



## FIGHTING BACK AGAINST ERISA LIENS

Lawyers can keep bill collectors' hands off many settlements

By JOEL T. FAXON

When a case is about to settle, my client's first question is always: what am I going to net after fees, costs, and liens? And it would seem that a good lawyer could at the very least give the client a straight answer to that question.

In fact, it was not so long ago when we could answer that question definitively because there was a clear distinction between those liens that had to be paid back and those that did not. Some government liens were statutorily required to be paid back, while all other private liens were prohibited by our state anti-subrogation law. Now the line is blurred.

Today, the Employee Retirement Income Security Act (ERISA) and the cases interpreting it bring arcane legal doctrine and ambiguity to the question of what liens must be paid back.

Now we must decipher: 1) which health and disability plans are promulgated pursuant to ERISA; 2) which of those ERISA plans are self-funded and thus entitled to federal preemption of the state anti-subrogation law; 3) whether the request for reimbursement meets the requirements of equitable restitution, or whether it is merely a claim at law for money damages; and, 4) what the lawyer's obligation is under the ethical rules.

Fear is a powerful motivator, and ERISA plans—or usually their collection agents—use this tool to claim an entitlement to our client's money. The plans and their collection agents scream, "Look at the plan language! Look at the law! Look at the reimbursement agreement your client signed! You must pay us back or . . . We will sue you! We will sue your client! We will grieve you!"

### Type Of Plan

It, by and large, is a sham. Here are the facts: The universe of liens that preempt the state anti-subrogation law is very small.

First, the plan must be promulgated under ERISA, and second, the plan must fully self-fund all medical expenses incurred by its plan participants. If the plan is operated by a commercial insurer some portions of state law are still applicable—thus anti-subrogation statutes can apply even if self-funded. Some plans are a hybrid and have stop-loss coverage. Many plans have self-funded portions that are very small and may apply in the aggregate to the entire company. They pay participant expenses up to a certain level, and then pay premiums to an insurer for medical expenses over that amount.

Only the expenses actually paid by the plan compel preemption of the anti-subrogation law according to Judge Alfred Covello's decision in *Connecticut Steel Co. v. Cordova*. Therefore it is incumbent on the lawyer to force the plan to trace the payment from the general assets of the company or from the excess coverage. The burden will be on the plan to establish its right to reimbursement.

Having narrowed the universe of possibly recoverable liens down to those plan participant medical expenses actually paid by an ERISA plan, the next question is what is the plan language regarding reimburse-

ment? The anti-subrogation law is only preempted to the extent of the plan language. Many plans require payback of 100 percent of the expenses paid by the plan from any settlement or award. But there are also many plans that require only limited reimbursement. The case-law on this point requires a proper identification of the fund from which the reimbursement monies are obtained. Thus, it is important to determine whether the language states that payments must be made out of an identifiable fund or from the beneficiary's general assets.

Obtaining all the plan documents beyond the summary plan description is also crucial. Most plans have three parties that participate in the ERISA subrogation decision: 1) the bill collector; 2) the plan itself; and 3)

the administrative services entity. Critical documents to obtain are the contracts between and among these entities because the issues of reimbursement and subrogation are controlled by the language.

### Answering The Letter

When a lien letter comes in, respond with a letter demanding the information noted above. This helps answer the questions: Is the plan really ERISA? Is it self-funded? How much is self-funded? Is the government paying? What do the agreement and the contracts say about third-party recoveries? It also makes the plan scurry to send the required documents and if they fail to



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do so, there are monetary fines that can add up. It also puts the plaintiff in a stronger settlement position.

After obtaining the documents, the lawyer should be able to determine the proper course of action. The critical issue in lien litigation is whether a lawyer has an obligation to hold the funds under Rule 1.15(e) and (f) because, if not, the alleged lienor will be without recourse if the monies are dissipated. Under Rule 1.15(e), the lawyer is obliged to pay the third person with an “interest” monies or property the “third person is entitled to receive.” Under sub-

section (f), the lawyer is required to keep “separate” monies where two or more persons claim an “interest.”

The commentary to subsection (f) indicates that the term “interest” includes “a valid statutory or judgment lien, or other lien recognized by law.” This provision is what gives the bill collectors their major right to a recovery. If, through your efforts you can reasonably establish that the purported lien is illegitimate or not an “interest” then there is no compulsion to hold the monies under Rule 1.15. If you release the monies, the bill collector’s pot of gold is

lost and the funds can be used immediately for the benefit of an injured client. Therefore, it is critical to thoroughly examine the basis—usually baseless—that the bill collector asserts for a share of the proceeds from your client’s case.

We can do better for our clients. In most cases, with client understanding and consent, we can totally avoid the alleged ERISA “lien.” In others, we should be able to negotiate from a position of strength vis-à-vis the plan, and significantly reduce the claimed lien. ■