

Subrogation in the Post Sereboff Era

On May 15th 2006, the United States Supreme Court handed down their decision in *Sereboff v. Mid Atlantic Medical Systems, Inc.* In this decision, the Court ruled that a self-insured employee health benefit plan could enforce its subrogation/reimbursement provision under the “other equitable relief” portions of ERISA.

Sereboff settled a dispute between the Federal Circuit Courts of Appeals as to whether plans had the right under ERISA to enforce the terms and conditions of their subrogation or reimbursement clauses. Since the Court’s decision, there have been seventy reported decisions handed down in the lower courts interpreting and applying the Sereboff decision in the context of subrogation or reimbursement.

Many of these decisions commenting on or interpreting Sereboff involve cases that have little to do with the actual issue of subrogation or reimbursement. Another set of the decisions only touch tangentially on the issue of subrogation or reimbursement by self-insured benefit plans. A portion of the decisions deal with the issue of subrogation in the context of long term disability benefits where the plan participant becomes eligible for Social Security Income benefits due to disability. These disability related decisions can provide some instruction in the context of the classic subrogation case as to what plans can do to successfully navigate the “other equitable remedies” concept in ERISA and thereby secure recoveries. However, this article will not comment on the above referenced cases. The purpose of this article is to provide a reasonably comprehensive list of citations that involve the classic subrogation case and to comment on some emerging trends in the area of subrogation that plans should be aware of.

(1)

The first case that plan’s should pay very careful attention to is *Popowski v. Parrott and Blue Cross Blue Shield of South Carolina v. Carillo*. This is an 11th Circuit Court of Appeals case that is attracting a lot of attention due to its interpretation of Sereboff and the requirements that the Circuit Court makes regarding the wording of the plan’s subrogation provisions. It is an interesting case because the Court consolidated two separate subrogation cases into one case because they both involved the same issue. That issue was whether the plan had the right to bring an action under ERISA to enforce its subrogation/reimbursement provision. The case is also interesting because the Court ruled for the plan that provided benefits to Parrott and against the plan that provided benefits to Carollo, The Court’s decision in this case is turned on differences between the subrogation language in the two benefit plans.

In the discussion regarding the plan’s subrogation language, the Court in Parrot stated that the plan language must specify both the fund out of which the reimbursement is due to the plan and the portion due the plan. This two prong language requirement is finding its way into a number of the subrogation cases.

(2)

One case that clearly relies on this two prong language test is the **Walmart v. Salazar** case. In that case, the United States District Court for Arizona states; “This Court agrees that to create a lien by agreement the plan must (1) specifically identify a fund, distinct from the beneficiary’s general assets, from which reimbursement must be taken, and (2) specify a particular share to which the plan is entitled. The SPD language here specifies both the fund (recovery from the third party or insurer) and the portions due the Plan (the amount the Plan paid out in medical benefits). Thus, the plan is equitable and complies with **Sereboff**.

(3)

Another case that is worth mentioning is the **Administrative Committee of Walmart v. Shank** case. Again, the above referenced two prong plan language test was met. This case is also notable because when the Supreme Court decided **Sereboff** it issues a footnote that made reference to the made-whole and common-fund doctrines. There was a speculation that these doctrines might be generally applied even though the subrogation provisions of the plan specifically refuted the made-whole and common-fund doctrines. Prior to **Sereboff**, the rule was that if a plan specifically refuted these doctrines in the subrogation/reimbursement provision that the doctrines would not operate against the plan. The **Shank** case clearly applies the standard that was in place prior to **Sereboff** to the post **Sereboff** era.

(4)

Mutual of Omaha v. Arachikavitz is a Federal District Court case out of Nevada. In that case, the plan was allowed to prevail and enforce its subrogation/reimbursement interest. What is particularly interesting in this case is that the plan’s subrogation lien interest was given priority over other lien holders, including medical providers, due to the wording of the plan. Once again, enforcing the proposition that strong plan wording is essential successful subrogation.

(5)

Reliance Standard v. Smith involved a case where the assets that the plan was seeking to recover were invested in the plan participant’s investment account. The plan prevailed in receiving its recovery out of that account. This is an important case as it stands for the proposition that as long as the funds that are subject to subrogation exist in some iraceable form they are subject to the plan’s claim for subrogation/reimbursement.

(6)

Brown v. Walmart is notable due to the fact that not only did the plan make a recovery, it recovered all of the available funds and effectively precluded both Mr. Brown and his attorney from making any recovery. While this is probably not the

best strategy for plans to follow, this approach could have substantial negative effects on the overall effectiveness of subrogation recovery, it could provide a useful tool in the successful negotiation of cases. If plaintiff's counsel believes that his/her fees may be at risk should the plan file suit, there may be some incentive to be more reasonable relative to the repayment of the plan. On the other hand, liberal use of this approach will create unnecessary litigation that may very well yield negative opinions from jurists that are not inclined to be pro-ERISA.

Overall, the vast majority of the post-Sereboff case law is very positive to plans seeking to enforce their terms and conditions. However, before declaring total victory plans would be wise to review two post Sereboff decisions that did not turn out so well for the plans. The first case is ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN v. Nancy Lynn GAMBOA, 2007 WL 2021966 (W.D. Ark). The second case is PRIMAX RECOVERIES, INC v. Joan GUNTER, et al., 2007 WL 865830 (M.D. Tenn).

Hopefully, the trend relative to subrogation decisions in the post Sereboff era will continue to be positive towards plans. **However, there are still unanswered issues like what happens if a plan participant dissipates the proceeds of the recovery. Is that plan participant personally liable to compensate the plan in the last of dissipation because that plan participant is considered by Sereboff to be a trustee of the plan?** Plans would be wise to make sure that their subrogation and reimbursement language is consistent with current case law and to make judicious use of litigation as a method to resolve disputes over repayment. For the time being, plans should enjoy a period of being able to make recoveries as long as they follow the rules delineated in Knudson, Sereboff, and their progeny.