

ERISA Lien Resolution

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Introduction to ERISA

Although a deep dive into ERISA law and liens is beyond the scope of this white paper, it will give you an overview and a starting point. The Employee Retirement Income Security Act (ERISA) was passed by Congress and signed into law by President Ford in 1974.¹ According to the U.S. Department of Labor, ERISA “protects the interests of employee benefit plan participants and their beneficiaries. It requires plan sponsors to provide plan information to participants. It establishes standards of conduct for plan managers and other fiduciaries. It establishes enforcement provisions to ensure that plan funds are protected and that qualifying participants receive their benefits, even if a company goes bankrupt.” Many would not agree with that statement when it comes to actually protecting plan participants as it relates to resolution of ERISA liens, but that is the stated purpose.

ERISA governs nearly all employer health plans. The primary exceptions are government employer plans governed by the Federal Employees Health Benefits Act (FEHBA) and state government or church plans which are governed by state law. Most, if not all, ERISA health insurance plans state that injuries caused by a liable third party are not a covered expense and require reimbursement when a plan pays for injury-related medical expenses (often referred to as subrogation clauses). ERISA provides that health plans which qualify under its provisions can bring a civil action under section 502(a)(3) to obtain equitable relief to enforce the terms of

¹ 29 U.S.C. 1001, et seq.
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the plan. Appropriate equitable relief is really the only enforcement mechanism an ERISA plan can utilize to address its reimbursement rights contained in the plan. While that all may sound simple, ERISA is a “compressive and reticulated statute” which means that the law on this subject is quite complicated.² The Supreme Court has clarified exactly what is appropriate equitable relief under ERISA over the last twenty years.

ERISA Law per SCOTUS

Starting in 2006, the United States Supreme Court began to clarify and articulate just how powerful a “self-funded” ERISA plan’s recovery rights are under federal law. In 2006, the Supreme Court issued its opinion *Sereboff*.³ In that decision, the Supreme Court found generally that reimbursement provisions asserted by ERISA group medical plans were enforceable under the ERISA statute and qualified as equitable relief under the ERISA provisions.⁴ Prior to *Sereboff*, there was disagreement amongst federal courts about whether an ERISA plan could even enforce its repayment provisions. Post *Sereboff*, an ERISA qualifying plan’s contractual provisions for repayment can be enforced via equitable principles under section 502(a)(3) by filing an action for an equitable lien or for constructive trust.⁵

In 2013, the *McCutchen* case was decided by the Supreme Court.⁶ After the *Sereboff* decision was issued, most lawyers understood that defeating reimbursement actions under ERISA depended on the strength of equitable defenses/arguments like “made whole” and “common fund.” *McCutchen* took on the issue of whether those doctrines could prevent an ERISA plan from enforcing its recovery rights. The exact question as framed by the Supreme

² *Great-West v. Knudson*, 534 U.S. 204, 209 (2002)

³ *Sereboff v. Mid Atlantic Medical Servs., Inc.* 547 U.S. 356 (2006).

⁴ *Id.*

⁵ *Id.*

⁶ *U.S. Airways, Inc. v. McCutchen*, 133 S.Ct. 1537 (2013).

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Court was "[w]hether the Third Circuit correctly held--in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits--that ERISA Section 502(a)(3) authorizes courts to use equitable principles to rewrite contractual language and refuse to order participants to reimburse their plan for benefits paid, even where the plan's terms give it an absolute right to full reimbursement." At the time, there was a split of the federal circuits on the question of whether notions of fairness (equitable defenses) could override an ERISA medical plan's reimbursement provisions. The *McCutchen* Court reversed the Third Circuit and held that in a section 502(a)(3) action based on an equitable lien by agreement, the ERISA plan's terms govern. "Neither general unjust enrichment principles nor specific doctrines reflecting those principles--such as the double-recovery or common-fund rules invoked by *McCutchen*--can override the applicable contract."

Post-McCutchen Strategies for ERISA Lien Resolution

Post *McCutchen*, the lesson to savvy plans is to word your master plan in such a way as to prevent any and all equitable defenses by disavowing "made whole" and "common fund". This is so since the root of the holding in *McCutchen* was that the written terms of the ERISA plan win the day over any possible equitable defenses. In its now infamous "McCutchen memo," Rawlings stated that "it is now undisputed throughout the entire nation that general principles of unjust enrichment and equitable doctrines 'reflecting those principles' cannot override an applicable ERISA plan contract." Obviously the *McCutchen* decision is important and a tough pill to swallow for the plaintiff who makes a recovery and then must reimburse an ERISA plan. While it is important, there are still many ways to get leverage and reduce ERISA plan liens, but you must know the pressure points to use. You also must realize who you are fighting. In most instances, it isn't the plans but instead their recovery vendors like Rawlings, Conduent, and Trover, among many others. These are big powerful companies who employ

thousands in large, beautiful office buildings with the single goal of riding the coat tails of the trial lawyer's hard work to get reimbursement for the plan. They are paid based on what they recover so there is plenty of incentive for the industry players to work hard against the plaintiff.

In fighting plans, the first and most important question is whether the plan is self-funded or not. A self-funded plan is funded by contributions from the employer and employee. If it is self-funded, then ERISA preempts state law and you are left with fighting an uphill battle under *McCutchen*. If it is fully insured, then the ERISA plan is subject to state law subrogation statutes or general equitable principles under common law. These are plans which are funded by purchased insurance coverage. How do you determine the funding status? The safest way is by reviewing the Summary Plan Description (SPD) and the Master Plan. How do you get those documents? Simply put, you make a written request to the ERISA plan administrator under 29 U.S.C. §1024(b)(4). Under 1024(b)(4), an ERISA plan administrator must provide, upon request by a participant or beneficiary, a copy of the summary plan description, annual report, “bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.” The request must go to the plan itself, not the plan administrator (TPA) or its recovery contractor (i.e., Rawlings, Optum, Conduent, etc.). If the plan administrator does not comply within thirty days, 29 U.S.C. §1132(c)(1)(b) establishes a \$100.00 per day penalty for failure to comply. Further, 29 U.S.C. §2575.502c-1 allows for this penalty to be increased to \$110.00 per day. There are plenty of cases out there where federal courts have imposed penalties upon a plan administrator for failing to comply.⁷

⁷ See generally in the Second Circuit, the cases are *McDonald v. Pension Plan of the Nysa-Ila Pension Trust Fund*, 320 F.3d 151, 163 (2d Cir. 2002) (\$15/day for 71 days; \$1065 total); in the Third Circuit, *Gorini v. AMP, Inc.*, 94 Fed. Appx. 913, 916 (3d Cir. April 16, 2004) (award of \$160,780 for an unnamed amount of time); in the Fourth Circuit, *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 659 (4th Cir. 1996)(\$2500 for each of three plaintiffs for a delay of about 90 days); in the Seventh Circuit, *Blazejewski v. Gibson*, 1999 U.S. Dist. LEXIS 18028 at 14 (N.D. Ill. ©Synergy 2025. All Rights Reserved

The following are key things to do/review and remember for a 1024(b)(4) request:

****The Plan Documents should be requested directly from the Plan Administrator and not the TPA or the subrogation vendor.****

1. **Written Request:** Plan participants or beneficiaries can request copies of certain plan documents in writing from the plan administrator.
2. **Types of Documents:**
 - Summary Plan Description (SPD):** Provides a comprehensive overview of the plan, including benefits, rights, and obligations of participants.
 - Summary of Material Modifications (SMM):** Describes changes to the plan or the SPD.
 - Annual Report (Form 5500):** Contains financial information, plan operations, and compliance information.
 - Plan Document:** The formal written document that establishes the plan and its terms.
 - Trust Agreement:** If applicable, the document that sets up the trust to hold plan assets.
 - Collective Bargaining Agreement:** If the plan is subject to one, this document outlines the agreement between the employer and the union.
 - Insurance Contract:** For plans funded through insurance, the contract between the plan and the insurer.
3. **Response Time:** Plan administrators are required to provide the requested documents within 30 days of receiving the written request.

1999)(\$10/day for about 400 days); in the Eighth Circuit, *Keogan v. Towers*, 2003 U.S. Dist. LEXIS 7999 at 34 (D. Minn. 2003)(\$100/day for 649 days; \$64,900 total); in the Ninth Circuit, *Advisory Comm. for Stock Ownership & Trust for Employees of Montana Bancsystem, Inc. v. Kuhn*, 1996 U.S. App. LEXIS 2273 at 22-23 (9th Cir. 1996) (\$33/day for 586 days; total of 19,338); in the Tenth Circuit, *Dehner v. Kansas City S. Indus., Inc.*, 713 F. Supp. 1397, 1402 (D. Kan. 1989)(\$20/day for 84 days; \$1680 total); in the Eleventh Circuit, *Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, 891 F.2d 842, 848 (11th Cir. 1990) (\$3/day for 240 days; \$800 total).

4. **Civil Penalties:** If the plan administrator fails to comply with a request for documents within 30 days, they may be liable for a penalty of up to \$110 per day (adjusted periodically for inflation) from the date of the failure to provide the documents.

In order to combat ERISA plan recovery attempts, the information received from the 1024(b)(4) request is critical. You want to evaluate the strength of the plan's claim based on the language in the plan. The 1024(b)(4) request arms you with the proper information to do so. This allows you to make the appropriate arguments for reduction. What you are looking for is abrogation of "common fund" and "made whole" primarily. If those equitable principles have not been abrogated, there are strong arguments for reduction. In addition, when the plan administrator fails to comply with the request, and they often do, penalties will begin to accrue. Once penalties have accrued, you have more leverage to negotiate with the ERISA recovery contractor for a reduced lien amount.

Contract Law Principles and Strategies for Reduction of ERISA Liens

Obtaining documents through a 1024(b)(4) request allows you to evaluate potential contract law principles and strategies to reduce an ERISA lien. It allows you to:

Examine the Plan Language - Ambiguities in the Plan Document: Carefully review the ERISA plan documents to identify any ambiguities in the reimbursement or subrogation clauses. Under the doctrine of contra proferentem, ambiguities in the contract are construed against the drafter. If the language is unclear, you may argue that it should be interpreted in favor of your client. **Scope and Limits of**

Reimbursement: Ensure the plan's reimbursement claim strictly adheres to the terms

outlined in the plan document. Some plans may have specific provisions or limitations regarding the scope of their recovery rights.

Evaluate Whether to Assert the Make Whole Doctrine - Plan Language

Examination: Assess whether the plan explicitly disclaims the "make whole" doctrine. If it does not, you can argue that the plan should only be reimbursed if and when your client has been fully compensated (made whole) for all their losses, including pain and suffering, lost wages, and future medical expenses. **Equitable Arguments:** Use the make whole doctrine to negotiate a reduction in the lien amount, arguing that the plaintiff has not been fully compensated for their total losses.

Determine Whether to Insist Upon Application of the Common Fund Doctrine -

Attorney's Fees and Costs: The common fund doctrine may require the ERISA plan to share in the attorney's fees and costs incurred in obtaining the settlement. Argue that the plan's recovery should be reduced proportionally to account for the legal expenses incurred in creating the settlement fund. **Explicit Plan Language:** Verify if the plan explicitly addresses the common fund doctrine. If the plan does not waive this doctrine, you can argue that it applies.

Analyze the Plan's Equitable Lien by Agreement - Equitable Lien

Requirements: For an equitable lien by agreement to be enforceable, the plan must identify a specific fund (the settlement) and assert a right to a portion of that fund.

Ensure the lien is tied to the settlement and not your client's general assets.

Constructive Trust: ERISA plans often seek a constructive trust on settlement funds.

Argue that the plan's right to recovery should be limited to specific funds clearly identified in the settlement agreement.

Potentially Demand a Proportional Allocation of Damages - Detailed Settlement

Allocation: Structure the settlement to allocate specific amounts to various categories of damages, such as medical expenses, pain and suffering, and lost wages. Argue that the ERISA lien should only apply to the portion allocated to medical expenses. **Court**

Approval: Seek court approval of the settlement allocation to strengthen the argument against the ERISA lien's applicability to non-medical portions of the settlement.

Evaluate Forms of Equitable Relief - Equitable Defenses: Use equitable defenses such as unjust enrichment, undue hardship, or the unclean hands doctrine to argue that full reimbursement would be inequitable under the circumstances, if applicable.

Negotiate and Settle the Lien Optimally - Negotiation Tactics: Engage in negotiations with the ERISA plan administrator, insurance carrier, subrogation vendor, etc., presenting all legal and equitable arguments to seek a reduction in the lien amount.

Conclusion

To sum up, when evaluating an ERISA plan's right of recovery, it is important to first determine if it is, in fact, a plan covered by ERISA and then secondly is it a self-funded plan. The *McCutchen* decision has given ERISA self-funded plans strong recovery rights under federal law. Since under that decision plan language is vitally important, using a 1024(b)(4) request to get plan documents is an important tool to properly evaluate the strength of a reimbursement claim. In addition, failure to comply with this information request provides for penalties which can be leveraged to get the lien resolved.

Lien Resolution Practice Tip:

When dealing with ERISA liens, it is crucial to first determine if the plan in question is indeed covered by ERISA, and if so, whether it is a self-funded plan. This distinction is significant as ERISA self-funded plans have strong recovery rights under federal law, per the McCutchen decision. An essential tool in evaluating the strength of a reimbursement claim is obtaining the plan documents through a 1024(b)(4) request, which mandates the plan administrator to provide necessary documents such as the Summary Plan Description and Master Plan. Non-compliance with this request can result in penalties, which can then be used as leverage in negotiations with ERISA recovery contractors for a reduced lien amount. Always carefully analyze the plan's language, specifically looking for any abrogation of “common fund” and “made whole” principles, as these can provide strong arguments for lien reduction.