Recent Challenges to the Uniform Enforcement of Subrogation and Reimbursement Provisions Under ERISA

By Catherine Dowie

As most court cases interpreting ERISA mention, ERISA is "not a model of legislative drafting". This sweeping and complex piece of legislation constantly seems to require clarification, particularly enforcement of plan subrogation rights under section 502(a)(3), which requires that relief sought by the plan be 'equitable' (as opposed to legal) in nature. To define the subrogation and reimbursement rights of a modern day plan, the Supreme Court has needed to look back to cases as far back as the 1880s that are rarely if ever relied on outside of the ERISA context nowadays. Prior to the US Supreme Court's decision in *Montanile v. BD. OF TRUSTEES, NAT. ELEVATOR*, 136 S. Ct. 651, 577 U.S., 193 L. Ed. 2d 556 (2016), the last half dozen decisions by the Supreme Court had carved a favorable path for self-funded employee benefit plans, ultimately affirming that the clear terms of a plan's subrogation and reimbursement provision cannot be overridden by state law or traditional equitable doctrines. These strong and uniformly enforced subrogation and reimbursement rights are a critical part of any basic cost-containment strategy and lead to millions of dollars in plan savings every year.

Under *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 569 U.S., 185 L. Ed. 2d 654 (2013), while plans that fail to adequately protect their rights with strong language may find themselves subject to various state regimes and restrictions when seeking subrogation or reimbursement, private, self-funded employee benefit plans are supposed to be able to enjoy uniform application of their plan terms nationwide. That uniform application of plan terms, the heart of ERISA, has recently been called into question by a handful of federal district and circuit court decisions across the country in the subrogation context. Some of these courts have held that the outcome of a case (and therefore a plan's ability to recover) can be decided based entirely on if a lawsuit is initiated by a plan instead of by a plan participant.

Two years ago the 2nd Circuit decided *Wurtz v. Rawlings Co., LLC*, 761 F.3d 232 (2d Cir. 2014). This was one of the first cases to address the issue of if all lawsuits related to subrogation and reimbursement under section 502(a)(3) of ERISA can be filed in or removed to federal court. Generally speaking, the party that files a lawsuit gets to determine the court it is heard in and the issues to be littigated that will determine which courts have jurisdiction over the case.

When a defendant responds to a lawsuit, any counterclaims or defenses they make do not usually expand jurisdiction to courts the plaintiff could not have brought their case in. Certain counterclaims and defenses are an exception to this general rule, including those brought under certain provisions of ERISA. So if a participant files a lawsuit in state court claiming that state law prohibits the plan from seeking reimbursement (a claim that a participant would generally not bring in federal court), a plan subject to ERISA would, ideally, have the ability to remove the case to federal court and claim that state law should not be enforced in defiance of plan terms under ERISA.

The problem facing courts centers on the interpretation of if a suit filed by a plan participant to avoid reimbursement to a plan could have been brought under 502(a)(3) (essentially if it can be

classified as akin to a 'claim for benefits') and if the underlying litigation impacts an independent legal duty of the defendant (the plan in the cases discussed here). If both of these criteria are met, a case filed in state court by a participant can be properly removed to federal court by a plan.

In *Wurtz*, the subrogation vendor for a fully-funded policy sought reimbursement from plaintiff's in personal injury cases in New York. New York is notoriously anti-subrogation, and the insureds filed an action for the return of funds they had sent to the vendor and a declaration that New York law barred any right of recovery the carriers might claim. Suit was filed in New York state court against the subrogation vendor, who sought to have the case removed to federal court, claiming that the federal courts had jurisdiction to hear the case based on ERISA. While the district court agreed with the vendor, the 2nd Circuit ultimately disagreed, holding that because ERISA was being raised as a defense, the cases were not being brought 'under' ERISA, and therefore the case belonged in state court. The 2nd Circuit held that the claim by the participant for enforcement of NY law in defiance of plan terms was not akin to a claim for benefits, and so could not be heard in federal court.

While a note in the case makes clear that it does not apply to self-funded employee benefit plans, the legal theories underlying the decision itself could have significant consequences for fully-insured and self-funded plans alike. The 2nd Circuit itself acknowledged that it's decision was 'in tension' with many other federal circuit courts. Recognizing the threat to federal uniformity of plan administration, the Self Insured Institute of America and the National Association of Subrogation Professionals filed a brief with the Supreme Court urging reversal of the 2nd Circuit. Unfortunately, the Supreme Court declined to hear the case, allowing the disagreement between the circuits, and uncertainty for plans, to stand. The most shocking part of this decision was that it is undisputed that if the suit had been filed by the party seeking reimbursement under the terms of a Plan, rather than seeking to enforce state law in opposition to the terms, the case would have been properly heard in federal court.

This issue has also been the subject of multiple lawsuits beginning in the state courts of Illinois. The 7th Circuit (where Illinois is located) is traditionally very favorable to self-funded ERISA plans, having gone so far as to suggest that an attorney be jailed for failing to reimburse a self-funded benefit plan (see *CENTRAL STATES v. Lewis*, 745 F.3d 283 (7th Cir. 2014)). In two separate cases attorneys representing participants in self-funded benefit plans issued full payment to those plans in accordance with their terms and federal law, and turned around and sued the plans in state court! In clear defiance of the Plan's terms, the attorneys sought contribution to their fees from the self-funded benefit plans. These self-funded plans removed the cases to federal court, seeking to enforce the plan's terms.

Unfortunately, the federal district court ultimately held similarly to the 2nd Circuit in *Wurtz*, stating that if the plan had wanted to be heard in federal court, they would have needed to file suit against the plan participant.

The plans took the district court's advice and filed a separate suit in federal court. They asked the federal court to enjoin the attorneys from pursuing any action that would force the plans to violate the plan's terms. Unfortunately, the plans were rebuffed yet again! Citing the federal

anti-injunction act, while the federal courts acknowledged the plan's strong position on the merits of their claims, they held that the plans would be required to litigate this matter in front of an Illinois state court. While the 7th Circuit has historically been favorable to self-funded plans, Illinois has not. The Illinois Supreme Court held in *Bishop v. Burgard*, 198 Ill. 2d 495, 764 N.E.2d 24 (2002) that the common fund doctrine would even apply in the case of a private, self-funded plan that clearly called for full reimbursement without any deduction for attorney fees and costs. While this case was decided before the Supreme Court's decision in *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 569 U.S., 185 L. Ed. 2d 654 (2013), it was in clear defiance of the vast majority of circuit courts which had held that the common fund doctrine could not overcome clear plan terms.

The most recent case out of the Illinois and the 7th Circuit has settled, and so that case can not be appealed to the Supreme Court to resolve the existing circuit split. Most recently, in *Noetzel v. Haw. Med. Serv. Ass'n*, No. 15-00310 SOM-KJM, 2016 BL 242341 (D. Haw. July 27, 2016) the federal district court for the district of Hawaii has rejected the logic of the *Wurtz* case, siding with the benefit plan and allowing the case to remain in federal court. Given the past procedural posture of this case, we anticipate that the parties will appeal the ruling to the 9th Circuit and can only hope that this case, or one like it, is heard by the Supreme Court in the near future.

For self-funded plans, this means that a subrogation recovery can literally come down to a race to the court house. If a participant or their attorney refuses to reimburse or otherwise honor the plan's recovery provisions, plans have a decision that needs to be made quickly. Either file suit against the appropriate parties in federal court under 502(a)(3) to enforce the terms of the plan, or run the risk that the participant will file in state court. Even assuming that a plan will ultimately receive a favorable outcome, litigation is likely to be more prolonged and outcomes more uncertain in front of a state court.

State courts are less likely to have the same familiarity with the complex preemption issues inherent in ERISA as federal courts and may impose widely varied requirements on plans seeking relief. Many states impose very specific, and often conflicting, regulations on recoveries. Many states impose costly notice requirements utilizing short deadlines, some require plans to either collect on their own behalf or utilize a vendor that meets numerous state-specific requirements in order to operate there.

Access to knowledgeable and diligent subrogation experts has never been more important to cost-containment and plan solvency. We can only wait and hope that an appropriate case is ultimately successfully appealed to the Supreme Court to resolve this circuit split and re-establish the uniform enforcement of plans' rights.