



TOPIC: Subrogation - Supreme Court decision in *Montanile* restricts a board of trustees' right to enforce a plan's right of reimbursement

EXECUTIVE SUMMARY: ON JANUARY 20, 2016, THE U.S. SUPREME ISSUED ITS DECISION IN *MONTANILE V. BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN*. THE CASE INVOLVED A PARTICIPANT WHO HAD BEEN INJURED IN A CAR ACCIDENT FOR WHOM THE PLAN ADVANCED APPROXIMATELY \$120,000 IN MEDICAL BENEFITS PURSUANT TO A SIGNED SUBROGATION AGREEMENT UNDER WHICH HE AGREED TO REIMBURSE THE PLAN FROM THE PROCEEDS OF ANY SETTLEMENT HE RECEIVED FROM THE RESPONSIBLE PARTY. ULTIMATELY, HE RECEIVED A SETTLEMENT OF APPROXIMATELY \$500,000. RATHER THAN REPAY HIS DEBT TO THE FUND, HOWEVER, HE SPENT THE SETTLEMENT TO SUPPORT HIS DAUGHTER AND ON THEIR HOME. SUBSEQUENTLY, THE PLAN FILED SUIT FOR RECOVERY OF THE DEBT ON BEHALF OF THE OTHER PARTICIPANTS OF THE PLAN.

IN AN 8-1 DECISION, THE COURT HELD THAT EVEN THOUGH AN ERISA PLAN ESTABLISHED AN EQUITABLE LIEN BY AGREEMENT ENFORCEABLE UNDER ERISA §502(A)(3) AGAINST A PORTION OF A PARTICIPANT'S SETTLEMENT PROCEEDS, ONCE THE PARTICIPANT OBTAINED TITLE TO THAT SETTLEMENT, THE PARTICIPANT DEFEATED THE PLAN'S RIGHT TO RELIEF UNDER ERISA §502(A)(3) BY SPENDING ("DISSIPATING") THE SETTLEMENT PROCEEDS PRIOR TO THE TRUSTEES FILING SUIT TO ENFORCE THE PLAN'S EQUITABLE LIEN BY AGREEMENT. IN OTHER WORDS, SINCE THE ASSETS IN QUESTION HAD BEEN SPENT, THE FUND WAS PROHIBITED FROM COLLECTING THE AMOUNTS OWED FROM OTHER ASSETS THE PARTICIPANT MIGHT OWN.

A DETAILED ANALYSIS OF THE CASE AND ITS IMPLICATIONS FOR HOW PLANS APPROACH SUBROGATION APPEARS BELOW.

PURPOSE: INFORMATIONAL

CATEGORY: COURT DECISION

ISSUER: SUPREME COURT OF THE UNITED STATES

TARGET AUDIENCE: TRUSTEES OF AND PLAN ADVISORS TO MULTIEMPLOYER HEALTH BENEFIT AND PENSION PLANS

FORWARD COMMENTS TO: Multi-elert@nccmp.org

REFERENCE: VOL. XVI, ISSUE 1,

FOR ADDITIONAL BACKGROUND SEE: *GREAT-WEST LIFE & ANNUITY INS. CO. v. KNUDSON*, 534 U.S. 204 (2002); *SERBOFF V. MID ATLANTIC MEDICAL SERVICES, INC.*, 547 U.S. 356 (2006); ERISA SECTION 502(A)(3); AND ATTACHED FILES CONTAINING THE MONTANILE DECISION AND THE AMICUS BRIEF FILED BY THE NCCMP.

U.S. SUPREME COURT'S DECISION IN *MONTANILE* CREATES NEW OBSTACLES FOR TRUSTEES SEEKING TO ENFORCE A PLAN'S RIGHT OF REIMBURSEMENT PROVISION

In an 8-1 decision handed down on January 20, 2016, the U.S. Supreme Court ruled that a participant of an ERISA plan can defeat enforcement of the plan's valid equitable lien by agreement—after the lien by agreement attaches (*i.e.*, after the participant obtains title to the third-party settlement fund subject to the plan's lien)—by “dissipat[ing] the whole settlement on nontraceable items” before the trustees bring suit. This issue of *Multi-Elert* will examine the implications of this decision for plans with otherwise enforceable subrogation and reimbursement provisions and identify some of the issues that trustees and plan professionals will face as they determine the impact of *Montanile* on their plans.

Background.

Robert Montanile was a participant in the National Elevator Industry Health Benefit Plan. The Plan document contained a reimbursement provision applicable when a participant or beneficiary received money from a third party for medical expenses. The reimbursement provision provided the Plan a right of first recovery up to the amount of benefits advanced by the Plan, without reduction for attorneys' fees, costs, or other damages.

In 2008, Montanile was in a car accident and was seriously injured. The Plan advanced approximately \$121,000 for his medical care, and Montanile signed a reimbursement agreement reaffirming his obligation to reimburse the Plan from any recovery he received from a third party. Montanile then sued the other driver for negligence and obtained a \$500,000 settlement. After paying his attorneys fees and expenses associated with the lawsuit, he was left with about \$240,000, or twice as much as he owed to the Plan. Montanile's attorney held most of that money in a trust account.

The Plan sought reimbursement from Montanile, but his attorney claimed the Plan was not entitled to any recovery. After discussions broke down between the Plan and Montanile, his attorney notified the Plan that he would distribute the remaining funds to Montanile unless the Plan objected within 14 days. The Plan did not respond within that time, so Montanile's attorneys disbursed the remainder of the funds to Montanile.

Six months later, the Plan sued Montanile under ERISA § 502(a)(3). The Plan sought reimbursement of \$121,000 in claims paid for Montanile's medical care. Among the arguments raised challenging the Plan's right to reimbursement, Montanile contended that the Plan could not recover the settlement funds because he had spent most, if not all, of the settlement funds on non-traceable items (services or consumable items such as food). In response, the Plan argued that its reimbursement provision imposed an equitable lien upon the settlement proceeds, that the lien attached the moment Montanile received the funds, and that dissipation of the settlement funds could not destroy the underlying reimbursement obligation.

The District Court and the Eleventh Circuit found in favor of the Plan and rejected Montanile's argument that his dissipation of the funds subject to the Plan's lien defeated the Plan's right of recovery under ERISA §502(a)(3). These holdings were consistent with the First, Second, Third, and Sixth Circuits but in conflict with decisions of the Eighth and Ninth Circuits. Montanile petitioned the U.S. Supreme Court for review of the Eleventh Circuit's decision. The Supreme Court granted review to resolve the conflict among the Courts of Appeals over whether an ERISA fiduciary can enforce an equitable lien against a defendant's general assets when the defendant had dissipated the specific funds on which the ERISA plan was asserting the lien prior to the plan filing suit.

Briefs were filed by the parties, and due to the significance of the issue for many multiemployer plans throughout the country, the NCCMP filed an *amicus* brief in support of the Plan's position for several compelling reasons. First, the terms of many multiemployer health and welfare plans contain right of reimbursement provisions, and the NCCMP was concerned that an adverse decision would significantly hinder trustees' ability to enforce these plan provisions and recover the funds that participants or beneficiaries have agreed to repay. Second, the NCCMP was concerned that if the right to reimbursement was not enforced, a single participant or beneficiary would essentially obtain a double recovery—once from the plan, and again from the third party who paid him—at the expense of all other plan participants and beneficiaries. Finally, the NCCMP was concerned that an adverse decision would also significantly interfere with the right of a multiemployer pension plan to seek reimbursement of overpayments to participants, beneficiaries or others not entitled to benefits.

The Court heard oral argument on November 9, 2015, and on January 20, 2016 it issued its opinion.

The Issue

ERISA 502(a)(3) authorizes plan fiduciaries to bring civil suits “to obtain other appropriate equitable relief . . . to enforce . . . the terms of the plan.” The Supreme Court has interpreted the term “appropriate equitable relief” as limited to “those categories of relief that were typically available in equity” in the days before 1938, when courts of law and equity were separate. The issue presented in Montanile is whether the relief sought by ERISA fiduciaries had been “*typically available in equity*” and is thus enforceable, or whether it is a “*legal remedy*” which is not. Specifically, the question presented is whether ERISA fiduciaries can enforce an equitable lien for reimbursement against a defendant's general assets when the specific funds to which the lien attached have been dissipated.

The Opinion

The Court determined that “*when a participant dissipates the whole [third party recovery] on nontraceable items, the fiduciary cannot bring a suit to attach the participant's general assets under § 502(a)(3) because the suit is not one for ‘appropriate equitable relief.’*” It noted that the test for “appropriate equitable relief” depends on “(1) the basis for [the ERISA fiduciary's] claim, and (2) the nature of the underlying remedies sought.” The Court emphasized that both the basis for the claim and the nature of the remedy must be the type that were “typically available at equity” in order for a plan fiduciary to recover under § 502(a)(3). In Montanile, the Court held that the “*basis for the Board's claim is equitable.*” Specifically, the Plan documents and agreement signed by

Montanile created an equitable lien by agreement, in which Montanile agreed to reimburse the Plan from the proceeds of any third party recovery. The Board of Trustees sought to enforce the Plan's equitable lien by agreement, which is "a type of equitable lien created by an agreement to convey a particular fund to another party." The Court confirmed that suits to enforce equitable liens by agreement are "typically available at equity" and therefore proper under ERISA 502(a)(3).

The Court went on to hold that "the nature of the Board's underlying remedy would have been equitable had it immediately sued to enforce the lien against the settlement fund then in Montanile's possession." However, the Court concluded that the remedy sought by the Plan was not equitable to the extent that Montanile had dissipated the settlement fund on nontraceable items before the Plan sued to recover the fund. The Court stated that under historical rules of equity, "a plaintiff could ordinarily enforce an equitable lien only against specifically identified funds that remain in the defendant's possession or against traceable items that the defendant purchased with the funds (e.g. identifiable property like a car). A defendant's expenditure of the entire identifiable fund on nontraceable items (like food or travel) destroys an equitable lien. The plaintiff then may have a personal claim against the defendant's general assets—but recovering out of those assets is a legal remedy, not an equitable one." Because 502(a)(3) only permits plan fiduciaries to seek "appropriate equitable relief," plans cannot recover from the defendant's general assets once he or she has dissipated the funds.

With respect to how this decision might be applied by the ERISA plan fiduciaries, the Court pointed out several ways that plans have "power to control and prevent the misdeeds" of beneficiaries who seek "to evade their reimbursement obligations." According to the Court, plans can "investigate and track expensive [medical] claims." They can, and do, "obligate participants and beneficiaries to notify the plan of legal process against third parties and to give the plan a right of subrogation." Finally, plans can "file[] suit immediately" if they have any sense that a participant or beneficiary may fail to honor his or her reimbursement obligation.

Finally, the Court noted that it was unclear whether Montanile had dissipated *all* of the settlement fund, or just most of it. If Montanile had not dissipated all of the fund, presumably the Plan would be entitled to the undissipated portion. The Court remanded the case to the District Court for further fact finding.

Judge Ginsburg filed a dissent disagreeing with the Court's analysis. She would have held that the relief sought was equitable, not legal, and would have allowed the plan to collect from Montanile's general assets the amount it had advanced to him in medical expenses.

Implications

Obviously, the implications of this decision will vary for each plan, depending on a number of factors including whether and how plans seek reimbursement or subrogation for medical claims, and where the plan is located. There may also be implications for pension plans or disability plans that seek to recoup overpayment of benefits. How this decision applies to your plan(s) is a question that should be directed to your own fund counsel. There are, however, a number of questions and suggestions that may guide counsel and plan fiduciaries in determining how to respond to Montanile. These questions and suggestions include:

- How does your plan enforce its subrogation and reimbursement claims? Do participants sign agreements to reimburse the plan for any overpayments or recoupments from third parties? Does the plan language, as well as the language of those agreements need to be changed in light of Montanile?
- Does your plan track and monitor large medical expense claims, and if so, does it have a protocol for attempting to enforce its reimbursement and subrogation provisions? Does your plan need to modify its protocols for attempting to settle claims or to file suit to collect monies owed to the Plan in order for the Plan to act faster to protect its assets from dissipation?
- In the pension or disability context can other plan provisions protect the plan from overpayment, such as future claim offset provisions, coordination of benefit sections, or cooperation clauses? Can a welfare plan terminate coverage for beneficiaries who have not complied with their reimbursement obligations?
- Can the plan sue for reimbursement/subrogation in state court?
- In many cases, the beneficiary has received a third party recovery from a personal injury lawsuit and the attorney receives the recovery first. If it appears that the attorneys are unwilling to recognize the plan's right of reimbursement, plan counsel may want to consider (a) reminding the attorney of his or her possible ethical obligations not to disburse disputed funds; or (b) naming the attorney in the plan's suit to recover third party claims, on the theory that the attorney has collected a significant fee from the settlement fund, and the Plan may be entitled to assert an equitable lien on some or all of that fee.

We strive to ensure that the information contained in this and every issue of Multi-Elert is correct to the extent information is available. Nevertheless, the NCCMP does not offer legal advice. Plan fiduciaries should rely on their own attorneys and other professional advisors for advice on the meaning and application of any Federal laws or regulations to their plans.

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If you have questions about the NCCMP, or about this or other issues of Multi-Elert, please contact the NCCMP, by phone at (202) 737-5315 or by e-mail at nccmp@nccmp.org .
