Offset: A Creative Recovery Solution For The Self-Funded, ERISA Medical Benefit Plan

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There is a familiar scenario occurring all too often in the world of health care subrogation. Medical benefits have been paid on behalf of a covered person. Third party funds are available for the incident. The case settles and neither the covered person nor his/her representative repay the health plan. The plan has been unable to successfully recover through subrogation or reimbursement and is left with nothing.

Since the Supreme Court's decision in *Great-West Life & Annuity Ins. Co., et al. v. Knudson* ("Knudson") and the decisions by the Courts of Appeals in the 6th and 9th Circuits interpreting the Knudson decision which have limited the use of the long-standing recovery methods of subrogation and reimbursement, subrogation professionals representing self-funded, ERISA medical benefit plans ("plans") have sought creative recovery methods. One of the methods gaining popularity with these types of plans is offset.

What do we mean by offset (or set off)? Offset is the temporary suspension of future medical benefits for a covered person after the covered person has recovered from the third-party, but the plan has not made a recovery through subrogation and/or reimbursement. The suspension lasts until the plan has recouped the amount paid for injury-related medical benefits paid on behalf of the covered person. Please be aware, however, offset tends not to be an effective recovery tool for employers which experience frequent employee turn-over because the threat of offset, or use of offset, is only effective when the covered person remains eligible for future medical benefits.

In the experience of the authors, plans that have offset in their language are not using the offset per se as the recovery tool; the threat of offset is usually sufficient to induce the covered person or the covered person's attorney or representative to negotiate reimbursement to the plan. In those rare instances where a plan has suspended benefits and the covered person learns that the use of offset was not merely a threat but an actuality, the covered person or covered person's representative then contacts the subrogation professional to negotiate reimbursement.

Since the Supreme Court's decision in *Knudson*, the focus on recovery on behalf of the plan has been on whether the remedy sought by the plan is an equitable remedy. As the Restatement of Trusts 2d provides that the right to offset must be provided for in the trust document, one might conclude that offset is not equitable but contractual. However, the Restatement of Trusts 2d does not address whether the remedy of offset itself is an equitable remedy, but merely addresses that the right to the remedy is contractual. The Restatement of Remedies 2d includes offset in the section on equitable remedies. Arguably, therefore, while the right to the remedy is contractual, the remedy itself is equitable.

At this time, there are no judicial opinions addressing whether offset in the context of suspending future medical benefits as a recovery tool when the covered person has made a third-party recovery and the plan has not made a recovery is an equitable remedy. Looking to court cases and reference materials in other contexts can be instructive, especially with respect to how they can be used to overcome objections from covered persons' attorneys when the subrogation professional uses the threat of offset as a negotiation tool and for plans considering new plan language to use offset as a recovery method.

Although health plans in the pre-*Knudson* era may have been able to rely on unspecific language to implement offset, such as the requirement in the plan language that the covered person cooperate with the terms of the plan, in post-Kudson times, such an argument on behalf of the plan may be ineffective. In light of the turbulent and changing case law, specific plan language is important. Recent judicial opinions in the health care context highlight just how important specific plan language is.
In *Summerlin v. Georgia-Pacific Corp. Life, Health and Accident Plan*, et al., the District Court concluded that offset was precluded because the covered person was not made whole. The District Court determined that the made-whole doctrine was not sufficiently disclaimed in the plan's offset provisions even though the plan's subrogation and reimbursement provisions disclaimed the made-whole doctrine.

In *Janssen, et al. v. Minneapolis Auto Dealers Benefit Fund, et al.*, the District Court disallowed the health plan to use offset because the plan language specified that the plan was entitled to subrogate for medical expenses and none of the covered person's recovery against the third party was designated as compensation for medical expenses.

Neither case discussed whether offset is an equitable remedy. Consequently, when a judicial decision is rendered concerning whether offset is an equitable remedy, the plan will need the ability to adjust accordingly. One way to prepare in advance is by looking to the court decisions on offset in other contexts. Furthermore, such opinions can be useful in countering the covered person's arguments against offset.

Even though offset is a very valuable recovery tool for the subrogation professional, he or she should expect some resistance from the covered person or the covered person's representative. Some will say that the plan cannot offset future benefits; others will argue that offset is not a fair and equitable remedy; still others will threaten suit.

To those who maintain that the plan cannot offset future benefits, regardless of the plain and unambiguous language of the plan, the subrogation professional might argue that the court has explored how the terms of the plan control the relationship between the plan and the covered person. In *Lane v. UNUM Life Ins. Co. of America*, the District Court allowed offset by the disability plan of covered person's workers' compensation benefits for which he remained eligible and entitled, regardless of the fact that he was no longer collecting benefits. In support of its conclusion, the Court referred back to an examination of state eligibility issues under Pennsylvania's workers' compensation law. Offset was found to be proper and appropriate under the circumstances.

In *Kornardy v. Cargill, Inc. et al.*, the District Court ruled that, under the plan language, the plan was entitled to offset the covered person's increased Social Security benefits retroactively and in the future where the covered person received a raise in his Social Security disability benefits in which he failed to report to the disability plan. The Court's entire focus regarding what benefits the plaintiff received under the plan began and ended with the terms of the plan. They concluded that as long as the plaintiff was considered disabled for purposes of social security for any reason, any payments received from social security could be offset under the plan.

To the allegation that offset is not a fair and equitable remedy one might argue that the plan was no more at fault for the covered person's injury than was the covered person. The plan is basically looking to have its funds restored to their original position. In relying on the provisions of the plan, a covered person can examine the summary plan description to review their obligation to the plan. In equity and fairness, the plan has as much as a right to recover as the covered person.

The subrogation professional's least worry should be when the covered person or the representative threatens suit. This threat will generally be in the context of a bad faith action or an action under 29 U.S.C. § 1132. Since there is no cause of action in ERISA for bad faith and any action in state court could be removed to federal court as application of state insurance law to the plan would be preempted, the subrogation professional's only worry would be an action under 29 U.S.C. § 1132. Theoretically, an action under § 1132(a)(1)(B) would fail because the covered person would not be entitled to the benefits being denied under the offset provisions, and an action to recover the offset benefits under § 1132(a)(3) would not fall within the requirement that the remedy sought be equitable. Moreover, the plan could use the offset provision as an
affirmative defense. Since the plan is not putting offset into issue as a counterclaim under § 1132(a)(3), no issue of whether offset is an equitable remedy should be raised.

The offset provision is not a cure-all for recoveries and has a limited effect when the covered person is or soon will not be covered by the health plan. It does, however, provide another tool in the arsenal of the recovery professional for those covered persons who remain covered by the health plan. These days corporate health plans need all the help they can get.

ENDNOTES

1 534 U.S. 204; 122 S. Ct. 708; 151 L. Ed.2d 635 (2002)

2 Qualchoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004); Providence Health Plan v. McDowell, 385 F.3d 1168 (9th Cir. 2004); Westaff (USA), Inc., v. Areo, 298 F.3d 1164 (9th Cir. 2002)

3 Under circumstances where the plan language provides that third-party recovery includes a recovery of uninsured motorist/underinsured motorist benefits, usually termed first-party funds, offset may also be a viable recovery method.

4 While on its face offset may seem to be a harsh recovery method, in application it does not need to be. As with any recovery method, it should be applied fairly with an understanding of the circumstances surrounding the injury, the severity of the injury and the total recovery available.

5 See, e.g., Olin v. Minnesota Teamsters Construction Division Health and Welfare Fund, 2001 U.S. Dist. LEXIS (D.Minn. October 1, 2001) (The District Court of Minnesota found that the plan administrator’s interpretation of the plan’s requirement that the covered person cooperate with the plan allowed for offset when the covered person failed to cooperate was not arbitrary and capricious.)


9 2003 WL 22158989 (N.D.Ill. September 18, 2003)

This article appeared in the Winter 2006 Issue of the NASP Subrogator.

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