Veteran health law attorney Robert L. Roth has joined HLB as managing partner of the firm’s newly-opened Washington, D.C. office.

Mr. Roth brings with him more than 24 years of health law experience in a 27-year legal career that includes 11 years of public service at both the state and federal levels. Before entering private practice in 1993, Mr. Roth served as an attorney for the Health Care Financing Administration (subsequently renamed the Centers for Medicare and Medicaid Services) in the U.S. Department of Health and Human Services and, previously, as an Assistant Attorney General for Maryland’s Department of Health and Mental Hygiene and Counsel to the Constitutional and Administrative Law Committee of the Maryland General Assembly, and the Commission to Revise the Annotated Code of Maryland.

In private practice, Mr. Roth represents his clients in litigation and counsels them on Medicare and Medicaid payment, compliance, and enforcement matters; licensing; coordination of benefits; and other health care regulatory issues.

“We are delighted that Bob is opening our Washington, D.C. operation,” said HLB Managing Partner Robert Lundy. “His broad expertise, private and public sector experience, and successful representation of health care providers complement the breadth and depth of experience among our firm-wide health law specialists. Bob’s addition to our practice helps to ensure that we will be able to continue to serve the needs of our expanding national client base with the personal responsiveness and excellence that are hallmarks of the firm. With the recent enactment of health care reform and the expanding role of the federal government, we believe it is essential to have a Washington, D.C. presence. Bob’s established practice and contacts in Washington, D.C. and around the country will serve our clients firm-wide.”

Formerly a partner with Crowell & Moring’s Washington, D.C. Health Care Group, Mr. Roth brings with him a history of successfully representing the interests of a broad range of health care clients, including hospitals, medical groups, DME suppliers, long-term care facilities, psychiatric hospitals, and imaging centers. In the Medicare reimbursement arena, Mr. Roth is best known for successfully arguing Monmouth Medical Center/Staten Island University Hospital v. Thompson, 257 F.3d 807 (D.C. Cir. 2001), which led to 253 lawsuits involving more than 600 hospitals consolidated under the case entitled In Re: Medicare Reimbursement Litigation. Mr. Roth was one of four members of the Plaintiffs’ Coordinating Counsel, which helped negotiate a settlement of more than $665 million to resolve these lawsuits.
In addition to his practice, Mr. Roth is widely respected in his peer community, holding leadership positions with the American Health Lawyers Association and the American Bar Association, including serving as Chair of the Health Law Section in 2001-2002. A frequent writer and speaker on health law issues, he also serves on the Advisory Board of BNA’s Health Law Reporter and Medicare Report and the CCH Medicare & Medicaid Guide.

Ranked by Chambers USA as one of the leading health care attorneys in Washington, D.C., Mr. Roth is described as “zealous and committed” and as “standing out as having second-to-none knowledge of Medicare Secondary Payer issues.” Mr. Roth has been recognized by Nightingale’s Healthcare News as both an outstanding health care litigator and fraud and compliance lawyer. Mr. Roth also has been teaching “Legislation” as an Adjunct Professor of Law at the University of Baltimore School of Law since 1984.

“I am thrilled to join a law firm that specializes completely in health care law as my clients grapple with the opportunities, risks, and complexity of the new health reform law,” Mr. Roth said. “Joining HLB will afford my clients access to the vast knowledge and experience of HLB’s highly-respected and nationally-known attorneys. Indeed, to be at the helm at the inception of the firm’s Washington, D.C. office is truly exciting.”

The firm’s Washington, D.C. address is 2000 K Street, NW, Suite 200, Washington, DC 20006. Mr. Roth may be contacted at 202-587-2590 or rroth@health-law.com.

Do ERISA Plans Have to Pay Interest On Late-Paid Claims?

By Glenn E. Solomon and Devin M. Senelick

It is no secret that health plan payors often pay claims late. Generally, the payors are obligated to pay interest on such late payments. However, ask an ERISA plan payor whether it will pay interest on late-paid claims and the answer you receive sometimes may be: “No.” If you inquire further, they will likely tell you that state interest statutes are preempted by ERISA, that there is no interest provision in the ERISA statute, and that no interest is due. But, is there really no downside for paying ERISA claims late? As discussed below, the ERISA statute does not shield plans from paying interest on late-paid claims.

Interest Is Recoverable On Late-Paid “ERISA Claims”

Interest is recoverable under ERISA to discourage and remedy delays in payments. Under federal common law applicable to ERISA claims, courts have discretion to award prejudgment interest to make the plaintiff whole, and often do. See, e.g., Hollenbeck v. Falstaff Brewing Corp., 605 F.Supp. 421, 435 (D.C. Mo., 1984). Thus, contrary to what ERISA plans might say, several courts have held that prejudgment interest is recoverable under ERISA to make a claimant whole and to avoid unjust enrichment and an incentive to delay. See, e.g., Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692, 696-697 (7th Cir. 1991); Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co., 896 F.2d 228 (7th Cir. 1990); Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc., 874 F.2d 431, 436 (7th Cir. 1989).

Because ERISA does not specify a rate of prejudgment interest, courts commonly borrow “analogous” state interest rates in ERISA actions. See, e.g., Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield of Alabama, 41 F.3d 1476 (11th Cir. 1995) (awarding provider 18 percent rate of interest under Alabama prompt pay statute by effectively borrowing that rate); Smith v. American Intern. Life Assur. Co. of New York, 50 F.3d 956 (11th Cir. 1995) (district court properly applied Georgia statute providing 12 percent rate of interest); Fox v. Fox, 167 F.3d 880 (4th Cir. 1999) (12 percent rate of prejudgment interest upheld under ERISA). While untested, in California, the Knox-Keene Act arguably is the most closely analogous state law, because it exists precisely to address untimely payments by health plans for health care services. The Knox-Keene Act sets a 15 percent interest rate when a health care service plan fails to timely reimburse all or part of a claim within 30 working days of receipt of the claim (extended to 45 days for HMOs). See Cal. Health & Saf. Code §§ 1371, 1371.05. Therefore, providers may want to demand this rate and cite this authority if an ERISA plan says that it is not required to pay interest on late-paid claims.
ERISA Doesn’t Preempt Provider’s Direct Claims Against ERISA Plan For Which a Provider May Recover Interest On Late-Paid Claims

Providers also may also recover interest against ERISA plans for late-paid claims based on independent, state law contractual claims against the self-funded plans. Such claims are independent from rights under ERISA, because the provider is pursuing a direct claim against the plan, rather than a claim derived from an assignment of benefits. Courts across the country generally have agreed that independent state law claims (e.g., express or implied contract, tort, etc.) are not preempted by ERISA. See, e.g., Blue Cross of Calif. v. Anesthesia Care Associates Med. Grp., Inc., 187 F.3d 1045, 1050 (9th Cir. 1999); Catholic Healthcare West-Bay Area v. Seafarers Health & Benefits Plan (9th Cir. 2008) 321 Fed.Appx. 563, 564 (no preemption of provider’s claims for implied contract, misrepresentation, estoppel, and quantum meruit); In Home Health, Inc. v. The Prudential Ins. Co. of Am, 101 F.3d 600, 604-606 (8th Cir. 1996) (state tort claims by independent third-party provider against ERISA plan administrator not preempted); Lordmann Enterp., Inc. v. Equicor, Inc., 32 F.3d 1529, 1534 (11th Cir. 1994) (“ERISA does not preempt a health care provider’s negligent misrepresentation claim against an insurer under an ERISA plan.”); Hospice of Metro Denver, Inc. v. Group Health Ins. of Ok., Inc., 944 F.2d 752, 756 (10th Cir. 1991) (health care provider claim to recover promised payment from an insurance carrier held not preempted by ERISA because it is distinct from an action brought by a plan participant seeking recovery of benefits due under the terms of the plan); Memorial Hospital System v. Northbrook Life Ins. Co. (5th Cir. 1990) 904 F.2d 236, 250 (claim for violation of state insurance code provision not preempted by ERISA where provider “brought this state law action in its independent status as a hospital”). In these situations, where providers have state law claims against an ERISA plan that are not preempted by ERISA, providers can recover interest under applicable state law.

In addition, the fact that the plan is administered by a third party who has the direct contractual relationship with the provider should not effect whether the provider can recover interest against the ultimate payor. For example, in California, there are a number of statutes which confirm that the rights of providers are governed by contract even when the administrator leases the contract to other payors like self-funded plans. See Health & Safety Code section 1375.7(c); Insurance Code section 10178.4; Labor Code Section 4610; Business & Professions Code section 511.3.

For additional information or questions, please contact Glenn E. Solomon at (310) 551-8179 or gsolomon@health-law.com, or Devin M. Senelick at (310) 551-8145 or dsenelick@health-law.com.
CALENDAR

May 14
CAPG Healthcare Conference 2010, Palm Desert.
David Hatch and Karl Schmitz present *The Nuts and Bolts of Organizing and Affiliating Entities Involved in ACO’s.*

June 24, 29, 30
CHA Annual Reimbursement Seminar, Sacramento, Newport Beach, Burbank
HLB is lead faculty for the program covering Medicare, Medi-Cal, Fraud & Abuse, Pending Hospital Fee, Health Care Reform and more. Lloyd Bookman, John Hellow and Mark Hardiman present.

29-30
AHLA Annual Conference, Seattle

Copyright 2010 by Hooper, Lundy & Bookman, PC Reproduction with attribution is permitted. To request addition to or removal from our mailing list contact Baron Kishimoto at Hooper, Lundy & Bookman, PC, 1875 Century Park East, Suite 1600, Los Angeles, CA 90067, phone (310) 551-8152. *Health Law Perspectives* is produced monthly, 10 times per year and is provided as an educational service only to assist readers in recognizing potential problems in their health care matters. It does not attempt to offer solutions to individual problems but rather to provide information about current developments in California and federal health care law. Readers in need of legal assistance should retain the services of competent counsel.