ERIC BUCHANAN AND ASSOCIATES

Eric Buchanan & Associates, PLLC
Attorneys at Law

ERISA & DISABILITY BENEFITS NEWSLETTER

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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.



Eric L. Buchanan, R. Scott Wilson, and D. Seth Holliday are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization.

SUBROGATION UPDATE BY: ERIC BUCHANAN

One of the most frustrating and scary moments for personal injury trial lawyers can be when your client's health insurance company claims a huge part of the recovery in a personal injury case, including your attorney's fees. This problem comes up over and over. To make matters worse, the fight over these claims usually falls under The Employee Retirement Income Security Act of 1974 ("ERISA"), which is a complex area of law with few simple answers.

We regularly help disabled people recover long-term disability insurance benefits, and many of the claims we help people with are subject to ERISA, so we have been forced to learn the ERISA rules in excruciating detail. Because we handle so many ERISA benefits claims, we regularly get questions from other attorneys about ERISA claims by health insurance companies who want to take money from an injured client.

Covering all of the law of ERISA subrogation and reimbursement is the subject of books and multi-day seminars; however, this newsletter article will provide you with an outline that you can use as a checklist, or road-map, to help analyze ERISA subrogation and reimbursement claims, so that you can have some simple answers to help you through the ERISA maze.

I. Is it an ERISA claim?

The first step is to determine if ERISA applies to the claim. A large portion of clients receive their health insurance coverage through a policy they obtained at work. Most of those policies, and the claims under those policies, will fall under ERISA.

ERISA does not apply if the client bought the policy directly from an insurance company, with no employer involvement. ERISA also does not apply if the client works for a government entity and receives the coverage from his employer. Also, church plans do not fall under ERISA unless the church has chosen to opt in to ERISA. However, ERISA does apply to government employees and church employees if the employee receives his coverage through a union or similar "employee organization."

Common questions I hear are: "If my client pays the premiums at work, is it still ERISA?" and "If my client's health insurance is self-funded is it still ERISA?" The answer to both of these questions is almost always, "Yes, it is still ERISA if an employer or employee organization provides the coverage, even if the employee pays for it or it is self-funded."

To learn more about how to tell if ERISA applies, look at the ERISA statute itself, beginning at ERISA § 4, 29 U.S.C. § 1003, and see our article, "How to Tell if an Insurance Claim is Preempted by ERISA," found on our website at http://www.buchanandisability.com/helpful-resourcesandarticles/.

II. If ERISA applies, what does the plan say?

If ERISA applies, it really, really matters what the plan says. There is no common law right of subrogation or reimbursement under ERISA. State law claims for subrogation or reimbursement are preempted by ERISA. The ERISA statute itself also does not provide a cause of action for reimbursement or subrogation.

Instead, the only right an insurance company or ERISA Plan has is to enforce the terms of the plan. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) sets out the causes of action an ERISA fiduciary has, and those are limited "(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."

II.A. Get a copy of the plan.

We strongly suggest that anytime you take on a personal injury case where your client received health insurance benefits that paid for treatment for injuries related to the case, you order a copy of the health insurance plan as part of your initial development of the case. Make it part of your checklist to order the policy or plan from the Plan Administrator. Also, remember, that under ERISA, if your client asks in writing for a copy of an ERISA Plan from the Plan Administrator, usually the employer, and those documents are not provided within 30 days, your client has a cause of action to sue for up to $110 per day for the failure to provide plan documents. To find out more on how to obtain ERISA Plan documents and to seek penalties if they are not provided, see our article, "ERISA 502(c) Actions: Penalties for the Failure to Provide Plan Documents," found on our website at http://www.buchanandisability.com/helpful-resourcesandarticles/.

II.B. Once you get a copy of the plan, read it.

ERISA health insurance plans have three different types of provisions that might apply when their insured, your client, recovers from a third party: 1) true subrogation clauses; 2) exclusionary clauses; and 3) recovery or reimbursement clauses.

True subrogation clauses do not allow the ERISA Plan or health insurance company to sue your client, but, instead, allow the plan or insurer to step into the shoes of your client and sue the tortfeasor directly.

Exclusionary clauses also do not allow the ERISA Plan to sue your client, but instead allow the plan to refuse to pay for health services for injuries that were caused by a third person.

Recovery and reimbursement clauses are the scary clauses; they allow the insurance company to sue your client (and sometimes you, as the attorney) directly to recover money your client (and you) recovered from the third-party tortfeasor. *See, e.g. Longaberger Co. v. Kolt*, 586 F.3d 459, (6th Cir. 2009) (Allowing an ERISA Plan to recover $37,889.44 from the personal injury attorney in addition to $75,889.87 recovered from his client).

If ERISA applies, and if the ERISA Plan does not have a recovery or reimbursement provision, there is no other mechanism for an ERISA Plan to recover, and your client cannot be sued to recover; however, most plans now contain recovery and reimbursement language. If there is such language, the plan may recover, but it may not, depending on the language and the facts of the case.

III. Read the reimbursement or recovery clause in the ERISA Plan carefully.

In a pair of cases, the Supreme Court conducted a deep analysis of the rights of ERISA Plans to recover under ERISA § 502(a)(3). *See, Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L Ed 2d 635 (2002) *Sereboff v. Mid Atlantic Medical Services, Inc.*, __ U.S. __, 126 S.Ct. 1869, 37 Employee Benefits Cas. 1929 (May 15, 2006).

A thorough analysis of these cases is beyond the scope of a newsletter, but the important thing to take from those cases is that ERISA plans can often recover from your clients if your client recovers from a third party, but under some plans' language and some facts, the ERISA Plan cannot recover, because the remedies under ERISA § 502(a)(3) are limited to "appropriate equitable remedies," which is less than all remedies.

IV. What are some of the circumstances where a plan cannot recover?

IV. A. ERISA Plans and ERISA fiduciaries must seek to recover only identifiable funds. Under the *Knudson* and *Sereboff* cases, *supra*, a significant part of the Supreme Court's reasoning is that ERISA fiduciaries may only obtain "equitable" remedies, which the Court explained were those remedies available to equity courts in the days of the divided bench. One such limit on "equitable" remedies, according to the Court, is that claims for a financial recovery out of the general assets of a defendant was not a remedy available in equity, but, rather, a party seeking to recover should be able to recover only where there are specifically identifiable funds over which a lien or constructive trust can be created.

Courts have read this requirement liberally, but it is still an important part of the analysis. Basically, if an ERISA Plan has language that would allow a recovery out of general assets, or a plan seeks such a general recovery in court, such a remedy may not be allowed. The lead case on this issue, *Popowski v. Parrott,* 461 F.3d 1367, 1369 (11th Cir.2006), compares the language of two plans, and find one allows for recovery because it seeks specifically identifiable funds, while the language from a second plan did not allow a recovery under ERISA because it would seek a general recovery.

IV.B. If the injured person is not made whole, can that bar recovery?

The general rule for ERISA preemption is that it preempts all state laws, including state laws that require that a Plaintiff be made whole before an insurance company can recover. However, ERISA has a "savings clause," ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), which provides that state laws regulating insurance are not preempted by ERISA. Thus, if the applicable state law requiring an injured person to be made whole is found to be only applicable to regulating insurance, it is saved from ERISA, and the person must be made whole if it is an insurance company seeking to recover.

Additionally, some circuits have found that the "made whole" rule is the default rule applicable to ERISA cases, so that a person must be made whole before an ERISA Plan can recover; however, if the ERISA Plan specifically disavows the

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"made whole" rule, it can still recover. *See, e.g. Copeland Oaks v. Haupt,* 209 F.3d 811 (6th Cir. 2000) (Holding that the "made whole" doctrine is the default rule in ERISA cases, and that for the plan language to "conclusively disavow the default rule" of the made whole doctrine, "it must be specific and clear in establishing *both* a priority to the funds recovered *and* a right to any full or partial recovery.")

V. Conclusion

ERISA subrogation and recovery can be a very complicated area of the law, and the law in this area is continually evolving. However, if you are a personal injury lawyer, and are facing a claim from an insurance company, you can use this outline to begin to gather the information you need in order to address this problem and begin to fill your toolbox with the tools you need to analyze these claims.

INTRODUCING OUR NEW ASSOCIATE ATTORNEY

Sam Robinson III focuses his practice in the areas of individual and group insurance litigation, including cases involving disability, health, and life insurance benefits. In 2001, Sam was awarded his *Juris Doctor* with concentrations in both litigation and corporate law from Valparaiso University School of Law. After graduation, Sam joined his father, Sam Robinson Jr., at the Robinson Law Firm in Chattanooga, which focused in the area of personal injury.

After working for his father's firm for a year, Sam branched into the area of criminal defense litigation. For the next 8 years, Sam ran a very active criminal defense practice, representing people charged with crimes ranging from first degree murder all the way to minor traffic violations. From 2004 – 2011, Sam served as a member of the CJA panel in the United States District Court for the Eastern District of Tennessee. In this capacity, Sam became active in litigation for people charged with federal crimes. In 2008, Sam moved back into personal injury when he took over his father's accident and injury practice. This prior exposure litigating cases to jury verdict and general representation of injured people gave Sam a solid foundation for his move into disability litigation at Eric Buchanan & Associates in 2011.

Sam is licensed to practice in the state courts of Tennessee and Georgia, as well as the federal courts in Tennessee.

UPCOMING SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the Tennessee Bar Association Disability Forum on May 5, 2011 in Nashville. He will speaking on Attorney's Fees in Social Security Cases.

Jeremy Bordelon will be speaking at the Tennessee Bar Association Disability Forum on May 5, 2011 in Nashville. He will speaking on the Interplay of Social Security Disability, WC, Medicare, COBRA & Long Term Disability.

R. Scott Wilson will be speaking at the Tennessee Bar Association Disability Forum on May 5, 2011 in Nashville. He will speaking on Prima Facie Proof of Disability in Social Security cases.

Eric Buchanan will be speaking at the Spring NOSSCR Social Security Disability Law Conference on May 13, 2011 in Baltimore, MD. He will speaking on ERISA LTD Claims for Beginners Part I and ERISA Part II.

Eric Buchanan will be speaking at the Association for Justice Conference on July 10, 2011 in New York, NY. He will speaking on Is your Client's Insurance Claim Preempted by ERISA.

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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