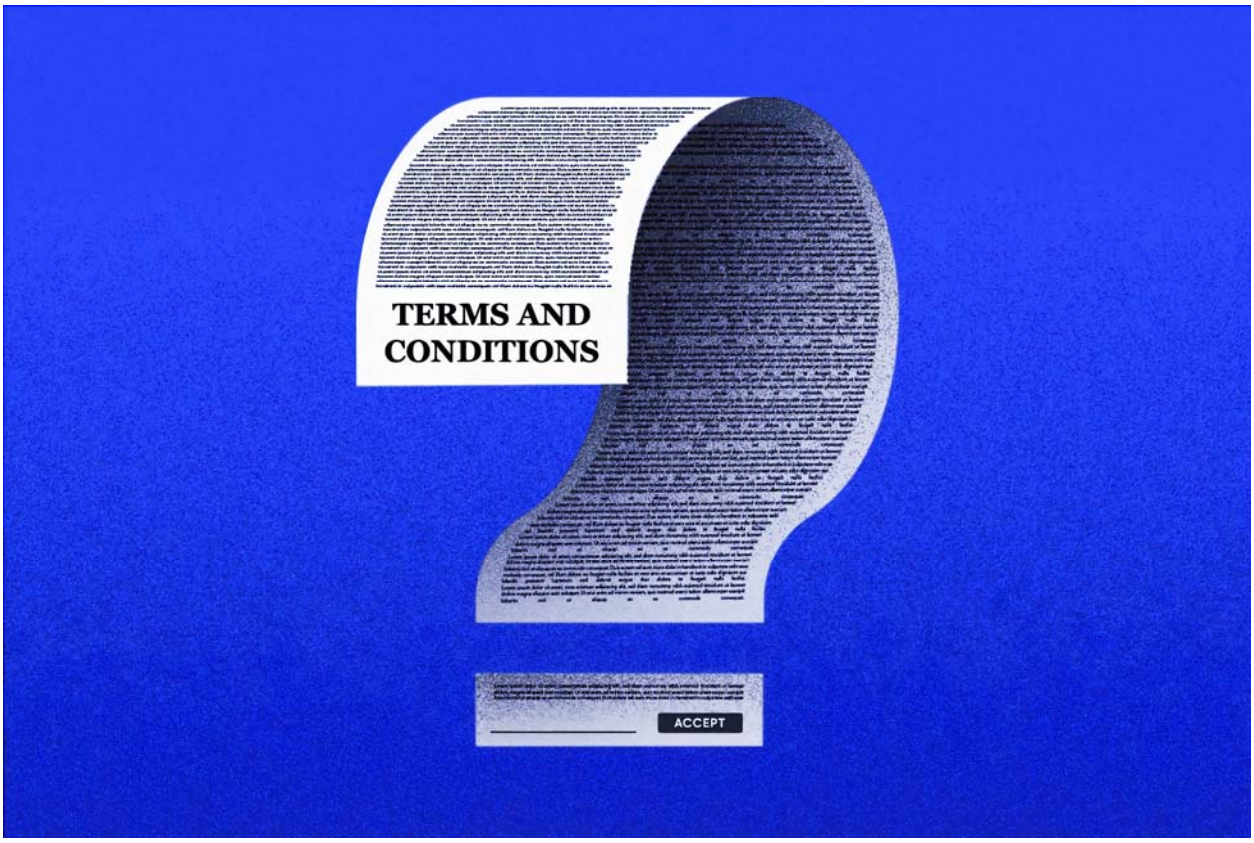
What are Your ERISA Plan's Recovery Rights?



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The following is adapted from The Art of Settlement.

In 1974, President Ford signed the Employee Retirement Income Security Act (ERISA) into law. According to the US Department of Labor, ERISA "protects the interests of employee benefit plan participants and their beneficiaries." ERISA governs nearly all employer health plans. The primary exceptions are government employer plans governed by FEHBA and state government or church plans which are governed by state law.

Most, if not all, ERISA health insurance plans state that injuries caused by a liable third party are not a covered expense and require reimbursement when a plan pays for injury-related medical expenses (often referred to as subrogation clauses). ERISA provides that health plans which qualify under its provisions can bring a civil action under section 502(a)(3) to obtain equitable relief to enforce the terms of the plan. Appropriate equitable relief is really the only enforcement mechanism an ERISA plan can utilize to address its reimbursement rights contained in the plan.

While that all may sound simple, ERISA is a “compressive and reticulated statute” which means that the law on this subject is quite complicated. Thankfully, over the last twenty years,, the Supreme Court has clarified exactly what is appropriate equitable relief under ERISA. Here’s what they’ve concluded.

The *Sereboff* and *McCutchen* Cases

Starting in 2006, the United States Supreme Court began to clarify and articulate just how powerful a “self-funded” ERISA plan’s recovery rights are under federal law. In 2006, the Supreme Court issued its opinion *Sereboff*. In that decision, the Supreme Court found generally that reimbursement provisions asserted by ERISA group medical plans were enforceable under the ERISA statute and qualified as equitable relief under the ERISA provisions.

Prior to *Sereboff*, there was disagreement among federal courts about whether an ERISA plan could even enforce its repayment provisions. Post *Sereboff*, an ERISA qualifying plan’s contractual provisions for repayment can be enforced via equitable principles under section 502(a)(3) by filing an action for an equitable lien or for constructive trust.

In 2013, the *McCutchen* case was decided by the Supreme Court. After the *Sereboff* decision was issued, most lawyers understood that to defeat reimbursement actions under ERISA it depended on the strength of equitable defenses/arguments like “made whole” and “common fund.” *McCutchen* took on the issue of whether those doctrines could prevent an ERISA plan from enforcing its recovery rights.

At the time, there was a split of the federal circuits on the question of whether notions of fairness (equitable defenses) could override an ERISA medical plan’s reimbursement provisions. The *McCutchen* Court reversed the Third Circuit and held that in a section 502(a)(3) action based on an equitable lien by agreement, the ERISA plan’s terms govern. Post *McCutchen*, the lesson to savvy plans is to word your master plan in such a way to prevent any and all equitable defenses by disavowing “made whole” and “common fund.”

Obviously the *McCutchen* decision is important and a tough pill to swallow for the plaintiff who makes a recovery and then must reimburse an ERISA plan. While it is important, there are still many ways to get leverage and reduce ERISA plan liens, but you must know the pressure points to use. You also must realize who you are fighting.

In most instances, it isn’t the plans but instead their recovery vendors like Rawlings, Conduent, Trover, among many others. They are paid based on what they recover so there is plenty of incentive for the industry players to work hard against the plaintiff.

Determine Whether the Plan is Self-Funded

In fighting plans, the first and most important question is whether the plan is self-funded. A self-funded plan is funded by contributions from the employer and employee. If it is self-funded, then ERISA preempts state law and you are left with fighting an uphill battle under *McCutchen*. If it is

fully insured, then the ERISA plan is subject to state law subrogation statutes or general equitable principles under common law. These are plans which are funded by purchased insurance coverage.

How do you determine the funding status? The safest way is by reviewing the Summary Plan Description (SPD) and the Master Plan. How do you get those documents? Simply put, you make a written request to the ERISA plan administrator under 29 U.S.C. §1024(b)(4). Under 1024(b)(4), an ERISA plan administrator must provide, upon request by a participant or beneficiary, a copy of the summary plan description, annual report, "bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." The request must go to the plan itself, not the plan administrator (TPA) or its recovery contractor (i.e., Rawlings, Optum, Conduent, etc.).

If the plan administrator does not comply within thirty days, 29 U.S.C. §1132(c)(1)(b) establishes a $100 per day penalty for failure to comply. Further, 29 U.S.C. §2575.502c-1 allows for this penalty to be increased to $110 per day. There are plenty of cases out there where federal courts have imposed penalties upon a plan administrator for failing to comply.

In order to combat ERISA plan recovery attempts, the information received from the 1024(b)(4) request is critical. You want to evaluate the strength of the plan's claim based on the language in the plan. The 1024(b)(4) request arms you with the proper information to do so. This allows you to make the appropriate arguments for reduction.

What you are looking for is abrogation of "common fund" and "made whole" primarily. If those equitable principles have not been abrogated, there are strong arguments for reduction. In addition, when the plan administrator fails to comply with the request, and they often do, penalties will begin to accrue. Once penalties have accrued, you have more leverage to negotiate with the ERISA recovery contractor for a reduced lien amount.

How to Move Forward

To sum up, when evaluating an ERISA plan's right of recovery, it is important to first determine if it is in fact a plan covered by ERISA and then secondly if it is a self-funded plan. The *McCutchen* decision has given ERISA self-funded plans strong recovery rights under federal law. Since under that decision plan language is vitally important, using a 1024(b)(4) request to get plan documents is an important tool to properly evaluate the strength of a reimbursement claim. In addition, failure to comply with this information request provides for penalties that can be leveraged to get the lien resolved.

For more advice on ERISA liens, you can find The Art of Settlement on Amazon.

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