What Plans and Plan Fiduciaries Need to Know about *Montanile*: Supreme Court Narrows ERISA Plan Reimbursement Rights

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On January 20, 2016, in a blow to ERISA plans and plan fiduciaries, the Supreme Court held in *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Ben. Plan*, 2016 WL 228344, 577 U.S. __ (2016), that when a participant receives a settlement from a third-party for an injury and spends the settlement on non-tangible items such as food and services, an ERISA plan fiduciary cannot bring an ERISA § 502(a)(3) claim for reimbursement from the participant's general assets. Under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), plan fiduciaries can file civil suits "to obtain…appropriate equitable relief…to enforce…the terms of the plan." ERISA fiduciaries have relied on ERISA §502(a)(3) to litigate claims for reimbursement against plan participants who have received plan benefits and who later receive a third-party settlement that triggers a right of reimbursement under the terms of the plan.

After *Montanile*, an ERISA plan may have a difficult time (and cannot bring a viable claim under ERISA §502(a)(3)) recovering benefits it paid where the participant who received the benefits related to a car accident has received a settlement payment from the other motorist or insurance and has spent the settlement payment on consumables or services (food and travel, for example).

This case has serious implications for health and disability plans but may also have far-reaching consequences for other welfare plans and pension plans. This decision by the Supreme Court will likely encourage participants to quickly spend all of their settlement funds or overpayments on non-traceable assets. The good news is that plan fiduciaries can take steps, which will be discussed later in this article, to protect their plans against such situations.

Circuit Split

In deciding *Montanile*, the Court resolved a long-standing circuit split, in favor of what appeared to be the minority position of the Eighth and Ninth Circuits, against the majority view adopted by the First, Second, Third, Sixth, and Eleventh Circuits.

Those latter five Circuit Courts of Appeals have held that plan fiduciaries pursuing an equitable lien under § 502(a)(3) on behalf of the plan may bring a claim for recovery from a participant's general assets, even in situations where specifically identified funds were not delineated from general assets. Two Circuits, including the Ninth Circuit in *Bilyeu v. Morgan Stanley*, 683 F.3d 1083 (9th Cir. 2012), and the Eighth Circuit in *Treasurer, Trustees of Drury Indus., Inc. Health Care Plan*

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& Trust v. Goding, 692 F.3d 888 (8th Cir. 2012), held that either possession of the funds received from the settlement or strict tracing to specifically identifiable funds is necessary for a plan to assert an equitable lien claim under § 502(a)(3). The Court's decision in *Montanile* is not entirely surprising, because it follows the reasoning and framework already established by the Ninth Circuit in *Bilyeu* and adopted by the Eighth Circuit in *Goding*.

The Supreme Court previously set forth the contours of an ERISA §502(a)(3) claim for "appropriate equitable relief" in *Great-West Life & Annuity v. Knudson* (2002), *Sereboff v. Mid-Atlantic Medical Services* (2006), and *US Airways v. McCutchen* (2013). But, as the Court recognized in *Montanile*, those prior cases did not resolve whether the remedy sought by plan fiduciaries for reimbursement for medical expenses after the plan participant recovered money from a third party, *from the participant's general assets*, is equitable in nature.

Background

Robert Montanile was a participant in a health plan administered by the Board. The plan stated: "Amounts that have been recovered by a [participant] from another party are assets of the Plan . . . and are not distributable to any person or entity without the Plan's written release of its subrogation interest." Further, the plan also provided that "any amounts" that a participant "recover[s] from another party by award, judgment, settlement or otherwise . . . will promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan . . . and without reduction for attorneys' fees, costs, expenses or damages claimed by the covered person." In addition, the plan contained language requiring participants to notify the plan and obtain consent before settling third-party claims.

In December 2008, Montanile got in a car accident with a drunk driver, and the plan paid $121,044.02 for his medical expenses. Montanile signed an agreement to reimburse the plan from any related settlement recovery, and he later obtained a $500,000 settlement against the drunk driver and Montanile's uninsured motorist insurance coverage. Montanile paid $260,000 of the settlement for legal fees, leaving him with $240,000.

At that point, Montanile's attorney put the settlement funds in the attorney's client trust account. The attorney denied the Board's request for reimbursement and after negotiations failed, informed the Board that he would disburse the remaining settlement funds to Montanile, unless the Board objected within 14 days. The Board did not object; Montanile's attorney released the funds to his client; and Montanile spent the settlement funds.

Six months after negotiations ended with Montanile, the Board sued Montanile under ERISA §502(a)(3) to enforce the plan's lien provisions for the $121,044.02 in benefits that the plan paid. The district court entered, and the Eleventh Circuit affirmed, a $121,044.02 judgment against Montanile out of his general assets. (Notably, the Supreme Court remanded the case to the district court to determine how much Montanile had dissipated the settlement funds and whether Montanile commingled the settlement fund with his general assets.)

The Eleventh Circuit mainly relied on another recent Eleventh Circuit case, *AirTran Airways, Inc. v. Elem*, 767 F.3d 1192 (11th Cir. 2014), where it held that settlement funds were specifically identifiable, even after the participant no longer possessed them, because the subsequent dissipation of funds could not destroy the lien that attached prior to dissipation.

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Supreme Court's Holding

The Supreme Court's opinion, delivered by Justice Thomas, held that when a participant spends a third-party settlement on nontraceable items, the plan fiduciary may not bring suit under §502(a)(3) to recover from the participant's general assets. The Court emphasized that the Board's claim would have been equitable (and could have been brought under §502(a)(3)) "had the Board immediately sued to enforce the lien against the fund."

The Board argued that if a plan had an equitable lien by agreement, a plan could still recover without specifically identifying a fund in the defendant's possession to which the right to recover attached. The Board based its reasoning on that of the majority of Circuit Courts of Appeals that had decided the issue and on its reading of *Sereboff*. The Board argued that under *Sereboff*, the plan was allowed to recover settlement proceeds from a participant under the terms of the plan, without requiring strict tracing of the settlement proceeds to a particular fund or asset.

Following the Court's framework in Sereboff, the Court's inquiry in *Montanile* began with the question of whether a remedy "is legal or equitable depends on [(1)] the basis for the [the plaintiff's] claim and [(2)] the nature of the underlying remedies sought." *Montanile* citing *Sereboff,* 547 U.S. at 363. Identifying the crux of the legal question before it, the Court opined that (1) the basis for the Board's claim is equitable, but the Court must decide if (2) the *remedy*, "enforcement of an equitable lien by agreement against the defendant's general assets," is equitable. The Court resolved this issue by examining standard equity treatises, where equitable remedies are generally directed against, or give a right to, a specific thing. The Court clarified its ruling in *Sereboff* by opining in *Montanile* that the Board "misread[] *Sereboff,*" which according to the Court, "left untouched the rule that all types of equitable liens must be enforced against a specifically identified fund in the defendant's possession." Even though the basis for the claim in *Montanile* was equitable, the "plaintiff must still identify a specific fund…to enforce the lien" *Montanile* (discussing *Barnes v. Alexander*, 232 U.S. 117, 123 (1914)).

Further, the Court identified a public policy reason for its holding — "allocat[ing] liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." Allocating that liability to the plans, the Court stated that plans have the knowledge and are in the best position to track expensive claims, especially when there are plan provisions requiring participants and beneficiaries to notify the plan of legal claims against third parties and giving the plan rights of subrogation and reimbursement.

Finally, the Court remanded the case to the district court to determine whether Montanile kept his settlement fund separate from his general assets or dissipated the entire fund on nontraceable assets.

Best Practices

Plan fiduciaries could face increased costs and obligations related to the ongoing tracking and monitoring of settlements and filing suit for an equitable lien *immediately*. Plans should dedicate resources to developing proper infrastructure to monitor and investigate any related litigation and must be prepared to race against the clock, before a participant spends all of his settlement funds. The Court trivialized[1] the additional burden and costs to plans, stating that plans have de-

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veloped safeguards, without admitting that those safeguards are not always adequate in yielding plan recoveries where they are due.

Plan sponsors should review their plans to ensure that they have strong reimbursement language that requires participants to give prompt notice to the plan in the case of a third-party settlement. After *Montanile*, plans should consider adding language requiring participants to give the plan a certain amount of notice before monies are disbursed.

Next, plan fiduciaries need to determine the most effective way to enforce the plan's subrogation and reimbursement rights, particularly when the plan provides health or disability benefits. Because the Court has opined that plans are the best equipped to stay abreast of potential third-party tort suits, the plans should maintain communication with all parties in a tort suit, particularly the participant's attorney, in hopes of receiving proper notice and a recovery before funds are disbursed to the client.

Montanile's most important lesson to plan fiduciaries is that they should take immediate action if the settlement funds are going to be distributed to the participant. As the Court remarked, the Board "had sufficient notice of Montanile's settlement to have taken various steps to preserve those funds." While it may not seem like a long time, even waiting six months could be fatal to the plan fiduciary's claim, especially where the participant has spent all, or a substantial portion, of the settlement on consumables.

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1 Notably, Justice Ginsburg, the lone dissenter, took issue with the Court's "bizarre conclusion" that a participant can escape his reimbursement obligation by rapidly spending settlement funds on nontraceable items.

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