ERISA, an Overview

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et. seq., known without affection as ERISA, was an effort by Congress to address the long term viability of Pension Plans. This paper is only an overview and is very incomplete and is not designed to be an all inclusive discussion of the topic, but rather an overview of areas that someone not practicing in the area of ERISA might encounter in their practice. In addition, this paper is designed more as a discussion of Employee Welfare Benefit Plans than of Employee Pension Benefits Plans.

Statutory Provisions Generally:

ERISA is a complex statute that Courts have construed in a way that it is unlikely that Congress originally intended. 29 U.S.C. § 1001a provides in part, "(c) Policy: It is hereby declared to be the policy of this Act— (1) to foster and facilitate interstate commerce, (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans, (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and (4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans." I would argue that the interpretation of the statute by the Courts has largely failed to acknowledge the benevolent nature of the statute and has not, in my opinion, complied with original intent of the statute or applied the benevolent rule of statutory construction.

ERISA has a definitions section that applies to the statute. I will not address those definitions except to state that they are key to the understanding of the Act and are found at 29 U.S.C. § 1002. However in an overview manner, there are two types of ERISA plans. There are the "Welfare benefit Plans" which are defined as "(1) The terms ‘‘employee welfare benefit

plan'' and ''welfare plan'' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions)." 29 U.S.C. § 1002(1).

And then there are the "Employee Pension Benefits Plans" which are defined at 29 U.S.C. § 1002(2)(A) as "Except as provided in subparagraph (B), the terms ''employee pension benefit plan'' and ''pension plan'' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution."

So what employers and groups does ERISA apply to? That is stated at 29 U.S.C. § 1003(a) as, "Coverage: (a) In general Except as provided in subsection (b) or (c) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained— (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2) **by any employee organization or organizations representing employees** engaged in commerce or in any industry or activity affecting commerce; or (3) by both." Again refer to the definitions section, 29 U.S.C. § 1002 before rejecting that any entity cannot provide an ERISA plan.

However, there are specific exclusions from ERISA These are found at 29 U.S.C. § 1003(b) and are as follows: (b) Exceptions for certain plans: The provisions of this subchapter shall not apply to any employee benefit plan if—(1) such plan is a governmental plan (as defined in section 1002(32) of this title); (2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of title 26; (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws; (4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or (5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded. The provisions of part 7 of subtitle B of this subchapter shall not apply to a health insurance issuer (as defined in section 1191b(b)(2) of this title) solely by reason of health insurance coverage (as defined in section 1191b(b)(1) of this title) provided by such issuer in connection with a group health plan (as defined in section 1191b(a)(1) of this title) if the provisions of this subchapter do not apply to such group health plan."

In addition, there is a federal common law created exclusion of sorts. And, that exclusion is to the medical decisions that are made by an HMO. In *Pegram v. Herdrich*, 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed. 2d 164 (2000), the Court held "Based on our understanding of the matters just discussed, we think Congress did not intend Carle or any other HMO to be treated as a fiduciary to the extent that it makes mixed eligibility decisions acting through its physicians." The Court in *Pegram* applies what it deems trust principles to reach this conclusion.

Pre-Emption:

ERISA was first determined to pre-empt state tort laws that do not directly regulate insurance in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 Led. 2d 39 (1987). *Pilot Life* was a bad faith case based on Mississippi state tort law. The Court held that 29 U.S.C. § 1144(b)(2), often referred to in Court decisions as the "Savings Clause", did not allow state common law actions of "bad faith" to go forward as such laws "do not regulate insurance". And, while *Pilot Life* prevented the use state tort laws, even it was not as broad in pre-emption as the decision of *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S.Ct. 2488, 159 L.Ed. 2d 312 (2004) which states, "Nor can the mere fact that the state cause of action attempts to authorize remedies beyond those authorized by ERISA § 502(a)[1] put the cause of action outside the scope of the ERISA civil enforcement mechanism." *Davila* instructed that ERISA would be interpreted as a statute of "extraordinary pre-emptive power".

Plan Documents:

29 U.S.C. § 1102(a)(1) provides, "Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1022 provides in part, " (a) A summary

[1] This cite is to the Public Law section of the Act. The statutory cite is 29 U.S.C. § 1132(a).

plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." Note that the Summary Plan Description is a mandatory requirement.

There are numerous cases from both Circuit Courts and District Courts that the Summary Plan Descriptions and the terms stated therein are a part of the plan and binding on the Employer, Plan, or Organization. Do not rely on such cases. The Supreme Court in *Cigna Corp. et. al. v. Amara et. al.*, ____ U.S. ____, 131 S. Ct. 1866, No.: 09-804 (2011) held, "For these reasons taken together we conclude that the summary documents, important as they are, provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the *terms* of the plan for purposes of § 502(a)(1)(B). We also conclude that the District Court could not find authority in that section to reform CIGNA's plan as written."

So how do you get a copy of the Plan? Because 29 *U.S.C.A.* § 1132(c) allows you to request the Plan and imposes a penalty of $100.00 per day after the failure to provide the plan to the Participant if that the failure occurs 30 days after receipt of the request. A Plan Participant or also has the right under this statute to request a complete copy of the file that relates to the Plan Participant, including internal emails and other documents.

The issue of Plan documents is very significant and cannot be understated. If the Plan documents state a limitation or any other written provision, it most likely will be upheld. There do not appear to be any limits on what the Plan documents can provide. For example, in ***Egelhoff***

v. Egelhoff, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed. 2d 264 (2000), the Participant had for whatever reason following a divorce not changed the beneficiaries on an employer provided pension and life insurance policy. The Plan Participant after the divorce passed away. His minor child after providing the Plan a copy of the divorce decree and relying on a Washington state statute that revoked beneficiaries on life insurance benefits and on pension plans in the event of a divorce brought suit to collect those benefits from the Plan. The Supreme Court in *Egelhoff* held, "We recognize that all state laws create some potential for a lack of uniformity. But differing state regulations affecting an ERISA plan's 'system for processing claims and paying benefits' impose 'precisely the burden that ERISA pre-emption was intended to avoid. * * * And, as we have noted, the statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents. We conclude that the Washington statute has a 'connection with' ERISA plans and is therefore pre-empted." Please note, the Washington state statute which regulated insurance and pensions was pre-empted not because it conflicted with or was supplanted by a law passed and enacted by Congress but because it conflicted with written plan documents of a private entity and were contrary to the plan documents.

For those of you who do divorces and believe that you can avoid the result of *Egelhoff* , the only option is a properly worded and legally correct Divorce Decree with a proper Qualified Domestic Relations Order that complies with 29 *U.S.C.A.* § 1056(d)(3). If for any reason the Divorce Decree does not meet the ERISA test as stated in 29 *U.S.C.A.* § 1056(d)(3), then *Egelhoff* controls and the benefits will upon death go to the ex-spouse if she remains as the named beneficiary. *See Kennedy as Executrix v. Plan Administrator for Dupont Savings and Investment Plan*, 555 U.S. 285, 129 S.Ct. 865, 172 L.Ed. 2d 662 (2009). You should note that in

the Divorce Decree in *Kennedy as Executrix*, the former spouse had waived her right to any benefits that she actually received at the death of her former spouse, the Plan Participant. But she was paid those benefits even though the Divorce Decree provided she had no entitlement to the benefits.

How far does deference to Plan documents go? Take the case of Social Security benefits. 42 U.S.C. § 407 prohibits the garnishment, attachment or assignment of Social Security benefits in both law and equity. You would think that ERISA which is a complex mix of contract and Trust principles and the Plans issued under ERISA would be limited by 42 U.S.C. § 407. However, the majority rule is that ERISA Plans can reduce, offset, or demand a refund of benefits paid based upon the receipt of Social Security benefits. *See Melech v. Life Ins. Co. of North America*, 739 F.3d 663, 674 (11th Cir. 2014) stating, 'We find nothing necessarily troubling in the terms of LINA's Policy that allow it to benefit from the SSA's alternative compensation mechanism".

How far does this disregard of 42 U.S.C. § 407 go if provided for in Plan documents? In an unpublished opinion, *Hackner v. Long Term Disability Plan for Employees of the Havi Group LP*, 81 Fed. Appx 589, 596 (7th Cir. 2003), the Court held, "Because the Plan provides that Social Security benefits paid to Hackner's 'children' due to his disability count against his benefits from the Plan, the district court was correct that Hartford was entitled to be reimbursed the additional $6,500 it seeks with respect to the Social Security benefits Hackner's son received as a result of Hackner's disability." In other words, a Plan Document that provided for the recovery of Social Security benefits from a non-participate child who received no monetary payments from the Plan, were ordered to be reimbursed to the Plan even though 42 U.S.C. § 407 would prohibit the assignment, garnishment, and attachment of such benefits because the Plan

Documents, not an act of Congress, provided for the reduction thereby allowing a private corporation to override the explicit will of Congress as enacted by 42 U.S.C. § 407. This is an extremely common plan provision in most Long Term Disability plan documents.

You should not read this case as allowing a representative payee for the child to actually pay any money to the Long Term Disability insurance company or other ERISA plan even if the Plan does require such payment. Any such reimbursement would have to be paid by the Plan Participant and not by the non-participant child or the child's representative payee. It should also be noted that the Social Security type cases are not true subrogation cases because of 42 U.S.C. § 407.

Subrogation/Reimbursement:

When it comes to subrogation and reimbursement, there are currently three important cases to be aware of. The first case is *Great –West Life & Annuity Insurance Co. et. al. v. Knudson, et. al.*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed. 2d 635 (2002). The events leading to *Great –West Life* were that the health insurance plan provided payment on behalf of a Participant to doctors and hospitals following an automobile wreck. The medical expenses exceeded $411,157.11. *Great –West Life* filed suit against the injured plan participant seeking to obtain a recovery in contract for the subrogation interest provided by the Plan documents. Knudson had settled the automobile wreck by a structured type settlement that provided that most of the settlement would be used to pay for future medical expenses and had been placed in a Spend Thrift Trust. The Supreme Court found that *Great –West Life* was limited to equitable remedies, not including restitution, by 29 *U.S.C.A.* § 1132(a)(3) stating, "Respecting Congress's choice to limit the relief available under § 502(a)(3) to 'equitable relief' requires us to recognize the

difference between legal and equitable forms of restitution. Because the petitioners seek only the former, their suit is not authorized by § 502(a)(3)."

As a result of *Great –West Life*, we now see insurance company's send to clients a written reimbursement agreement that allows them to file suit in contract or at law to recover for the reimbursement of monies paid. Those written reimbursement agreements amount to a written modification of the plan and the validity of a written modification of a plan for one Participate as opposed to the entire plan may not meet the standards of 29 U.S.C. § 1102. However, more recently especially in the Long Term Disability and Health Insurance Plans, I am seeing a Plan provision that requires in the event of an injury and/or an illness that the Plan Participant execute and deliver to the Plan a written reimbursement agreement. Are such Plan provisions valid since they would conflict with Court's interpretation in *Great –West Life*? I do not know the answer, but given the deference to the Plan documents, I would guess that it is a valid provision. *See below U.S. Airways Inc. v. McCutchen et.al.*, _____ U.S. _____, 133 S.Ct. 1537, No. : 11-1285 (2013).

The next case is *Sereboff et. ux. v. Mid Atlantic Medical Services*, 547 U.S. 356, 126 S.Ct. 1869, 164 L.Ed. 2d 612 (2006). The facts in *Sereboff* are very similar to *Great –West Life*. Both cases arise from an accident and both cases are the result of health benefits paid. The difference is that in *Sereboff,* the amount of the medical expenses were sought to be recovered as a specifically identified fund and not from the general assets of the Plan Participant. The *Sereboff* Court explained the reason it allowed a recovery as follows:

> It alleged breach of contract and sought money, to be sure, but it sought its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the Sereboffs' assets generally, as would be the case with a

> contract action at law. ERISA provides for equitable remedies to *enforce plan terms*, so the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable; that would make §502(a)(3)(B)(ii)[2] an empty promise. This Court in ***Knudson*** did not reject Great-West's suit out of hand because it alleged a breach of contract and sought money, but because Great-West did not seek to recover a particular fund from the defendant. Mid Atlantic does.

The Supreme Court in ***Sereboff*** goes on to state, "This rule allowed them to 'follow' a portion of the recovery 'into the [Sereboffs'] hands' 'as soon as [the settlement fund] was identified,' and impose on that portion a constructive trust or equitable lien."

In ***U.S. Airways Inc. v. McCutchen et.al***., _____ U.S. _____, 133 S.Ct. 1537, No. : 11-1285 (2013), the Plan had a specific provision that created an equitable lien on the proceeds recovered for injuries sustained in an automobile wreck. The Supreme Court in ***McCutchen*** upholds that portion of the Plan Documents and states, "US Airways, like Mid Atlantic, is seeking to enforce the modern-day equivalent of an 'equitable lien by agreement.' And that kind of lien – as its name announces – both arises from and serves to carry out a contract's provisions. * * * So enforcing the lien means holding the parties to their mutual promises. * * * Conversely, it means declining to apply rules – even if they would be 'equitable' in a contract's absence – at odds with the parties' expressed commitments. McCutchen therefore cannot rely on theories of unjust enrichment to defeat US Airways' appeal to the plan's clear terms." The progression from ***Great –West Life*** and ***Sereboff*** is that the Court has now recognized that the equitable lien can now be created in the Plan documents and that the Plan documents can preclude and prohibit specific legal arguments that would limit the subrogation recovery.

[2] 29 *U.S.C.A.* § 1132(a)(3)(B)(ii).

Given this new holding, does it mean that the limitation on recovery set forth in *Great – West Life* is no longer valid if the Plan documents provide otherwise and that *Great –West Life* had been *de facto* overruled? My guess is no, but that *Great –West Life* has been extremely limited to apply only to those situations where benefits are due in the future such as a Long Term Disability Plan. In other words, to a situation where benefits have not yet accrued and therefore the contractual equitable lien has nothing to which it can attach.

U.S. Airways Inc. v. McCutchen et.al., _____ U.S. _____, 133 S.Ct. 1537, No. : 11-1285 (2013) did allow for attorney fees and costs to the Plan Participant but only where, "The plan is silent on the allocation of attorney's fees, and in those circumstances, the common-fund doctrine provides the appropriate default."

As I originally pointed out, this is an overview of how ERISA, particularly Welfare Benefit Plans, may affect non- ERISA issues. It does not address the complexities of ERISA litigation itself and is not so intended. I do however hope it is somewhat instructive.

Date: September 4, 2014

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