

Pension & Welfare Plan Overpayments: What's an Employer to do?

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Highlights

Pension Plan Overpayments

- Common scenarios
- Legal Framework
- Correction Procedures
- Judicial Framework
- Practical Tips for Recouping Pension Overpayments

Welfare Plan Overpayments

- Out-Of-Network Provider Litigation
- Cross-Plan Offsetting to Recoup Overpayments
- Practical Tips for Recouping Welfare Overpayments

Recent Decision Exemplifying Overpayment Litigation

Pension Plan Overpayments: Common Scenarios

Defining pension plan overpayments

Why does an overpayment occur?

- A plan miscalculates a participant's benefits.
- A participant receives income from some other source that should have reduced the pension benefit
- Misapplication of the suspension of benefits rules in multiemployer plans
- The PBGC takes over a plan and takes several years to determine whose pensions must be reduced to conform to the PBGC's guarantee limit. During that time, any retiree whose pension is above the agency's guarantee limit is being overpaid.
- Unaware of a participant's death, a plan continues making payments.

Pension Plan Overpayments: Legal Framework – DOL Guidance / PBGC

Statutory/Regulatory Framework

DOL

- Fiduciary duty to attempt to recoup overpayments when prudent to do so
- Fiduciaries may determine that it is not prudent to seek repayments based on equitable considerations
 - Hardship to participant
 - Cost of collection efforts
- Fiduciaries may recover from a negligent service provider who caused the error without first seeking recoupment from the participant

PBGC

- PBGC has its own recoupment rules, which some practitioners model

Pension Plan Overpayments: Legal Framework – IRS Correction Procedures

Overpayments are operational defects eligible for correction under EPCRS (Rev. Proc. 2016-51)

Self-Correction Program (SCP)

- If the failure is “significant,” correction must be completed by the last day of the second plan year following the plan year in which the error occurred

Voluntary Correction Program (VCP)

- Employer must pay a fee based on participant headcount
- Approval reflects IRS determination that the failure is corrected
- Ability to correct by retroactive plan amendment
- Ability to obtain excise tax relief for recipients who rolled the overpayment over into an IRA

Pension Plan Overpayments: Legal Framework – IRS Correction Procedures

Correction Principles

- Put the plan and the participants in the position that they would have been in had the failure not occurred
- Correction should be reasonable/appropriate for the failure and should, if possible, resemble a correction method provided in the guidance
- If a correction method has been authorized by an agency with respect to a legal requirement within that agency's authority, then the IRS may take the agency's method into account
- De minimis rule for overpayments of \$100 or less

Pension Plan Overpayments: Legal Framework – IRS Correction Procedures

Return of Overpayment Method:

- Employer must take reasonable steps to have the overpayment with interest at the plan's earnings rate returned to the plan & reduce future payments to the corrected amount
- If the amount returned is less than the above the employer (or another person) must contribute the difference

Adjustment of Future Payments Method:

- Future payments are offset until the overpayment plus interest at the plan's actuarial equivalence rate is repaid
- An overpayment to a participant may not be recouped from the survivor benefit

The plan must notify the participant that the overpayment was not eligible as a qualified rollover

Pension Plan Overpayments: Legal Framework – IRS Correction Procedures

Other methods?

- In 2015, IRS clarified that plan sponsors are not always required to demand recoupment from the participant
- Employer or third party can contribute the amount of the overpayment (plus interest) to the plan in lieu of seeking recoupment first
- “or any other appropriate correction method” that satisfies the general principles of EPCRS

Pension Plan Overpayments: Judicial Framework – Background

Until recently, many courts permitted plans to legally enforce an (explicit or implicit) contractual reimbursement arrangement and recoup overpayments

A line of Supreme Court cases casts serious doubts regarding a plan's ability to recoup lump sum overpayments unless those funds are still in the participant's possession or traceable to identifiable property purchased with the funds

- This line of cases affects a plan's ability to recoup an overpayment from the recipient's general assets without affecting its ability to recoup by offsetting future payments

Pension Plan Overpayments: Judicial Framework – *Montanile*

A disability plan paid about \$120,000 in medical expenses for Montanile who also recovered \$500,000 against the drunk driver who hit him

Although the plan demanded reimbursement out of the settlement proceeds, they were released to Montanile

The Supreme Court held that ERISA's enforcement scheme permitted recoupment by the plan only if specific funds remain in the participant's hands or at least are traceable to identifiable property (like real estate or a vehicle) that was purchased with the funds

Pension Plan Overpayments: Judicial Framework – *Montanile* (cont'd)

ERISA §502(a)(3) limits a plan's ability to bring a claim unless the relief sought is "equitable relief"

- The plan was seeking the remedy of equitable lien which requires specific identifiable funds
- Before *Montanile*, it was thought that this requirement was satisfied because the overpayment amount itself was specific and distinct

The Court reasoned that, where the equitable lien is broken, the plan may still have a claim against the participant's general assets but recovering from those assets is a legal remedy not an equitable one and, thus, not enforceable under ERISA §502(a)(3).

Pension Plan Overpayments:

Judicial Framework – Post-*Montanile* Theories of Recoupment

Relief under ERISA §502(a)(3) if assets are in the participant's possession or traceable (e.g., the overpayment was rolled over to an IRA)

Fiduciary breach under ERISA §502(a)(2)?

- Overpayment is a plan asset, making the participant a fiduciary and his or her failure to return it a breach of fiduciary duty
- Permits recovery from participant's general assets without the possession/traceability requirement
- *Alcatel-Lucent USA Inc., et. al. v. Samuel Borlabi, et. al.*

Contractual right to recovery that falls outside the reach of ERISA preemption?

Pension Plan Overpayments: Judicial Framework – Participant Defenses

After *Cigna v. Amara*, the Supreme Court has held that traditional equitable remedies are available to participants for fiduciary breach claims under ERISA§502(a)(3)

- Reformation
- Estoppel
- Surcharge

By claiming the overpayment was caused by a fiduciary breach, the participant can petition courts for equitable relief to keep it

Participants are asserting (and will likely continue to assert) fiduciary breach claims not just as a defense in suits brought by the plan but offensively

Practical Tips for Addressing Overpayments

Plan language

Participant communications

Preventative steps

Welfare Plan Overpayments: Out-Of-Network Provider Litigation

- Some large Third-Party Administrators ("TPAs") have sued out-of-network medical providers ("Providers") alleging unlawful failure to disclose fee splitting, excessive fees and improper fee forgiveness
 - Claims are for overpayment/reimbursement under ERISA, other statutory violations, common law fraud, negligent misrepresentation and unjust enrichment
- Providers have counterclaimed under ERISA
 - Alleging violations alleging failure to pay benefits, breach of fiduciary duty, failure to provide full and fair review, violations of claims procedure requirements, failure to provide documents, statutory claims and breach of contract
- Recently Providers are making demands directly to plan administrators in an attempt to circumvent or achieve leverage over TPAs and sue plans directly for ERISA violations
 - Key to suit against plan is a valid assignment to Provider of the participant's rights under the plan

Welfare Plan Overpayments: Out-Of-Network Provider Litigation

- TPAs are engaging in "self-help" outside of litigation by offsetting payments due to a Provider from one plan against alleged prior overpayment to the same Provider for a prior claim or claims under the same plan (same-plan offsetting) or an unrelated plan (cross-plan offsetting)
- While there is support for same-plan offsetting, Providers are contesting a TPA's right to engage in cross-plan offsetting
 - *Quality Infusion Care, Inc. v. Health Care Service Corporation*, 628 F.3d 725 (5th Cir. 2010) finds plan language allowed same-plan offsets (non-ERISA case)
 - Providers are contesting use of cross-plan offsetting when payments due from a self-funded plan are "offset" against alleged overpayments under the TPA's fully-insured plan
 - Objection to self-insured/fully-insured plan offsetting is that the TPA improperly takes money from the self-insured plan that the TPA administers, not to pay the Provider for participant services that have been approved by the TPA, but to reimburse the TPA
 - Providers also argue that offsetting prevents payment under ERISA

Welfare Plan Overpayments:

Plan's Defense

- No "statutory standing" due to plan's anti-assignment/anti-alienation clause
 - Provider must have a valid assignment of the participant's claim to sue the plan
 - *Spinedex v. United Healthcare of Arizona*, 770 F.3d 1282 (9th Cir. 2014) - "Anti-assignment clauses in ERISA plans are valid and enforceable."
 - *Hermann Hospital v. MEBA*, 959 F.2d 569 (5th Cir. 1992) ("*Hermann II*") - Stretches to construe anti-assignment clause as applying only to creditors for debts having no nexus to plan or plan benefits (so-called "spendthrift" language)
 - *LeTourneau v. Wal-Mart*, 298 F.3d 348 (5th Cir. 2002) - Enforced anti-assignment clause with language "unquestionably directed at providers of health care services", distinguishing *Hermann II* anti-assignment language
 - "No attempt at assignments or [sic] benefits will be recognized by the Plan" and "[n]othing contained in the written description of Wal-Mart medical coverage shall be construed to make the Plan or Wal-Mart Stores, Inc., liable to any third-party to whom a participant may be liable for medical care treatment or services."
- Plan excludes specific charges that it is not obligated to pay under its terms
- Plan provides for maximum allowable/reimbursable charges that are permitted under its terms
 - "reasonable and customary" or "usual and customary" vs. multiple of Medicare reimbursement rates or other method

Welfare Plan Overpayments: Cases Addressing Anti-Assignment

- *North Cypress Medical Center Operating Co. v. Cigna Healthcare*, 781 F.3d 182 (5th Cir. 2015)
 - Affirms existing law concerning validity of plan anti-assignment provisions that explicitly prohibit assignment of claims to medical providers
 - Calls into question interpretation of common plan exclusion language ("charges for which you are not obligated to pay or for which you are not billed") based on whether an ordinary plan participant would understand that he or she has no coverage if there is no charge for coinsurance
- *Griffin v. Focus Brands, Inc.*, 635 Fed. Appx. 796 (11th Cir. 2015)
 - Supports broad enforceability of plan anti-assignment clauses ("Benefits available under this [Plan] are not assignable by any Member without written permission from [BCBSGA]")
 - No implied waiver except in a "clear case"
 - Note that many other circuits are more liberal in finding waiver

Welfare Plan Overpayments: Cases Addressing Fee Forgiveness

- *Cigna v. TrueView Surgery Center One L.P.*, 128 F.Supp.3d 501 (D. Conn. 2015)
 - Cigna alleges TrueView defrauded it using fee-forgiving billing practices and brings action for declaratory and injunctive relief and damages
 - 316 plans at issue - 228 are self-insured, 74 are fully insured and 14 require Cigna to reimburse claims above a certain amount
 - Court finds:
 - Reimbursement of overpayments claim is not an "adverse benefit determination" requiring exhaustion of administrative remedies
 - Cigna is not withholding future payments, which could be an adverse benefit determination, but seeks recovery of overpayments directly from TrueView
 - Cigna adequately stated claim of fraud for submission of charges that grossly exceeded amounts quoted to patients (as a result of coinsurance waiver)
 - Cigna's state law fraud claims are not preempted by ERISA, but state law tortious interference with the contract is preempted by ERISA

Welfare Plan Overpayments: Cases Addressing Fee Forgiveness

- *Arapahoe Surgery Center LLC v. Cigna Healthcare, Inc.*, 171 F.Supp.3d 1092 (D. Colo. 2016)
 - Summary judgment review of claims for both self- and fully-insured plans related to provider fee-forgiveness practices and Cigna's "fee forgiveness protocol"
 - Some plans in states with statutes barring delegations of discretion to insurers to interpret plan terms
 - Court:
 - State statute prohibiting such delegation are not preempted by ERISA with respect to fully-insured plans, but with respect to self-insured plans
 - Provider is not required to exhaust administrative remedies under the "futility exception" for claims after the Cigna policy was put in place
 - Cigna's decision to reduce payment was "not unreasonable and within its discretion" where based on "substantial evidence" that patient was billed based on estimate of in-network charge for same service
 - Where Cigna completely denied coverage, Cigna's decision was reasonable only if there was "substantial evidence" that the patients were "not obligated to pay" or "not billed" for "anything at all" -- fact issue on this point precluded dismissal
 - Denied (i) provider's motion for summary judgment on Cigna's tortious interference and unjust enrichment claims and (ii) Cigna's motion of summary judgment on the exclusion provision in plans and ERISA violations

Welfare Plan Overpayments: Pending Overpayment Offset Cases

- *Peterson v. UnitedHealth Group & Riverview Health Institute v. UnitedHealth Group*, Case No. 14-cv-02101-PJS-BRT (D. Minn.)
 - Provider sued UnitedHealth Group ("UHC") in June 2014 alleging ERISA fiduciary violations and fraud based on UHC's offset policy used to recoup provider overpayments of claims under one plan from payments due to provider from another plan; motions currently under review by the court
 - UHC summary judgment motion:
 - Offsets are a form of payment (through forgiveness of debt) under ERISA and so provider has been paid - otherwise provider would have a windfall
 - While the terms of the plans do not explicitly address cross-plan offsetting, the plans do not expressly prohibit it and generally authorize recoupment of overpayments
 - Plan sponsors made fiduciary determination by "negative consent" (like rate increases) for plan participation in cross-plan offsets to reduce administrative costs and have faster/more reliable recoveries of overpayments, which are legitimate plan objectives under ERISA
 - Provider cannot serve as "authorized representative" for patients because he failed to adequately disclose his conflict of interest (that is, if UHC doesn't pay, provider can seek payment from the patient/participant)
 - Points to the 5th Circuit decision in *Quality Infusion Care* (discussed earlier) as support

Welfare Plan Overpayments: Pending Overpayment Offset Cases

- *Peterson v. UnitedHealth Group* (con't)
 - Provider opposition to UHC summary judgment motion:
 - There is no plan language that authorizes cross-plan offsets, only same-plan offsets
 - Interpretation permitting cross-plan offsets is arbitrary and capricious
 - Motivation behind the cross-plan offsets is to benefit UHC by using the self-insured plan money to recover UHC's own fully-insured plan overpayments - 80% of the cross-plan offsets involved UHC taking money from a self-insured plan and none of the self-insured plans benefitted from cross-plan offsets
 - UHC's actions breach ERISA fiduciary duty of loyalty (ERISA 404) and result in a prohibited transaction due to self-dealing (ERISA 406)
 - Provider patients waived any conflict of interest
- *RedOak v. AT&T Inc.*, filed July 12, 2016, in the Southern District of Texas (Houston)
 - Complaint against AT&T as plan sponsor
 - Providers alleges use of cross-plan offsets violates ERISA and is embezzlement
 - Alleges ERISA fiduciary breaches, prohibited transactions and fraud/embezzlement, along with co-fiduciary liability against plan sponsor
- *See also RedOak Hospital v. GAP Inc.*, filed June 27, 2016 in the Southern District of Texas (Houston)

Welfare Plan Overpayments: What's An Employer To Do?

- Review and revise anti-assignment clauses
 - Avoid drafting pitfalls, carefully consider scope, ensure consistency between plan and SPD
- Adopt "authorized representative" procedures
 - Consider requiring use of plan's authorized representative form
- Review and revised plan documents
 - Revise maximum allowable/reimbursable charge definitions
 - Confirm authorization of TPA to engage in same-plan and cross-plan offsets
 - If the plan allows such offsetting, then arguable it should be upheld as valid
 - Provide no coverage if copayment or coinsurance is waived by a Provider
 - Review participant communications
- Ensure TPA is asserting/enforcing anti-assignment clauses and other plan provisions and monitoring excessive Provider claims that result in overpayments
- Be mindful of ERISA 104(b)(4)
- Stay tuned for rulings by the courts on cross-plan offsets

Recent Overpayment Case: Pharmacia Corp. Supplemental Pension v. Weldon (E.D. Miss 2015)

Facts

- Plan mistakenly paid Defendant \$1.3 million in pension distributions
- Plan brought suit almost 5 years after it discontinued distributions
- Pfizer outsourced its “ministerial recording keeping and administration” functions of its sponsored retirement and health and welfare plans

Selected Claims

- Request for Injunctive Relief to Freeze Funds
- Enforcement of the Terms of the Plan
- Conversion, Accounting and Restitution
- Unjust Enrichment
- Recoupment / Money Had and Received

Relevant Law Under ERISA

29 U.S.C. § 1132(a)(3) authorized only relief typically available *in equity*

- E.g. Constructive Trust or Equitable Lien
- “Equitable restitution” seeks to punish the wrongdoer by taking his ill-gotten gains whereas “legal restitution” seeks to recover in money the value of the harm done to the plaintiff.

§ 502(a): civil remedies completely preempt state law remedies

OUTCOME

Request for Injunctive Relief to Freeze Funds

- *Withdrawn*

Enforcement of the Terms of the Plan

- *No “repayment” clause*

Conversion, Accounting and Restitution

- *Recovery limited to “specifically identifiable” property or identifiable proceeds thereof*

Unjust Enrichment

- *Same*

Recoupment

- *Inapplicable*

Money Had and Received

- *Dismissed as an action at law*

Questions & Answers

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- [Standard Clause, Letter to Participant Requesting Return of Pension Plan Overpayment](#)
- [SPD Language, Subrogation and Reimbursement](#)
- [PN, ERISA Litigation: Causes of Action and ERISA Section 502](#)
- [Practice Note, ERISA Fiduciary Duties: Overview](#)

About the Speakers



Mark A. Bodron is a partner in the Executive Compensation/Employee Benefits practice group in the Houston office of Baker Botts L.L.P. His practice ranges from assisting clients with tax and ERISA issues related to the design and operation of qualified and welfare employee benefit plans to counseling clients on issues related to equity-based and non-qualified/deferred compensation plans and arrangements. Mark also provides legal counsel on employee benefit matters related to corporate mergers and acquisitions and employee benefits litigation. Mark is a member of the Employee Benefits Committee of the American Bar Association's Tax Section, serving as the Committee's 2012-2013 Chair, and is a Fellow in the American College of Employee Benefits Counsel. Mark is a past Chair of the American Bar Association's Joint Committee on Employee Benefits and the Gulf Coast TE/GE Council. He is currently a member of the Board of Directors of both the American College of Employee Benefits Counsel and the SouthWest Benefits Association and serves as a Vice Chair of the Committee on Government Submissions of the Tax Section of the American Bar Association. Mark earned a J.D. from the Paul M. Hebert Law Center at Louisiana State University and a B.S. and M.B.A. from Louisiana Tech University.



Gia Norris is a senior legal editor for Practical Law's Employee Benefits & Executive Compensation service. Gia joined Practical Law from Roberts & Holland LLP, where she was a senior employee benefits and executive compensation associate. Previously she was an employee benefits and executive compensation associate at both White & Case LLP and Proskauer Rose LLP. Gia's practice focused on ERISA Title I fiduciary issues, executive compensation, multiemployer plans and retirement plan compliance. Gia is currently the Website & Technology Chair of the Employee Benefits Committee of the American Bar Association's Section of Taxation. She is also a member of the Employee Benefits Committee of the Tax Section of the New York State Bar Association. Gia received her Juris Doctorate from the University of Pennsylvania Law School and her Bachelor of Arts from Johns Hopkins University in Political Science and Women's Studies.



Elizabeth Abbott Gilman is an associate in K&L Gates's Houston office. She focuses her practice on commercial disputes and has particular experience in disputes involving the energy sector, especially oil and gas. Her technical education and experience enhances the value of her representation and counsel. She earned her undergraduate degree from Purdue University, majoring in industrial management with an emphasis in manufacturing. Ms. Gilman excels in her ability to work with clients and experts in complex fields. Ms. Gilman has experience in all phases of the dispute process which allows her to provide comprehensive representation for her clients. She has experience in early dispute management, litigation and arbitration through the appellate process and collection. She has tried cases both in front of a jury and an arbitrator. On behalf of her clients, she brings a unique level of experience in energy litigation, and both on-shore and off-shore construction disputes. Ms. Gilman's experience in contract negotiation and drafting further contributes to the value of her representation to her clients.



Judy Hensley concentrates on a wide variety of employee benefits and executive compensation matters in both the transactional and compliance contexts. She advises on tax, ERISA and other legal considerations relating to employee benefit plans, programs and arrangements, including design, administration and compliance of tax-qualified plans. She has advised clients on ERISA fiduciary matters for investment funds and plan fiduciaries. Her experience includes the structuring and design of equity compensation arrangements and nonqualified deferred compensation plans, as well as executive employment, severance and change-in-control agreements. Judy has been designated as a New York Metro Rising Star by Super Lawyers for 2014, 2015 and 2016. She received a B.A. from Gustavus Adolphus College, an M.T.S. from Harvard University, her J.D. from Stanford Law School and a PhD in Philosophy from University of Chicago.