

ERISA & DISABILITY BENEFITS NEWSLETTER

ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

For more Information about Eric Buchanan & Associates, PLLC, visit our website at www.buchanandisability.com.

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ERISA SUBROGATION BY: JEREMY L. BORDELON

Practicing personal injury law seems to become more and more complicated every year. One complication is that when our client's injuries require treatment, and that treatment is paid for by their health insurance policies, most health insurance companies want that money back when the case is settled or won. These types of claims are often referred to generally as "subrogation" claims. Since the majority of our clients receive their health insurance through work, most of these types of "subrogation" claims fall under the federal Employee Retirement Income Security Act of 1974, or "ERISA."

The common definition of subrogation is when one party "steps into the shoes of another." Black's Law Dictionary defines it specifically as "The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy."

Technically speaking, "subrogation" clauses are only one of three types of clauses insurance companies include in their policies to save money when an insured person is injured by a third party. Subrogation clauses allow the insurance company or ERISA plan to step into the shoes of the injured person. Under those clauses, the insurance company or ERISA plan has no direct claim against its own insured, the injured person, but rather, has the right to sue the person who caused the injuries. In order to recover, the insurance company or ERISA plan must take affirmative action to protect its interests and must proceed against the tortfeasor, and has no greater rights than the injured person does.

Rather than requiring the insurance company or ERISA plan to step into the shoes of the injured person, many

insurance policies and ERISA plans contain "reimbursement clauses." Under these clauses, the insurance company or ERISA plan can ask the injured person to pay the insurance company or plan directly, and allow the insurance company or plan to sue the injured person directly to recover what the injured person collected from the third party that caused the injuries.

Some policies or ERISA plans also contain a provision that they will not pay any health insurance benefits for medical expenses where a third party caused an injury, and should be liable for the medical costs caused by the injury. Under these provisions, the insurance company or ERISA plan can refuse to make any payments if it is determined that the covered person was injured by someone else, or may seek to recover payments made "in error" as contrary to these plan provisions.

Many insurance policies and ERISA plans have been well-drafted by lawyers who specialize in ERISA plan administration, and contain two, or even all three of the types of clauses, so that the insurance company or ERISA plan has more than one way to ensure they can recover or avoid paying medical expenses where a third party caused the injury.

For the most part, the ERISA statute and regulations do not control what provisions may be placed into a plan. The statute does, however, limit the types of actions that may be brought, and the relief that may be had in those actions:

- (a) Persons Empowered to Bring Civil Action.**
 – A civil action may be brought...
 (3) by a ... fiduciary ... to obtain other appropriate equitable relief ... to enforce ... the terms of the plan..."

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ERISA § 502(a); 29 U.S.C. § 1132(a). This is the only portion of the statute that would apply to an insurer seeking subrogation. The rest of the civil actions authorized under the statute are reserved to plan participants or the Secretary of Labor, or are related to other causes of action not applicable to subrogation claims.

ERISA § 502(a)(3) has several limits. First, it only allows a fiduciary to enjoin practices that violate the terms of ERISA or of a plan, or to enforce the provisions of ERISA or the plan. Because ERISA contains no general right of subrogation or similar right of recovery by an ERISA fiduciary, then the language of the statute only allows an ERISA fiduciary to seek an order enjoining a practice which violates the terms of the plan, or to seek to enforce the specific terms of a plan. Because state law claims are preempted, and ERISA only provides those causes of action set forth in the statute, the result is that an ERISA fiduciary plan can *only* seek to enforce the terms of the plan.

One traditional partial defense to subrogation claims is the "made whole" doctrine, but recent decisions have stated that this defense may not be available if the Plan language explicitly gives the Plan a right of first recovery, regardless of whether the participant is made whole. *See Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. Nov. 16, 2009). Attorneys in particular should take note of *Longaberger*, because the attorney in that case was also sued by the Plan fiduciary, and was required to return the fee he earned in the underlying tort case. *See also*

Greenwood Mills, Inc. v. Burris, 130 F.Supp.2d 949 (M.D. Tenn. 2001) (holding that a lawyer who is aware of his client's obligation under an ERISA plan to honor the plan's subrogation interest may be held liable under ERISA § 502(a)(3)).

If the terms of an ERISA plan allow a recovery from a beneficiary, the likely outcome in most cases will be that the recovery will be allowed, so long as the plan seeks some kind of equitable remedy, and does not simply seek to recover from the general assets of the beneficiary. *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). However, ERISA does not provide for general equitable relief to enforce a subrogation claim as a general rule. ERISA's limited remedies only allow a Plan to recover under the terms of ERISA or the terms of a plan. ERISA § 502(a)(3). Therefore, attorneys should carefully review the terms of the relevant ERISA plan documents to ensure that the plan actually allows the recovery sought by the insurance company or ERISA administrator.

ERISA subrogation is the one area in this field that can most affect clients and attorneys who do not even realize an ERISA claim is involved. At worst, attorneys need to be aware of the plan's potential subrogation rights. At best, you may find that the plan fiduciary is reaching beyond the terms of the plan, and that its recovery can be limited. Careful attention to this developing field, and consultation with attorneys experienced in it, is the best way to stay forewarned, and forearmed.

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the Spinal Cord Injury Support Group Meeting on filing for disability benefits at Stallworth Rehab in Nashville, TN on January 20, 2010 at 6:00 pm.

Eric Buchanan will be speaking at the Chronic Pain & Depression Support Group Meeting on filing for disability benefits at the Faith Promise Church in Knoxville, TN on January 21, 2010 at 12:00 pm.

Eric Buchanan will be speaking at the Trigeminal Neuralgia Support Group Meeting on filing for disability benefits at the 2nd Presbyterian Church in Knoxville, TN on January 26, 2010 at 6:30 pm.

Eric Buchanan will be speaking at the NOSSCR Social Security Disability Spring Conference on ERISA LTD claims in New Orleans, LA on May 12-15, 2010.

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates are available to speak to your organization regarding Social Security Disability, ERISA Long-term Disability, Group Long-term Disability, Private Disability Insurance, ERISA Benefits, Denied Health Insurance Claims and Life Insurance Claims. Contact Molina Haynes, Office Manager at (423) 634-2506 or via email at mhaynes@buchanandisability.com

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