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JANUARY, 2003 ERISA CASE LAW UPDATE

Happy New Year! Subrogation and preemption issues highlight the current cases, while QDRO and COBRA questions continue to surface.

Reimbursement/subrogation cases. Great-West Life & Annuity Ins. Co. v. Knudson, 122 S. Ct. 708 (2002) (holding that ERISA provided no remedy for the health plan) began 2002. Since then no claims have survived appellate review. Where an ERISA plan insurer attempted to assert a superior lien right to $100,000 in settlement funds intended to reimburse an automobile insurer which had advanced them to the insured, the Sixth Circuit held that ERISA preempted that state law claim. Community Ins. Co. v. Morgan, 2002 WL 31870325 (6th Cir. Dec. 20, 2002).

In the district courts mixed results continue. Where an ERISA plan expressly excluded coverage for charges for treatment to injuries for which a third party might be responsible but the plan allegedly mistakenly paid $50,000, unaware that the plan participant had already recovered $100,000 from the tortfeasor's insurer, the court held that the ERISA plan could seek restitution of the amounts it had allegedly paid by mistake. The court also permitted the plan to pursue a state law claim for fraud. Iron Workers Tri-State Welfare Plan v. Jaraczewski, 2002 WL 31854972 (N.D. Ill. Dec. 19, 2002). On the other hand, where a plan which had paid almost $500,000 in benefits sought to have a constructive trust imposed *before* the plan beneficiary received settlement proceeds from the tortfeasor, the court held that the plan failed to state a claim for equitable relief under ERISA. Primax Recoveries, Inc. v. Goss , 2002 WL 31833757 (N.D. Ill. Dec. 13, 2002).

Preemption. Where an HMO allegedly caused delay in the hospitalization of a diabetic with an infected foot and resulted in the subsequent amputation of his leg, the HMO decision that a treating physician was not a primary care physician under the plan was not a medical treatment decision but rather an administrative decision. Therefore, ERISA preempted the amputee's state law negligence action against the HMO. Haynes v. Prudential Health Care, 313 F.3d 330(5th Cir. 2002). ERISA, however, did not preempt a state law fraud claim against an employee who kept his divorced spouse enrolled in a health plan five years after the divorce. Trustees of AFTRA Health Fund v. Biondi, 303 F.3d 765 (7th Cir. 2002). A hospital's state law misrepresentation claim against an ERISA plan was likewise not preempted. Transitional Hospitals Corp. v. Advantage Health Plan, Inc., 2002 WL 31365790 (E. D. La. 2002).

"Saving" state laws regulating insurance from preemption. Maryland's external review law was saved from preemption. Conn. Gen. Life Ins. Co. v. Ins. Comm'r., 810 A. 2d 425 (Md. 2002), following Rush Prudential HMO v. Moran, 122 S. Ct. 2151 (2002).

Life insurance/QDRO cases. Where the plan administrator acknowledged receipt of a divorce decree awarding the former spouse (of 30 years) half of the participant's "present retirement funds" to be set forth in a separate qualified domestic relations order, the participant died nine months after the divorce decree and the family court entered a QDRO two days later treating the former spouse as the participant's surviving spouse, the 8th Circuit approved a QDRO. The plan administrator had notice of the order before

the participant died, and the QDRO was filed with the administrator within the 18-month period permitted to secure a QDRO. Hogan v. Raytheon Co., 303 F. 3d 854 (8th Cir. 2002).

Where the participant's third wife and the children of the participant's first marriage claimed the participant's life insurance proceeds under the participant's will, but the second wife claimed the life insurance proceeds under the beneficiary designation form, which named her the sole beneficiary, the district court found that under the life insurance policy *the will* could validly change the beneficiary. Under the policy the beneficiary could be changed "on forms approved by the Policyholder" and could be submitted after the participant's death. The will was not preempted by ERISA. Liberty Life Assur. Co. of Boston v. Kennedy, 228 F. Supp. 2d 1367 (N.D. Ga. 2002).

Exhaustion of administrative remedies excused. In a notable break with its tradition of broad application of the exhaustion of administrative remedies the 11th Circuit began 2003 by holding that, if a claimant reasonably interprets the summary plan description as permitting her to file a lawsuit without exhausting her administrative remedies and she consequently fails to exhaust them, the claimant is not barred from pursuing her claim in court. Watts v. BellSouth Telecommunications, Inc., 2003 WL 23394 (11th Cir. Jan. 3, 2003). Likewise, where a plan administrator in fact conducted a full and complete review of the claim, the plan had not been prejudiced by the claimant's failure to exhaust administrative remedies. Suit was filed a year after the written denial by way of an explanation-of-benefit form. The plan administrator provided an explanation only weeks before suit was filed and a formal denial letter only after suit was filed. Combe v. La Madeleine, Inc., 2002 WL 31496373 (E.D. La. Nov. 6, 2002).

Penalty for failure to furnish plan document. Where the employer failed to provide a summary plan description upon written request by the claimant's attorney (and refused even to admit it was the plan sponsor and insisted that the insurance policy was a booklet), the district court held that, where the SPD *should exist*, the plan administrator *must create it* or face penalties. The court awarded $17,475 in penalties. Sunderlin v. First Reliance Standard Life Ins. Co., 2002 WL 31662609 (W. D. N.Y. Nov.4, 2002).

COBRA penalties assessed. Failure to provide the COBRA election notice can produce a penalty. Courts continue to award such penalties. O'Shea v. Childtime Childcare, Inc., 2002 WL 31738936(N.D. N.Y. Dec. 2, 2002), where the court awarded the penalty at the rate of $50 a day based on prejudice to the employee and deterring other employers from failing to provide notice.
A court awarded statutory penalties and attorney's fees of over $50,000 for failure to provide a terminated employee COBRA notice. The court applied the rate of $55 a day. The total penalty awarded was $27,610. Holford v. Exhibit Design Consultants, 218 F. Supp. 2d 901(W.D. Mich. 2002).