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Subrogation and Liens

Continued

Judy Kostura

Judy Kostura
Judge, Kostura & Putman, P.C.
2901 Bee Cave Road, Suite L
Austin, Texas 78746

jkostura@jkplaw.com

512.328.9099

In *Haung v. Life Insurance Co of North America*, (E.D. Mo. 09/16/2014; No. 4:13CV00299 AGF) the Court applied Missouri law to reform a life insurance policy by reading mandated statutory provisions into the policy:

> The Supreme Court has "repeatedly held that state laws mandating insurance contract terms are saved from preemption under § 1144(b)(2)(A)." *UNUM Life Ins. Co. of Am. v. Ward,* 526 U.S. 358, 375 (1999); see also *Ky. Ass'n of Health Plans, Inc*., 538 U.S. at 339 n.3 (holding that state law rule "which dictates to the insurance company conditions under which it must pay for the risk that it has assumed . . . certainly qualifies as a substantial effect on the risk pooling arrangement between the insurer and insured")…. "). … See *Larson v. United Healthcare Ins. Co.,* 723 F.3d 905, 912 (7th Cir. 2013) ("[W]hen an [ERISA] plan includes an insurance policy, contract terms mandated by state insurance law become plan terms.").

In *Kentucky Ass'n of Health Plans, Inc. v. Miller,* 538 U.S. 329, 341-42 (2003), the Supreme Court receded from the McCarran-Ferguson factors, stating:

> Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a "law ... which regulates insurance" under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. *See Pilot Life, supra,* at 50, 107 S.Ct. 1549, *UNUM, supra,* at 368, 119 S.Ct. 1380; *Rush Prudential,* supra, at 366, 122 S.Ct. 2151. Second ... the state law must substantially affect the risk pooling arrangement between the insurer and the insured. Kentucky's law satisfies each of these requirements.
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> The majority of cases addressing state subrogation and collateral source statutes have determined that they are laws regulating insurance. In *FMC Corp. v. Holliday,* 498 U.S. 52, 60-61 (1990), the Supreme Court considered whether a Pennsylvania anti-subrogation statute was a law "regulating insurance" and held:
>
> There is no dispute that the Pennsylvania law falls within ERISA's insurance saving clause.... Section 1720 directly controls the terms of insurance contracts by invalidating any subrogation provisions that they contain. *See Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S., at 740-741, 105 S.Ct., at 2389-2390. It does not merely have an impact on the insurance industry; it is aimed at it. *See Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 50, 107 S.Ct. 1549, 1554, 95 L.Ed.2d 39 (1987). This returns the matter of subrogation to state law.
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> *Coleman v. BCBS of Alabama, Inc*., No. 1D10-1366, (D. Ct of Appeal Florida, 1st Dist. - Dec. 8, 2010)

Privacy laws are not pre-empted by ERISA. In *Justin Quintana v. Kem L. Lightner, et al*, the U.S. District Court, N Dist., Dallas Div. No. 3:10-CV-0571-G, March 21, 2011, remanded an action back to state court. Quintana sued Lightner, a State Farm adjuster, State Farm, and Ingenix for invasion of privacy and violations of HIPAA and intentional infliction of emotional distress after Ingenix disclosed privileged health information to State Farm, allowing State Farm to settle Ingenix's subrogation interest in Quintana's third party claim against the State Farm driver. Ingenix argued that Quintana's claim "constitutes claims for benefits under an employee welfare benefit plan that is subject to ERISA…and therefore this court has federal question jurisdiction…. The court disagrees. … Quintana does not claim a right to receive benefits under the plan. Instead, he is suing as a victim of Ingenix's allegedly tortious conduct that he claims exceeded the scope of its authority under the Plan. … Quintana is asserting an independent right to privacy."

Laws regarding journeyman's wages do not "relate to" employee welfare benefit plans and are not preempted by ERISA, *California Labor Standards v. Gillingham Construction*, 117 S.Ct. 832 (1997).

A New York law which taxed gross receipts of health care facilities operated by a trust fund established to administer an employee welfare benefit plan, did not "relate to" employee welfare benefit plans and are not preempted by ERISA, *De Buono v. NYSA-ILA Medical and Clinical Serv.*, 117 S.Ct. 1747 (1997); a state statute which "requires hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross Blue Shield plan, and also subjects certain health maintenance organizations to surcharges" does not "relate to" employee benefit plans and is therefore not pre-empted by ERISA; see *N.Y. Conference of Blue Cross v. Travelers Ins.*, 115 S.Ct. 1671 (1995).

Wrongful death claims are not pre-empted by ERISA; wrongful death beneficiaries are not subject to the subrogation or reimbursement provisions; see Federal District Court of Illinois, Central District in *Caterpillar, Inc. v. Wilhem*, 2008 WL 4330213 at *5: "To the extent the Illinois Wrongful Death Act enables a close relative to recover for his or her own loss arising from the death of a plan participant, that claim is too remote to relate to a welfare benefit plan, and ERISA generally does not preempt the operation of the statute."

Wrongful death claims and the subrogation claims asserted by ERISA are not removable to federal court; *In the Matter of Boisseau*, U.S. District Court, Northern District of New York, (CV-00549-LEK-ATB Jan. 30, 2017), "The probate exception operates as a bar to the exercise of federal jurisdiction, and there is no carve out for cases arising under ERISA. *See Carpenters' Pension Tr. Fund-Detroit & Vicinity v. Century Truss Co.*, No. 14-CV-11535, 2015 WL 1439868, at *6 (E.D. Mich. Mar. 27, 2015) (where the probate exception applies, the court lacks jurisdiction to consider ERISA preemption); *In re Estate of Lewis*, 128 F. Supp. 2d 573, 574 (N.D. Ill. 2001) (same)."

E. The child support lien takes priority over an ERISA interest.

A child support lien or domestic relations order trumps an ERISA subrogation interest. 29 U.S.C.A. §§ 1144(7) states:

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 1169(a)(2)(A) of this title), and the provisions of law referred to in section 1169(a)(2)(B)(ii) of this title to the extent they apply to qualified medical child support orders.
Domestic relations orders means:

(B) For purposes of this paragraph--
(i) the term "qualified domestic relations order" means a domestic relations order--
(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and
(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which--(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a State domestic relations law (including a community property law).

F. Retaliation is barred under ERISA.

Employers may not retaliate against employees for using their ERISA plan: See *29 USC §§ 1140. Interference with protected rights*:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS §§ 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS §§ 1132] shall be

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