MEDICAL AND GOVERNMENT BENEFIT SUBROGATION

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Subrogation is generally prohibited by the MVFRL unless preempted.

Preemption occurs with any of the following:

1. Federal statutory preemption (Medicare, Medicaid, FEHBA);

2. Federal case law preemption (ERISA);

3. State statutory preemption (Workers' Compensation); and

4. State case law preemption (HMOs)

ERISA PREEMPTIONS

Any ERISA Plan, to be exempt, must be a self-funded ERISA Plan.

In a self-funded Plan, the Employer assumes risk of providing benefits to their employees.

If an Employer purchases insurance coverage from a third party insurance company, and pays premiums each year, that is not considered a self-funded Plan

Non self-funded Plans are not entitled to ERISA preemption and remain subject to the state laws that regulate insurance like the Pennsylvania MVFRL.

HOW DO WE KNOW IF WE ARE DEALING WITH A SELF-FUNDED PLAN OR A NON SELF-FUNDED PLAN?

1. Request the "**Summary Plan Description**" which should state whether or not the Plan is self-funded;

2. Request the Plan's **"Form 5500"** by registering for a free account at www.freeerisa.com to search for filed 5500 Forms;

3. Go on www.efast.dol.gov "EFAST2 Filing - Welcome" and click on "FORM 5500/FORM 5500-SF Search" to assess the DOL's on-line database (this is also free).

Beware!

Form 5500s are frequently ambiguous or indeterminate and do not specifically state the Plan's funding mechanism.

SOME HELPFUL HINTS

Fully-insured Plans (i.e., not self-funded Plans), must attach a Schedule "A" Form for each insurance contract that provides a specific employment benefit.

Qualifying self-funded Plans only need to file a 5500 Form, with no attachments, if the benefits are paid strictly out of the general assets of the Plan sponsor.

Mixed funded Plans must attach a Schedule "A" Form for each insurance contract pertaining to all insured portions of the Plan.

Request the Master Plan Document ("MPD")

When you obtain the MPD, be sure it contains a provision that authorizes the Plan to obtain reimburse from a "**specifically identifiable fund**" in the possession and control of the Plan's beneficiary.

A Quick Summary

1. Get the MPD;

2. Read the MPD;

3. Determine whether the MPD contains language addressing subrogation or reimbursement. (If it does not, then there is no right of recovery because there exists no "equitable lien by agreement");

4. Does the language in the MPD limit the Plan's right of subrogation or reimbursement of a specifically identifiable fund in the possession and control of a Plan beneficiary. (If it does not, then there is no right of recovery); and

5. Does the language in the MPD specifically address allocation of attorneys' fees and costs?

CLAIMS AGAINST MUNICIPAL DEFENDANTS

Plaintiffs cannot typically recover medical bills against a municipal defendant under 42 Pa. C.S.A. §8553.

If the Master Plan document language applies equitable liens to all sums received from third parties, then subrogation attaches, despite inability to prove/recover medical expenses.

THE DEPARTMENT OF HUMAN SERVICES

Phases I and II of the Third Party Liability Divisions web portal is up and running.

Phase III is coming soon.

Currently, your client's information can be submitted on line, directly to the Department of Human Services.

You cannot, however, view the status of a claim, get lien information, or payoff amounts electronically at this time. That will happen once Phase III comes into effect.

The DHS Third Party Liability Division web portal is located at

www.dhs.pa.gov

click Citizens,

click Casualty Recoveries by the Division of Third Party Liability.

Time sensitive requests for lien compromises can be emailed to tpl-casualty@pa.gov.

Pursuant to 23 Pa. C.S. §4604(d), "the Department shall have a first lien against the proceeds of any cause of action that existed during the time an individual, his spouse, or his unemancipated children received cash assistance".

DHS has a lien for medical payments paid as well and that permits a state's recovery to extend to all proceeds collected from a third party, not just from those proceeds representing payment from medical bills.

Assigned Claims Plan vs. The Department of Human Services

The Department of Public Welfare v. Pennsylvania Financial Responsibility Assigned Claims Plan, 731 A.2nd 228 Pa.Cmwlth. (1999) held that the Assigned Claims Plan is not liable to the Department of Human Services for reimbursement under state or federal law.

This is because the Assigned Claims Plan is not considered a third party and, therefore, 55 Pa. Code §259.3 only authorizes DHS to recovery from beneficiaries that portion of the tort recovery that represents payment of medical bills by a third party.

MEDICARE

CMS Online Portal

Go to https://www.cob.cms.hhs.gov/MSPRP/login to register for an account.

With the CMS online portal, you can submit a valid Proof of Representation and Consent to Release, request Conditional Payment updates, submit settlement information, and dispute claims electronically.

The instructions on how to register and set up accounts are included in the online materials under the heading "MSPRP Account Designee Access".

Instructions on how to navigate and use MSPRP's website is also included in the online materials under the heading "MSPRP User Manual."

Be sure to check that the payments made under the Conditional Payment section are, in fact, all related to treatment necessitated by the injuries your client received in the accident.

Challenge CMS if they made over inclusive demands for reimbursement for Conditional Payments not related to treatment for your client's injuries.

Beware, however, that CMS takes the position that, if a provider's bill contains multiple diagnosis codes for various forms of treatment, CMS will demand reimbursement for all of the treatment provided, whether related or note, if at least one diagnosis code relates to the accident or collision.

Medicare Set Asides

Effective October 1, 2017, the Center for Medicare Services has announced a new set aside process for Liability Medicare Set Aside Arrangements (LMSA) and No-Fault Medicare Set Aside Arrangements (NFMSA).

Medicare is starting to determine which claims it thinks needs a Medicare Set Aside, post settlement, and denying treatment for those bills, if they deemed that a Medicare Set Aside was required.

Accordingly, a great deal of consideration must be made, and client's consent, after fully informing them of the realities of Medicare Set Asides, is required.

THE DEPARTMENT OF VETERANS AFFAIRS

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