PRECISION RESOLUTION

FEHB Reimbursement vs. Attorney's Fee: Which Takes Priority?
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Federal Employee Health Benefit ("FEHB") plans have grown bolder in their attempts to collect since the U.S. Supreme Court decision in*Coventry Health Care of Mo. v. Nevils*, 137 S.Ct. 1190 (2017). **See our past post on that case here.** In some cases, these plans have claimed that their reimbursement rights are superior, even to the attorney's fee. If you find yourself in this situation, keep on reading.

The Federal Employee Health Benefits Act expressly provides that any provisions in a FEHB plan that "relate to the nature, provision, or extent of coverage or benefits" preempt state law which relates to health insurance or plans. 5 U.S.C. §8902(m)(1).

The Federal Government began taking action to amend its regulations to combat a number of cases throughout the country which held that subrogation and reimbursement provisions in a FEHB contract do not "relate to the nature, provision, or extent of coverage or benefits," and therefore state anti-subrogation laws survived and prevailed. Ultimately, pressure by FEHB insurance carriers prevailed, and in 2015 the Office of Personnel Management (the federal agency which regulates FEHB plans) declared that FEHB subrogation and reimbursement contract provisions were in fact "related to issues of coverage or benefits." The revised regulation at 5 CFR §890.106 states in part as follows:

> *(f) Pursuant to a subrogation or reimbursement clause, the FEHB carrier may recover directly from any party that may be liable, or from the covered individual, or from any applicable insurance policy, or a workers' compensation program or insurance policy, all amounts available to or received by or on behalf of the covered individual by judgment, settlement, or other recovery, to the extent of the amount of benefits that have been paid or provided by the carrier.*
>
> *(g) Any [FEHB] contract must contain a provision incorporating the carrier's subrogation and reimbursement rights as a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan's coverage. . .*
>
> *(h) A carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. 8902(m)(1). These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans.*

5 CFR §890.106(f)-(h).

Equipped with these amendments, the Supreme Court held in *Nevils* that the FEHB plan's subrogation and reimbursement provisions did relate to "the nature, provision, or extent of coverage or benefits" under 5 U.S.C. 8902(m)(1). *Nevils*, 137 S.Ct. at 1197. Therefore, a FEHB plan's subrogation and reimbursement provisions preempt state anti-subrogation laws, which relate to health insurance or plans.

The FEHB regulation at 5 CFR §890.106(e) establishes the priority of a FEHB reimbursement claim. Subsection (e) provides as follows:

> *Any subrogation or reimbursement recovery on the part of a FEHB carrier shall be effectuated against the recovery first (before any of the rights of any other parties are effectuated) and is not*

impacted by how the judgment, settlement, or other recovery is characterized, designated, or apportioned.

5 CFR §890.106(e). Likely emboldened by the regulation, many FEHB plans have language that assert much stronger and broader "first priority" rights, and take the position that they are entitled to be reimbursed even before an attorney takes a contingent fee.

But can a FEHB reimbursement claim really take precedence over an attorney's fee?

Remember that only state law which "relates to health insurance or plans" is preempted pursuant to 5 U.S.C. §8902 (m)(1). A FEHB carrier would be hard-pressed to make a legitimate argument that the New York Judiciary Law relates to health insurance or plans. It obviously does not. Therefore, it is our position that the attorney's lien in New York falls outside of the preemptive scope of the Federal Employees Health Benefits Act.

In New York, the Judiciary Law grants attorneys a charging lien over a cause of action, claim or counterclaim - from the very beginning of the action - and the lien attaches to the settlement as well as its proceeds, and cannot be compromised by any agreements made between the parties before or after the determination. The statute provides in relevant part:

> *From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute,* ***the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come****; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.*

N.Y. Jud. Law §475 (emphasis added).

The next question becomes: whose right takes priority?

In New York, it is our position that the attorney's lien is superior. First, it is a lien; while FEHB claims are not liens, they are rights of reimbursement. Second, the attorney's lien attaches immediately to the verdict, settlement, or judgment. The FEHB reimbursement claim is "effectuated against the recovery" pursuant to the regulation. Likewise, the FEHB regulations define reimbursement as "a carrier's pursuit of a recovery . . . and has
received. . . a payment from any party that may be liable." 5 CFR §890.101."Recovery" and/or "receipt of payment" occurs after a verdict, settlement, or judgment. Therefore, a FEHB plan's rights accrue after an attorney's lien attaches.

Therefore, in states with similar statutes protecting attorney's liens, a FEHB plan's reimbursement rights would appear to be inferior to an attorney's lien for their fees.

Importantly, even where state statutes do not specifically provide a rule on attorney's fees, the common law embraces similar principles. In *Barnes v. Alexander*, 232 U.S. 117 (1914), Barnes was an attorney and was retained on a matter. He needed help, so he sought the assistance of another attorney. He made an oral promise to pay the other attorney for his assistance and said "if you will attend to this case I will give

you one third of the fee which I have coming to me on a contingent fee." Id. at 120. The Supreme Court of the United States held that there was a contract for a contingent fee out of a fund; and, the contract constituted a lien upon the fund. Furthermore, the attorney lien attached the moment that the fund was received: "At the latest, the moment the fund was received the contract attached to it as if made at that moment. It is an ancient principle even of the common law that words of covenant may be construed as a grant when they concern a present right." Id. The Court looked at the intent of the parties and said that the scope of the contract depended on the terms of the contract. Since Barnes did not promise to give the other attorney anything out of his own property, only from the fund recovered, it was an identified fund from which one-third was due to the other attorney.

In *Elam v. Monarch Life Ins. Co*., 598 A.2d 1167 (D.C. 1991), the United States Court of Appeals for the District of Columbia held that the attorney's lien is an equitable lien. Elam filed a personal injury lawsuit in a motor vehicle case and agreed to pay her attorney out of any recovery. The fee agreement provided that the attorney would get "a sum equal to 33 1/3% (1/3) of any sum I shall recover as the result of this accident." As her settlement was being consummated, Monarch Life Insurance Company filed an action to enforce a judgment it had previously secured against Elam. The court issued a writ of attachment in judgment. Monarch served this writ on the defendant insurance company in the personal injury action, with whom Elam was in the process of settling. The District of Columbia Court of Appeals considered under what circumstances an attorney charging lien is created and when the lien attaches. As to the former, the court held that the contingency fee agreement here created an attorney charging lien. All that was necessary to show an attorney charging lien was that from the contract, one could reasonably conclude that the parties intended that the judgment would pay for the attorney's services, as opposed to the attorney relying on the client's personal obligation or resources to pay for the attorney's services. Any other view, the court reasoned, would be inconsistent with general contract principles and the modern trend in case law towards protecting an attorney's right to compensation. The court also held that this was an equitable lien, not just a right to bring an action in contract for recovery of attorney's fees.

As to the second issue of when an attorney charging lien attaches to the proceeds, the court held that the lien attached to the settlement proceeds at the very latest, the moment a settlement was made between the plaintiff and defendant. Monarch had argued that it should attach to only a judgment. However, the court said that if it required the lien to attach to a judgment, it would violate public policy because it encouraged lawyers to take cases for indigent clients all the way to trial in the hopes of getting a judgment, when the proper thing to do was to settle the case.

In conclusion, look closely at your state's statutory law and common law. If your state has a statute similar to New York's, then we would take the position is that an attorney's lien is superior to any FEHB lien. If on the other hand, where there is no statute, then the common law also can help establish that the attorney fee lien takes priority over FEHB reimbursement.