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The provisions of ERISA which allow for subrogated recovery that basically trumps all other considerations is a horrific and abused provision of ERISA. Often the injured party will have difficulties recovering a fair settlement because of issues totally out of their control such as damage caps, governmental immunities, insurance policy limitations etc. Often those in that situation will be left with devastating injuries that leave them permanently damaged yet will have to disgorge a significant amount, or even the entirety of their recovery, over to the insurance with no regard to their situation. There are many occasions where cases are not pursued when the only prospect for recovery means the funds will be turned over to an insurance carrier and not the injured party. As a practicing attorney representing injured people, I have turned down and or closed cases where there is an aggressive ERISA plan as it is too discouraging to work on a case for a long period of time, pay paralegals case costs to pursue a claim for a client in light of potentially never getting paid or reimbursed nor getting the injured party any recovery as the carrier would step in and get paid first.

I recently ran into this very situation where the injured party was injured by a governmental entity with damage caps which will severely limit her recovery versus the extent of her injuries and the carrier has been so aggressive with their ERISA subrogation stance and refusing to pay medical bills unless the injured person signed over their complete recovery rights to them, that not only will I be dropping the case, she will not be pursuing it as there is no way for her to get any benefit from any recovery, despite her permanent lifelong injuries. In this case her husband is an owner of the practice which purchased the insurance and brought the business to this carrier, yet they will be preventing his wife from and chance to be made even partially whole from her injuries. The Shank vs Walmart case is a perfect example of how this tragic situation often plays out. As always happens too, the insured never receives a benefit from reduced premiums etc as the carriers pocket all the money without reporting where it goes.

When people face these situations, they are shocked that the legislation takes their rights away, but it clearly does, time and time again. Despite how many premiums one has paid, despite how badly one is injured, despite the failure of a fair recovery, the injured victim gets victimized a second time by their carrier.

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