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Subrogation, Survival, And Wrongful Death Actions – How To Protect Wrongful Death Damage Recoveries From Unwarranted Subrogation Claims

by Brenda M. Johnson

You represent the estate of a woman who, despite heroic medical efforts, died as a result of a tragic auto accident. Those heroic medical efforts, however, were not without cost – and the bills have been paid by the decedent's employer's health insurance plan. There's a survivor claim, of course, for the medical expenses, but the decedent's husband and children have a right to wrongful death damages as well, and, as is often the case, the tortfeasor's insurance will not cover the full value of the survivor claim *and* the wrongful death claims. The plan has informed you that it has a right of subrogation it intends to exercise over any recovery you make against the at-fault driver. And, of course, because it is an employee benefit plan, ERISA is implicated.

This not-uncommon scenario presents a number of questions. The first, of course, involves the scope of the insurer's potential subrogation claim. Is it limited to the survivor action, or can the insurer reach amounts recovered for the wrongful death claim as well? And if the subrogation claim is limited to the survivor action, can you protect the amounts available for settlement simply by allocating any available settlement amounts to the wrongful death claim?

The answer to the first question is that any subrogation right the insurer may have will extend no farther than the survivor action. The other questions, however, are much more complicated. While subrogation rights have limits, your power to allocate settlement proceeds to a wrongful death claim in order to avoid subrogation is limited as well. If not done correctly, you may find yourself in a situation in which a federal court determines that the *entire* settlement amount is vulnerable to a subrogation claim, regardless of whether wrongful death claims were involved. The good news, however, is that a few simple steps will go a long way to protecting your client – and you – from overreaching on the part of subrogated health care insurers.

I. The Insurer's Rights Have Limits …

A basic tenet of subrogation is that an insurer cannot succeed to any right that its insured did not have in the first instance, and Ohio law is consistent with this.[1] Ohio's wrongful death statute does not allow for recovery of the decedent's medical expenses; moreover, "damages awarded . . . do not flow to the estate, but are to be distributed directly to the beneficiaries."[2] Moreover, it is well-established that Ohio's wrongful death statute "creates a new cause or right of action distinct and apart from the right of action which the injured person might have had," and is intended "to compensate others for death resulting from injuries," not to compensate for the injuries themselves.[3]

So, as a general rule, an insurer has no subrogation right under Ohio law to any

amounts recovered in the wrongful death claim, since the wrongful death claim is not a claim originally held by the insured decedent. Federal courts, in turn, follow the same rule when determining whether an ERISA plan has a subrogation right against amounts recovered after an insured's death – namely, that the plan's subrogation rights extend only to those claims for which the estate can recover, and not to those that are personal to wrongful death beneficiaries. In *Atteberry v. Memorial-Hermann Healthcare Sys.*,[4] for instance, the Fifth Circuit held that death benefits paid to an employee's estate only gave rise to a subrogation interest in the estate's survival claim, and did not extend to wrongful death claims that were personal to the surviving family members. Similarly, in *Liberty Corp. v. NCNB National Bank of S.C.*[5] the Fourth Circuit observed that an ERISA plan that required an insured to reimburse the plan for medical benefits paid on his behalf did not create a subrogation right in a wrongful death claim where, as is the case in Ohio, the wrongful death claim belongs to the beneficiaries, and not the insured's estate.[6]

II.…But So Does Your Ability To Allocate Settlement Funds To The Wrongful Death Claim.

While the wrongful death claim is not subject to subrogation, there's no getting around the fact that a survivor claim for medical expenses exists if medical care was provided to the decedent, or that such a claim could well be subject to subrogation. Thus, the question becomes whether it is possible to minimize or avoid the insurer's subrogation claim by crafting a settlement with the tortfeasor that allocates nothing (or a *de minimis* amount) to the survival claim. The answer to this question depends very much on how the settlement is crafted, and the extent to which the insurer is given notice of any relevant probate court proceedings involving approval of the settlement and allocation of its proceeds.

Not surprisingly, federal courts have held that "[a]n ERISA plan participant can not unilaterally allocate settlement proceeds to something other than medical expenses in order to evade subrogation . . .."[7] Where the plan participant is deceased, however, there can be no unilateral allocation of the proceeds, since any settlement and allocation must be approved by the probate court. This, in turn, places you and your clients in a favorable position if you simply follow some basic rules.

First, put the health care insurer on notice of any probate court proceedings involving approval of your settlement. Even if the health care insurer declines to participate in the probate proceedings and instead takes its claims to federal court, federal courts generally will not disturb a damage allocation made by a probate court when the insurer has been given notice and an opportunity to participate in the state probate court proceedings. In *Caterpillar, Inc. v. Wilhelm*,[8] for example, the U.S. District Court for the Central District of Illinois granted summary judgment against a self-insured health plan when the plan had been given ample notice of probate court proceedings, but chose not to participate.[9] And though it technically did not reach the issue, the Eighth Circuit's opinion in *Administrative Comm. of the Wal-Mart Stores, Inc., Associates' Health and Welfare Plan v. Soles*[10] supports this as well. In that case, the Eighth Circuit held that Wal-Mart's federal challenge to a state probate court-approved settlement was time barred; however, the dissenting judge observed that any recovery Wal-Mart could have made would have been limited to those amounts that the probate court had allocated to the survival action.

Second, make sure that the settlement agreement and, to the extent you can control it, the probate court's order approving the settlement, address the wrongful death and survivor claims separately, and draw a clear distinction between the amounts allocated to each – otherwise, a federal court may find sufficient ambiguity in the settlement to allow for a subrogation claim against the entire settlement amount. In *Diamond Crystal Brands, Inc. v. Wallace*,[11] for instance, the district court allowed a plan to recover the full amount it had paid in pre-death medical costs from settlement amounts that had been allocated to a wrongful death claim when the settlement agreement indicated the settlement sum was for all claims, even though the sum was later allocated in the agreement between the survivor and wrongful death claims. And in *McInnis v. Provident Life & Accident Ins. Co.*,[12] the Fourth Circuit similarly allowed recovery against a wrongful death settlement when the probate court order approving the settlement was ambiguous as to whether the settlement was for "all claims" or simply wrongful death claims.

Wallace appears to have involved a settlement that had not been submitted for probate court approval, and *McInnis*, for reasons discussed further below, has other distinguishing characteristics. Nevertheless, both opinions underscore the significance that settlement language (and the language of probate court orders) can play in protecting a wrongful death allocation from subrogation claims. Any indication that a lump sum is being tendered in settlement of all claims, or is being approved as a settlement for all claims, could be grist for a challenge and should be avoided as much as possible.

IIII. And Let's Not Forget The Specter of Preemption – And How It Can Be Dispelled.

Placing the insurer on notice of any probate court proceedings involving approval of your carefully crafted settlement should go a long way to protecting your clients' rights to a wrongful death recovery. This article would not be complete, however, if it did not address the tendency among plans to argue that ERISA preempts state wrongful death laws (and, consequently, the presumption that the plan's rights stop where the wrongful death claim begins). This tactic owes its existence to two Fourth Circuit opinions addressing a unique aspect of North Carolina wrongful death law that, as the following will show, is not duplicated in Ohio law. As a result, the argument for preemption that has worked (albeit under factually limited circumstances) under North Carolina law would not apply in a case governed by Ohio's wrongful death statute.

North Carolina has a hybrid wrongful death/survivor statute that provides for recovery by the estate of the damages the decedent could have recovered if she had lived, and then combines them with the wrongful death claims available to beneficiaries.[13] This statute, in turn, includes what amounts to an antisubrogation provision, in that it provides that the amount recovered under the statute "is not liable to be applied as assets, in the payment of debts or legacies, except as to . . . reasonable hospital and medical expenses not exceeding [an amount currently set at $4500] incident to the injury resulting in death."[14]

Liberty Corp. v. NCNB National Bank of S.C.[15] is the first opinion in which the Fourth Circuit addressed the effect of this statute on an ERISA plan's subrogation rights. *Liberty* involved an auto case where the insured incurred substantial medical bills before dying of his injuries. A court-approved settlement was reached that obligated the tortfeasor to pay $1,500,000 "to be distributed as hereinabove set forth pursuant to the North Carolina Wrongful Death and Intestate Succession Acts."[16] The estate fiduciary then offered to pay the self-insured employer $1,160, which at the time was the maximum that could be reimbursed to a health care provider under the statute. The plan filed an action for recovery in federal court in which it argued (among other things) that North Carolina's wrongful death law fell within ERISA's broad preemption clause because it affected the plan's ability to exercise its subrogation rights.

The Fourth Circuit rejected this argument, largely because it looked to the settlement at issue as having been *solely* for the wrongful death claim. After acknowledging the notorious breadth of ERISA preemption, the court also noted that preemption still has limitations:

> ERISA preemption is "conspicuous for its breadth" and not limited to "state laws specifically designed to affect employee benefit plans." Despite the breadth of this preemption, however, "some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."[17]

The court then concluded that the effect of North Carolina's law on the plan was "too tenuous" because the plan was never subrogated to the wrongful death claim, and the settlement was solely of the wrongful death claim.[18]

Only one year later, a different panel of the Fourth Circuit addressed the issue again, in *McInnis v. Provident Life & Accident Ins. Co.*[19] In that case, the estate fiduciary entered into a court-approved settlement in which the probate court held that the settlement total (which was an undifferentiated amount) was "in the best interest of the Estate . . . and the beneficiaries. . . ."[20] Shortly thereafter, the estate submitted a claim for nearly $60,000 in medical bills to the decedent's health care plan. The plan refused to pay unless the fiduciary entered into a subrogation agreement. The estate then brought an action against the plan for benefits, arguing that any subrogation agreement would be contrary to North Carolina's law.

On these facts, the Fourth Circuit held that ERISA did, in fact, preempt North Carolina's limit on the payment of medical costs, but did so by deciding that the *McInnis* settlement, unlike the *Liberty* settlement, comprised both survivor and wrongful death claims. Acknowledging the holding in *Liberty*, the court determined that it was presented with different circumstances in *McInnis*:

> The court [in *Liberty]* found that the claim under North Carolina's wrongful death statute belonged not to the plan participant or to his estate, but rather to his beneficiaries. While disposition of assets belonging to the beneficiaries of a plan participant may "relate" to a plan, we concluded that its relation to the plan was too "tenuous, remote, or peripheral," and thus the beneficiaries' claims would not be governed by ERISA. We were careful to note, however, that if the damages were recovered "by or on behalf of the same person [plan participant] whose medical expenses it had paid . . . [then] the conflict between the state law and the ERISA plan must be resolved in favor of the plan and therefore in favor of preemption." **Thus, the**

> **answer to the question of whether a claim under North Carolina's wrongful death statute belongs to the deceased plan participant or to a beneficiary of the decedent defines the line between remoteness and relatedness under our *Liberty* decision. Our inquiry in this case, then, is directed to the question of whose damage claim is at issue.**[21]

After noting that survival claims traditionally belong to the decedent's estate, whereas wrongful death claims belong to the beneficiaries, and that "the damages recovered as settlement clearly included those belonging to [the decedent] and her estate," the Fourth Circuit held that the facts were distinguishable from those in *Liberty*, and that on those specific facts ERISA preempted North Carolina's wrongful death statute to the extent it purported to limit the plan's subrogation rights.[22]

Ohio's wrongful death statute does not purport to include survival claims, and Ohio does not have any type of antisubrogation law that would be implicated in our case. Accordingly, the Fourth Circuit's analysis in *Liberty* and *McInnis* does not support any kind of preemption argument with respect to Ohio law, or the law of any state with a traditional wrongful death statute. Indeed, it is hard to see how it would support a preemption argument in any state with a traditional wrongful death/survivor statutory framework.[23] ■

End Notes

1. *See, e.g., State Dep't of Taxation v. Jones* (1980), 61 Ohio St.2d 99, 100 ("In a broad sense, one person is subrogated to certain rights of another person *where he is substituted in the place of such other person so that he succeeds to those rights of the other person*" (emphasis added; *citing Aetna Cas. & Sur. Co. v. Hensgen* (1970), 22 Ohio St.2d 83)).
2. *Sallach v. United Airlines, Inc.* (10th Dist. 1997), 121 Ohio App.3d 89, 93 (Dreshler, J., concurring).
3. *Karr v. Sixt* (1946), 146 Ohio St. 527 (syllabus at ¶¶ 1, 2).
4. (5th Cir. 2005), 405 F.3d 344.
5. (4th Cir. 1993), 984 F.2d 1383.
6. *See Liberty Corp.*, 984 F.2d at 1388-1389 ("This right [to a wrongful death claim] was never subrogated.").
7. *Moore v. Blue Cross & Blue Shield of the Nat'l Capital Area* (D.D.C. 1999), 70 F. Supp.2d 9, 39 (citing *Chitkin v. Lincoln Nat'l Ins. Co.* (S.D. Cal. 1995), 879 F. Supp. 841); see also Wright v. Aetna Life Ins. Co. (11th Cir. 1997), 110 F.3d 762, 765 n. 3 (allocation of damages in settlement agreement not binding on subrogated insurer that was not a party to the agreement; "To hold otherwise would allow [the insured and the tortfeasor] to control [the insurer's] reimbursement rights.").
8. (C.D. Illinois, Sept. 20, 2009), No. 08-CV-2020, 2009 U.S. Dist. LEXIS 92620.
9. *Id.* at *8-*10 ("Caterpillar could have intervened in the state court settlement to protect its interests … but it chose not to intervene or appeal and instead waited to file this claim in federal court.").
10. (8th Cir. 2003), 336 F.3d 780.
11. (N.D. Ga. Feb. 16, 2010), No. 1:07-CV-3172, 2010 U.S. Dist. LEXIS 48684.
12. (4th Cir. 1994), 21 F.3d 586.
13. *See* N.C. Gen Stat. § 28A-18-2(a).
14. *Id.*
15. (4th Cir. 1993), 984 F.2d 1383.
16. *Id.* at 1385.
17. *Id.* at 1388 (citations omitted)
18. *Id.* at 1389-90.
19. (4th Cir. 1994), 21 F.3d 586.
20. *Id.* at 587.
21. *Id.* at 589 (citations omitted; emphasis added).
22. *McInnis*, 21 F.3d 586 at 590.
23. That being said, there is at least one case in which a federal district court in Arkansas (perhaps unsurprisingly) held that ERISA broadly preempted Arkansas' traditional wrongful death statute, and permitted Wal-Mart's self-insured health plan to subrogate against a wrongful death recovery. *See In re Estate of Allen v. Wal-Mart Stores, Inc., Associates' Health and Welfare Plan* (E.D. Ark. 2002), 196 F. Supp.2d 780. Even so, the persuasive value of this opinion is questionable. There is no indication that it has been relied on as persuasive authority. Moreover, though no appeal was taken from this opinion, there is good reason to believe that the district court's opinion would not have survived review in the Eighth Circuit based on *Administrative Comm. of the Wal-Mart Stores, Inc., Associates' Health and Welfare Plan v. Soles* (8th Cir. 2003), 336 F.3d 780, where the lone dissenter would have allowed Wal-Mart to proceed with a reimbursement action that the rest of the panel deemed to be time-barred, but would have limited Wal-Mart's subrogation rights to those amounts that the state probate court had allocated to survival claims (as opposed to wrongful death).