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Supreme Court Breathes New Life Into the Ability of Benefits Plans to Sue Under ERISA to Seek Recoupment

By Daniel W. Srsic and Steven J. Friedman

By the time a covered person recovers a judgment or settlement from a third party or insurance company for injuries sustained in an auto accident, chances are good that the reimbursable portion of medical bills have been paid for by an employer sponsored group health plan. Since 2002, group health plans have been limited in their ability to seek reimbursement from the judgment proceeds because of a United States Supreme Court ruling narrowly construing the remedies available under the Employee Retirement Income Security Act (ERISA).

On May 15, 2006, however, the Supreme Court opened the door to more effective recovery actions by group health plans. In *Sereboff v. Mid Atlantic Medical Services, Inc.*, No. 05-260 (May 15, 2006) a self-insured group health plan paid approximately $75,000 in medical bills on behalf of Joel and Marlene Sereboff who were injured in an auto accident. The Sereboff's lawsuit filed in connection with the accident was eventually settled for $750,000.00. The question was whether the enforcement provisions found in the ERISA statute would permit the benefit plan to recover what it had paid.

Background

As the *Sereboff* case proceeded through the trial court and the courts of appeals, it was governed by the Supreme Court's 2002 decision in *Great-West Life & Annuity Insurance Company v. Knudson*. In that case, the Court held that a group health plan could not, under ERISA, enforce such a subrogation provision.[1] The Court held that because a claim for reimbursement was a claim for money damages, no lawsuit could be brought under section 502(a)(3) of ERISA, which authorizes parties to enjoin violations of plan terms and to "obtain other appropriate equitable relief." The decision left unanswered whether the plan could ever assert a claim for repayment that would qualify as the type of "equitable relief" available under ERISA.

Other courts have struggled in recent years with various forms of lawsuits that were designed to obtain the type of reimbursements that were at issue in the *Knudson* case. The Fourth, Fifth, Seventh, and Tenth Circuit Courts of Appeals all recognized limited types of equitable claims that could be used to force repayment under ERISA.[2] Meanwhile, the Sixth and the Ninth Circuit Courts of Appeals maintained that any such recovery could not be achieved under ERISA.[3]

In *Sereboff*, the Supreme Court did not overrule *Knudson* but rather found that

1 534 U.S. 204 (2002).
2 *See Mid Atlantic Medical Services, LLC v. Sereboff*, 407 F.3d 212 (4th Cir. 2005); *Bombardier Aerospace Employee WelfareBenefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348 (5th Cir. 2003); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003); *Administrative Committee of the Wal-Mart Asssociates Health & Welfare Plan v. Willard*, 393 F.3d 1119, 1122 (10th Cir. 2004).
3 *See Qualchoice, Inc. v.Rowland*, 367 F.3d 638 (6th Cir. 2004); *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002).

the money damages sought by the plaintiffs actually constituted equitable relief. As it did in the *Knudson* decision, the Supreme Court looked deep into legal history to define what theories of recovery might allow the recovery of a money judgment as a form of "equitable relief." The 1914 Supreme Court decision in *Barnes v. Alexander* provided just what was needed to make reimbursement of benefit payments equitable relief in most cases.

In *Barnes*, Supreme Court Justice Holmes stated, "the familiar rule of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets the title to the thing." Needless to say, if this rule was still "familiar," the Supreme Court would not have needed to address the types of equitable relief available under ERISA for the second time in two years.

In the context of modern ERISA reimbursement disputes, the Supreme Court provided what appears to be a generous description of what is needed to establish an equitable claim. It held that the "Acts of Third Parties" provision in a Plan (requiring a plan participant to reimburse the plan administrator for benefits which are received if there has been a recovery from a third party as a result of an "act or omission" of the third party) was sufficient to create a "fund." This "fund" could be viewed as a source of money separate from the Sereboff's general assets, giving rise to an equitable claim for recovery.

Action Steps for Employers

Once the plan language identifies recoveries from a third party as a source of repayment, it must lay claim to a portion of that total recovery to establish its claim. The constructive trust or equitable lien will then follow the appropriate portion of the recovery into the hands of the individual.

The Supreme Court explained that this process will eliminate the "strict tracing rules" that have been a component of the equitable restitution theories that have been approved by some of the Circuit Courts of Appeals. Thus, not only did the Supreme Court provide an avenue for group health plans to pursue recovery, but it has given its approval to a simplified approach that will discourage wasteful litigation with complicated technical procedures required by the centuries old laws of equity.

Employers with self-funded health benefit plans should take steps to ensure that they are in a position to take advantage of the cost containment opportunity offered by the Supreme Court decision:

- As a first step, benefit plan documents must be examined to ensure that appropriate provisions regarding reimbursement of benefit payments are in place. The Court specifically looked to the "Acts of Third Parties" provisions in the plan. Without the precise language set forth in the plan, the holding may have been different.

- Employers should comprehensively review their strategies with respect to subrogation or recoupment. Once collections and litigation strategies have been adopted, education of participants and beneficiaries will become a primary concern.

Prior to 2002, it was not uncommon for plaintiff's lawyers to enter into a stipulation to repay health plan benefits without requiring the plans to incur significant litigation expenses. It is too early to tell whether the *Sereboff* decision will result in a return of similar conditions. But, there can be no doubt that the decision was in step with one of ERISA's primary purposes - to provide a method to resolve disputes over benefits inexpensively and expeditiously.

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