WHO SHOULD BEAR THE BURDEN? ERISA PREEMPTION AND ITS IMPACT ON COMPENSATION RECEIVED BY INDIVIDUALS INJURED AS A RESULT OF MEDICAL MALPRACTICE IN IOWA

ABSTRACT

The unresolved question of the Employee Retirement Income Security Act of 1974 (ERISA) preemption of Iowa Code section 147.136 impacts every medical malpractice claim in the state of Iowa. Although persons injured as a result of medical malpractice are prevented from recovering damages for medical expenses that were indemnified by insurance, ERISA plans still often make a subrogation claim against any settlement or recovery. The result is that many plaintiffs are undercompensated for their injuries. The impact of this issue continues to grow as the popularity of ERISA plans has grown exponentially over the last decade. To prevent plaintiffs injured as a result of medical malpractice from being undercompensated, Iowa Code section 147.136 should be amended to exclude payments from ERISA covered plans from the definition of medical expenses that were “indemnified by insurance.”

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I. INTRODUCTION

Imagine that a person is scheduled to have surgery to repair a fractured elbow. The individual’s medical expenses are covered by a self-funded employee benefit plan governed by the Employee Retirement Income Security Act of 1974 (ERISA) that is provided through their employer. Although the only scheduled surgery was to repair a fractured elbow, the surgeon decided to perform another surgery on surrounding tendons, which had not been discussed with the patient, that the doctor believed would provide additional relief. Following the unauthorized procedure, the patient begins to suffer an adverse reaction and is no longer able to use her arm fully.

The patient would likely have a medical malpractice claim against the surgeon who performed that unauthorized procedure. However, under Iowa Code section 147.136, the patient could not recover medical expenses incurred as a result of the medical malpractice if those expenses were indemnified or covered by insurance. After recovering for damages caused by medical malpractice, the individual’s self-funded employee benefit plan that is governed by ERISA will likely make a subrogation claim to recover the cost of medical expenses paid by the plan. The issue presented is: if a

1. See generally STATE OF COLO. DEP’T OF REGULATORY AGENCIES: DIV. OF INS., ERISA—EMPLOYER-SPONSORED SELF-FUNDED HEALTH BENEFIT PLANS 1–2 (2009) [hereinafter ERISA REPORT] (discussing the range of plans that the Employee Retirement Income Security Act of 1974 covers). ERISA governs over 2.5 million different health benefit plans, which insure over 134 million Americans. Id. at 1. ERISA does not govern traditional health insurance policies that are purchased through an insurance company. Id. Instead, ERISA regulates self-funded plans that are funded and administered by an individual’s employer. Id. By establishing a self-funded employee benefit plan, the employer accepts the risks of paying the medical expenses of their employees through the plan. See id. In some cases, an employer may hire an insurance company to process the claims of a self-funded employee benefit plan. In these instances, the self-funded employee benefit plan is still subject to the regulations of ERISA. Id. Plans governed by ERISA are not subject to state insurance laws or regulations. Id.

2. See Farley v. Ginther, 450 N.W.2d 853, 855, 857 (Iowa 1990) (noting the plaintiff brought medical malpractice claim against surgeon for alleged negligence in repairing broken leg, however, the court eventually dismissed the claim, due to a failure to provide proper expert testimony supporting the claim); see also Babcock v. Broadlawns Med. Ctr., No. 03-1008, 2004 WL 1396199, at *1, *2 (Iowa Ct. App. June 23, 2004) (recognizing an individual’s claim for medical malpractice as a result of an error by a surgeon during a surgical procedure; dismissing case due to the statute of limitations).

3. See, e.g., Ruling on Defendant’s motion in limine at 2, Banks v. Beckwith, No. CL101596, 2007 WL 2820525 (Iowa Dist. Ct. June 1, 2007) (noting the ERISA plan made a subrogation claim against individual injured as a result of medical malpractice, despite the inability of the injured individual to recover those expenses under Iowa Code section
court holds ERISA preempts Iowa Code section 147.136, the injured party may be required to reimburse the plan for the medical expenses it paid, even though the patient was not entitled to recover those damages because of the application of Iowa Code section 147.136 to the patient’s medical malpractice claim. These expenses would include the cost of medical care as a result of the medical malpractice that was paid by the self-funded employee benefit plan. In effect, the interplay between Iowa Code section 147.136 and ERISA undercompensates the person injured as a result of medical malpractice.

Under Iowa Code section 147.136, also known as the Iowa Medical Malpractice Act, individuals are not allowed to recover damages for medical expenses incurred as a result of medical malpractice if those medical expenses are indemnified by insurance. The purpose behind section 147.136 was to address the “high cost and impending unavailability of medical malpractice insurance.” Although individuals injured as a result of medical malpractice are not allowed to make a claim for medical expenses indemnified by insurance, a self-funded employee benefit plan governed by ERISA often still makes a subrogation claim for payments made on behalf of the injured individual since its right of subrogation is often contractual. If an individual is required to reimburse an ERISA self-funded plan for medical expenses paid as a result of medical malpractice, the result is that the injured individual is undercompensated for their injuries and must use damages recovered for other categories of losses to satisfy the subrogation claim of the ERISA plan. Though the purpose of the Iowa Medical Malpractice Act was to “assure the public of continued health care at affordable rates,” there is no evidence that the legislature intended to

147.136); infra Part I (defining the concept of indemnification and subrogation).
8. See, e.g., Electro-Mech. Corp. v. Ogan, 820 F. Supp. 346, 350 (E.D. Tenn. 1992) (finding that ERISA preempted the application of the Tennessee Medical Malpractice Act and allowing a subrogation claim by an ERISA self-funded plan); see also Ruling on Defendant’s motion in limine 3–4, supra note 3 (rejecting ERISA plan’s subrogation claim for payments made as a result of medical malpractice because the language of the plan limited recovery of plan to all “lawful claims” and the injured individual did not have a lawful claim for medical expenses indemnified by insurance).
achieve this goal by undercompensating persons injured as a result of medical malpractice.

The issue of whether the Iowa Medical Malpractice Act is preempted by ERISA has not been definitely decided in the state courts of Iowa. The purpose of this Note is to examine the likely result of a challenge to the Iowa Medical Malpractice Act on the grounds that its application is preempted by ERISA. Part II analyzes the language of Iowa Code section 147.136 and the legislative intent behind its passage. Part III examines ERISA and the legislative intent behind its passage. In addition, Part III includes a discussion of the broad preemption clause contained within ERISA. Part IV of this Note analyzes the application of ERISA’s preemption clause to state laws relating to health insurance, including laws in both Tennessee and Iowa. Finally, in Part V, this Note offers a proposal to amend the Iowa Medical Malpractice Act to address any inconsistencies between the goals of the Act and its application for subrogation claims made by an ERISA self-funded employee benefit plan.

Before discussing in greater detail the implications of subrogation claims by ERISA plans in the context of medical malpractice causes of action in the state of Iowa, a general discussion of ERISA, subrogation, and indemnification is in order. ERISA establishes self-funded employee benefit plans as an area of exclusive federal control. ERISA plans are funded by employers, rather than purchased directly from an insurance company. However, insurance companies are hired in some circumstances to administer the ERISA plan on behalf of the employer. In the United States, over 134 million individuals’ healthcare is covered by a self-funded employee benefit plan governed by ERISA. Overall, 60 percent of individuals with health insurance through their employers are covered by ERISA plans. The number of people covered by ERISA plans continues to grow exponentially. In the last decade, the number of individuals

10. United States ex rel. Hixon v. Health Mgmt. Sys., Inc., 613 F.3d 1186, 1190 (8th Cir. 2010) (“The Iowa Supreme Court has not specifically been asked to determine whether § 147.136 applies to Medicaid payments.”).
12. ERISA REPORT, supra note 1, at 1.
13. Id.
14. Id.
16. See id.
covered by an ERISA plan has grown by over 80 percent.17

Subrogation involves an insurer’s right of reimbursement for expenses paid on behalf of its insured when the medical expenses were incurred as a result of the wrongdoing of a third party.18 In the cases of individual health insurance policies, an insurer’s right to subrogation will most often be contractual.19 This means that the insurer’s subrogation right is established within the policy between the insurer and the insured.20 The insurer’s subrogation right is derivative from the rights of their insured.21 This means that the legal rights of an insurer to recover their expenses cannot exceed the legal rights of their insured.22 The purpose of subrogation is to ensure that an individual harmed by the conduct of another does not receive compensation that would amount to a windfall or unjust enrichment.23 To the extent that an insured’s medical expenses were indemnified or covered by insurance, an insurer may exercise their subrogation rights to recover those expenses, as agreed upon in the health insurance policy.24

Under Iowa Code section 147.136, an individual may not recover damages for medical expenses incurred as a result of medical malpractice to the extent that those expenses “are indemnified by insurance.”25 Indemnification is defined as “[t]he action of compensating for loss or damage sustained.”26 In the context of Iowa Code section 147.136, the language “indemnified by insurance” relates to situations in which an individual suffered injuries as a result of medical malpractice and the treatment for those injuries was paid for by the injured party’s insurer.27

17. Id.
20. Parker, supra note 18, at 726.
21. Id. at 724.
22. Id.
23. See id. at 725–26.
24. See id. at 731–32.
27. IOWA CODE § 147.136.
II. IOWA CODE SECTION 147.136: THE IOWA MEDICAL MALPRACTICE ACT

Iowa Code section 147.136 states as follows:

[I]n an action for damages for personal injury against a physician and surgeon, ... or against a hospital . . . , based on the alleged negligence of the practitioner in the practice of the profession or occupation, or upon the alleged negligence of the hospital in patient care, . . . the damages awarded shall not include actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury, including but not limited to the cost of reasonable and necessary medical care, . . . to the extent that those losses are replaced or are indemnified by insurance.28

The effect of the Iowa Medical Malpractice Act is that individuals injured as a result of medical malpractice are not allowed to make a claim for damages related to medical expenses incurred as a result of the medical malpractice if those expenses have been indemnified by insurance or another covered source.29 Applying this situation to the hypothetical in the Introduction to this Note,30 the individual subjected to the unnecessary surgical procedure would not be allowed to recover any medical expenses paid by the plan as a result of the malpractice under Iowa Code section 147.136. However, they might still be required to reimburse the self-funded employee benefit plan, since the plan is governed by ERISA—which may preempt the state law—and the plan’s subrogation right is likely to be contractual.

A. Legislative Intent for the Passage of the Iowa Medical Malpractice Act

In enacting the Iowa Medical Malpractice Act, the Iowa legislature had multiple purposes.31 By limiting an injured party’s ability to recover medical expenses caused by medical malpractice, the legislature hoped to reduce the size of medical malpractice judgments and make medical malpractice insurance more affordable.32 In addition to making medical malpractice

28. Id. (emphasis added).
29. Id.
30. See supra Part I.
32. See Heine v. Allen Meml Hosp. Corp., 549 N.W.2d 821, 823 (Iowa 1996); Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 550, 558 (Iowa 1980) (“It thus appears that the legislature’s purpose in enacting section 147.136 was to reduce the size of malpractice verdicts by barring recovery for the portion of the loss paid for by collateral
insurance more affordable, Iowa Code section 147.136 was also intended to ensure access to affordable healthcare for individuals throughout the state of Iowa. There is no indication in the legislative record that the intent of the statute was to shift the costs of medical malpractice insurance onto individuals injured as a result of medical malpractice. Rather, the purpose of the statute was to require health insurance providers to bear the costs of ensuring affordable healthcare to the public.

III. ERISA: EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

In passing the Employee Retirement Income Security Act of 1974, Congress noted “the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial.” The congressional findings state that regulation of self-funded employee benefit plans is necessary for “the continued well-being and security of millions of employees and their dependents are directly affected by these plans.” Congress was concerned that without a federal law protecting these self-funded employee benefit plans, “the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered.” To ensure that self-funded employee benefit plans were not subject to conflicting laws in different states, Congress included a broad preemption clause: “[T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of

33. See Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 424 (Iowa 1985) (“The legislature’s intent was to help assure the public of continued health care services.”); Rudolph, 293 N.W.2d at 558. The purpose behind enacting Iowa Code section 147.136 was to decrease the “size of malpractice verdicts by barring recovery for the portion of the loss paid by collateral benefits.” Rudolph, 293 N.W.2d at 558.

34. Rudolph, 293 N.W.2d at 558.

35. See Toomey v. Surgical Servs., P.C., 558 N.W.2d 166, 170 (Iowa 1997) (“Although our conclusion means that United Fire cannot recoup payments made for Toomey’s economic losses in the form of medical expenses and weekly compensation, we believe it is more equitable for the insurer, which has been paid a premium for the workers’ compensation coverage, to bear the loss.”).


37. See id.

38. See id.
this title.” 39 The preemption clause contained within ERISA “is conspicuous for its breadth.” 40 By including a broad preemption clause, Congress intended to ensure that any state law that subjected a self-funded employee benefit plan governed by ERISA to conflicting obligations would be preempted. 41

A. Legislative Intent for the Passage of ERISA

By establishing self-funded employee benefit plans as an area of exclusive federal control, Congress intended to provide uniform regulations for employers that operated across multiple states. 42 Uniform regulations would promote economic development and interstate commerce. 43 In addition, these uniform regulations would decrease health insurance compliance costs by subjecting plans to the same regulations no matter what state they were operating within. 44 Allowing states to pass legislation that impacted self-funded employee benefit plans governed by ERISA could lead to litigation and the unnecessary expenditure of plan resources. 45 Therefore, Congress included perhaps the broadest preemption clause possible to prevent any issues with exposing plans to conflicting obligations. 46

B. Determining Whether a State Law is Preempted by ERISA

In examining the legislative history of ERISA, the original draft bill contained a preemption clause that only preempted “state laws relating to

39. Id. § 1144.
43. See id.
44. See id.
45. See FMC Corp., 498 U.S. at 65 (“It would therefore undermine Congress’ desire to avoid ‘endless litigation over the validity of State action and instead lead to employee benefit plans’ expenditure of funds in such litigation.’” (quoting 120 CONG. REC. 29942 (1974) (remarks of Sen. Javits)).
46. See id. at 58–59. “The pre-emption clause is conspicuous for its breadth.” Id. at 58. The Senate version of the bill that ultimately became ERISA contained a more narrow preemption clause, but the House version replaced it with a broader preemption clause. Id. at 58–59.
the specific subjects covered by ERISA." However, the conference committee made the decision to expand the preemptive scope of ERISA and included the following language: “[T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title.” A state law is considered to “relate to” a self-funded employee benefit plan governed by ERISA “if it has a connection with or reference to such a plan.”

The U.S. Supreme Court has deemed that a state law has a “connection with” a self-funded employee benefit plan governed by ERISA when the state law subjects the plan to conflicting obligations in different states. The purpose of ERISA’s preemption clause was to ensure that providers of self-funded employee benefit plans were not required to comply with different regulations in multiple states. If a “patchwork scheme of regulation” was allowed for plans governed by ERISA, their administration would vary by state and inefficiencies would enter into the equation. A state law is considered to have a “reference to” a self-funded employee benefit plan governed by ERISA when the law specifies that it applies to plans governed by ERISA. The effect of the language used within ERISA’s preemption clause, which includes any state law that has a connection with or reference to any plan governed by ERISA, is to preempt most state laws that subject a covered plan to differing obligations in various states, whether the law implicitly or explicitly applies to an ERISA plan.

48. See id.
50. Shaw, 463 U.S. at 96–97.
51. See FMC Corp., 498 U.S. at 59 (“In the past, we have not hesitated to apply ERISA’s pre-emption clause to state laws that risk subjecting plan administrators to conflicting state regulations.”).
52. See id. at 60.
53. See id. (“[A] ‘patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation.’” (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987))).
54. See id. at 59.
However, not all laws that subject an ERISA plan to inconsistent obligations in different states are preempted by federal law. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, the Court upheld a New York statute imposing surcharges on certain commercial insurers, which included some plans governed by ERISA. In support of their claim that the New York statute was preempted by ERISA, the ERISA plans argued that the statute in question related to an ERISA covered plan because it imposed a significant economic burden on the plan. In rejecting that argument, the Court reasoned that “[a]n indirect economic influence . . . does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself.” Although the Court upheld the New York statute, it did not foreclose on the idea that an indirect economic influence caused by a state statute could be preempted if the effect on an ERISA covered plan was sufficiently severe.

**IV. ERISA PREEMPTION OF STATE MEDICAL MALPRACTICE LAWS**

The issue of whether ERISA preempts the application of Iowa Code section 147.136 regarding subrogation claims by ERISA plans has not been definitely decided in the State of Iowa. However, Tennessee enacted a similar statute excluding from damages the cost of medical expenses that were made on behalf of a party injured as a result of medical malpractice

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57. Id.
58. See id. at 654.
59. Id. at 659.
60. See id. at 668.

We acknowledge that a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers, and that such a state law might indeed be pre-empted under § 514. But as we have shown, New York’s surcharges do not fall into either category; they affect only indirectly the relative prices of insurance policies, a result no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate.

when those costs were indemnified by insurance. Court decisions regarding ERISA preemption of the Tennessee Medical Malpractice Act may provide insight into how a court in Iowa would rule regarding ERISA preemption of Iowa Code section 147.136. With the exception of Tennessee and Iowa, no other states have enacted legislation excluding medical expenses indemnified by insurance from damages that can be recovered in a medical malpractice cause of action. The language of Tennessee Code section 29-26-119 reads as follows:

In a health care liability action in which liability is admitted or established, the damages awarded may include . . . actual economic losses suffered by the claimant by reason of the personal injury, including, but not limited to, cost of reasonable and necessary medical care . . . but only to the extent that such costs are not paid or payable and such losses are not replaced, or indemnified in whole or in part, by insurance provided by an employer either governmental or private . . . .

Iowa Code section 147.136 and Tennessee Code section 29-26-119 both prohibit recovery of medical expenses in a medical malpractice cause of action if those expenses were indemnified by insurance. Although worded differently, the impact of both pieces of legislation is the same. The issue of ERISA preemption of Tennessee Code section 29-26-119 has been decided in the federal courts of the state of Tennessee.

64. See Iowa Code § 147.136 (2015); Tenn. Code Ann. § 29-26-119; B. Sonny Bal, An Introduction to Medical Malpractice in the United States, 467 Clinical Orthopaedics and Related Res. 339, 344–45 (2008) (discussing how many states have enacted legislation aimed at controlling the cost of medical malpractice insurance). One of the primary methods for controlling costs has been legislation placing statutory caps on the amount a plaintiff can recover in a medical malpractice cause of action. Bal, supra at 344. Some states have also enacted legislation limiting the amount of attorney fees that can be awarded in a medical malpractice cause of action. Id. Finally, numerous states have enacted legislation providing a shorter statute of limitations for the filing of medical malpractice causes of action. Id. The purpose behind these reforms has been to decrease the number of medical malpractice cases and the size of verdicts. See id.
68. See Electro-Mech. Corp., 820 F. Supp. at 349 (holding that ERISA preempts the application of the Tennessee Medical Malpractice Act in a case involving the subrogation claim of an ERISA self-funded employee benefit plan) (citing FMC Corp. v. Holliday, 498 U.S. 52 (1990)).
A. ERISA Preemption of Tennessee Code Section 29-26-119

In *Electro-Mechanical Corp. v. Ogan*, a subrogation claim was brought by an ERISA self-funded employee benefit plan to recover expenses paid on behalf of Mr. Ogan, who was injured as a result of medical malpractice. In the action brought by Mr. Ogan for medical malpractice, Mr. Ogan eventually obtained a judgment for $1.1 million. Following this judgment, the Plan made multiple attempts to recover funds paid on behalf of the injured party as a result of the medical malpractice. Mr. Ogan refused to comply with the subrogation claim made by the Plan, arguing that since he was not entitled to recover damages for medical expenses indemnified by insurance under Tennessee Code section 29-26-119, the Plan did not have a valid subrogation claim for the medical expenses they paid on behalf of Mr. Ogan. In addition, he argued that Tennessee Code section 29-26-119 did not “relate to” or have a “connection with” a self-funded employee benefit plan governed by ERISA such that it should be preempted by ERISA.

In evaluating the claims made by the Plan and Mr. Ogan, the court relied heavily on the Supreme Court’s decision in *FMC Corp. v. Holliday*. The court held that since the application of Tennessee Code section 29-26-119 would destroy the Plan’s subrogation claim in this case, its application was preempted by ERISA. Although Mr. Ogan was not allowed to recover

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69. *Id.* at 347–48.
70. *Id.* at 348.
71. *Id.*
72. *See id.* (“Having utilized the term ‘subrogation’ in its Plan without any definition or explanation, the Plaintiff is now bound by the legal principles associated with ‘subrogation’, including the legal principles of equity, which should not require reimbursement of medical expenses from the proceeds of a personal injury settlement, when the claimant recovered no such medical expenses.”).
73. *Id.* (“[T]he Tennessee Medical Malpractice Act, which prevents recovery of benefits paid by third parties, affects the plaintiff’s ERISA Plan in only a tenuous and remote manner, and as such, is not preempted by ERISA.”).
74. *See id.* at 349.
75. *Id.*

However, inasmuch as this statute purportedly destroys the Plan’s right of subrogation, the court finds that FMC Corporation v. Holliday, is controlling. In that case, the United States Supreme Court specifically holds that ERISA preempts the application of a Pennsylvania state statute which prohibited the exercise of subrogation rights by an employee benefit Plan on an automobile accident tort recovery.

*Id.* (internal citation omitted).
damages for medical expenses that were covered by the plan under Tennessee Code section 29-26-119, the Plan was still allowed to maintain a subrogation claim, rejecting an argument that principles of equity override the clear legislative intent of Congress. In response to Mr. Ogan’s argument that the principles of equity should prevent a subrogation claim by the Plan, the court stated:

The Court finds that this is equally at odds with the Congressional purpose of uniformity of regulations in regard to pension plans, and that this is merely an attempt to utilize case law to defeat a right of subrogation in a self-funded Plan, when this cannot be accomplished by use of a specific statute.

Ultimately, the court enforced the subrogation claim made by the Plan and found that the application of Tennessee Code section 29-26-119 in this particular case was preempted by ERISA.

B. ERISA Preemption of Iowa Code Section 147.136

Although the issue of ERISA preemption of Iowa Code section 147.136 has not been definitely decided, there have been multiple decisions that provide some guidance as to how the issue would be resolved if presented. In Banks v. Beckwith, the issue of ERISA preemption of Iowa Code section 147.136 was decided by the Iowa District Court for Polk County. In concluding that ERISA did not preempt the application of Iowa Code section 147.136, the court looked to the language of the specific

76. See id. at 350.
77. Id.
78. Id. (“It is undisputed that the Plan before this Court is self-funded. Therefore, the Court finds that the plaintiff employee benefit Plan in this case cannot be ‘deemed’ an insurance company and ERISA preempts applicable state law.”).
79. See Magellan Health Servs., Inc. v. Highmark Life Ins. Co., 755 N.W.2d 506, 513–14 (Iowa 2008) (concluding that ERISA did not preempt the application of Iowa’s “always secondary” provision under Iowa Code Chapter 513C. “[W]e conclude there is no reason to believe that chapter 513C . . . so clearly touch[es] on the objectives of ERISA that Congress must have understood that this is the type of law that would not survive ERISA.”); see also Banks v. Beckwith, No. CL101596, 2007 WL 2820525, at *4–5 (Iowa Dist. Ct. June 1, 2007) (“Section 147.136 also is drastically different from other antisubrogation statutes that have been found to ‘relate to’ an ERISA plan . . . . Section 147.136 only addresses possible recovery of damages against a third-party tortfeasor and has no preventative language directed towards an ERISA plan.”).
80. See Beckwith, 2007 WL 2820525, at *5.
ERISA plan at issue in the case. Since the injured party did not have a “lawful claim” for medical expenses incurred as a result of medical malpractice since those expenses were indemnified by insurance, the ERISA Plan was not entitled to a subrogation claim for the expenses paid on behalf of the injured individual. The court concluded “that section 147.136 does not ‘relate to’ an ERISA plan within the meaning of 29 U.S.C. § 1144(a)” and thus its application was not preempted by ERISA. Since it was the language of the ERISA plan that limited its right of subrogation to only “lawful claims” made by the injured party, the court concluded that Iowa Code section 147.136 did not “relate to” a self-funded employee benefit plan governed by ERISA.

In United States ex rel. Hixson v. Health Management Systems, Inc., a claim was brought under 31 U.S.C. §§ 3729–3733, also known as the False Claims Act, against two companies for failing to seek recovery of medical expenses paid by Medicaid in a medical malpractice cause of action, as is required by federal law. In their defense, the defendants asserted that Iowa Code section 147.136 prevented them from seeking reimbursement from the tortfeasor for medical expenses incurred as a result of medical malpractice since those expenses were indemnified by Medicaid. The court noted that the scope of Iowa Code section 147.136, in its relation to federal law, had not been definitely decided in the State of Iowa. Without concluding whether federal law preempted the application of Iowa Code section 147.136, the

81. See id. at *4.
82. Id.
83. Id. at *4–5 (“[I]t is the ERISA plan which limits its ability to seek reimbursement to ‘lawful claims’ made by the member. It is clear from the language of section 147.136 that claims for medical expenses which have been ‘replaced or indemnified by insurance’ in this case are not ‘lawful claims.’”).
84. Id. at *5.
85. Id.
86. United States ex rel. Hixson v. Health Mgmt. Sys., Inc. 613 F.3d 1186, 1187 (8th Cir. 2010).
87. Id. at 1189.
88. Id. at 1190 (“The Iowa Supreme Court has not specifically been asked to determine whether § 147.136 applies to Medicaid payments. We think, however, that the court’s opinion on a closely related issue indicates that Medicaid is merely another ‘collateral source’ under § 147.136.” (citing Peters ex rel. Peters v. Vander Kooi, 494 N.W.2d 708, 714 (Iowa 1993))).
court noted that the defendants’ interpretation that Iowa law prevented them from seeking to recover damages for medical expenses that were indemnified by Medicaid was “a reasonable interpretation, perhaps even the most reasonable one.”89 Although these decisions do not conclusively indicate how the issue of ERISA preemption of Iowa Code section 147.136 would be decided, they do seem to provide some indication that the courts of Iowa may be hesitant to find that ERISA entirely preempts the application of Iowa Code section 147.136 in regards to subrogation claims made by ERISA plans.90

C. Issues Presented by Unanswered Question of ERISA Preemption of Iowa Code Section 147.136

When a court definitely decides whether Iowa Code section 147.136 is preempted by ERISA, there will be policy implications for both ERISA plans and persons injured as a result of medical malpractice. If it is decided that ERISA preempts the application of Iowa Code section 147.136, the injured individual will be required to reimburse the plan for all medical payments made, although they will still be prevented from recovering for those damages that were indemnified by insurance. If a court determines that Iowa Code section 147.136 is not preempted by ERISA, then self-funded employee benefit plans governed by ERISA may not be subrogated for payments made on behalf of individuals injured as a result of medical malpractice.

V. PROPOSAL TO AMEND IOWA CODE SECTION 147.136

To prevent persons injured as a result of medical malpractice from being undercompensated for their injuries, an amendment should be made to Iowa Code section 147.136. The purpose in enacting Iowa Code section 147.136 was to ensure continued access to affordable healthcare for the public while keeping medical malpractice insurance rates as low as possible.91

89. See id. (“Because the plain language of § 147.136 and the legislature’s apparent intent quite evidently at the very least support a conclusion that a plaintiff in a medical malpractice case cannot recover costs already paid by the government, the defendant’s interpretation of the applicable law is a reasonable interpretation, perhaps even the most reasonable one.”).


91. Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 550, 558 (Iowa 1980) (“It thus appears that the legislature’s purpose in enacting section 147.136 was to reduce the size of malpractice verdicts by barring recovery for the portion of the loss paid for by
There is no evidence within the legislative record that the Iowa legislature intended to achieve these goals by placing the burden on individuals injured as a result of medical malpractice by undercompensating them for their injuries.92

Iowa Code section 147.136 provides that damages awarded as a result of medical malpractice “shall not include actual economic losses incurred or to be incurred in the future by the claimant . . . to the extent that those losses are replaced or are indemnified by insurance, or by governmental, employment, or service benefit programs or from any other source.” Subsection 2 of Iowa Code section 147.136 goes on to list other potential sources of payment for medical expenses that do not prevent an injured individual from recovering medical expenses incurred as a result of medical malpractice. These sources, which are not covered by the provisions of Iowa Code section 147.136, include payments made “under the medical assistance program under chapter 249A,”93 such as Medicaid, and payments made by the claimant or an immediate family member.94 The exceptions included within subsection 2 of Iowa Code section 147.136 were purposefully enumerated by the Iowa legislature.95 Although keeping medical malpractice insurance rates low was a priority, the state and the individual harmed as a result of medical malpractice should not be left with the burden of paying for medical expenses without the ability to be compensated for those expenses.

A. Amending Subsection 2 of Iowa Code Section 147.136 to Include Self-Funded Employee Benefits Plans Governed by ERISA

Keeping with these above-mentioned priorities, Iowa Code section 147.136 should be amended to ensure that individuals injured as a result of medical malpractice are not undercompensated for their injuries simply because they are insured by a self-funded employee benefit plan governed

92. See H.F. 803, 66th Gen. Assemb., Reg. Sess. § 1 (Iowa 1975); Toomey v. Surgical Servs., P.C., 558 N.W.2d 166, 170 (Iowa 1997) (“Although our conclusion means that United Fire cannot recoup payments made for Toomey’s economic losses in the form of medical expenses and weekly compensation, we believe it is more equitable for the insurer, which has been paid a premium for the workers’ compensation coverage, to bear the loss.”).


94. See generally id. § 249A.

95. See id. § 147.136.
by ERISA. The proposal this Note offers to address this issue is to add ERISA plans to subsection 2 of Iowa Code section 147.136 as a source of payments that does not prevent an individual from recovering those damages in an action against the individuals responsible for the medical malpractice. The effect of this amendment would be that individuals could recover the cost of medical expenses if an ERISA plan indemnified those expenses. Then, the plan would be allowed to make a subrogation claim against their insured to recover the money it paid on behalf of the individual.

This amendment would address the unfairness of requiring an individual injured as a result of medical malpractice to reimburse their ERISA plan while not allowing them to recover those damages from the liable party. Opponents of this amendment would likely argue that it would lead to increased medical malpractice insurance rates, which was one of the primary motivations behind the enactment of Iowa Code section 147.136.86 Though this concern is legitimate, the following data on medical malpractice claims and insurance in Iowa indicates that these likely fears are exaggerated.

The number of successful claims for medical malpractice in the State of Iowa have been steadily declining for the last decade. In 2001, there were 684 medical malpractice claims closed, for a total cost of $32,699,565.97 Only four years later, the number of medical malpractice claims closed had decreased by over 17 percent to 567, at a total cost of $24,482,853.88 By 2012, only 310 medical malpractice claims were closed, an over 45 percent decrease from 2005, at a total cost of $16,790,183.99 Although the costs of medical malpractice are still significant, there is a clear trend in the State of Iowa towards fewer and fewer successful claims.100

Considering the steady decrease in successful medical malpractice claims in Iowa, it follows that medical malpractice insurance rates would also remain affordable. From 2001 to 2007, there was a 48 percent decrease in

98. Id.
100. See id.
medical malpractice claims across the nation.101 This dramatic decrease led to a 16 percent decrease in medical malpractice insurance rates nationally.102 Medical malpractice insurance rates have been steady in the state of Iowa, between $5,000 and $8,000 annually.103 Iowa’s steady medical malpractice insurance premiums have been attributed to “the tendency of the state’s culture to not be overly litigious.”104 Additionally, Iowa has a reputation for being a “state that traditionally practices extremely safe and sound care and has fewer claims than many other larger metropolitan areas.”105

VI. CONCLUSION

In considering the medical malpractice landscape in Iowa, fears of this proposal drastically increasing medical malpractice insurance rates would be greatly exaggerated. This proposal to amend Iowa Code section 147.136 would only apply to individuals with self-funded employee benefit plans governed by ERISA. For many medical malpractice claims, the injured individual would still be prevented from recovering the cost of medical expenses that were indemnified by insurance.106 Given the steady medical malpractice insurance rates and decreasing number of annual claims in Iowa, this proposal would simply ensure that individuals injured as a result of medical malpractice were not bearing the burden by being undercompensated for their injuries, thus preventing a problem that does not currently exist within the state. To prevent this injustice from occurring, subsection 2 of Iowa Code section 147.136 should be amended to exclude payments made by a self-funded employee benefit plan governed by ERISA from the definition of “indemnified by insurance” within subsection 1 of section 147.136.

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102. Id.
103. Id.
104. Id.
105. Id.
106. See Banker, supra note 15 (discussing that 60 percent of Americans who receive their health insurance through their employer are covered by plans governed by ERISA). Since the proposed reform only addresses plans governed by ERISA, many plans would not be impacted in any way by the proposed change to Iowa Code section 147.136.