

HOW SUBROGATION AFFECTS YOUR CLIENT

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INTRODUCTION

How do you protect your client in negotiating personal injury settlements in view of Powell v. Blue Cross & Blue Shield of Alabama, 581 So. 2d 772 (Ala. 1990)? This question arises in a majority of personal injury lawsuits today. Consequently, lawyers for both plaintiffs and defendants must consider and address the issue of subrogation early in each case. In this article, I will briefly discuss the various aspects of the insurer's "subrogation claim" and how to prepare for a Powell hearing.

I. POWELL: DOES THE INSURER HAVE A RIGHT TO SUBROGATION?

You file a lawsuit on behalf of your client who sustained injuries in a motor vehicle collision. Your client has incurred, and may continue to incur, medical expenses for necessary treatment of his injuries. His health insurer pays nearly all of the medical expenses. Does the insurer have a right of subrogation to recover payments it made? Will the insurer reduce or waive its subrogation claim? If not, is your client required to reimburse the insurer from the settlement proceeds? To answer those questions, we must first look to the Supreme Court of Alabama's decision in Powell which established the test to determine whether the insurer has a right of subrogation.

Subrogation is based on two equitable principles: (1) an insured should not recover twice for a single injury; and (2) an insurer should be reimbursed for payments it made that, in fairness, should be borne by the wrongdoer. Powell, 581 So. 2d at 774. In Powell, the Supreme Court of Alabama held that an insurer is not entitled to subrogation unless and until the insured has been made whole for his loss. Id. at 777. "For purposes of subrogation, the test for when the insured has been made whole is whether the injured plaintiff has been completely compensated for *all* of his loss. Likewise, *all* sources of reimbursement must be considered in determining the extent to which the plaintiff has been compensated." Id. It is only when the plaintiff's recovery exceeds the sum total of the plaintiff's damages that the right of subrogation arises. Id. This test also applies to reimbursement of property damage claims. See Alfa Mut. Ins. Co. v. Head, 655 So. 2d 975, 977 (Ala. 1995).

If the proceeds collected from the tortfeasor, either through settlement or judgment, when added to the amount paid to the plaintiff by the indemnitor (such as reimbursement of medical expenses, lost wages, and disability), equals the amount of the plaintiff's loss, then the plaintiff is made whole. Powell, 581 So. 2d at 777-78. Calculation of the plaintiff's loss requires consideration of such damages as property damage, medical expenses, pain and suffering, lost wages, and disability. Id. Punitive damages cannot be included in the calculation of losses because such damages are not an element of compensation. Id. at 778. The plaintiff is not allowed to list attorney fees or litigation expenses as a "loss." Id. at 781.

In determining the plaintiff's recovery, every payment made to or on behalf of the plaintiff that arises out of the damages in the plaintiff's claim must be considered. Id. at 778; see Head, 655 So. 2d at 975. The Supreme Court of Alabama has rejected the contention that the settlement sets the amount of full compensation as a matter of law. Complete Health, Inc. v. White, 638 So. 2d 784, 787 (Ala. 1994). The burden is on the insurer to prove that the insured

has been fully compensated before asserting its subrogation rights against the insured. White, 638 So. 2d at 787.

II. NOTIFY THE INSURER/ATTORNEY FEES

The plaintiff's attorney should write the insurer after a lawsuit is filed and give notice of your representation and the lawsuit. If not, you may settle your case, dismiss it and then receive a subrogation letter from the insurer. Then, this time consuming situation must be resolved at a time when your client thinks the case is over and he is demanding his money.

After you have written the insurer, generally the insurer will give you notice of its subrogation interest. Often, the insurer may request that you represent its interest in the case. The insurer may agree to pay an attorney's fee if you will protect its subrogation interest. The standard agreement allows you to receive 1/3 of the amount recovered for the insurer if you try the case and 1/4 if you settle. This agreement may be negotiated depending on the facts of your case.

Is it in your client's best interest for you to represent the insurer's subrogation interest? You should ask yourself that question in each case. The answer depends on the facts of your case. If there is clear liability, severe injuries, strong medical testimony, and sufficient liability insurance then you may want to agree. You should always discuss the request with your client and obtain client approval to represent the insurer. Some clients will not give you the approval. There are times when you can use the subrogation claim in your settlement negotiations. The defendant will often agree to take care of the subrogation claim.

On the other hand, if you do not know whether your client will incur future medical expenses or whether there is sufficient liability insurance, it may not be in your client's best interest for you to represent the insurer's interest. However, you should be aware that if you take the position that the insurer is not entitled to any reimbursement of its subrogation claim, then you may not be entitled to reduce the amount of reimbursement by attorney fees if the insurer proves that your client is fully compensated. See CNA, Ins. Cos. v. Johnson Galleries, 639 So. 2d 1355 (Ala. 1994). In Powell, the Court stated that if the indemnitor is entitled to subrogation, the amount the indemnitor is to be reimbursed is reduced by attorney fees the indemnitor legally owes related to efforts in obtaining a third-party recovery. Powell, 581 So. 2d at 781.

Generally, attorney fees are not recoverable; however, the "common fund" doctrine is an exception to the general rule.¹ CNA, 639 So. 2d at 1359. If applicable, it would allow a plaintiff's attorney to recover attorney fees from others who directly benefit from the attorney's efforts in obtaining recovery for his client. Id. If, however, the attorney is simply acting on behalf of his client, the attorney is not entitled to attorney fees from those receiving the incidental benefit. Id. In CNA, the attorney clearly had an adversarial relationship with the insurer as to its right to reimbursement from the settlement funds; therefore, the Court held that the attorney would not be entitled to recover attorney fees from CNA on a common fund theory. Id. For that reason, it may benefit your client in the long run if you do not dispute that the insurer may possibly be entitled to receive a portion of the settlement funds if your client is made whole by the settlement.

In Alston v. State Farm Auto. Ins. Co., 660 So. 2d 1314 (Ala. Civ. App. 1995), the insurer intervened and filed discovery after the plaintiff's attorney signed the subrogation agreement. However, the insurer did not participate in the trial or the cost of the litigation until the jury returned its verdict. Alston, 660 So. 2d at 1316. In Alston, the Court held that the insurer was obligated to pay its pro rata share of the costs of litigation because it relied on the plaintiff's attorney to generate the benefits that it received from the common fund.² Id.

III. DOES THE INSURER HAVE A RIGHT TO INTERVENE?

During your case, the insurer may file a Motion to Intervene. Does the insurer have a right to intervene? Rule 24 of the Alabama *Rules* of Civil Procedure sets out the grounds for intervention. To intervene under Rule 24(a)(2), the intervenor must have a direct, substantial, and legally protectable interest in the proceeding. Ala. R. Civ. P. 24. Permissible intervention under 24(b)(2) is within the broad discretion of the trial judge. Ala. R. Civ. P. 24.

In GEICO Ins. Co. v. Lyons, 658 So. 2d 445 (Ala. 1995), the insured claimed that the \$11,721 payment it made to the plaintiff fully compensated her for the property damage and the insurer sought intervention. The insurer did not specify whether it sought intervention under Rule 24(a) or 24(b); therefore, the Court treated the petition under both procedures. The Court found that the plaintiff had not been compensated for the \$500 deductible the insured subtracted from the value of her vehicle nor had she been compensated for her personal injuries. Lyons, 658 So. 2d at 446. The Court affirmed the trial court's order denying the insurer's intervention. Id.

The insurer's subrogation claim does not arise until the plaintiff's recovery from all sources, including recovery for property damage, exceeds the plaintiff's total loss. Id.; see Head, 655 So. 2d at 977. In Head, the Court held that Alfa did not have a direct, substantial, and protectable interest because it did not appear that the plaintiffs had been made fully compensated for their property damage loss. Head, 655 So. 2d at 977. Since Alfa lacked an interest under Rule 24(a)(2), it was denied a right to intervene. Id.

Often, the insurer will file a Motion for Limited Intervention pursuant to Rule 24(b)(2). Without intervention, the insurer typically argues: (1) that its rights to fully participate in a Powell hearing will be severely impaired; and (2) that its interest is not adequately protected by the parties. In addition, the insurer usually claims: (1) that intervention will not result in additional time, inconvenience, or delay; and (2) that it will not appear on or participate in the trial. The trial court generally allows the insurer to intervene under Rule 24(b)(2) for the limited purpose of participating in discovery. This will usually assist the insurer to better evaluate and determine whether it has a right to subrogation.

IV. THE POWELL HEARING

You settled your client's case. If you did not agree to represent the insurer's interest, did not succeed in reducing or waiving the claim, or simply oppose the subrogation claim, then you

must request a Powell hearing before a judge. In your motion, list the insurer on the certificate of service so it will have notice. The insurer may or may not attend the hearing, depending on the likelihood of proving its burden. You should prepare for the hearing expecting to offer testimony and evidence of your client's losses compared to his recovery. In Powell, the Court gave us examples of charts which assist the trial court in its determination of whether the plaintiff has been made whole. Powell, 581 So. 2d at 779-82. Be sure to list each recovery made, including medical payments benefits, property damage, etc. Also, list your client's losses and list the amount of loss for pain and suffering, mental anguish, future medical expenses, etc.

Prepare your client to testify about his injuries and what he has gone through both physically and emotionally. If you have depositions or affidavits of doctors, submit those to the judge to support your argument against the subrogation claim. In each case, you must be familiar with how your judge conducts these type hearing. Some judges are more lenient with evidentiary requirements. On the other hand, there are judges who are very strict. The insurer has the burden of showing that the settlement fully compensated the plaintiff; however, you do not want to be surprised and fall short on presenting evidence to support your client's damages. In Complete Health, Inc. v. White, 638 So. 2d 784 (Ala. 1994), the insurer failed to offer evidence on specific items of the plaintiff's damages. The judge properly considered such lack of evidence regarding plaintiff's damages in determining that the plaintiff had not been fully compensated. White, 638 So. 2d at 788.

V. ERISA

The Employee Retirement Income Security Act (ERISA) may apply to your client's health insurance coverage. 29 U.S.C. § 1000 (1990). If so, how does that affect the insurer's subrogation claim? ERISA preempts every state law that relates to a covered employee benefit plan. Although the "saving" clause of ERISA allows the States the power to enforce state laws that "regulate" insurance, the "deemer" clause provides that a covered plan shall not be "deemed to be an insurance company or other insurer...or to be engaged in the business of insurance" for purposes of state laws "purporting to regulate" insurance companies or insurance contracts. 29 U.S.C. § 1144(b)(2)(A)&(B); FMC Corp. v. Holliday, 498 U.S. 52, 57-8 (1990).

In interpreting the provisions of ERISA, the United States Supreme Court has recognized a distinction between self-funded and insured employee benefit plans. FMC Corp., 498 U.S. 52, 61 (1990).³ The Supreme Court of the United States has held that ERISA preempts state laws of subrogation when the plan is self-funded and paid by the employer. FMC Corp., 498 U.S. at 61. On the other hand, employee benefit plans that are insured are subject to indirect state insurance regulation. Id.

The Court analyzed the deemer clause in recognizing this distinction.⁴ Id. It is unclear, however, whether the insured/self-funded distinction is dispositive.⁵ Blue Cross & Blue Shield of Alabama v. Fondren, 966 F. Supp.1093, 1095 (M.D. Ala. 1997). In Fondren, the Court noted that Supreme Court precedent requires deemer clause analysis only upon a finding that the saving clause exception applies. Fondren, 966 F. Supp. at 1095. The state law must regulate insurance within the meaning of the saving clause.⁶ The distinction between an insured and self-funded plan becomes relevant under the deemer clause analysis. Id. at 1096. State laws that

directly regulate insurance are “saved” but do not reach self-funded ERISA plans because the plans may not be deemed to be insurance companies. FMC Corp, 498 U.S. at 61. The insurance company that insures an ERISA plan is bound by state insurance laws. Id.

In Fondren, the Court interpreted FMC Corp. as indicating that subrogation laws regulate insurance whether or not they are limited to the insurance industry. Fondren, 966 F. Supp. at 1098. Alabama’s subrogation laws affect the enforcement of subrogation provisions and have an effect on the substantive terms of the contractual relationship. Id. at 1097. Therefore, the Court found that Alabama’s subrogation law was a regulation of insurance and is saved under the saving clause. Id. at 1098. In Fondren, the Court held that Alabama’s law of subrogation applied to the plan because it was an insured benefit plan. Id. at 1097-98. Therefore, it was governed by Alabama law rather than ERISA. Id. at 1097.⁷ The district court lacked federal subject matter jurisdiction. Id.

Furthermore, the Court has adopted the “make whole” doctrine. Cagle v. Bruner, 112 F.3d 1510 (11th Cir. 1997). Under the “make whole” doctrine, “an insured who has settled with a third-party tortfeasor is liable to the insurer-subrogee only for the excess received over the total amount of his loss.” Cagle, 112 F.3d at 1520. In Cagle, the Court held that the doctrine is a default rule in ERISA cases. Id. at 1521. The doctrine applies to the ERISA plan unless the plan includes language specifically rejecting it. Id. at 1521-22. In other words, the language must specifically allow the plan the right of first reimbursement from the settlement funds even if the insured is not made whole.⁸ Id.

VI. WORKER'S COMPENSATION

Section 25-5-11(a) allows an employee to proceed against his employer for compensation benefits and to proceed against any other party who might also be liable to the employee for his injuries. *Ala. Code* § 25-5-11(a) (1992). The Alabama legislature has provided that employers are entitled to be reimbursed out of any settlement or judgment recovered by the employee or his personal representative in an action against the third party tortfeasor. *Ala. Code* § 25-5-11(a) (1992); see Northeast Utilities, Inc. v. Pittman Trucking Co., 595 So. 2d 1351, 1354 (Ala. 1992). An employer or insurer is entitled to subrogation for amounts paid to the deceased employee’s dependents under the Wrongful Death Act. *Ala. Code* § 6-5-410 (1993); see Pittman, 595 So. 2d at 1354.

Alabama Courts have consistently upheld the subrogation rights of workmen’s compensation insurance carriers in actions against third parties under § 25-5-11. Millers Mut. Ins. Ass’n v. Young, 601 So. 2d 962, 963 (Ala. 1992). In Ex parte Cincinnati Ins. Co., 689 So. 2d 47, 50 (Ala. 1997), the Supreme Court of Alabama held that the worker’s compensation carrier had a clear legal right to seek punitive damages in its wrongful death action against the third parties even though the damages may exceed the amount of its subrogation interest. In Ex parte Cincinnati, the widow did not file suit within the 2 year statute of limitations. Under the extended limitations period of § 25-5-11(d), the insurer asserted its right to subrogation for its worker’s compensation payments. Ex parte Cincinnati, 689 So. 2d at 48. Any amount exceeding the insurer’s subrogation interest would be held in trust for the deceased employee’s dependents. Id. at 50.

A recent case addressed a question of first impression: whether an employer is entitled to subrogation of future medical expenses not yet incurred by an employee under *Ala. Code* § 25-5-11(a) (1992). Bussen v. BE & K Constr. Co., 1997 WL 272436 (Ala. Civ. App. May 23, 1997). In Bussen, the Civil Court of Appeals concluded that § 25-5-11(a) speaks only of past payment. The Court held that an employer's right to reimbursement for medical benefits expended on behalf of the employee does not accrue until the employer has actually paid the medical benefits on the employee's behalf. Bussen, 1997 WL 272436. The Court noted that its holding was consistent with the recognized principles of subrogation. The Court reversed and remanded the case. Bussen, 1997 WL 272436.

VII. UNINSURED/UNDERINSURED MOTORIST CLAIMS

Although the Uninsured Motorist Act does not expressly provide for subrogation, the Supreme Court of Alabama has recognized that a right of subrogation exists in uninsured/underinsured motorist cases. *Ala. Code* § 32-7-1 (1989); Star Freight, Inc. v Sheffield, 587 So. 2d 946 (Ala. 1991); Hardy v. Progressive Ins. Co., 531 So. 2d 885 (Ala. 1988). In Hardy, the Court held that the underinsured motorist carrier had a right of subrogation for sums paid by the insurer, pursuant to a personal injury claim, in excess of the tortfeasor's limits of liability. Hardy, 531 So. 2d at 887. The Uninsured Motorist Act also provides for the recovery of damages for an insured person who is injured or killed by an uninsured or underinsured motorist. *Ala. Code* § 32-7-1 (1989). In Aetna Cas. & Sur. Co. v. Turner, 662 So. 2d 237, 239 (Ala. 1995), the Court extended the right of subrogation to wrongful death claims on the same basis. The Court held that an insurer that pays underinsured motorist benefits to a party pursuant to a wrongful death claim is entitled to subrogation from the wrongdoer. Turner, 662 So. 2d at 239-40.

The Supreme Court of Alabama has established guidelines for preserving subrogation rights in regard to an uninsured/underinsured motorist claim. Lambert v. State Farm Mut. Auto. Ins. Co., 576 So. 2d 160 (Ala. 1991); Brantley v. State Farm Mut. Auto. Ins. Co., 586 So. 2d 184 (Ala. 1991). An insured must give reasonable notice in advance to an underinsured motorist carrier of an intent to settle with a liability carrier. Brantley, 586 So. 2d at 186-87. If the insured fails to do so, he impairs the subrogation right of the underinsured motorist carrier and forfeits any right to claim underinsured motorist benefits. Id. If an underinsured carrier elects to advance to its insured the amount offered by the tortfeasor's insured in order to preserve its right of subrogation, it may be required to pay a pro rata share of the plaintiff's attorney fees as a condition of recovering its subrogation claim. Brantley, 586 So. 2d at 187.

VIII. MEDICARE/MEDICAID/LIENS

Medicare provides health insurance for senior citizens and people with disabilities. 42 U.S.C. § 1395 (1993). Medicare has a statutory right of subrogation. 42 U.S.C. § 1395y(b)(2) (1993). Under the Medicare Secondary Payer program, Medicare is precluded from paying for beneficiary's medical expenses when payment "has been made or can reasonably be expected to be made...under an automobile or liability insurance policy or plan." 42 U.S.C. § 1395 (1993). However, Medicare may pay medical expenses conditioned on reimbursement to Medicare from

proceeds received pursuant to a third party liability settlement or judgment. The reimbursement to Medicare is reduced by a pro rata share of attorney fees and costs. 42 U.S.C. § 1395 (1993).⁹

Under the Medicare statute, the beneficiary has the right to appeal the amount of Medicare's recovery claim if believed to be incorrect. 42 U.S.C. § 1395ff. In addition, the beneficiary may request Medicare to waive or compromise its recovery. 42 U.S.C. § 1395 y(b)(2)(B)(iv); 42 U.S.C. § 1395gg(c); 31 U.S.C. § 3711. Several factors must be considered before a waiver is granted such as out of pocket expenses incurred by the beneficiary; age of the beneficiary; assets; monthly income; expenses of the beneficiary; and physical and mental impairments of the beneficiary. Medicare Intermediary Manual (MIM) § 3418.13. If the beneficiary can prove financial hardship, a waiver may be granted. In addition, if there are uncovered medical expenses (including future expenses) and the beneficiary's income is lower than the expenses, a waiver may be granted.

In Kimberly-Clark Corp. v. Golden, 486 So. 2d 435, 438 (Ala. Civ. App. 1986), the Supreme Court of Alabama held that Medicare has subrogation rights against an injured employee for any amounts he recovers in a lawsuit against his employer. The Court noted that no exclusion or limitation in state law can affect Medicare's rights. Golden, 486 So. 2d at 438; see also 42 U.S.C. §§ 405.323(b)(c)(3) (1993). Section 25-5-77 does not operate to reduce the employer's liability by the amount of medical bills paid by Medicare. *Ala. Code* § 25-5-77 (1992); Golden, 486 So. 2d at 438.

If the Alabama Medicaid Agency has provided medical assistance to the plaintiff, the State of Alabama also has a statutory subrogation interest in any recovery from the tortfeasor. *Ala. Code* § 22-6-6(a) (1992). In Smith v. Alabama Medicaid Agency, 461 So. 2d 817 (Ala. Civ. App. 1984), the Court applied equitable principles to determine whether Medicaid had a right to recover. Such a determination depends on the particular facts of the case, including the injury sustained, the medical expenses, and the settlement amount. Smith, 461 So. 2d at 819-20. The Court noted that: "...[w]e do not understand § 22-6-6 as requiring 100% recovery of medical assistance paid. Additionally, 42 U.S.C.A. § 1396 (a)(25)(C) (1993), does not specifically require or even suggest 100% recovery." Smith, 461 So. 2d at 820. According to Smith, the plaintiff may be able to significantly reduce the amount the State of Alabama would accept for its subrogation interest.

In Zinman v. Shalala, 835 F. Supp. 1163, 1171 (N.D. Cal. 1993) *aff'd*, 67 F.3d 841 (9th Cir. 1995), the Court concluded that Medicare does not have a lien interest in the settlement awards. The Court ordered Medicare to stop using the term "lien" to describe its recovery claims since the government did not have a claim against property, but a cause of action against the party responsible for paying. Zinman, 835 F. Supp. at 1171. Although Medicare's right of reimbursement is not a lien, you must inform your client of the Medicare Secondary Payer program and advise the client that Medicare has a subrogation right and the right to bring an independent action to recover its payments. 42 U.S.C. § 1395 y(b)(2)(B)(ii) and (3). You should ensure that Medicare is reimbursed prior to disbursing the settlement funds to avoid the risk of the government pursuing an action against you or your client.¹⁰

If a hospital has provided services to the plaintiff, the equitable principles of Alabama's subrogation law do not apply. Instead, the hospital may have a lien for all reasonable charges incurred for treatment rendered to the injured plaintiff. *Ala. Code* § 35-11-370 (1991). The hospital's right to reimbursement is not subject to subrogation principles. *Guin v. Carraway Methodist Medical Center*, 583 So. 2d 1317 (Ala. 1991). You need to search the probate office in the county in which your client's cause of action arose and verify that the lien is valid and has been perfected according to the applicable statutes. *Ala. Code* §§ 35-11-370-371 (1991). Your client had to enter the hospital within one week after receiving the injuries; therefore, you must check the medical records to verify the date of the services rendered. Otherwise, the hospital may not claim it has a statutory lien and cannot be a "secured creditor."¹¹ If the hospital service was rendered within one week of the injuries, the Court has held that the hospital's failure to timely file or perfect the lien does not affect the lien. *Guin*, 583 So. 2d at 1319-20.

CONCLUSION

In evaluating potential cases, we are taught to investigate the facts, consider all possible injuries, damages, and theories. Throughout the case, you should plan and develop your case to prove all losses your client has incurred and may incur, such as property damage, medical expenses, future medical treatment and expenses, lost wages, disability, pain and suffering, and mental anguish. Generally, it is only when the plaintiff's recovery exceeds the sum total of the plaintiff's damages that the right of subrogation arises. There are exceptions to the general rule such as self-funded ERISA plans, worker's compensation claims, Medicare claims, and hospital liens which may apply in your client's case.

In cases with severe injuries and impairments, most likely there will be large medical payments to healthcare providers. Even in the smaller cases, there will be such payments made. Early in the case, you should notify the insurer of your representation and the lawsuit. If the insurer requests you to represent its interest, you must discuss it with your client and determine if whether it would ultimately benefit your client. Remember to document all agreements with insurance carriers who have subrogation claims that affect your client's case.

The ultimate effect of subrogation on your client's recovery must be considered from the outset. Failure to do so can result in problems that can be minimized if not totally eliminated. You must check recent state and federal cases as your case progresses to make sure that no significant changes in subrogation law have occurred that affect your client.

¹ See *Henley & Clarke v. Blue Cross & Blue Shield of Alabama*, 434 So. 2d 274, 276 (Ala. Civ. App. 1983) (explanation of requirements for applying the "common fund" doctrine).

² See also *Blue Cross & Blue Shield of Alabama v. Freeman*, 447 So. 2d 757, 758 (Ala. Civ. App. 1983); see also *Mathews v. Bankers Life & Cas. Co.*, 690 F. Supp. 984, 988 (M.D. Ala. 1988).

³ See also *Blue Cross & Blue Shield of Alabama v. Fondren*, 966 F. Supp. 1093, 1094 (M.D. Ala. 1997) (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985)).

⁴ See also *Blue Cross & Blue Shield of Alabama v. Fondren*, 966 F. Supp. 1094, 1095 (M.D. Ala. 1997) .

⁵ But see *Blue Cross & Blue Shield of Alabama v. Lewis*, 754 F. Supp. 849, 851-52 (N.D. Ala. 1991).

⁶ See *Blue Cross & Blue Shield of Alabama v. Nielsen*, 917 F. Supp. 1532, 1538 (N.D. Ala. 1996) (two step analysis to determine if saving clause applies); *Blue Cross & Blue Shield of Alabama v. Hayden*, 843 F. Supp. 1427, 1433-36 (M.D. Ala. 1994).

⁷ But see *Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F. 3d 1347 (11th Cir. 1998) (ERISA preempted application of state law to self-funded health benefits plan); *Blue Cross & Blue Shield of Alabama v. Lewis*, 754 F. Supp. 849, 851 (N.D. Ala. 1991).

⁸ *Cagle v. Bruner*, 112 F. 3d 1510, 1519-20 (11th Cir. 1997) (court also held that the plan could require participant to sign subrogation agreement before paying claims where agreement did not contain arbitrary and capricious interpretation of the plan's subrogation rights).

⁹ But see *Zinman v. Shalala*, 835 F. Supp. 1163, 1166-67 (N.D. Cal. 1993) *aff'd*, 67 F.3d 841 (9th Cir. 1995) (court held Medicare is not required to reduce its reimbursement demand when settlement does not fully cover beneficiary's damages).

¹⁰ See *United States v Sosnowski*, 822 F. Supp. 570, 573 (W.D. Wis. 1993) (Medicare must be reimbursed within 60 days of receipt of settlement proceeds); See also 42 C.F.R. § 411.24 (h).

¹¹ See *Johnson v. Health Care Author.*, 660 So. 2d 1017, 1019 (Ala. Civ. App. 1995) (injured party did not enter the hospital within one week of being injured; therefore, the hospital did not have a statutory lien, but could recover its charges based on contract with injured party).