Much Needed Correction in the Second Circuit ... Is Relief (Equitable, That Is) Around the Corner?

Third party subrogation and reimbursement rights and the State of New York have always had a bit of a contentious relationship. At every turn it seems New York is tinkering with its state laws in a way that weakens the rights of insurance companies and (they think) benefit plans of all kinds.

Many arguments are available both for and against the viability of a benefit plan's rights in New York. As you can expect, Private Self-Funded ERISA Plans enjoy the benefit of preemption and surely do not have to be concerned with these changes in New York State Law … Or do they?

Ask any attorney practicing personal injury law in the State of New York and most will argue (rather aggressively, in fact) that New York does not allow subrogation and reimbursement under any circumstances, and that they have the federal case law to prove it.

Sereboff v. Mid Atlantic Medical Services, Inc. and its progeny be damned, despite providing that a benefit plan with clear and explicit plan terms allowing for recovery without reduction is entitled to full recovery so long as it is proactive and can trace the actual settlement fund to traceable assets. 547 U.S. 356 (2006). See also *US Airways, Inc. v. McCutchen*, 133 S.Ct. 1537 (2013). To them a quick read of *Wurtz v. Rawlings* is the law of the land. 761 F.3d 232 (2014).

Dominate In Your Self-Funding Career from the Comfort of Your Own Home

The Health Care Administrators Association (HCAA) has reenergized its Certified Self Funding Specialist® (CSFS®) online training and certification program. Now you can earn Continuing Education credits and obtain the designation to propel you to the next stage of your self-funding career.

Comprehensive and insightful, the seven courses cover every aspect that plan sponsors, brokers, employee benefit professionals and other health care professionals need to consider when establishing or maintaining a self-funded plan.

Course	Course Name
01	Introduction to Self Funding, Risk Management and the TPA
02	Stop Loss and Marketing in Self Funding
03	Cost Containment and Vendor Selection
04	Accounting, Funding and Tax Consequences
05	Actuarial, Legal, Reporting and Disclosure
06	State Regulations and Federally Mandated Benefits
07	MEWAs and VEBAs

Take your career to the next level!

- 24x7 mobile-ready access
- Study at your own pace
- Insights on the latest regulations and best practices

HCAA

Visit us online for full course descriptions and to register.

www.hcaa.webce.com
www.hcaa.org
888-637-1605

Recall *Wurtz* in 2014 when the Second Circuit Court of Appeals held that United Health, a fully insured benefit plan arrangement, was unable to satisfy the Davila test and obtain complete preemption from state law, and accordingly, the New York anti-subrogation law would apply to eliminate the rights of United Health and eradicate its right of recovery. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). That outcome, alone, is not all that surprising given the health plans fully insured status. *Wurtz*, 761 F.3d. at n. 6.

What did come as a bit of a surprise was the way in which the Second Circuit reached that decision. Essentially, the court reasoned in a long, somewhat convoluted opinion that a law suit by a plan beneficiary against its employee benefit plan to enforce an anti-subrogation law does not "relate to" employee benefits and therefore cannot be preempted on a defensive pleading. In pertinent part, the court stated:

> This expansive interpretation of complete preemption ignores the fact that plaintiffs' claims are based on a state law that regulates insurance and are not based on the terms of their plans. As a result, state law does not impermissibly expand the exclusive remedies provided by ERISA § 502(a). Under ERISA § 514(a)-(b), state laws that "relate to" ERISA plans are expressly preempted, but not if they "regulate insurance." 29 U.S.C. § 1144(a)-(b). Based on this "insurance saving clause," the Supreme Court has held that state statutes regulating insurance that nonetheless affect ERISA benefits are not expressly preempted, with no hint that claims under these statutes might still be completely preempted and thus unable to be adjudicated under those state laws when they do not expand the remedies available for beneficiaries for claims based on the terms of their plans. *See* Rush Prudential HMO Inc. v. Moran, 536 U.S. 355, 377-79, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 366-67, 119 S.Ct. 1380, 143 L.Ed.2d 462 (1999).

This effectively created a race to the courthouse steps. If the participant first sues the plan for enforcement of an anti-subrogation law, the plan would not be able to claim preemption and would be unable to litigate in federal court, potentially unable to enforce its right of recovery.[1]

Every plaintiff's lawyer in New York (along with its sister states Connecticut and Vermont, all notoriously anti subrogation) was provided the leverage they needed to look at all benefit plans, even private self-funded plans whose rights have repeatedly been protected by The Supreme Court of the United States and force them into settlements.

After all, do the plans really want to end up in state court and argue with a court consisting of New York judges with a bias against subrogation that just went to great lengths to interpret incorrectly ERISA's preemption framework in order to reach its outcome?

Interestingly, the court itself acknowledged in footnote 6 of the decision that the outcome for a private self-funded plan would likely be different. The footnote stated:

> The issue in *FMC* was the effect of the so-called "deemer clause" of ERISA § 514(b)(2)(B), which exempts self-funded plans from the savings clause. The Supreme Court held that the deemer clause did not cause preemption of the entire statute in all cases, but only as applied to self-funded plans. 498 U.S. at 61, 111 S.Ct. 403. Under FMC, the applicability of N.Y. Gen. Oblig. Law § 5-335 to self-funded plans would only mean that the law is preempted as applied to those plans (which is not the case here because the plans at issue are insured), not that the law is not "specifically directed" at insurance.
>
> *Wurtz*, 761 F.3d. at n. 6.

You see, even there the court conceded that this outcome was based on the fact that this was an insured Plan, but of particular concern is how the Court determined that anti subrogation law did not relate to the benefit Plan.

So really, what is the problem here? It appears the court clearly misinterpreted ERISA's preemption framework, while likely still reaching a correct outcome given that particular plans' fully insured status, and even conceded that the outcome would likely be different for a Private Self-funded Plan? Well, the problem is simple.

We lawyers find any leverage point we have and use it to our full advantage. The fact of the matter is that that law is only as good as what can and reasonably in prudently be enforced, and lawsuits are expensive. That, along with considering the risk of the Second Circuit Court again misinterpreting the "relation to" portion of ERISA, can be a risky proposition and not always a prudent use of Plan assets to win the race to the Court, so to speak.

Enter *Cognetta v. Bonavita*, a case this author hopes is the beginning of a clarification of the decision in *Wurtz* that will finally give plan representatives the tool they need to once and for all quiet this race to the court nonsense. E.D.N.Y. No. 1:17-cv-03065 (2018). In *Cognetta*, the Plan paid approximately $110,000.00 to cover the medical expenses of plan participants injured in an automobile accident. In an abundance of caution, the Plan got way ahead of the game and won the race to the court. In fact, the Plan did not even wait for the case to settle.

Instead, while the participant's injury claims were still pending with the third party, the Plan shrewdly filed for a Declaratory Judgement asking the court to determine that it did, in fact, have an equitable lien and a constructive trust over the possible settlement funds and sought a Court Order that upon settlement, those funds were to be held in Trust.

Much to the delight of self-funded benefit plans everywhere, the court ruled in favor of the Plan. Among the most interesting parts of the decision was how this court laid out the most important part of the entire dispute in *Wurtz*, and that is, how the Court handled this "relation to" notion. In *Cognetta*, the Court provided in pertinent part:

> …The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004). To that end, ERISA Section 514(a) expressly preempts "any and all" state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). A state law "relate[s] to" an employee benefit plan if that law "has a connection with or reference to such a plan." Franklin H. Williams Ins. Tr. v. Travelers Ins. Co., 50 F.3d 144, 148 (2d Cir. 1995) (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985)). The scope of ERISA's express preemption clause is "as broad as its language." FMC Corp. v. Holliday, 498 U.S. 52, 59 (1990) (quoting Shaw v. Delta Air Lines, 463 U.S. 85, 98 (1983))…
>
> Even where a state law "relate[s] to" an employee benefit plan, however, ERISA does not expressly preempt that law if it "regulates insurance." 29 U.S.C. § 1144(b). A law "regulates insurance" if it is "specifically directed towards entities engaged in insurance" and "substantially affect[s] the risk pooling arrangement between the insurer and the insured." Wurtz v. Rawlings Co., 761 F.3d 232, 240 (2d Cir. 1994) (quoting Kentucky Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329, 342 (2003)). In such a situation, the state law is "saved" from express preemption. Id. Nevertheless, an employee benefit plan governed by ERISA cannot be "deemed . . . an insurance company or other insurer . . . for purposes of any law of any State purporting to regulate insurance." 29 U.S.C. § 1144(b)(2)(B). That is, a state law cannot escape ERISA preemption by erroneously classifying an employee benefit plan as "insurance." *See id.*
>
> Whether a state law that regulates insurance applies to a plan or is preempted by ERISA depends on whether the plan purchases insurance. *See* FMC Corp., 498 U.S. at 64; see *also* Arnone v. Aetna Life Ins. Co., 860 F.3d 97, 107 (2d Cir. 2017). Where a plan buys insurance, it "remains an insurer for purposes of state laws `purporting to regulate insurance.'" FMC Corp., 498 U.S. at 61. By contrast, where a plan is self-funded and does not purchase insurance from an insurance company, ERISA "exempt[s]" the plan "from state laws that `regulat[e] insurance.'" *Id.* (second alteration in original); see *also* Wurtz, 761 F.3d at 241 n.6. …

Cognetta, E.D.N.Y. No. 1:17-cv-03065

And in that last paragraph lies the crux of the issue. It is because the private self-funded plan does not purchase insurance, and under ERISA's Deemer clause, cannot be considered "insurance" that application of the rule in Wurtz is incorrect as it relates to self-funded benefit plans. Once one determines that a plan is not insurance pursuant to the Deemer clause, it is then that we determine whether the law a participant is seeking to enforce "relates to" an employee benefit Plan. An anti-subrogation clause is by definition the attempt of a plan participant to seek benefits to which it is not entitled, i.e. the ability to keep benefits paid which are subject to a subrogation or reimbursement obligation.

While this is indeed an exciting development, some notes of caution.

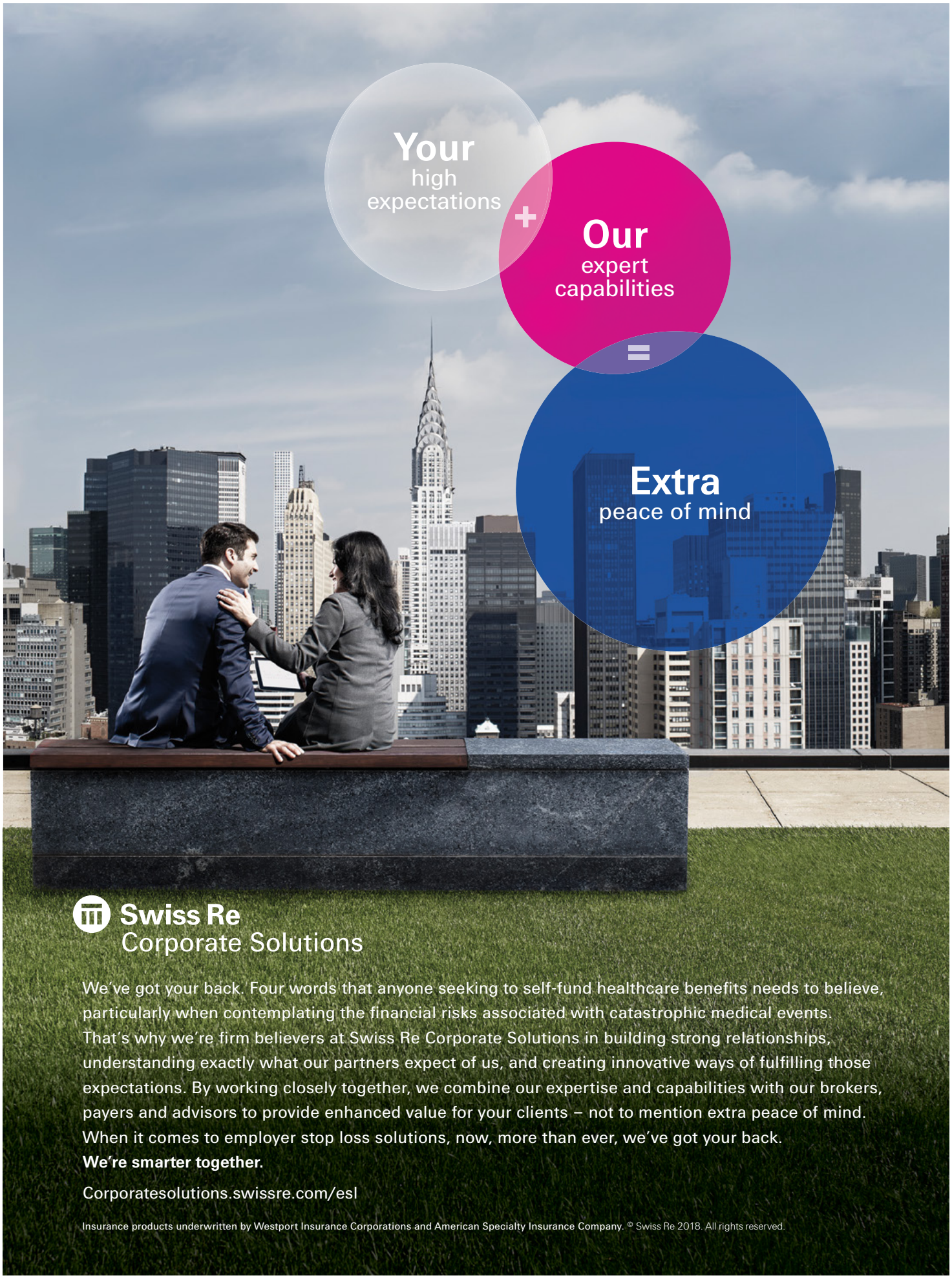
First, this decision was reached at the Federal Trial Court level. There are three other Federal districts in New York and none of them have binding authority over the other; meaning that if this exact same issue were to be heard in the Southern District of New York, the outcome could be different. If and only if this decision is appealed, heard, and upheld, by the Second Circuit Court of Appeals will it then be the law of the land in all Federal Districts under the purview of the Second Circuit, including Connecticut and Vermont.

Until then, this decision simply gives plans the same leverage New York attorneys had against them, the risk of loss and cost of pursuit rendering such pursuit an imprudent use of funds, be that due to fiduciary concerns with respect to the plan, or practical concerns with the respect to the participant.

Second, and perhaps most importantly, the ability of self-funded benefit plans to win on any issue in Federal Court in the Land still rests on one very basic concept … plan language. If the Plan language is insufficient in any way, a plan is at serious risk of losing its rights. In *Cognetta*, the Plan was well drafted, and assuming the Second Circuit makes good on its Footnote in the *Wurtz* decision, It would likely uphold the decision in the *Cognetta* case upon appeal.

We will have to wait and see how this plays out. Either way, it is an exciting development in the Second Circuit and finally provides what looks to be a light at the end of the tunnel on the *Wurtz* problem in the Second Circuit.

Make no mistake, New York lawyers will find other ways to make our road to recovery more difficult. Having the right tools and partners in place to identify recovery opportunities and act on them continues to be the best way to protect plan funds. Then all we can do is roll with the punches, and every so often, we'll get some relief! ■



Swiss Re
Corporate Solutions

We've got your back. Four words that anyone seeking to self-fund healthcare benefits needs to believe, particularly when contemplating the financial risks associated with catastrophic medical events. That's why we're firm believers at Swiss Re Corporate Solutions in building strong relationships, understanding exactly what our partners expect of us, and creating innovative ways of fulfilling those expectations. By working closely together, we combine our expertise and capabilities with our brokers, payers and advisors to provide enhanced value for your clients – not to mention extra peace of mind. When it comes to employer stop loss solutions, now, more than ever, we've got your back.

We're smarter together.

Corporatesolutions.swissre.com/esl

WANT TO IMPROVE THE HEALTH AND PRODUCTIVITY OF YOUR EMPLOYEES?

YOU'LL NEED MORE THAN A WELLNESS PROGRAM AND SOME HEALTH DATA.

You need a comprehensive view of workforce health & the systems and expertise to turn data into action.

YOU NEED IN-SIGHT FROM IPMG.

In-Sight provides a single, integrated platform for all employee health, injury, workers' compensation, absence and engagement activity — and the specialized teams that use your data to proactively minimize risks and promote productivity.

BECAUSE THRIVING COMPANIES RELY ON HEALTHY EMPLOYEES.

ipmg.com/in-sight.

IPMG

In-Sight

Christopher Aguiar is an attorney with The Phia Group who has focused most of his career on subrogation and reimbursement recovery, representing TPAs and self-funded benefit plans since 2005. Chris has oversees tens of thousands of cases all over the country and spearheads negotiations between plan participants, plaintiffs' counsel, and plan administrators on matters of State and Federal Law as well as ERISA Preemption. He has recovered millions of dollars on behalf of benefit plans in virtually every state and federal jurisdiction. He also holds the distinction of a Certified Subrogation Recovery Professional. Although Chris spent several years dabbling in other areas of benefit plan cost containment, including plan drafting as well as plan consulting matters ranging from plan language analysis, claims appeal assistance, balance billing defense, overpayment recovery, stop loss, PPO, and administrative service agreements. Chris is a regular contributor to The Self Insurer Magazine and is invited to present annually at the National Association of Subrogation Professionals National Conference.

References

1 This can present insurmountable challenges in some states, such as Illinois, where state courts have repeatedly refused to apply clear plan terms that conflict with state laws. *Bishop v. Burgard*, 764 N.E. 2d 24 (Ill. 2002). As an intermediate court of appeals in the state noted "…*McCutchen* may foreshadow a different result than our supreme court has pronounced in the past." *Schrempf, Kelly, Napp & Darr, Ltd. v. Carpenters' Health and Welfare Trust Fund*, 35 N.E.3d 988 (2015).