

MEMORANDUM

To: Pension Counseling and Information Program

From: Emily Spreiser

Re: Results of Recovery Survey and Hypotheticals

Date: April 7, 2014

In preparation for a discussion on recoveries to be held during the Nuts & Bolts session at this year's National Training Conference Joellen Leavelle and I made phone calls to each of the projects. During the phone calls we asked general questions about how each project defines and tracks recoveries. We also asked whether the project attorneys would claim a recovery in response to various hypotheticals.

The Definition of "recovery"

None of the projects maintains written guidelines as to what constitutes a recovery nor do any of the projects maintain a written definition of "recovery." The project attorneys all agreed, however, that for a win to constitute a recovery it must result in a new or increased monetary benefit for the client and that the project has to have had a hand in obtaining the benefit.

The projects' concepts of what constitutes a recovery varied, however, when it came to determining the necessary degree of project involvement. The project attorneys' methods of identifying a recovery fall into two general categories when it comes to this factor: projects that use "but for" analysis and those that use "substantial involvement" analysis. Note that some attorneys appear to switch from one form of analysis to the other depending on the type of case.

But for analysis

But for analysis asks, "but for the project's involvement, would the client have received the benefit?" In other words, would the client have been unable to eventually obtain the benefit without the project's assistance? If the client would ultimately have obtained the benefit on his or her own or was already on the right track, these projects would not claim a recovery. These projects were also inclined to find that if the project referred the client to an outside resource such as a litigator that an eventual victory for the client would not constitute a project recovery.

Substantial involvement analysis

Substantial involvement analysis asks whether the project played a substantial role in helping the client to obtain the benefit. These projects are more inclined to claim a recovery in any situation in which the project has done substantial work on a case resulting in a benefit even though the project may not be solely responsible for obtaining the benefit.

Litigation Referral Scenario

For instance, the project attorneys were asked whether they would claim a recovery if they invested substantial time on behalf of a client during the claims and appeals process, were denied on appeal, and referred the client to the litigator who won the case in court after relying heavily on the project attorney's research and arguments. One of the project attorneys using the *but for* approach did not feel this would be a recovery because the project actually failed during the claims and appeals process and it was the litigator's work that led directly to the recovery.

One of the project attorneys using a *substantial involvement* analysis, however, indicated that this would be a recovery. That attorney also noted that, even if the litigator had not relied heavily on the project attorney's work, the project attorney still played a necessary and significant role by exhausting the claims and appeals process, a prerequisite to litigation. Conversely, multiple attorneys indicated that, while this scenario would constitute a recovery if the litigator relied heavily on the project attorney's work during the claims and appeals process, it would not result in a recovery where the litigator did not rely heavily on the project's research and arguments because the project would not have had "significant input" leading to the recovery.

One attorney indicated that while referrals to litigators generally do not constitute recoveries, there may be special circumstances in which they do. This might include situations in which there is an especially difficult plan that has impacted multiple clients, requiring the project to maintain ongoing referral relationships with outside litigators. Multiple attorneys also agreed that if two projects substantially helped the same client only one project should be able to claim a recovery.

Multiple project attorneys indicated that one factor in their decision not to count outside referrals as recoveries is the fact that it is difficult to track outcomes once the case is out of the project's hands, particularly as they consider cases closed once referred out. Several attorneys also indicated that referrals to litigators rarely ever seem to result in a victory, and that most referrals are of clients who did not prevail during the claims and appeals process because they had weak cases. One attorney noted that counting litigation successes as referrals would be problematic because a single litigation victory could dramatically alter recovery statistics.

Information and Advice Scenario

The projects were also asked whether it would count as a victory if a savvy client called to request legal advice and information, then pursued a benefit claim on her own and won after relying on information provided by the project. The attorneys who prefer a *but for* analysis tended to claim that this was a likely recovery if the project's advice led directly to the benefit whereas *substantial involvement* attorneys were more likely to say that this is not a recovery because it is too attenuated or doesn't require enough project involvement. Whereas in the referral-to-litigator scenario *but for* analysis is less likely than *substantial involvement* to lead to a recovery, in this situation *but for* analysis is more likely than *substantial involvement* analysis to lead to a recovery.

Lost Plan Scenario

All of the project attorneys applied a *but for* type analysis to lost plan scenarios. The criteria the attorneys applied were whether the client would have been able to find the plan without help from a project attorney or had been trying unsuccessfully up to that point, and whether the lost plan information provided by the project eventually led to a monetary benefit. The attorneys indicated that the difficulty or time spent on a lost plan search did not determine whether a lost plan scenario could result in a recovery. The project attorneys were presented with a hypothetical scenario in which a client did not know how to contact her plan, the project attorney looked up the plan's 5500 online and was able to find the plan administrator's phone number in less than five minutes, called the plan administrator that day and was told that the client was entitled to a benefit and that the plan would send distribution paperwork that day. All the attorneys agreed that this scenario would result in a recovery.

Following Up on Recoveries

The projects engage in varying degrees of follow-up to capture recovery information. One project attorney expressed concern that follow up contact can seem like the project is prying into clients' lives, and indicated that the project probably does lose recoveries because it does not follow up to confirm that a client has received distribution paperwork or an actual benefit payment, etc. A second project reported that its attorneys assume that the client will call back if she encounters any further problems. A third project indicated that its attorneys will remember good cases and keep them open for follow up but does not have a systematic follow-up procedure.

Conversely, other projects and individual attorneys have systematic follow-up procedures. One attorney indicated that it is standard to call up to three or four times to try and get hold of the client and will, if unsuccessful, send a final follow up letter. This attorney also sets electronic follow-up reminders on the computer. One project maintains a task grid completely external to PIKA which it uses to keep track of potential recoveries and follow-up dates. This project also reports that it will make a point of following up with the plan administrator to seek copies of distribution and benefit paperwork that will provide the information necessary to calculate a recovery.

Given the wide disparity in follow up procedures it is likely that several projects are failing to capture a significant number of recoveries and are therefore *underreporting* their successes.

Gray Areas and "Non-Monetary" benefits

One question we presented to the project attorneys was whether they had encountered any cases or come up with any hypothetical scenarios in which they were unsure whether a victory counted as a recovery. Multiple projects brought up overpayment and recoupment cases in which the projects obtained a modified repayment schedule. In these cases the client will (presumably, depending on life expectancy) repay the same amount of money over the course of his or her lifetime, but nevertheless enjoy a higher level of retirement income on a month-to-month basis. This increase in monthly income can have a dramatic tangible impact on clients' lives, in many cases enabling the client to make mortgage payments and pay for other important necessities.

One project attorney would like greater clarity regarding recoveries resulting from a settlement reached with the employer, not the plan, and in which the client received money out of employer rather than plan assets. For example, this might occur in a situation where someone working for the employer but not the plan misrepresented plan information to the participant and the participant made employment-related decisions in reliance.

Multiple project attorneys have encountered cases in which the project has clearly obtained a recovery but the amount of the recovery is unclear because the client has not provided exact dollar amounts. The projects indicated that they follow up with these clients to varying degrees, but even those projects that engage in substantial follow up still encounter clients who do not respond or who are unwilling to provide the information necessary to calculate an accurate recovery. In this situation the attorneys would like there to be a system in PIKA for tracking these types of recoveries. Possibilities include creating an “additional recoveries of unknown value” category or using program or region wide statistics to attribute an average value to these recoveries.

Multiple project attorneys indicated that multiple projects should not be able to claim a recovery when two or more projects have assisted the same individual, and that this situation has occurred in the past. This indicates that there may be a need for guidance as to determining which project should claim a recovery in this situation.

Finally, there was disagreement as to whether a speculative, future benefit can count as a recovery. We presented the projects with an actual fact scenario that PRC encountered. A client and her participant spouse had divorced after the participant had already retired and begun receiving his pension annuity. The parties had both represented themselves in the divorce and so there was no QDRO. We sent a document request to the plan in order to determine whether the client was entitled to survivor benefits and the plan refused to provide the documents, claiming that the client was not a beneficiary. We responded with a citation to an IRS regulation stating that a former spouse remains a survivor beneficiary if the divorce occurred after the participant’s annuity start date. The plan agreed that the client was a beneficiary, provided the documents and sent written confirmation that the client would be entitled to a monthly survivor annuity *if* predeceased by her former husband.

Several project attorneys determined that this was a recovery, even though the client had not begun receiving the benefit and may never receive the benefit. Most of these attorneys indicated that they would code this as a recovery by using the client and former spouse’s life expectancies. One project attorney who has a standard recovery follow up procedure would wait and follow up, even years into the future, and claim the recovery then. Three project attorneys indicated, however, that this would not constitute a recovery because the direct impact of PRC’s involvement was too speculative as the client had not yet received the benefit.

Recommendations

- Determine the situations in which the program should rely on a *but for* analysis and those in which the program should use *substantial involvement* analysis
- Determine whether and how to capture a recovery resulting from a successful modification of repayment in overpayment and recoupment situations

- Establish a system for capturing recoveries of which the project was unable to determine the benefit amount
- Develop guidance regarding which project should claim a recovery when two or more projects have assisted the same individual
- Develop tools and guidance for tracking cases after closure and following up with past clients in order to capture a greater number of recoveries
- Provide guidance for claiming and calculating speculative future recoveries

**Summary of April 30, 2014 Nuts and Bolts discussion at PCIP National Training Conference
Presentation by Rebecca Davis, Joellen Leavelle, and Emily Spreiser**

Topic 1: If it is discovered that two counseling projects have helped the same client, which counseling project should claim the recovery?

- When one counseling project has referred a case to a second counseling project, the second counseling project should claim the recovery. If it is discovered that a client has worked with another counseling project on the same matter, the two counseling projects should reach an agreement as to which counseling project should continue representing the client. The counseling project that continues representing the client will record any related recovery.
- When counseling project staff first speak with clients, they should ask whether the client has received help from any other attorneys, including those at another counseling project.

Topic 2: How should the pension counseling projects record a recovery in an overpayment/recoupment scenario when a counseling project has obtained a modified repayment schedule and not a full recoupment waiver?

- Counseling project staff should enter the difference between the amount the plan initially wanted to recoup and the amount that is ultimately recouped in the “Amount Not Recovered” box in Pika’s recovery calculator.

Topic 3: Would counseling project staff like a separate field in Pika to track recoveries for which the amount is unknown?

- The counseling projects should track unknown recovery amounts by simply selecting “Benefit Obtained” from the “Pension Case Closure” drop-down menu and not entering any recovery amount.
- Alternatively, counseling projects may use the benefit amount that is listed in a client’s Social Security Annual Benefit Statement, if available.

Topic 4: It is difficult for counseling project staff to get clients to share certain demographic and case-related information with them, particularly after a client has received a recovery. What methods do counseling projects use to obtain this information from clients?

- Counseling projects can conduct follow-up calls to clients. During these calls, counseling projects can again try to obtain answers to key demographic questions.
- Counseling projects can also remind clients that their answers to these questions help the counseling program to continue providing services free of charge.

Topic 5: Discussion of *but for v. substantial analysis* approaches to determining whether a counseling project may claim a recovery.

- A case should count as a recovery if a counseling project’s involvement could reasonably be said to have resulted in a benefit.
- Some counseling projects do not track recoveries when referring clients to outside litigators.
- A suggestion was made to add a selection to Pika’s “Pension Case Closure” drop-down menu to indicate when a client has been referred to an outside litigator. This would help in tracking recoveries resulting from referrals to litigators.

Suggested Guidelines for Claiming a Recovery

The following guidelines can be used in determining whether to claim a recovery for reporting purposes:

A counseling project can claim a recovery if:

1. Counseling project staff speaks to or corresponds with the client,
2. Counseling project staff provides pension counseling services to the client, and
3. Those pension counseling services play any role in helping the client to obtain a benefit that may not have been obtained otherwise.

Pension counseling services include:

- Providing substantive legal advice or information (e.g. explaining vesting rules, explaining what a QDRO is)
- Providing resource and/or referral information (e.g. referring to EBSA, providing an advisory opinion, explaining why and how to obtain a Social Security Detailed Earnings Report, referring client to a litigator)
- Conducting a lost plan search (assistance in a lost plan search if the client either does not know whom to contact or knows whom to contact but has been unable to do so)
- Contacting the plan on the client's behalf (e.g. a phone call to negotiate informally, a document request, a claim letter)
- Contacting a government agency on the client's behalf

A counseling project should generally not claim a recovery if:

- The client asks for help locating a plan or resource phone number but the client would clearly be able to obtain this information on his/her own (e.g. the client has the phone number written down but does not want to dig through his files, the client does not have the Internet but would have found the plan's contact information by going online at the library had she not called the counseling project).
- Counseling project staff's work does not lead to the benefit (e.g. a project attorney has begun research on a case but has not yet provided any legal information to the client. Meanwhile the client negotiates with the plan/retains another attorney/ involves a government agency entirely on her own and this leads to a benefit).