



# REIMBURSEMENT CLAIMS BY ERISA HEALTH PLANS

RISK MANAGEMENT PRACTICE GUIDES  
OF LAWYERS MUTUAL



**LAWYERS  
MUTUAL**

LIABILITY INSURANCE  
COMPANY OF  
NORTH CAROLINA

5020 Weston Parkway, Suite 200, Cary, North Carolina 27513

Post Office Box 1929, Cary, North Carolina 27512-1929

919.677.8900 800.662.8843 919.677.9641 FAX [www.lawyersmutualinc.com](http://www.lawyersmutualinc.com)

## About the Author

Jay Trehy is “of counsel” with Twiggs, Strickland & Rabenau, P.A., and he is the principal of Jerome P. Trehy, Jr., P.A. He is an active member of the North Carolina Advocates for Justice, the American Association for Justice and the Attorneys Information Exchange Group. Jay has been selected by his peers for membership in the American Board of Trial Advocates and the Southern Trial Lawyers Association, and for inclusion in Best Lawyers in America for both Personal Injury and Products Liability and in N.C. Super Lawyers. Jay is a graduate of Duke University (B.A., Math 1979) and the University of North Carolina School of Law (J.D. 1983). In addition to numerous CLE papers and presentations, Jay is the author of: “Reimbursement Claims by ERISA Health Plans,” NCAJ Liens Manual, 2nd Edition, LexisNexis, pending 2014; “Product Liability” and “Woodson Claims” Chapters, NCAJ Prima Facie Manual, 5th edition, 2012; and, “Insurance in Bodily Injury Matters,” Chapter, North Carolina General Practice Deskbook, N.C. Bar Association Foundation, Inc., 3rd Ed. 2004. The majority of Jay’s practice focuses upon complex litigation and catastrophic injury or death involving: products liability; trucking litigation; accident reconstruction; electrocutions, fires and explosions; workplace injuries; dangerous structures or conditions on property; and, professional and medical negligence. The remainder of Jay’s practice focuses upon insurance coverage, bad faith and unfair claims practices.

# REIMBURSEMENT CLAIMS BY ERISA HEALTH PLANS

---

RISK MANAGEMENT PRACTICE GUIDES OF LAWYERS MUTUAL

The issue of reimbursement claims for ERISA health plans has long been a complication for attorneys.

Personal injury practitioners face this issue frequently.

To help prevent problems, properly review your client's health care plan to determine the best course of action for the case.

Advising your client early can save you headaches down the road.

## HOW TO USE THIS GUIDE

This Lawyers Mutual Practice Guide will help you address ERISA reimburse claim issues in your cases. It is designed as a tool for firms that practice personal injury law or look to practice in these areas in the future.

Here are some suggested uses:

- To instruct attorneys on legal ethics and risk management.
- To develop staff hiring criteria.
- To help with staff orientation.
- To help with staff training.
- To use as a topic at a firm meeting or retreat.
- To use as curriculum for in-house continuing education.

This Guide offers general information that should benefit most practices. It is not intended as legal advice or opinion, nor does it purport to establish a specific standard of care for your practice.

Every law office is different. Your cases are unique. This Guide suggests ways to bring out the best in your engagements.

For more information – or if you have additional questions – please contact Lawyers Mutual's Client Services Team.

---

## TABLE OF CONTENTS

---

Introduction	1
What Should the Attorney Do?	3
ERISA Reimbursement Litigation	6
Jurisdiction and Venue	8
Who Can and Cannot Be Sued for Reimbursement?	9
Negotiating the Plan's Claim for Reimbursement	11

---

**DISCLAIMER:** *This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.*

# INTRODUCTION<sup>1</sup>

For the practice of personal injury law, one cannot understate the evolved preeminence of the reimbursement claim by ERISA health plans. Personal injury attorneys must accept that most health plans have judicially recognized claims for reimbursement — enforceable through an “equitable lien by agreement”<sup>2</sup> — and these claims can only be ignored at the peril of both their clients and themselves. Defense attorneys and liability insurers must know that ERISA plans *cannot* sue tortfeasors and their liability insurers for a recovery — ERISA creates reimbursement rights, not subrogation rights — and plans can only obtain reimbursement *through* a recovery by a participant or beneficiary.

The bottom line in North Carolina: If medical bills are paid by a health plan obtained through a private employer, and if the health plan is “self-funded,” the plan provisions regarding reimbursement will generally be honored by a federal court.<sup>3</sup> Claimants and their attorneys are left to their own devices in negotiating with plan administrators in such circumstances. How to determine what is a valid claim for reimbursement, and what to do about it, is beyond the scope of this article. This article limits its discussion to the evolved preeminence of the reimbursement claim by the self-funded health plan.

Federal courts want nothing to do with deciding what is fair or equitable in the division of a settlement recovery between a claimant, her attorney, and her insurance plan. Except in those increasingly rare situations in which the construction of plan provisions are helpful to the participants or beneficiaries, the only negotiating leverage enjoyed by such claimants and their attorneys are *practical* ones. For most personal injury claimants with ERISA health plans, the options are stark and onerous. The plan participant or beneficiary can either:

- (a) decline benefits from the health plan, and pursue the personal injury or wrongful death claim;
- (b) accept benefits, and decline to sue rather than work for the health plan; or
- (c) accept benefits, pursue the personal injury or wrongful death claim, and deal with the plan and its ERISA reimbursement claim.<sup>4</sup>

After decades of interpretation of ERISA by the U.S. Supreme Court and other federal courts,<sup>5</sup> and particularly after 2013’s *U.S. Airways v. McCutchen* decision,<sup>6</sup> North Carolina attorneys must conclude that claimants and their attorneys who face reimbursement claims by self-funded ERISA plans can rarely look to the courts for equity or justice. Except in those increasingly rare situations in which the construction of plan provisions is helpful to the participants or beneficiaries, the tools for negotiation leverage enjoyed by such claimants and their attorneys are practical ones, sometimes including the claimant’s decision to *refrain* from actively pursuing her own claim and the attorney’s decisions to *decline* the case. We can now say:

1 © Jerome P. Trehy, Jr.

2 *Sereboff v. Mid-Atlantic Medical Services, Inc.*, 547 U.S. 356, 364-65, 126 S. Ct. 1869, 1875, 164 L. Ed. 2d 612, 620-21 (2006) (applying the “equitable claim by agreement” to enforce provisions of the plan agreement reached with employer).

3 For reasons beyond the scope of this article, for plans that are not “self-funded” or “self-insured” but instead are funded by an insurance policy to pay medical bills, the plan’s policy is subject to 11 NCAC 12.0319 (“Life or accident and health insurance forms shall not contain a provision allowing subrogation of benefits.”). In states *without* insurance laws or regulations for subrogation and reimbursement, the federal courts simply enforce the plan provisions as written and construed.

4 See *Administrative Comm. for the Wal-Mart Stores, Inc. Associates’ Health and Welfare Plan v. Salazar*, 2007 U.S. Dist. LEXIS 61273, pp. 21-22 (D. Ariz. 2007) (in enforcing equitable lien by agreement, court notes employee did not have to participate in plan or accept benefits).

5 See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 113 S. Ct. 2063, 124 L.Ed.2d 161 (1993) (limiting available remedies to equitable relief as understood in when courts were divided between law and equity); *Great West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002) (denying ERISA reimbursement claim, but explaining how a reimbursement claim can be pursued); *Sereboff*, 547 U.S. at 364-65, 126 S. Ct. at 1875, 164 L. Ed. 2d at 620-21 (2006) (applying the “equitable claim by agreement” to enforce reimbursement claim, and eliminating traceability of the res as a requirement for recovery); *Popowski v. Parrott*, 461 F.3d 1367 (11th Cir. 2006) (allowing equitable relief against third parties); *The Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. 2009) (requiring dissipated settlement funds to be replenished); *U.S. Airways, Inc. v. McCutchen*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1537, 185 L. Ed. 2d 654 (2013) (denying equitable defenses for the equitable relief under ERISA).

6 *McCutchen*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1537, 185 L. Ed. 2d 654.

*If* the plan is “self-funded” by its terms,

And

*If* the plan language correctly sets forth a claim for reimbursement,

*Then*, upon actual or constructive delivery of a recovery, that money is held — by the person or entity holding it — under a lien that is created under federal law and protected by the federal courts.

Determining whether the plan is self-funded, and whether the plan terms include the magic language for creation of the lien, are now tasks that comprise part of the due diligence required of North Carolina trial lawyers.

Disbursement without dealing with a valid lien — the ERISA lien by agreement is a valid lien, and therefore attorneys are subject to the RPCs and ethical commentary regarding liens and moneys held in trust — is perilous for the client and the attorney. As for the client, the plan can follow the money, and put liens on what the recovery was used for: the house for which the mortgage was paid, the car that was purchased, the realty purchased, the annuity benefits to be received, the settlement or special needs trust that was created, etc. As for the attorney, even within the Fourth Circuit, a federal judge is likely to enforce an equitable claim against a claimant’s attorney, as this is the rule for a growing consensus among the other circuits. Attorneys have been ordered to replace dissipated funds, after money was moved from an IOLTA account in the firm operating account.

North Carolina plaintiff’s counsel should deal with the ERISA health plan, and negotiate in advance of settlement. A claimant’s greatest negotiation leverage for working out a sharing of procurement and recovery occurs in advance of filing a lawsuit, and perhaps in advance of making the claim, at all. A claimant’s negotiation strength weakens the closer the claimant gets to a finalized settlement with the liable, third-party/employer/insurer. And, once a recovery is in hand, claimants are left to supplicate or to wrangle for concessions by the ERISA health plan.

## WHAT SHOULD THE ATTORNEY DO?

For many years, commentators, including this author, have argued for and promoted ways to thwart ERISA reimbursement claims, based upon the loyalty owed to clients, the traditional proscriptions against subrogation for insurance, the practical difficulties in negotiating settlements, and the inequities of allowing insurance to enjoy reimbursement for a loss after premiums have been paid to cover the loss. The question for attorneys facing ERISA reimbursement claims used to be: What is the attorney *legally required* to do?

Given the obvious direction of federal courts in accepting and protecting ERISA's "equitable *lien* by agreement," the question for attorneys facing ERISA reimbursement claims has perhaps become: What is the attorney *ethically required* to do?

Personal injury attorneys are required to represent zealously and diligently the interests of their clients, but they must do so as officers of the court and in accordance with the Rules of Professional Conduct. Practitioners must accept that the federal courts have embraced the ERISA reimbursement claim as a true "lien" — an "equitable lien by agreement" — and speak of recoveries that "in good conscience, belong" to the plan.<sup>7</sup> At the moment there has been an actual or constructive delivery of a recovery to a plan participant or beneficiary, or their attorney, an ERISA health plan's *valid* claim for "reimbursement claim" transforms into a "lien" that is recognized and protected under federal law.

An appropriate starting point is the Preamble to North Carolina's Rules of Professional Conduct, a reminder of an attorney's important obligations in addition to those owed to their clients.

### 0.1 Preamble: A Lawyer's Responsibilities

- [1] A lawyer, as a member of the legal profession, is a representative of clients, *an officer of the legal system*, and a public citizen having special responsibility for the quality of justice.
- [2] As a representative of clients, a lawyer performs various functions.
- As advisor, a lawyer provides a client with an *informed understanding* of the client's legal rights and obligations and explains their *practical implications*.
- As advocate, a lawyer zealously asserts the client's position *under the rules of the adversary system*.
- As negotiator, a lawyer seeks a result advantageous to the client but *consistent with requirements of honest dealing with others*.
- As evaluator, a lawyer acts by examining a client's legal affairs and *reporting about them to the client or to others*.
- ...
- [5] A lawyer's conduct should *conform to the requirements of the law*, both in professional service to clients and in the lawyer's business and personal affairs.
- A lawyer should use the law's procedures *only for legitimate purposes* ... .
- A lawyer should demonstrate *respect for the legal system* ... .
- While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's *duty to uphold the legal process*.
- ...

<sup>7</sup> *Knudson*, 534 U.S. at 214, 122 S. Ct. at 715, 151 L. Ed. 2d at 645.

[12] In the nature of law practice, however, *conflicting responsibilities are encountered*.

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.

The Rules of Professional Conduct often prescribe terms for resolving such conflicts.

Within the framework of these Rules, however, many difficult issues of professional discretion can arise.

Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

These principles include the lawyer's obligation *zealously to protect and pursue a client's legitimate interests, within the bounds of the law*,

while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.<sup>8</sup>

A practicing attorney's ethical and professional obligations have long included obligations imposed by the existence of valid, judicially recognized liens. In undertaking representation for a personal injury or wrongful death claim, an attorney needs to educate the client about these additional duties for officers of the court and practicing attorneys.

*If through due diligence* an attorney determines that a self-funded ERISA plan has a valid claim for reimbursement—and therefore a legally recognized ability to enforce an equitable lien by agreement upon one with actual or constructive possession of a recovery from a third-party — the attorney has an ethical duty to address the plan's reimbursement interest.<sup>9</sup>

Once a settlement or judgment recovery is in hand, the federal courts dictate the legal consequences, and the Rules of Professional Conduct dictate the ethical consequences. The ERISA equitable lien by agreement is, under federal law, created automatically and as soon as a settlement or judgment recovery is in the attorney's actual or constructive possession. Logically, therefore, the attorney's obligation to represent the client with zeal and diligence demands that the attorney to deal with the ERISA lien long before it is ever created.

Attorneys are required to follow certain rules regarding the holding of property, including settlement and judgment recoveries, entrusted to them for safekeeping. RPC Rule 1.15-1(e) states:

- (e) "Entrusted property" denotes trust funds, fiduciary funds and other property belonging to someone other than the lawyer which is in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services.<sup>10</sup>

RPC Rule 1.15-2(a) then states general rules for such entrusted property:

- (a) Entrusted Property. All entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, *disbursed*, and *distributed only in accordance with this Rule 1.15*.<sup>11</sup>

---

<sup>8</sup> N.C. Rules of Prof'l Conduct, 0.1 Preamble: A Lawyer's Responsibilities (2006) (emphasis supplied; reformatted for clarity).

<sup>9</sup> What due diligence requires goes well beyond the scope of this article.

<sup>10</sup> N.C. Rules of Prof'l Conduct, Rule 1.15-1 Definitions (2012) (reformatted for clarity).

<sup>11</sup> N.C. Rules of Professional Conduct, Rule 1.15-2 General Rules (2012) (emphasis supplied; reformatted for clarity).

RPC Rule 1-15, Comment 15 sets forth what the attorney must do with respect to a *valid* ERISA lien—hold the disputed funds in trust until the claim for reimbursement is resolved:

Third parties may have lawful claims against specific funds or other property in the lawyer’s custody, ...

*A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client.*

In such cases, *when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claim is resolved.*

A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to receive the funds, the lawyer may file an action to have a court resolve the dispute.<sup>12</sup>

In addition to the above ethical requirements, settlement funds are almost invariably paid under a settlement agreement that includes *the express precondition* that all valid liens are to be satisfied or resolved. When a settlement is paid with such a precondition to disbursement, a practitioner handling a settlement recovery is *obligated* to deal with an ERISA equitable lien by agreement. The failure to do so amounts to a dishonest and unethical breach of a precondition of the settlement’s payment.<sup>13</sup>

Given the above discussion regarding the ethical obligation of personal injury attorneys, it is inappropriate and unacceptable to disburse a settlement recovery in accordance with a client’s direction or instruction to ignore an ERISA plan’s valid lien. Wholly inapplicable are old ethics opinions dealing with a client’s instruction to ignore payment of unpaid medical bills in the absence of a valid medical lien.<sup>14</sup>

---

12 N.C. Rules of Prof’l Conduct, Rule 1-15, Safekeeping Property, Comment 15 (2008) (emphasis supplied; reformatted for clarity).

13 N.C. State Bar Formal Op. 127, Conditional Delivery of Settlement Proceeds (1992) (“Opinion rules that deliberate release of settlement proceeds without satisfying conditions precedent is dishonest and unethical.”).

14 See N.C. State Bar Formal Op. 69, Payment of Client Funds To Medical Providers (1989) (“Opinion rules that a lawyer must obey the client’s instruction not to pay medical providers from the proceeds of settlement in the absence of a valid physician’s lien); N.C. State Bar Formal Op. 125, Disbursement of Settlement Proceeds (1992) (“Opinion rules that a lawyer may not pay a medical care provider the proceeds of the settlement negotiated prior to the filing of suit over his client’s objection unless the funds are subject to a valid lien.”).

## ERISA REIMBURSEMENT LITIGATION

The plan provisions must authorize the claim for reimbursement, and indeed, the reimbursement claim will fail if not *properly* authorized by the plan provisions.<sup>15</sup> If the plan’s reimbursement provisions are proper in content, however, they will be honored by a federal court.<sup>16</sup>

Plan participants and beneficiaries cannot evade ERISA reimbursement claims by creatively manipulating a settlement or its proceeds. If the plan provisions call for reimbursement from a settlement or judgment, the provisions will be honored even if the settling parties attempt to designate the recovery as being for something other than reimbursement of medical expenses.<sup>17</sup>

Under *McCutchen*, the courts will not require a plan to be “fair” or “equitable,” and therefore courts will not require ERISA self-funded plans to follow equitable principles developed under the common law for health insurance.<sup>18</sup> Equitable principles developed by the states for insurance companies do not apply to ERISA plans, although these principles may inform interpretation and construction of plan terms and provisions.

For a self-funded plan, if the plan provisions clearly state a *priority of payment*, these provisions will be followed.<sup>19</sup> Before plans became so emboldened by the free hand given to them by the federal courts, plan provisions regularly included provisions for sharing the procurement costs — the attorney fees and litigation expenses.<sup>20</sup> A court *will* enforce,

- 
- 15 *Reinhart Cos. Employee Benefit Plan v. Vial*, 2011 U.S. Dist. LEXIS 27703, pp. 15-19 (W.D. Mich. 2011) (plan provisions authorized reimbursement claims against parties found to be “responsible or liable,” so that reimbursement claim failed against settling party who had not been judicially determined to be responsible or liable).
- 16 *Shank*, 500 F.3d at 838 (“The Supreme Court has directed that when courts consider the meaning of ‘appropriate’ equitable relief, they should ‘keep in mind the special nature and purpose of employee benefit plans.’ Among the primary purposes of ERISA is to ensure the integrity of written plans and to protect the expectations of participants and beneficiaries. Ordinarily, courts are to enforce the plain language of an ERISA plan ‘in accordance with its literal and natural meaning.’”); *See Findlay Indus., Inc. v. Bohanon*, 2007 U.S. Dist. LEXIS 85154 (N.D. Ohio 2007) (plan provisions were explicit regarding priority of payment, and so plan provisions honored).
- 17 *See Shank*, 500 F.3d at 839 (rejecting argument successfully made for Medicaid reimbursement in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006) that part of settlement was for items other than medical benefits); *Wright v. Aetna Life Ins. Co.*, 110 F.3d 762, 765, n.3 (11th Cir. 1997) (“Since Aetna was not a party to the settlement agreement, that agreement’s purported allocation of damages does not govern the district court’s determination. To hold otherwise would allow [the covered individual] and the [tortfeasor] to control Aetna’s reimbursement rights.”); *Moore v. Blue Cross and Blue Shield of the Nat’l Capital Area and CapitalCare*, 70 F. Supp. 2d 9, 30 (D.D.C. 1999) (“An ERISA plan participant cannot unilaterally allocate settlement proceeds to something other than medical expenses in order to evade subrogation.”); *Bd. of Trustees for the Laborers Health & Welfare Trust Fund v. Hill*, 2008 U.S. Dist. LEXIS 9193, pp. 3, 17 (N.D. Cal. 2008) (participant characterizes settlement compensation exclusively for her pain and suffering and lost wages, but court allows claim for constructive trust as an equitable remedy to keep the plan participant from “unjust enrichment.”); *Diamond Crystal Brands, Inc. v. Wallace*, 2010 U.S. Dist. LEXIS 48684, pp. 19-21 (N.D. Ga. 2010) (“The Estate’s actions in structuring the settlement to maximize its reimbursement to the plan for the medical expenses of Deborah Hayes while maximizing the recovery to Defendant Tamara Hayes violates the express terms of [the plan].”); *but see Administrative Comm. of the Wal-Mart Stores, Inc. Associates’ Health and Welfare Plan v. Gamboa*, 2007 U.S. Dist. LEXIS 50644 (W.D. Ark. 2007) (Gamboa II) (plan had no right to settlement funds against plan participant who received nothing personally, but released liable third-party in consideration for the participant’s family receiving \$1MM).
- 18 *McCutchen*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1537, 185 L. Ed. 2d 654; *see Shank*, 500 F.3d at 837-38 (“[I]he make-whole doctrine originated in the law of insurance, where the overriding purpose of an insurance policy is to fully compensate the insured in case of loss, but ... many ERISA-regulated benefit plans do not share that purpose. We thus concluded that the make-whole doctrine does not carry over from the insurance context to ERISA.”); *see Elec. Energy, Inc. v. Lambert*, 757 F. Supp. 2d 765, 770-71 (W.D. Tenn. 2010).
- 19 *See Copeland Oaks v. Haupt*, 209 F.3d 811, 814 (6th Cir. 2000) (“for plan language to conclusively disavow the default rule, it must be specific and clear and establishing both a priority to the funds recovered and a right to any full or partial recovery”); *Popowski*, 461 F.3d at 1370; *Bohanon*, 2007 U.S. Dist. LEXIS 85154; *Hill*, 2008 U.S. Dist. LEXIS 9193; *Wallace*, 2010 U.S. Dist. LEXIS 48684; *Farie v. Jeld-Wen, Inc.*, 2008 U.S. Dist. LEXIS 88893, p. 7 (N.D. Ohio 2008) (*Farie I*).
- 20 *See Beveridge v. Benefit Recovery*, 2006 U.S. Dist. LEXIS 50942 (D. Az. 2006).

however, plan provisions that disavow payment of attorney fees and expenses.<sup>21</sup> If the plan provisions decline to pay fees or expenses except in the plan administrator's discretion, those plan provisions will be followed.<sup>22</sup> If the plan states a valid claim for reimbursement, but fails to disavow any obligation to share pro rata the procurement cost of attorney fees and claim expenses, then the courts will enforce the Common Fund Doctrine.<sup>23</sup>

ERISA plans have no obligation to file or serve any document in order to perfect an equitable lien by agreement. The "notice" is found in the very existence of the plan contract. As the "familiar rule" from the 1914 case cited in *Sereboff* states, "a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets title to the thing."<sup>24</sup> For example, EOBs<sup>25</sup> provide notice that third-party recovery may be subject to a reimbursement claim, for they indicate who is paying the medical bills.<sup>26</sup> A plan may bring a reimbursement claim even if the participant or beneficiary has settled the case before the plan sends out notice of its reimbursement claim.<sup>27</sup>

A fiduciary's reimbursement claim can proceed as long as it seeks to recover funds that (1) are specifically identifiable — the third-party recovery, (2) "belong in good conscience to the Plan," and (3) are within the possession and control of the defendant.<sup>28</sup> The fund over which a lien is asserted was not, but need not be, in existence at the time of the execution of the contract containing the lien provision.<sup>29</sup>

Litigation over a reimbursement claim can possibly result in more than a mere loss of part or all of a recovery by settlement or judgment. If plan provisions called for the payment of reasonable attorney's fees and if the plan is required to seek equitable relief in order to enforce reimbursement provisions, these attorney-fees provisions may be enforced.<sup>30</sup> Indeed, a plan participant or beneficiary may be ordered to pay to a prevailing plan attorney's fees for fighting a valid claim for reimbursement.<sup>31</sup>

21 *McCutchen*, 133 S. Ct. at 1543, 185 L. Ed. 2d at 661 (common fund doctrine cannot "override the clear terms of plan"); *Quest Diagnostics v. Bomani*, 2013 U.S. Dist. LEXIS 85747, pp. 3-4 (D. Conn. 2013) ("Unlike the plan in *McCutchen*, the plain language in this case is unambiguous, leaving no room for equitable defenses to operate."); see *Johnson Controls, Inc. v. Flaherty*, 408 Fed. Appx. 312 (11th Cir. 2011) (no reduction of lien for attorney's fees and expenses when the plan language clearly and unambiguously denies such a reduction); *Aetna Life Ins. Co. v. Kohler*, 2011 U.S. Dist. LEXIS 126841 (N.D. Cal. 2011) (rejects application of the common fund doctrine because the plan terms provide that if a party accepts benefit that party agrees that the plan is not required to pay court costs or attorney fees); *Sheet Metal Workers Local 27 Health & Welfare Fund v. Estate of Beenick*, 2008 U.S. Dist. LEXIS 99345, pp. 32-33 (D.N.J. 2008); *O'Hara*, 604 F.3d at 1237, n. 4 (11th Cir. Ga. 2010); *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1298-99 (7th Cir. 1993) (the make-whole rule can be overridden by clear plan language).

22 *Brown v. Associates Health and Welfare Plan*, 2007 U.S. Dist. LEXIS 60307 (W.D. Ark. 2007) ("Plaintiffs had a pre-existing contractual obligation to the Plan to reimburse it for the full amount of any benefits paid on their behalf without a reduction for attorney's fees. That obligation precludes Plaintiffs from entering into an agreement with their lawyer to pay him from a fund they were not entitled to."); *Shank*, 2006 U.S. Dist. LEXIS 62280, pp. 12-13 (E.D. Mo. August 31, 2006), *aff'd*, 500 F.3d 834 (8th Cir. Mo. 2007), *cert. denied*, 552 U.S. 1275, 128 S. Ct. 1651, 170 L. Ed. 2d 386 (2008) (provisions called for plan to get first dollar until fully reimbursed and made attorney fees and litigation costs the responsibility of the participant).

23 *McCutchen*, 133 S. Ct. at 1543, 185 L. Ed. 2d at 661 (2013) (common fund doctrine informs interpretation of plan provisions when they are silent about allocating costs of recovery); see *Iron Workers Locals 40, 361 & 417 Health Fund v. Dinnigan*, 911 F. Supp. 2d 243, 261 (S.D.N.Y. 2012).

24 *Sereboff*, 547 U.S. at 363, 126 S. Ct. at 1877, 164 L. Ed. 2d at 612 (quoting *Barnes v. Alexander*, 232 U.S. 117, 121, 34 S. Ct. 276, 58 L. Ed. 530 (1914)).

25 "Explanation of Benefits."

26 See *Schwade v. Total Plastics, Inc.*, 837 F. Supp. 2d 1255, 1271 (M.D. Fla. 2012) (*Schwade II*) (EOB makes claim for reimbursement).

27 *Brown*, 2007 U.S. Dist. LEXIS 60307 (settlement date is not relevant because participant "had prior notice they would be required to reimburse the Plan if they recovered funds from a third party as reimbursement for injuries for which the Plan paid out benefits").

28 *Popowski*, 461 F.3d at 1372; *Sereboff*, 547 U.S. at 366, 126 S. Ct. at 1876; *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 356 (5th Cir. 2003); *Brown*, 2007 U.S. Dist. LEXIS 60307; *Beveridge*, 2006 U.S. Dist. LEXIS 50942, pp. 10-12.

29 See *Sereboff*, 547 U.S. at 366, 126 S. Ct. at 1876; see *Beveridge*, 2006 U.S. Dist. LEXIS 50942, pp. 11-12.

30 See *Farie II*, 2010 U.S. Dist. LEXIS 24864, p. 31 ("[T]he Court finds that the unambiguous language of [the master plan document] entitles the Plan to an award of reasonable attorneys fees under the circumstances of this case.... [T]he express terms of the contract ... are controlling and clearly establishment and entitlement to this relief."); *Ritter*, 2011 U.S. Dist. LEXIS 66686, pp. 18-19 (court to consider application for attorney's fees when plan documents allow for reimbursement of costs and attorney's fees if the plan is forced to file suit in order to recover reimbursement).

31 *K-V-A-T Food Stores, Inc. v. Hutchins*, 2012 U.S. Dist. LEXIS 26575, p. 11 (W.D. Va. 2012) (attorney's fees awarded to prevailing plan against participant who far reimbursement without a reasonable basis).

## JURISDICTION AND VENUE

---

Federal courts have original, exclusive jurisdiction for reimbursement claims brought by plans.<sup>32</sup> Furthermore, 29 U.S.C. § 1132(d)(2) authorizes nationwide service of process in ERISA actions.<sup>33</sup>

Under 29 U.S.C. § 1132(e)(2), proper venue is where the plan is administered, where the breach took place, *or* where the defendant resides or may be found.<sup>34</sup> A plan can bring an action for reimbursement in the district court where the plan is administered, even if the participant or beneficiary lacks minimum contacts with that state in which the district is found.<sup>35</sup> Thus, if a plan is administered in Illinois and the injured beneficiary resides in North Carolina, the plan has the choice of filing a lawsuit in Illinois or in North Carolina.

Forum selection clauses in plan provisions are enforceable, potentially requiring the participant or beneficiary to carry out what is essentially a document-centric litigation in an inconvenient jurisdiction.<sup>36</sup>

---

32 29 U.S.C. § 1132(e)(1); *see Cavanagh v. Providence Health Plan*, 699 F. Supp. 2d 1209 (D. Or. 2010) (removal from state court to federal court of underlying tort action in the process of obtaining judicial approval of a personal injury settlement).

33 *Pioneer Title Co. Employee Welfare Benefit Trust v. Tague*, 2009 U.S. Dist. LEXIS 51022, p. 2 (D. Idaho June 17, 2009).

34 2009 U.S. Dist. LEXIS 51022, p. 3.

35 *See United Health Group Inc. v. Mesa*, 2007 U.S. Dist. LEXIS 71692 (D. Minn. 2007); 29 U.S.C. § 1132(e)(2).

36 *Smith v. Aggon USA, LLC*, 2010 U.S. Dist. LEXIS 17243 (W.D. Va. 2011) (enforced forum selection clause); *Price v. PBG Hourly Pension Plan*, 2013 U.S. Dist. LEXIS 26348 (E.D. Mich. 2013); *Marin v. Xerox Corp.*, 2013 U.S. Dist. LEXIS 33400 (N.D. Cal 2013); *but see Coleman v. Supervalu, Inc. Short Term Disability Program*, 2013 U.S. Dist. LEXIS 13372 (N.D. Ill. 2013) (forum selection clause violates ERISA public policy).

## WHO CAN AND CANNOT BE SUED FOR REIMBURSEMENT?

No conscious wrongdoing on the part of the participant/beneficiary is required for enforcement of a plan's reimbursement claim.<sup>37</sup> Plan reimbursement may be had from any recovery based on a liability of another for the injuries necessitating payment of health plan benefits, even if the recovery comes from UM or UIM coverage.<sup>38</sup> If a workers compensation claim is initially denied, so that an employee's ERISA health plan pays the medical bills from a workplace accident, and if the workers compensation claim is later honored or enforced, the employee will have to reimburse the health plan, if the plan provisions so require.<sup>39</sup>

Unlike the traditional, "equitable lien for restitution," which is limited to the res itself, *traceability is not required* for "equitable liens by agreement or assignment."<sup>40</sup> As long as the plan sues the proper person with the money or assets from the recovery, it does not matter that the person was neither a participant nor a beneficiary of the plan. A reimbursement claim will be permitted to go forward against a third-party so long as an action is filed while the funds or assets from the funds are in the possession of a defendant.<sup>41</sup>

Almost every type of arrangement has been attempted to avoid ERISA reimbursement, but they can almost all be trumped by enforcement of truly valid reimbursement claims by self-funded plans. ERISA self-funded plans can go after commingled funds, settlement trusts, special needs trusts, conservatorships, and even annuity payments.<sup>42</sup> Examples of unsuccessful efforts to thwart reimbursement claims include:

- A plan successfully sought reimbursement from annuity payments used to fund a special needs trust, even when the settlement provided for no recovery payment to the plan participant or beneficiary.<sup>43</sup>
- A federal court ordered reimbursement after a guardianship proceeding in state court established a special needs trust with spendthrift protection.<sup>44</sup>
- When the recovery was obtained for a bad faith insurance claim, as opposed to a recovery from a tortfeasor, the plan was permitted to pursue reimbursement for benefits paid.<sup>45</sup>
- Faced with the claim that settlement proceeds have been dissipated, the court may well order discovery to determine how the settlement proceeds were spent.<sup>46</sup>

37 *Humana Health Plan, Inc. v. Powell*, 2009 U.S. Dist. LEXIS 102887, pp. 3-4 (W.D. Ky. 2009).

38 *Simmitt*, 2009 U.S. Dist. LEXIS 20876, pp. 17-19 (D. Or. 2009) (though plan documents focused upon reimbursement from recovery for "third-party" liability, UIM coverage is treated as payments made on behalf of the tortfeasor, and therefore plan could seek reimbursement from UIM recovery; "to hold otherwise would provide a windfall to plan members who are injured by uninsured or underinsured tortfeasors"); *Rhodes*, 937 F. Supp. 1202 (ERISA plan seeks reimbursement from UIM recovery).

39 *DeGryse*, 579 F. Supp. 2d 1063 (N.D. Ill. 2008) (plan must be reimbursed from workers compensation proceeds; plan provisions excluded benefits for medical expenses covered under workers compensation).

40 *Sereboff*, 547 U.S. at 364-65, 126 S. Ct. at 1875, 164 L. Ed. 2d at 621; see *Gutta v. Standard Select Trust Ins.*, 2006 U.S. Dist. LEXIS 65530 (N.D. Ill. 2006).

41 See *Popowski I*, 461 F.3d at 1373.

42 *Horton*, 513 F.3d 1223 (conservatorship) ("[T]he important consideration is not the identity of the defendant, but rather the settlement proceeds are still intact, and thus constitute an identifiable res that can be restored to its rightful recipient."); *Shank*, 500 F.3d 834 (settlement trust and special needs trust); *ACS Recoveries v. Griffin*, 2013 U.S. App. LEXIS 9324 (5th Cir. 2013) (special needs trust); *Arachikavitz*, 2007 U.S. Dist. LEXIS 71172 (special needs trust); *Ralcorp Holdings, Inc. v. Fricke*, 290 F. Supp. 2d 759 (W.D.Ky. 2003) (annuity payments); *Popowski v. Parrott*, 2008 U.S. Dist. LEXIS 71615 (N.D. Ga. 2008) (*Popowski II*) (annuity payments); *Dinnigan*, 911 F. Supp. 2d 243, 258 (supplemental needs trust).

43 *Griffin*, 2013 U.S. App. LEXIS 9324, pp. 24-25 (release exchanged for obligation of annuity company to make payments into a special needs trust; plan entitled to reimbursement from special needs trust and the periodic annuity payments).

44 *Bush*, 2006 U.S. Dist. LEXIS 81912.

45 *AirTran Airways, Inc. v. Elem*, 771 F. Supp. 2d 1344 (N.D. Ga. 2011) (bad faith insurance settlement).

46 *Bd. of Trustees for the Laborers Health & Welfare Trust Fund v. Hill*, 2008 U.S. Dist. LEXIS 96239 (N.D. Cal. 2008) (*Hill II*).

- If the money from a settlement recovery can be followed to newly purchased property, *a lien will be imposed on the new property*.<sup>47</sup>
- After the participant's attorney transferred his fees from his IOLTA account to his operating account, the court ordered him to replace the money into the IOLTA account and then awarded it to the plan.<sup>48</sup>

At the time this chapter is being written, there appears to be a split between the circuits as to whether the *attorney* of a participant or beneficiary can be a valid defendant for reimbursement claim. In the Fifth, Sixth, Seventh, Ninth and Eleventh Circuits, at least, attorneys are legitimate defendants in suits for enforcement of an equitable lien by agreement.<sup>49</sup> The Fourth and Eighth Circuit might not allow recovery against attorneys,<sup>50</sup> but the decisions from these Circuits disallowing such claims are highly suspect in light of more recent decisions and the reasoning behind those decisions. Attorneys should simply avoid allowing themselves to be in a position to become a defendant to an ERISA claim, for litigation reasons and for ethical reasons, as discussed *supra*.

Plan administrators and their collection designees have *no* legal or equitable leverage a tortfeasor or a liability insurer. Plan administrators *must* get their reimbursement through an actual recovery by a plan participant or beneficiary. A plan *cannot* sue a third-party liability insurer to pay a claim. Liability insurance policies that pay settlements to participants and beneficiaries cannot be sued for conversion regarding benefits that “should” go to reimburse a plan.<sup>51</sup> Plans can only *enforce* their right to a recovery share after the participant or beneficiary has actual or constructive possession.

47 *Board of Trustees for the Laborers Health & Welfare Trust Fund for N. Cal. v. Hill*, 2009 U.S. Dist. LEXIS 27116 (N.D. Cal. 2009) (*Hill III*) (equitable lien imposed on purchased auto and condominium); *Popowski v. Parrott*, 2008 U.S. Dist. LEXIS 71615, pp. 19-20 (N.D. Ga. 2008) (*Popowski II*) (discovery and briefing ordered to determine whether a constructive trust would be imposed on tangible assets purchased by settlement funds that should have been reimbursed to plan); *contrast, UNUM Life Ins. Co. v. Wolf*, 2008 U.S. Dist. LEXIS 43735 (D. Colo. 2008); *Security Mutual Life Ins. Co. v. Joseph*, 2007 U.S. Dist. LEXIS 47664 (E.D. Pa. 2007); *UnitedHealth Group, Inc. v. Dowdy*, 2007 U.S. Dist. LEXIS 80090 (M.D. Fla. 2007).

48 *Brown*, 2007 U.S. Dist. LEXIS 60307.

49 *Bombardier*, 354 F.3d at 353 (ERISA permits reimbursement claim against non-fiduciary attorney who holds disputed settlement funds on the half of a plan participant); *Longaberger*, 586 F.3d 459; *Wells*, 213 F.3d 398 at 403 (7th Cir. 2000); *CGI Techs. & Solutions, Inc. v. Rose*, 683 F.3d 1113, 117-18 (9th Cir. 2012); *Central States v. Lewis*, 871 F. Supp. 2d 771, 778 and 780 (N.D. Ill. 2012) (relief available against attorney who commingled or dissipated funds; ordering attorney to restore settlement funds paid as attorney fees); *Elem*, 771 F. Supp. 2d 1344; *Board of Trustees of the Health & Welfare Dep't of the Construction and General Laborers' District Council of Chicago and Vicinity v. Filichia*, 2013 U.S. Dist. LEXIS 11517, p. 8 (N.D. Ill. 2013); *Greenwood Mills, Inc. v. Burris*, 130 F. Supp. 2d 949, 960 (M.D. Tenn. 2001).

50 *T.A. Loving Co. v. Denton*, 723 F. Supp. 2d 837, 840-41 (E.D.N.C. 2010) (declining to follow Sixth Circuit and Longaberger and instead following *Bullock*); *Great-West Life & Annuity Ins. Co. v. Bullock*, 202 F. Supp. 2d 461, 465 (E.D.N.C. 2002) (allowing claim under § 502(a)(3) only where there are allegations of attorney wrongdoing or an intentional effort to enable participant to avoid plan reimbursement provisions.); *Treasurer v. Goding*, 692 F.3d 888, 895-96 (8th Cir. Mo. 2012) (attorney who properly disposed of settlement recovery could not be sued for equitable relief).

51 *See Central States, Southeast & Southwest Areas Health and Welfare Fund v. Bollinger, Inc.*, 2013 U.S. Dist. LEXIS 119295, p. 13 (D.N.J. 2013) (plan provisions did not create a lien on the property of insurance companies, for they are not in possession of specific, identifiable assets belonging to the plan); *Hartford Hosp'l Medical Plan v. State Farm Mut. Ins. Co.*, 2010 Conn. Super. LEXIS 1137, pp. 21-22 (Conn. Sup. Ct. 2010) (conversion action against auto liability insurer did not seek specifically identifiable funds, and action dismissed for seeking legal, rather than equitable, relief).

## NEGOTIATING THE PLAN'S CLAIM FOR REIMBURSEMENT

Without the availability of legal or equitable defenses, plan participants and beneficiaries, and their counsel, are left with little or no litigation tools for negotiating with self-funded ERISA health plans. The only leverage available for negotiations on behalf of participants and beneficiaries are practical ones: the plan desires cooperation for voluntary reimbursement, and the best way to get that cooperation is through concession. While it is true that plans can enforce reimbursement provisions through litigation, doing so consumes time, energy, and expense.

If a plan requires a participant or beneficiary to sign an agreement to honor the plan's claim for reimbursement, a plan may refuse to pay medical bills until that signing occurs.<sup>52</sup> A plan cannot require a participant, beneficiary, or attorney to sign a document acknowledging the lien or creating a greater obligation, unless the plan provisions so provide,<sup>53</sup> or unless a requirement to sign documents is a proper exercise of the discretion granted the plan administrator.<sup>54</sup>

Plans enjoy the greatest negotiating leverage when the participant or beneficiary is in need of future medical care that will be covered under the plan. Depending upon plan language, plans may have the authority, perhaps even the discretionary authority, to deny payment of future benefits to an uncooperative participant or beneficiary.<sup>55</sup> Plans can also answer a participant's or beneficiary's breach of the plan contract by denying future benefits.

Given the above realities, participants and beneficiaries are best served by initiating negotiation early, probably while obtaining from the plan administrator the documents necessary for review. Ideally, an arrangement should be reached by which the plan agrees to accept a specific percentage, or graduated percentage, of whatever recovery may be obtained, and this agreement should take into account attorney's fees and other procurement costs. Most importantly, a negotiated arrangement should be reached before a claim is pursued, and certainly before litigation is initiated.

The following list of suggestions may be helpful to attorneys in negotiating with plan administrators or their collection designees.

- The plan administrator has a fiduciary obligation not only to the plan, but also to plan participants and beneficiaries.
- The plan administrator desires reimbursement in the most efficient and least costly manner.
- Plan administrators have neither the attorneys nor the resources to pursue personal injury and wrongful death claims for plan participants and beneficiaries.
- Plan administrators, and the collection companies they designate, have economic incentives to reach an agreement with participants and beneficiaries.<sup>56</sup>

52 See *Cagle v. Bruner*, 112 F.3d 1510, 1519-20 (11th Cir. 1997)(plan requiring participant, in the exercise of the plan's discretion, to sign reimbursement agreement before obtaining benefits); *Cossey v. Associates' Health and Welfare Plan*, 2008 U.S. Dist. LEXIS 7185 (E.D. Ark. 2008) (plan permitted to refuse to pay medical benefits until participant and attorney signed agreement to reimburse); *Schwade v. Total Plastics, Inc.*, 837 F. Supp. 2d 1255, 1265 (M.D. Fla. 2011)(*Schwade I*) (benefits denied for failing to sign documents); *but see Martinez*, 695 F. Supp. 2d at 1105 (improper to require execution of a document purporting to create greater lien obligations than the plan provisions provide).

53 *Martinez*, 695 F. Supp. 2d at 1105.

54 *Zarringhalam v. UFCW Local 1500 Welfare Fund*, 2012 U.S. Dist. LEXIS 170560, pp. 32-33 (E.D.N.Y. 2012).

55 See *Bird v. NECA-IBEW Local 176 Health & Welfare Plan of Benefits*, 2003 U.S. Dist. LEXIS 22866 (N.D. Ill. 2003)(plan provisions call for denial of benefits if beneficiary or participant refused to sign reimbursement agreement).

56 Collection representatives face added pressure to reach reimbursement agreements at the end of fiscal or accounting periods.

- During the oral arguments for *U.S. Airways v. McCutchen*, the plan’s counsel and BCBS, as amicus curiae, promised the court that the current, normal practice for dealing with ERISA reimbursement claims is to reach a negotiated arrangement *before* litigation is initiated.<sup>57</sup>
- Under ERISA, the plan has no authority to seek reimbursement directly from a third-party, an indemnitor, or a liability insurer, and reimbursement must come to the plan, if at all, through a recovery by a participant or beneficiary.
- A third-party paying a recovery will invariably require the execution of a release in order to protect the releasees and to reach finality regarding resolution of a claim and future exposure.
- Unless the plan provisions require the participant or beneficiary to execute a release in consideration for healthcare benefits, and so long as the participant or beneficiary otherwise cooperates, the plan cannot obtain reimbursement without the execution of a release of the third party.
- The fairness, equity, and practicality called for by the *McCutchen* decision demand an equitable arrangement by which the plan, the participant or beneficiary, and her attorney share the settlement or judgment recovery *and* share the cost of procurement.
- The plan benefits from having its reimbursement claim acknowledged and integrated *early* in the prosecution of the personal injury or wrongful death claim.
- The plan benefits from the surety of having an agreement and arrangement about reimbursement.
- The plan and its participant/beneficiary both benefit by mutual cooperation and through a negotiated agreement, and this is best done, for many reasons, in the beginning of a claim.
- Plan administrators abrogate their fiduciary obligations towards the plan and towards participants and beneficiaries if discretionary decisions about plan reimbursement are not being made upon appropriate considerations, but are instead being driven by a collection company’s profit motive.

---

57 During oral argument, Justice Alito inquired about the lack of incentive for participants and beneficiaries and their counsel to pursue claims when the money would go only to reimburse the plan, and the Court was informed that arrangements are “usually” negotiated prior to the commencement of litigation.

JUSTICE ALITO: ... If [Mr. McCutchen and his attorneys] understood that things would work out the way you think they should work out and they saw that the limits of the insurance policies against which they could collect were \$110,000, wouldn’t they have realized that this was a suit that wasn’t worth pursuing? There would be no point in doing it because nothing would be — nothing would be gained for Mr. McCutchen or for his attorneys.

MR. KATYAL: Not at all, Justice Alito. Two things. One, the rule on ERISA – and this rule has been the rule in the Third Circuit since *Federal Express v. Ryan* in 1996. This is a long-establish rule — if an attorney comes and takes a case knowing that there is an ERISA plan at stake, seems to me there at least on inquiry notice that there must be some sort of —

JUSTICE ALITO: Well, perhaps they should have realized it; but, if they realized it, they have no incentive to pursue this litigation or to pursue the tort decision —

MR. KATYAL: Not so. *This is both in our brief, as well as the Blue Cross amicus brief.*

*What usually happens in these situations is that an agreement is struck in advance, before the lawsuit is filed, between the plan and the plaintiff’s attorney to reach some accommodation.*

*After all, the plan has an incentive in some sort of action being brought—*

*U.S. Airways v. McCutchen*, Oral Argument before the U.S. Supreme Court, pp. 19-21, November 27, 2012 (emphasis supplied).

Creative lawyering will certainly add to the above list. The key will be to find practical incentives for the plan to negotiate and reach an arrangement early in the process, while the participant or beneficiary still enjoys some negotiating leverage. If the claim is pursued without negotiating an arrangement early, the claimant and attorney can expect the plan will seek a full reimbursement, and the longer and further the claimant and attorney are committed to pursuing a claim in the absence of an agreement, the stronger will be the negotiating position of the plan.

*McCutchen* teaches attorneys, plan administrators and their collection designees that they cannot look to judicial solutions for the resolution of the many thousands of reimbursement claims by ERISA plans. *McCutchen* teaches that attorneys, plan administrators and their collection designees ought to share in procurement costs, and that these parties need to find practical solutions — *for sharing of procurement and recovery* — in pursuing personal injury and wrongful death claims on behalf of a plan participants and beneficiaries.