Many attorneys struggle with getting reductions on ERISA liens. The primary reason is lack of leverage and less than complete information. This blog post gives some tips on how to be better prepared to fight ERISA recovery contractors. The following are key points from this month's blog post regarding ERISA liens:

- ERISA is a federal statute that protects self-funded employer-based health insurance plans from application of state law when they have a lien
- It is critically important to review an ERISA plan before negotiating a lien
- Use 1024(b)(4) request to put pressure on the ERISA plan
- Determine funding status – self funded versus insured
- Review Master Plan Document for subrogation language, don't rely on the Summary Plan Document
- Get every piece of information you are owed from the ERISA plan prior to resolving the lien
- Follow our step by step plan discussed in the blog post
- Synergy's lien resolution group averages over 40% reductions on self-funded ERISA plan liens!

ERISA Liens – Back to the Basics

LIENS

ERISA is a very complex federal statute that has been interpreted very negatively for personal injury victims by the United States Supreme Court. The goal of this blog post is to explain ERISA and its impact when settling case in a very simple way.

Key takeaways:

- ERISA is a federal statute that protects self-funded employer-based health insurance plans from application of state law when they have a lien
- It is critically important to review an ERISA plan document as well as determine funding status.
- Get what your client is owed from the plan.
- Truly self-funded plans are rare, know the difference.

What is ERISA?

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most voluntarily established employer-based pension and health plans to provide protection for individuals in these plans. It was created to protect the employee and their funds that were contributed to covered plans via payroll deductions. It has been bastardized by ERISA recovery contractors and plans to aggressively recover dollars spent by covered health insurance plans when there is a liability case. While ERSIA wasn't created for this purpose, it is being used in this way.

Today, if you speak to a recovery vendor you hear the following:

> *"ERISA gets 100% of our lien paid back even if you as the attorney and the client gets nothing."*
> *"You have to be pay ERISA liens back at 100% because of the McCutchen case."*
> *"All ERISA plans have the same rights of recovery."*

It is true there is case law on the side of self-funded ERISA plans. The strong recovery rights come from the US Supreme Court's decision in US Airways, Inc v McCutchen. This is the link to the final brief in McCutchen.

The Court was asked to answer two basic questions in the brief:

1. Whether the participant's reimbursement obligation is subject to a pro rata reduction under general unjust enrichment principles because he did not receive a full recovery from the third party. Commonly known as Made Whole.
2. Whether the equitable common-fund doctrine should govern the allocation of responsibility for the attorney's fees the participant incurred in securing the recovery from which the fiduciary seeks reimbursement.

The decision came down in favor of US Airways, the ERISA plan. Mr. McCutchen was not given any relief since the plan language could abrogate Made Whole & Common Fund according to the Court. It seemed he would have to pay the "lien" in full. That isn't what happened though. Mr. McCutchen's case was remanded back to the trial court for a determination on the lien. U.S. Airways v. McCutchen, Case 2:08-cv-01593-DSC (emphasis added) (W.D. PA. March 16, 2016). On remand, the court delved into the actual plan language which incredibly had never been reviewed by the attorneys when the matter was before the US Supreme Court. There was discussion in the opinion on remand about the Summary Plan Description and Master Plan Document. The SPD had recovery provisions which supported US Airway's claim of a equitable lien under ERISA but the MPD did not. SPDs generally don't control, it is the MPD that does. The dispute was whether Mr. McCutchen's recovery from his first party carrier was subjected to US Airway's claim. Because the MPD didn't support it, US Airway's claim was only applicable as to his third-party recovery of $10,000.00 and not his larger first party recovery. An incredible end result. The good guys won in the end but the McCutchen opinion in the US Supreme Court made bad law for plaintiffs across the country.

What does the decision mean for your clients?

Since funding status and plan language are king based on McCutchen, you must review the full plan documents. Fully insured plan status versus self-funded status as well as the Master Plan Document are vitally important.

Funding Status

Funding status determines whether a plan gets to use ERISA's federal preemption and McCutchen versus being subjected to state law subrogation statutes. Many ERISA plans are insured plans versus self-funded which means ERISA's federal law preemption doesn't apply. ERISA covered group health insurance plans are funded in two ways:

Insured Plans- An employer with a small pool of workers will likely use an insured plan. The primary way your health insurance works at work has not changed for the last fifty years, insured plans. You pay for insurance through your employer for a plan with a large health insurance company like Blue Cross, Aetna or United Healthcare. The insurance company collects your premiums from your employer and pays your claims. In short, the premiums are revenue and the claims are expenses of the health insurance company. This is an insurance company plan that is subject to state law when it comes to subrogation even though it is ERISA.

Self-Funded Plans – Large employers can collect premiums and pay claims from their own pool of funds. These plans often look the same because the employer outsources most of the work related to the program. They will utilize a third-party administrator, claims management and stop loss Insurance to help them administer the plan. In short, the company collects the premiums to create an asset pool that is used to pay claims. The pool is employee money and subrogation rights are governed by federal law under ERISA.

Plan Documents

Review of plan documents is incredibly important and cannot be overlooked. The Master Plan Document (MPD) will ultimately layout the recovery rights for the ERISA plan. Strong language in the MPD can minimize or eliminate many

common reduction strategies. Vague language can allow for reductions for common fund or limit recovery rights on 1st party coverage. The Summary Plan Document (SPD) is not very useful, see McCutchen, you need and are entitled to the MPD.

The McCutchen decision makes it much harder to achieve a reduction for ERISA Self-Funded Plans with strong recovery rights in the Master Plan Document. Therefore, you need to know what you are dealing with and the MPD must be critically analyzed for any chinks in the armor.

What can you do to be prepared to fight ERISA subrogation claims?

The first step is to determine what type of plan you are up against. The third-party recovery vendor (Optum, Rawlings, etc.) are not going to tell you the truth. You need to get what you are owed. You can request the Master Plan Document from the Plan Administrator. That is going to be someone at the sponsoring employer (The Plan). They are not an employee of the recovery vendor. The recovery vendor does not have to give you the information. You must request from the plan documents from the proper person to trigger the statute that imposes penalties for failure of a plan to send you the documents. The plans are required by law to send the plan documents upon request to a plan participant or face fines under 29 U.S.C. 1024 (b)(4). The Master Plan Document will specify the funding mechanism and give you the recovery language. That is why it is so important.

The second step is audit and verification. Private Insurance companies are just like Medicaid, Medicare, military and other lien holders. Their bills often contain unrelated or duplicate billing. You must make sure to clean up the bill and remove unrelated/ improper included charges.

Once you review the plan language, verify the funding mechanism and clean up the bill, then you start to fight for the appropriate reduction. The recovery contractor looking to collect the money for their lienholder does not want to litigate. They are a collection company. Rawlings, Optum or whatever recovery contractor you are up against does not get paid until you send them a check. They have internal expenses that go along with collecting and those cut into their profits. They are a business and the less they work to recover funds, the higher the internal profit is on a file. The more they work, the less the profit on a file. Their employees have quotas and goals. They want to reach those goals. You may achieve better reductions at the end of the month, quarter or year.

Even with the law on their side for self-funded plans, recovery vendors do not get paid until the lien is resolved. They will negotiate to get a file closed. Most employers do not want to hear about how a horrible accident suffered by one of their employees has turned into a fierce battle over their employer sponsored health insurance plan. Most employers want happy employees.

Conclusion

In summary, self-funded ERISA Health Plans with strong language have the law on their side. The United States is made up of small businesses. According to The Small Business Administration Office of Advocacy, over 99% of all businesses are made up of 500 or fewer employees. You need a large pool for a self-funded Plan to make sense. Two things to remember, the clear majority of ERISA plans are not self-funded. However, most large company plans (500 EEs or more) are self-funded.

Synergy sees every day how every dollar saved has a drastic impact on a client's life. It is more money to pay off debt, modify a house or get extra therapy. Every dollar matters to their eventual transition from litigation to life. You fought hard for your client's settlement now it is time to fight hard to help them keep it out of the hands of greedy ERISA plans.

Our lien resolution team at Synergy has great success reducing liens from self-funded ERSIA plans despite tough plan language. In 2017 our reduction percentage for ERISA liens was 43%. If you aren't getting those results, talk to us about outsourcing these troublesome liens to us and focus on what you do best.