

Adam V. Russo, Esq.

The Phia Group, LLC

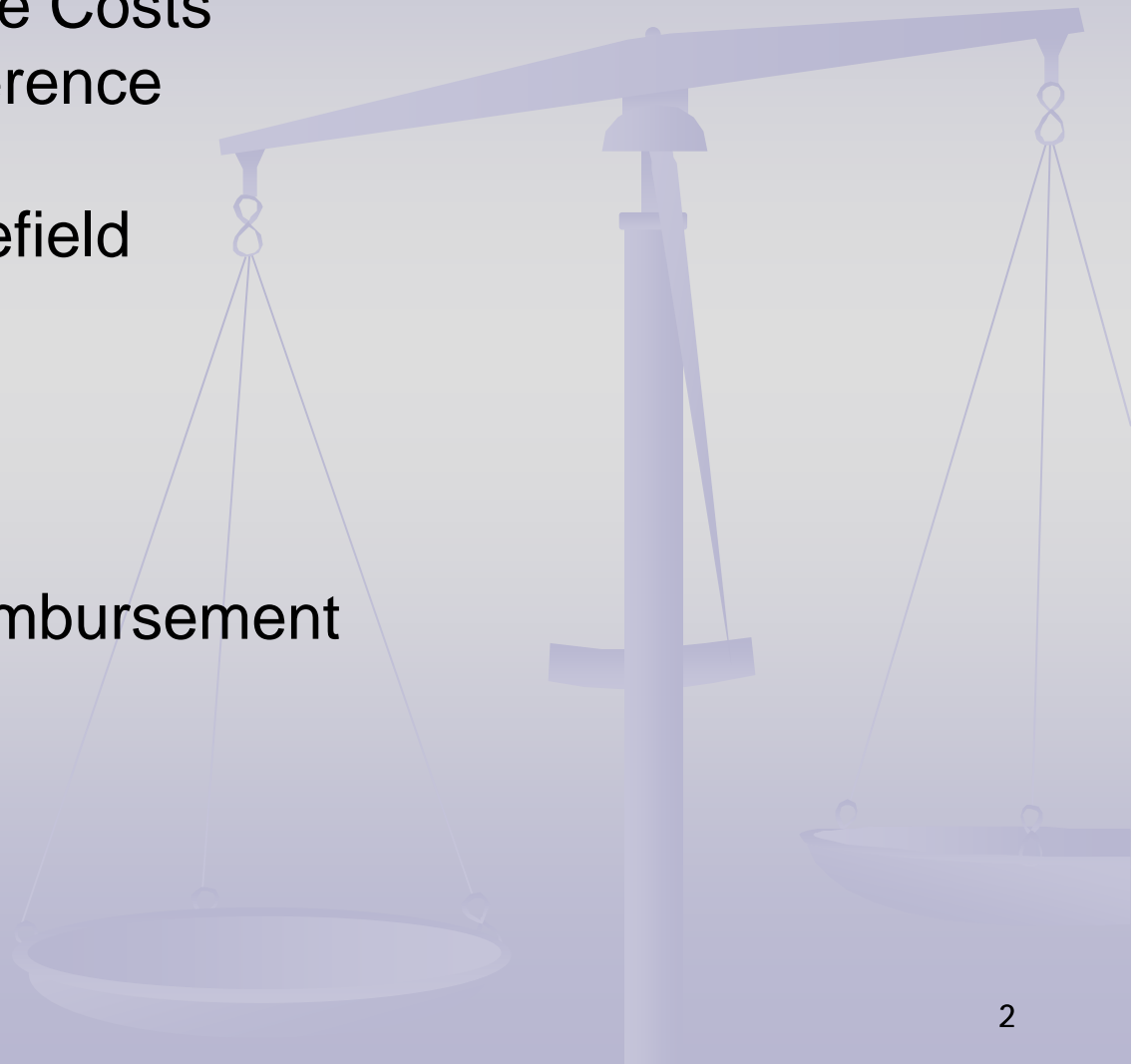
The Law Offices of Russo & Minchoff



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Discussion Topics

- Reducing Health Care Costs
- The Phia Group Difference
- Recovery Solutions
- The New Legal Battlefield
- Plan Consistency
- MetLife v. Glenn
- The Shank Case
- The Sereboff Case
- Subrogation and Reimbursement
- Plan Language
- State & Federal Law



Want to Reduce Your Costs

- Review & Revise plan document language – COB, exclusions and subrogation/reimbursement.
- Be aggressive with recoveries from WC, auto carriers and RPs.
- Identify recovery/exclusion opportunities through focused claim review. What claims are you reviewing? Diagnosis codes, dollar amounts?
- Understand State and Federal laws relating to Plan rights.
- Update your procedures and investigations – ask the right questions and obtain the correct info.
- Just because a liable third party denies responsibility, doesn't mean you have to close your file and pay – you have rights.

The Phia Group Difference



The Phia Group

- AM Best's Recommended Insurance Experts
- 90% of clients are TPAs & Self-Funded Employee Benefit Plans
- Services Catered to the Self-Funded Industry & Preservation of Plan Rights
- Highest Active Cases Identified - 1 Net Active Case per 60 EEs
- Unmatched Recovery Numbers – \$30-\$40 per EE Life Per Year
- The Phia System™ – Efficiently Maximizing Opportunities & Results
- Exclusive Data Extracts with TriZetto RIMS
- Only Firm to Review All Claims - Paid, Pended, or Denied

The Phia Group



- Analysis of Claims Data Against Every Federal & State Court Filing to Uncover Additional Subrogation Opportunities
- Alliance With Law Offices of Russo & Minchoff - Immense Cost Savings for Plans
- Legal Updates, Annual Review & Revision of Plan Document Provisions
- Innovative Consulting Services - On-Site Training Sessions, Meetings, & Legal Seminars
- Phia Employees – Incentive Based Pay, Continuous CSRP Training and Certification
- Expanded Office Hours – 9am to 8pm EST

Recovery Solutions



- Attorney Consultation
- Plan Language Review and Revision
- Subrogation and Right of Recovery
- Overpayment Recovery
- Subrogation Audits
- Claim Processing Evaluation
- Claims Exclusion Issues
- Reinsurance Claim Analysis
- Workers' Compensation – Self-Funded and Claim Denial
- Coordination of Benefits Recovery
- Duplicate Payment Recovery

The New Legal Battlefield

- Over past decade the legal debate was over Federal Preemption of State Law.
- Also whether ERISA plans could enforce terms over state regs. *Sereboff v. Mid Atlantic Medical Services.*, 126 S. Ct. 1869, (U.S. 2006).
- Now they are attacking plan administrator benefit decisions on the grounds that they are not “neutral” decision makers.
- While a neutral fiduciary may be given deference from reviewing courts, many administrators are accused of having a financial interest in denial of claims and are thus due no such deference.

The New Legal Battlefield



- Argument - decisions should be judicially reviewed by weighing evidence for and against equally – not compared to a deferential review where any evidence supporting the decision is enough even if the majority of the evidence weighs against the decision.
- If more stringent standard of review is implemented – 2 immediate effects. Plan participants will be encouraged to raise more appeals and bring more denials to the Courts for review.
- Second, judges will be re-evaluating so many denials that the administrator will lose any sense of authority.

Plan Consistency



- Plan documents have become very complex.
- Plans can summarize all programs in single SPD that can be hundreds of pages or use a wrap document.
- If drafting is kept up to date and done carefully, nothing will go wrong.
- Problems arise if the SPD omits important provisions that are included in another document.
- Two recent cases came to different conclusions on the impact of such modifications on plan recovery rights.

Plan Consistency



- *Burgett v. MEBA Medical and Benefits Plan*, 2007 WL 2815745 (E.D. Tex., Sept. 25, 2007) involved medicals totaling \$90,000. Patient's father refused to sign reimbursement agreement so plan refused to pay claims.
- Plan document had subrogation provision that stated a covered person had to take such actions as the plan may require to protect plan's rights.
- Court said that SPD had no requirement that beneficiaries had to execute a subrogation agreement before having their claim for benefits paid.
- Court stated that in absence of provision SPD controls - plan was required to honor the claim even without required signed subrogation agreement.

MetLife v. Glenn – SC Decision

- Supreme Court ruled on June 19, 2008 in favor of Glenn, affirming the Court of Appeals' decision.
- Company which both administers and funds a benefit plan operates under a conflict of interest that must be considered as a factor in court's review of claim denials.
- The question now is how much weight will such a conflict have? Does it change the standard of review or is it a tie breaker when evidence could equally support or counter the decision?
- SC said the Court of Appeals properly weighed the conflict of interest "as a factor determining whether there was an abuse of discretion."
- Court said there should be a "deferential standard of review" - the presence of a conflict does not automatically authorize court to apply heightened scrutiny.

MetLife v. Glenn - Facts

- Glenn filed for disability benefits with her health plan, funded and administered by MetLife, as a result of a severe heart condition.
- MetLife determined her condition was stable and ceased payment of benefits. Glenn appealed.
- USDC for the Southern District of Ohio enforced MetLife's decision since it had discretionary authority to interpret and administer the plan.
- Court applied a deferential standard of review and could only reverse MetLife's decision if the decision was arbitrary or capricious.
- In 2006, Glenn's physician notes, overlooked in the initial ruling, were presented to the 6th Circuit Court of Appeals.

MetLife v. Glenn - Facts

- Notes provided evidence that stress from occupational duties could worsen Glenn's condition.
- Court determined that MetLife, as both administrator of plan and payer of claims, faced a conflict of interest.
- Court balances the evidence for itself and reversed the initial decision, ruled against MetLife, and reinstated Glenn's benefits.
- MetLife was operating under a conflict of interest that would have to be "weighed".
- MetLife never addressed letters from Glenn's doctor stating that Glenn could not withstand the emotional stress of work.

MetLife v. Glenn - Conclusion

- Conflict simply ranks as “but one factor among many that a reviewing judge must take into account.”
- If the goal ceases to be application of plan terms and instead becomes the minimization of payable claims, a conflict is evident.
- Conflicts of interest are assigned “weights.” The weight is the relative importance of the conflict in the case.
- Decision does not change the standard of review and does not create special procedural or evidentiary rules.
- Plan administrators should act preemptively to “lessen the weight” of any potential conflicts.

The Shank Case

- Ms. Shank was severely injured in a car accident. Her medical expenses were paid by Wal-Mart's self-funded benefit plan.
- Family settled for \$700,000 and Wal-Mart sought to enforce their subrogation provision. Both the district and circuit courts enforced Wal-Mart's right to recovery. The Supreme Court refused to hear an appeal.
- In November 2007, Wall Street Journal published an article discussing how Wal-Mart sued to recover every penny leaving Ms. Shank brain damaged and penniless.
- It was never mentioned that the money recovered is returned to the employee benefits plan and not to Wal-Mart itself.
- CNN picked up the story and also took an anti-Wal-Mart approach. Thousands of angry emails hit the media bashing Wal-Mart. CNN ignored the substantial attorney's fees involved, which was more than the plan sought to recoup.
- In April 2008, Wal-Mart waived its subrogation rights in the case.

The Shank Case

- While waiving a lien is certainly not unusual, doing so after attracting so much attention will hurt Plan rights to subrogation in the future.
- This is viewed by personal injury lawyers as an unofficial precedent whereby publicly contesting Plan rights will end reimbursement.
- In the end, employees will pay when their contributions need to increase or plan is dissolved when costs become too high for employers to bear.
- It is important that plans pick their battles carefully.

The Sereboff Case

Sereboff v. Mid-Atlantic 126 S.Ct. 1869 (US 2006)

- Court sponsored erosion of your recovery rights
- Plan language is more important than ever before
- Experts must examine plan documents
- Parameters must be met to obtain Federal/ERISA relief
- Prompt action to prevent fund distribution
- Equitable liens and identified funds in trust
- The Made Whole and Common Fund Doctrines are still threats to recovery rights

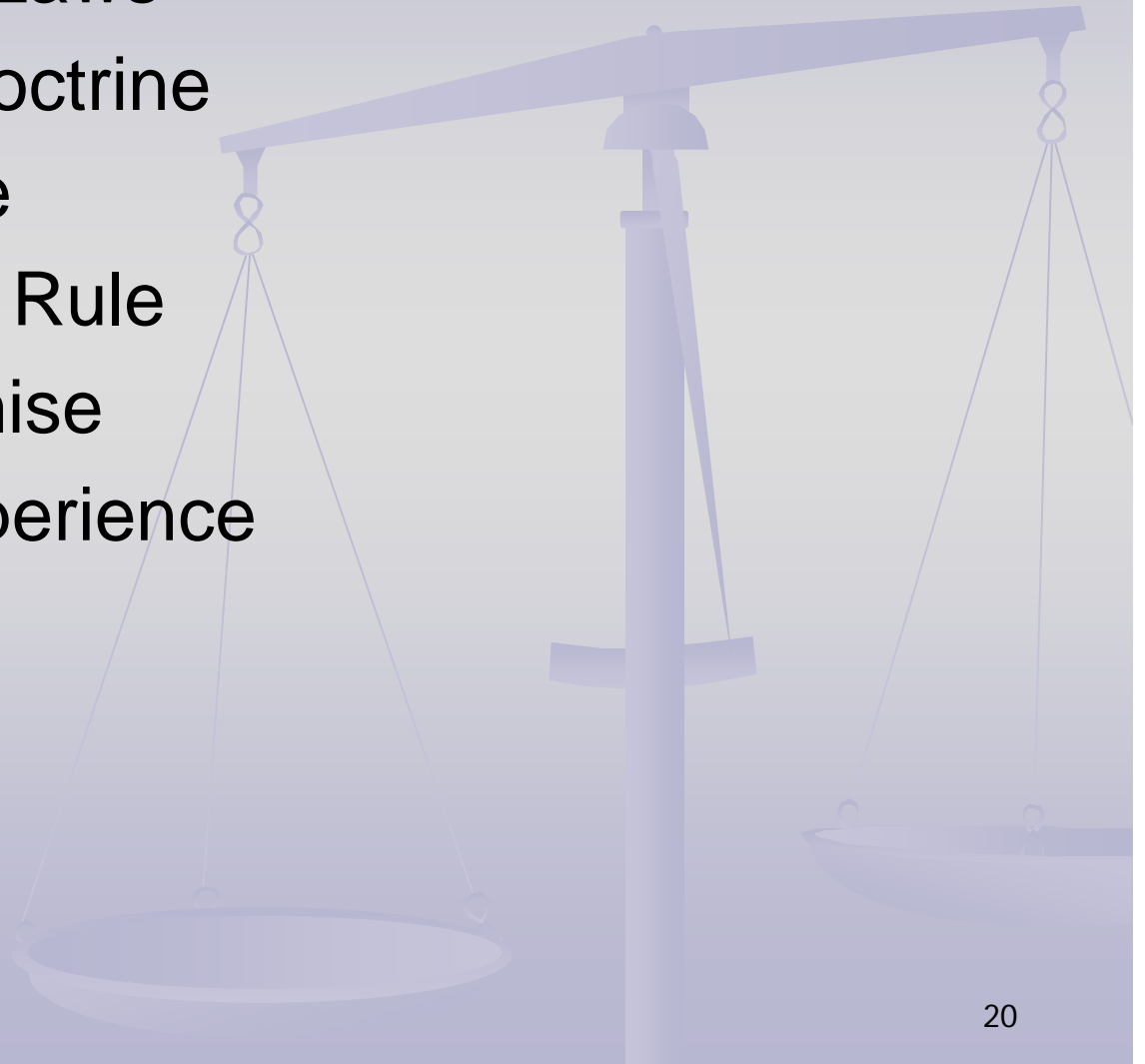
Plan Language

- Subrogation & Reimbursement
- ERISA
- Payment Condition
- Excess Insurance
- Offset
- Obligations
- Language Interpretation
- Plan Exclusions
- COB



State Law Barriers

- State Anti-Subro Laws
- Common Fund Doctrine
- Made Whole Rule
- Collateral Source Rule
- Minor's Compromise
- Trial Attorney Experience
- State Judges
- Bankruptcy



1st Circuit Law

MA, ME, NH, RI

Right of Recovery:

- 1st Circuit has not addressed the matter since *Sereboff* was decided.

Made Whole Rule:

- As long as the terms of the plan confer an unqualified right to full reimbursement, the made whole rule will be presumed not to apply, and the ERISA plan administrator will not be required to prove that the participant has been fully compensated. *Harris v. Harvard Pilgrim*, 208 F.3d 274 (1st Cir. 2000).

Common Fund Doctrine:

- An ERISA covered plan does not have to reduce a lien amount for attorney's fees unless the Plan specifically states that it will contribute to said fees. *Harris v. Harvard Pilgrim*, 208 F.3d 274 (1st Cir. 2000).

2nd Circuit Law

CT, NY, PR, VT

Right of Recovery:

- Since *Sereboff*, the Court held that monetary relief under section 502(a)(3) may be more broadly available in suits against ERISA fiduciaries than against non-fiduciaries but the mere fact that a defendant is a fiduciary of the plaintiff does not necessarily make the relief equitable in nature. *Rubin-Schneiderman v. Merit*, 2006 U.S. App. LEXIS 21192 (2d. Cir. 2006).

Made Whole Rule:

- The Second Circuit has not addressed the Made Whole rule but its district courts have thus far applied the terms of the Plan Document.

Common Fund Doctrine:

- The court has not addressed the Common Fund Doctrine, but its district courts have applied the terms of the Plan Document.

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