OAJ Insurance Law Section Article June 2016

Ohio Insurance Law: A Throwback Perspective on the Past, Present, and Future

By: Bob Kerpsack, Chairperson

I believe it was a Thursday—a Throwback Thursday if you will—when I received the call from President Paul Grieco, appointing me chairperson of the Ohio Association of Justice Insurance Law Section—again. You see I held this same position in 1998 and 1999. In fact, in 1998, the late Past President Tom Henretta presented me with a Distinguished Service Award for organizing a series of insurance law seminars with some of the largest attendance in this association's history (think UM coverage by operation of law). Yes, during my first term as section chair, the membership lined up in droves to learn the latest consumer-friendly insurance case law being churned out by the Ohio Supreme Court. Of course, this was before the days of online listservers and webinars. Ah, the good ol' days. In all likelihood, I am not going to be able to return us to those glory days of yesteryear, but I can tell you that I accepted the role of section chair—again—because there is again consumer-friendly insurance law for our membership to learn and share.

THE PAST

During the late 1990's and early 2000's, the hottest area of Ohio insurance law was probably un/underinsured motorist (UM/UIM) coverage provided by operation of law. At that time, Ohio's UM statute included a mandatory express offering and rejection of UM coverage for all motor vehicle liability insurance policies.[1] Homeowners' policies, commercial general liability policies, and umbrella policies were all found by Ohio appellate courts to be motor vehicle liability insurance policies subject to the UM statute.[2] The Ohio Supreme Court also found employees and their family members to be insureds under corporate employers' business auto policies, regardless of whether they were involved in a business-related crash.[3] Also during this era, the Ohio General Assembly seemed to be enacting legislation to supersede every consumer-friendly insurance decision issued by the Ohio Supreme Court.[4] The General Assembly eventually amended the UM statute to eliminate the mandatory express offering/rejection of UM/UIM coverage.[5] In *Snyder v. Am. Family Ins. Co.*,[6] the Ohio Supreme Court interpreted this stripped-down version of the former UM statute to mean that an insurer "may, but is not required to" include UM/UIM coverage in a motor vehicle liability insurance policy. Thus, we entered the era of "negotiated" UM/UIM coverage conditions, exclusions, and limitations.

As the volume of UM/UIM claims in Ohio declined, subrogation enforcement by insurers was rising sharply. In response to the federal Deficit Reduction Act of 2005, the Centers for Medicare and Medicaid Services (CMS) also became much more aggressive in tracking and enforcing the federal first-priority statutory rights of subrogation/reimbursement (without notice) against enrollees' tort settlements. More and more employers also responded to skyrocketing health insurance premiums by converting to self-funded employee benefits plans established under the federal Employee Retirement Income Security Act of 1974 (ERISA).[7] As a result, a growing body of employer-friendly federal case law was holding longstanding consumer-friendly Ohio subrogation law (i.e. common fund doctrine, made whole doctrine, double-recovery rule, etc.) to be preempted by ERISA. The ERISA subrogation frenzy probably came to a peek when the United States Supreme Court issued its decision in *U.S. Airways, Inc. v. McCutchen.*[8] In *McCutchen*, the Supreme Court upheld an "equitable lien by agreement," finding that equitable defenses *cannot* alter the unambiguous terms of a written plan document.

In a strange twist in *McCutchen*, however, only the U.S. Airways Summary Plan Description (SPD)—not the actual Plan Document—contained a reimbursement provision. This was significant because the U.S. Supreme Court has consistently held that a SPD does not establish the terms and conditions of an ERISA plan.[9]

THE PRESENT

On January 20, 2016, the U.S. Supreme Court issued another pivotal decision in an ERISA subrogation case. In *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*,[10] the Supreme Court found that when an ERISA-plan participant wholly dissipates a tort settlement on non-traceable items (i.e. food, services, travel, etc.), the plan may not bring suit to attach the participant's separate assets because only "appropriate equitable relief" is authorized by ERISA. But in the Sixth U.S. Circuit, a personal injury attorney's contingent fee is considered to be a traceable item to which an ERISA Plan's equitable lien attaches. See *The Longaberger Co. v. Kolt*.[11] Also not to be forgotten is that, even in an era of consumer-friendly federal or state subrogation law, an ERISA plan may still withhold benefits until a participant acknowledges and/or pays a plan's claimed right of subrogation/reimbursement.

Recently, the Ohio General Assembly enacted a consumer-friendly anti-subrogation statute, R.C. 2323.44. The statute imposes a pro-rata sharing of less-than-full-value tort recoveries. The statue became effective as to automobile insurance policies on December 22, 2015; however, the statute will not be effective as to health insurance policies or plans until January 1, 2017. Regardless, this statute is having an immediate impact on the willingness of automobile insurers to compromise their med pay subrogation/reimbursement claims.

THE FUTURE

Even though Ohio's recently-enacted anti-subrogation statute expressly states that it is applicable to insurance companies, self-funded plans, and anyone else claiming a right of subrogation by contract or common law, it remains to be seen whether courts are going to find the state statute to be preempted by the federal ERISA statute. On this issue, federal case law is just beginning to emerge, finding similar state anti-subrogation statutes to apply to self-funded ERISA plans. *Roche v. Aetna, Inc.*[12] is a class action against a self-funded plan and its subrogation collector, The Rawlings Company, in which a federal district court in the Third U.S. Circuit held on March 1, 2016, that New Jersey's anti-subrogation statute applies to self-funded plans under ERISA's savings clause. Similarly, in *Wurtz v. The Rawlings Co., LLC*,[13] the Second U.S. Circuit Court of Appeals held in 2014 that the New York anti-subrogation statute was "saved" from ERISA preemption, finding that the state statute permissively regulates insurance and its application to the self-funded plan does not disturb ERISA's goal of providing national uniformity.

Another body of federal case law that is emerging addresses whether Medicare Advantage (MA) Plans—which are provided by private insurance companies—enjoy the same federal first-priority right of subrogation/reimbursement (without notice) that is created by federal statute and regulation in favor of CMS.[14] Currently, there is a split among the U.S. Circuit courts of appeal as to whether MA plans may bring their own private reimbursement actions. On this issue, the Third U.S. Circuit Court of Appeals held in 2012 in *In re Avandia Marketing, Sales Practices and Products Liability Litigation*[15] that the "plain text" of the Medicare Secondary Payor (MSP) statute's private cause of action provision[16] sweeps broadly enough to include MA plans. In 2003, the Sixth U.S. Circuit Court of Appeals held in *Care Choices HMO v. Engstrom*[17] that there is no federal cause of action under the MSP statute for MA plans seeking reimbursement; however, the statute does not prohibit an MA plan to include a contract provision making the

MA plan a secondary payer with the same reimbursement rights as CMS. Not to be forgotten is that *Engstrom* was decided *before* 2005 and 2010 amendments to the federal regulations governing MA plans, which expressly added provisions that MA plans *may* (not mandatory) exercise the same rights to recover that the CMS exercises under the MSP regulations, that the MA standards supersede any state laws or regulations with respect to the MA plans, and that MA plans have the right to seek reimbursement from tort recoveries and MA plan enrollees.[18] Only time will tell whether all MA plans enjoy the same super-liens as Medicare, regardless of the MA plan's contractual language.

PERSPECTIVE

I liken chairing the OAJ Insurance Law Section at this point in my career to having another child late in life—or maybe a grandchild. Just like caring for a child, I have no doubt that chairing this section again will come with its challenges. However, the practice of insurance law in Ohio has always been challenging—and probably always will be. My goal over the next year is to rekindle more of the same enthusiasm the members of this organization had for Ohio insurance law when I was a young(er) lawyer. As trial lawyers, I believe we can and will make a difference in Ohio insurance law over the next year.

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[1] former R.C. 3937.18

[2] *Goettenmoeller v. Meridian Mut. Ins. Co.*, 10th Dist. Franklin No. 95APE11-1553, 1996 Ohio App. LEXIS 2764, 1996 WL 362089 (June 25, 1996); *Selander v. Erie Ins. Group,* 85 Ohio St.3d 541, 709 N.E.2d 1161 (1999); and *Scott-Ponzer v. Liberty Mut. Fire Ins. Co*., 85 Ohio St.3d 660, 710 N.E.2d 1116 (1999)

[3] *Scott-Pontzer* and *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, 86 Ohio St.3d 557, 715 N.E.2d 1142 (1999)

[4] S.B. 20, effective October 20, 1994; H.B. 261, effective September 3, 1997; S.B. 57, effective November 2, 1999; and S.B. 267, effective September 21, 2000

[5] S.B. 97, effective October 31, 2001

[6] 114 Ohio St.3d 239, 2007-Ohio-4004

[7] 29 U.S.C. §1132(a)(3)

[8] 569 U.S. ___, 133 S. Ct. 1537, 185 L. Ed. 2d 654 (2013)

[9] *CIGNA Corporation v. Amara,* 563 U.S. ___ (2011), 131 S. Ct. 1866, 1878 (2010); Accord *McCutchen*, 133 S. Ct. at 1543 n. 1

[10] 577 U.S. ___ (2016), 136 S.Ct. 651 (2016)

[11] 586 F.3d 459 (6th Cir. 2009)

[12] No. 13-1377, 2016 U.S. Dist. LEXIS 252082016, WL 797553, (D.N.J. March 1, 2016)

[13] 761 F.3d 232, 243–44 (2d Cir. 2014)

[14] See 42 U.S.C. §1395y(b)(2)(B)(iii) and 42 C.F.R. §411.26

[15] 685 F.3d 353 (3d Cir. 2012)

[16] 42 U.S.C. § 1395y(b)(3)(A)

[17] 330 F.3d 786 (6th Cir. 2003)

[18] See 42 C.F.R § 422.108(f); 42 C.F.R. § 422.402; and 42 C.F.R. § 422.108