

ERISA Preemption of the New York Antisubrogation Law
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Although the New York Antisubrogation Law (primarily Gen. Obl. L. 5-335) is young, and further court interpretation will be necessary to determine its full effect, it seems clear that the New York Antisubrogation Law will effect fully-funded ERISA plans, but will not prevent the assertion of lien and/or subrogation rights found in a self-funded ERISA plan. Note that this conclusion has been drawn by a number of early commentaries written regarding the Antisubrogation law.¹

At the outset, we should note that lien/recovery rights in ERISA plans are a result not of a statutory provision, but of the plan language itself. 29 USC §1132(a)(3) provides that “appropriate equitable relief” may be given to enforce an ERISA plan’s language. Hence, the plan’s language is given force of ERISA law and will preempt state law to the same extent that ERISA itself preempts state law.²

In absence of New York case law on point, we will explain this analysis with

¹See e.g.:

- “Antisubrogation Bill Passes in New York” at <http://www.mwl-law.com/CM/InsuranceNewsandDevelopments/ANTI-SUBRO-BILL-PASSES-IN-NY-11-23-09.pdf> (“It appears that ERISA-covered self-funded health plans should still be able to avoid the harsh effects of this new bill thanks to ERISA’s preemption provisions, which themselves have become the target of anti-subrogation efforts.”)
- Michael Russel, <http://lienresolution.typepad.com/gfrgblog/2009/12/how-does-new-yorks-anti-subrogation-law-effect-erisa-plans.html> (“Unfortunately, the Supreme Court in *FMC Corp v. Holiday*, 498 US 52, 61 (1990) held that the “Deemer clause” exempts self-funded plans under ERISA from state laws that “regulate insurance” within meaning of the saving clause, and thus self-funded ERISA plans are exempt from state regulation insofar as that regulation relates to the plans. Thus, a self-funded plan would most likely NOT be effected by the new legislation.”)
- “ANTI-SUBROGATION BILL PASSED IN NEW YORK” <http://www.passionforsubro.com/erisa/anti-subrogation-bill-passed-in-new-york/> (“It appears that the only area of subrogation that will be drastically affected will be health insurance subrogation involving plans which are not self-funded ERISA plans.”)
- New York Anti-Subrogation Law...At A Glance http://www.onlineaccent.com/downloads/TPL%20Leg%20Changes_12.22.09.pdf (“All states have statutes that impact subrogation and reimbursement. New York’s statute prohibits subrogation, but a self-funded plan governed by the federal statute, ERISA, should override the state statute.”)

² See further Michale Russel, “New York Collateral Source and Anti-Subrogation Amendment: Part F” <http://www.garretsonfirm.com/garretson/news/index.cfm?newsID=97>.

reference to a the general observations of the United States Supreme Court, and a well-reasoned New Jersey Appellate Division case which provides an excellent nuts-and-bolts understanding of ERISA preemption. Further clarification of the interpretation of the ERISA preemption provisions can be found in FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990).

The United States Supreme court in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739-740 (1985) observed:

The two preemption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general preemption clause broadly pre-empts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time.

The ERISA preemption scheme, and its effect are summarized well in O'Brien v. Two West Hanover Co., 350 N.J. Super 441, 446-447, 795 A. 2d 907, 910 (App. Div. 2002). First, we look to 29 U.S.C. 1144(a), which is ERISA's "preemption clause." It reads in part:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .

Effectively, this clause means that any state law which relates to the employee benefit insurance scheme is preempted. If this were the last word in ERISA, subrogation would be available to any ERISA plan.

The effect of 1144(a) is almost entirely eliminated by 1144(b)(2)(a), which is commonly referred to as the "savings clause." The pertinent provision of this clause reads:

Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

According to this clause, any state law which regulates the insurance industry is not preempted by ERISA.

Thus far, the preemption clause of ERISA 1144(a) opened the door widely for subrogation of disability payments, while the savings clause of 1144(b)(2)(A) slammed that door shut. A final relevant clause, the "deemer clause" of 1144(b)(2)(B) provides:

Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company . . . or to be engaged in the business of insurance . . . for purposes of any law of any State

purporting to regulate insurance companies [and] insurance contracts . . .

O'Brien explains the import of this clause:

Ultimately, the Court concluded that the deemer clause exempts self-funded ERISA plans from State laws regulating insurance within the meaning of the saving clause.

350 N.J. Super 441, 447, 795 A. 2d 907, 910,911 citing *F.C. Corp. v. Holliday*, 498 U.S. 52, 65 (1990). Thus, O'Brien concluded that self-funded ERISA plans are permitted to make claims against a tortfeasor, whereas insurance plans covering the same losses may not.

Presuming that the New York Antisubrogation law is viewed as a law regulating the insurance industry, fully-funded ERISA plans (AKA "nonerisa plans") will be subject to the provisions of the law. Self-funded ERISA plans, on the other hand, are deemed not to be part of the insurance industry, and therefore the "savings clause" 1144(b)(2)(a) will not allow the New York antisubrogation law to effect the rights of self-insured ERISA plans.³

Please note that the opinions set forth in this memo are subject to and qualified in all respects by the following:

1. We are members of the Bars of the State of New Jersey and New York, and do not hold ourselves out as being an expert in, and do not express any opinion herein as to any jurisdiction other than the state of New Jersey.
2. The foregoing expresses our legal opinion as to the matters set forth above based upon our professional knowledge and judgment in reliance upon the facts known and legal precedents as of the date of this opinion. This opinion should not be construed as a guarantee that a Court of competent jurisdiction considering such matter would not rule in a manner contrary to the opinions set forth above.

³ Note that in the unlikely event that the New York Antisubrogation Law is understood not to be a law regulating the insurance industry, then all ERISA plans, both self-funded and fully-funded, will preempt the provisions of the Antisubrogation law. See e.g. *Levine v. United Healthcare Corp.*, 402 F.3d 156, 162 (3d Cir. 2005) (Holding that New Jersey's collateral source law was not a law "which regulates insurance" and therefore was preempted by ERISA).