



## Those pesky ERISA reimbursement claims

By: Phillip Bantz © May 18, 2017

Mount Pleasant lawyer Scott Bluestein recently negotiated a settlement of nearly \$950,000 for a personal injury client — then the insurer came knocking with a claim for reimbursement under the Employee Retirement Income Security Act.

The insurer ended up walking away with a \$200,000 chunk of the client's recoveries, after agreeing to reduce the ERISA lien by \$15,000.

"ERISA liens are really problematic for us," Bluestein said. He's abandoned some cases because an insurer refused to play ball when he wanted to negotiate for a lien reduction. Otherwise, the lien would have consumed most, if not all, of the client's recoveries.

"The insurance company wouldn't agree to reduce its lien so why should I take my time and effort to go litigate this case?" he said.

Bluestein is not alone. For many personal injury lawyers, ERISA is a four-letter word.

"It certainly can lead to some very, very unfair results," said ERISA specialist Nathaniel Bax of the Foster Law Firm in Greenville.

"When you're talking about medical bills, they're generally astronomical," he added. "Even if you get a small settlement from whatever the injury is, that's usually completely eaten up by the subrogation (ERISA reimbursement) and then you're still on the hook for a large amount of legal bills."

But there are ways to keep insurers from leveraging the Employee Retirement Income Security Act to seize big chunks of a client's recoveries.

"I never walk away from them," John Peace, a personal injury lawyer in Greenville, said of ERISA lien cases. "People still need representation. You just have to take it as part of the landscape."

The landscape became bleaker for personal injury lawyers in 2013, when the U.S. Supreme Court's held in *U.S. Airways v. McCutchen* that equitable defenses could not overcome the terms of an ERISA benefits plan. The opinion essentially showed that a properly worded plan gives the insurer's lien "super priority" over other creditors, including attorneys, Peace said.

"If they'd have recognized equitable defenses I'd think we'd have a much more level playing field," he added.

But in the *U.S. Airways* case, the trial court found on remand, after taking a close look at the ERISA plan in question, that the reimbursement provisions did not reach the injured worker's entire recovery.

"Check the actual subrogation language of the plan, which should state what they do and don't have the right to subrogate," Bax said. "If it's broadly written you may be out of luck. But if it's specifically written and doesn't list everything you're covered on they don't have the right to recover everything."

For instance, if the plan doesn't address underinsured motorist coverage, any UIM recoveries will be out of the insurer's grasp.

"If you can't attack it under the language of the plan then you get into what is currently kind of a gray area," Bax said. "I always say it's worth an attempt to make an equitable argument to the plan and try to negotiate."

Peace agreed that "it never hurts to ask" the plan's third-party administrator or claims processor for a reduction.

"I've certainly been told 'no' a lot of times," he said, "but I've also been pleasantly surprised."



Before delving into negotiations, Bax advised that attorneys read the U.S. Supreme Court's decisions in the aforementioned *U.S. Airways*, *Mertens v. Hewitt Associates*, *Great-West Life & Annuity Insurance Co. v. Knudson*, *Sereboff v. Mid Atlantic Medical Services, Inc.* and *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*.

The most recent decision, *Montanile*, which was decided last year, indicates that "the court is trending towards recognizing more and more equitable remedies" in ERISA reimbursement cases, Bax said.

He also cautioned lawyers to avoid dispersing any awards or settlements before an ERISA lien is settled. He said he's seen cases outside the state in which attorneys were held personally responsible for the lien because they released the recoveries prematurely.

"It's certainly not a situation that anybody wants to be in," he said.

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