TRANSPARENCY FOR ERISA REIMBURSEMENT RECOVERIES: A PROPOSAL FOR ADMINISTRATIVE AND CONGRESSIONAL ACTION

By Professor Roger M. Baron[1]

Proposal:

The federal government shall require, through already established reporting requirements found in the Form 5500 Series, that ERISA Plans providing health care benefits, also disclose in conjunction with Form 5500 filings:

1) The amount of money received through subrogation/reimbursement.
2) The amount paid to attorneys and other agents utilized to secure these recoveries.
3) The ultimate disposition of this money, including full disclosure of all amounts paid to plan service providers, such as stop loss insurers, health insurers, reinsurers, claims administrators, etc.

Such reporting requirements could be accomplished administratively by directive of the President and implemented by the Department of Labor, through the Employee Benefits Security Administration. Additionally or alternatively, Congress could manifest its intention regarding the importance of revealing this information to the public, by mandating the expansion of existing Form 5500 reporting requirements.

Rationale for Proposal:

According to industry statistics, ERISA plans and related insurers are collecting $ 1 billion per year through the seizure of tort recoveries and other contractual payments received by insured personal injury victims. The plans aggressively pursue reimbursement on a "first dollar priority" basis with no consideration of the impact reimbursement leaves upon the insured. Unfortunately, there is little or no oversight on the ability of these insurers to bring reimbursement actions.

Authority for "reimbursement" claims is attributed to federal preemption under the auspices of ERISA which was enacted in 1974. The fact of the matter is, however, that when Congress enacted ERISA, the ability of a health insurer to seek reimbursement was not recognized under the law. At the time ERISA was enacted by Congress in 1974, subrogation for health insurers was uniformly prohibited in this country. Such claims were deemed unlawful in all jurisdictions. The first reported judicial decision involving an effort of a health insurer to seek subrogation on a personal injury claim is the 1982 decision in Frost v. Porter Leasing Corp., 436 N.E.2d 387 (Mass. 1982) in which subrogation was denied. These types of claims began arising as ERISA "reimbursement claims" in the late 1980s and have been resisted by many federal courts. The problematic nature of ERISA reimbursement continues and is exemplified by the Wal Mart v. Shank litigation which gave rise to a national outcry for justice.

The insurance industry speciously argues that these recoveries flow to the benefit of other insureds, but such has never been established. In reality, these recoveries are treated as sources of profit for the insurers and those engaged in the collection business itself.

The coveted status of federal preemption – i.e., complete freedom from governmental oversight -- in the matter of reimbursement, is not only enjoyed by ERISA plans, but also by stop loss insurers, contract administrators, and other related insurers doing business through ERISA plans. These insurers furtively mold their coverage and policy provisions to fall under federal preemption and then mandate "first dollar priority" on their self-granted reimbursement claims.

Most ERISA Plans are required to file a Form 5500 annually with the Department of Labor. This form series, jointly developed by the Department of Labor, Internal Revenue Service, and Pension Benefit Guaranty Corporation to meet the annual reporting requirements under Title I and IV of ERISA, requires the disclosure of many aspects of the plan's operations. "Basic Plan Information" filing requirements incorporate the identification of plan administrators, number of plan participants, plan funding arrangements, etc. As noted on the Department of Labor/Employee Benefits Security Administration website, "The Form 5500 Series is part of ERISA's overall reporting and disclosure framework, which is intended to assure that employee benefit plans are operated and managed in accordance with certain prescribed standards and that participants and beneficiaries, as well as regulators, are provided or have access to sufficient information to protect the rights and benefits of participants and beneficiaries under employee benefit plans."

Indeed, a recent emphasis on expanding the disclosure of financial information on the Form 5500 and "Schedule" attachments has begun to emerge. In 2010, all Form 5500s are required to be submitted electronically through EFAST2 (ERISA Filing Acceptance System) as a measure taken by the Department of Labor to accelerate availability of public display. Additional changes include added financial disclosure requirements of small (under 100 participant) welfare plans, as well as the disclosure of fees focusing on indirect compensation received by service providers on Schedule C (Service Provider Information) and several new categories of fees paid by the plan on Schedule H (Financial Information) for large welfare plans. Yet, there are currently no require-

ments for plans to disclose any information concerning subrogated/reimbursement recoveries. Such information could appropriately be incorporated into either Schedules C or H and could be included on Schedule A, which covers "Insurance Information." The Form 5500-SF, for small employer health plans, could also easily incorporate such an addition to its simplified financial reporting requirements.

In witnessing the significant injustices arising out of subrogation/reimbursement claims, I have come to believe that the more the public knows about these recoveries, the better. Bringing transparency and sunshine to these reimbursement recoveries may serve well as a catalyst for meaningful reform aimed at equitable treatment for these victims who are injured twice -- once by a tortfeasor and then again by their health insurers. Accordingly, I am proposing that we request the federal government, to amend the Form 5500 Series to also require that ERISA Plans, which provide health care benefits, also disclose:

1) The amount of money received through subrogation/reimbursement.
2) The amount paid to attorneys and other agents utilized to secure these recoveries.
3) The ultimate disposition of this money, including full disclosure of all amounts paid to plan service providers, such as stop loss insurers, health insurers, reinsurers, claims administrators, etc.

Such disclosure requirements could be imposed administratively through Presidential directive and additionally or alternatively through a legislative mandate by Congress.

Please assist me in suggesting that such a disclosure requirement be placed as a priority item on the agenda of our lawmakers and leaders.

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[1] Professor of Law, University of South Dakota. The author wishes to acknowledge and thank Marilyn Trefz for her valuable assistance in enabling me to understand the Department of Labor filing requirements in form 5500 and in her assistance in helping me put forth this proposal and in preparing this paper. Views expressed in this Memorandum are my views as an individual and do not reflect the views of the University of South Dakota.

[2] "One of the largest private healthcare claims recovery services in the United States recovered $239.9 million in health claims in 2003. See Trover Solutions, Inc., Form 10-K (FY 2003) at 29. Based on the recoveries made by this service, it is estimated that more than $1 billion is recovered annually on behalf of all plans." Amicus Brief filed by the US Chamber of Commerce in the Sereboff case, 2006 WL 467695, at footnote 37, page 15.

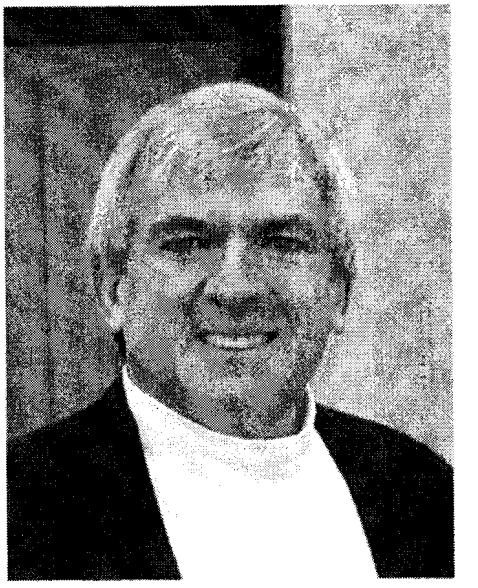
[3] Roger M. Baron, Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom, 55 Mercer Law Review 595 (2004).

[4] Marilyn F. Trefz, Public Pressure Reverses Adverse ERISA Result for Deborah Shank, The Advocate, Sept-Oct 2009, page 36 (published by Kentucky Association for Justice); Andrew H. Koslow, "Appropriate Equitable Relief" in Wal-Mart v. Shank: Justice for Whom?, 12 QUINNIPIAC HEALTH L. J. 277, 280 (2008).

[5] Roger M. Baron and Delia M. Druley, ERISA Reimbursement Proceeds: Where Does The Money Go?, Minnesota Trial, Spring 2010, p. 10. (Compiling the leading authorities, both primary and secondary.)

[6] Department of Labor, Employee Benefits Security Administration, Form 5500 Series, available at http://www.dol.gov/ebsa/5500main.html (last visited October 6, 2010).

[7] Professor Baron may be contacted by e-mail at Roger.Baron@usd.edu.



PROFESSOR ROGER BARON, *University of South Dakota School of Law, has been actively involved in ERISA reimbursement litigation and legislation. Over the past decade, he has participated in three U.S. Supreme Court proceedings involving ERISA Reimbursement and has worked on federal legislation at the request of various members of Congress. Roger's law review articles on subrogation and ERISA reimbursement have been cited by numerous courts across the country. Roger has been a guest lecturer for MAJ on three different occasions over the last few years – twice in Minneapolis and once in Duluth.*

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