

February 2, 2016

## ERISA Plans Should Act To Reinforce Reimbursement Rights In Light Of Recent SCOTUS Decision

Group health plan administrators should take actions to address the recent U.S. Supreme Court decision holding that an ERISA plan cannot enforce its equitable lien, which had been established through the plan's reimbursement provisions, when a participant spent amounts received in a third-party settlement on "nontraceable" assets. See, *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan* (No. 14-723), 2016 WL 228344 (Jan. 20, 2016).

### What Happened

Robert Montanile ("Montanile"), a participant in the National Elevator Industry Health Benefit Plan (the "Plan"), was severely injured in an automobile accident involving a drunk driver. Montanile sued the drunk driver and ultimately received a \$500,000 settlement. The Plan had paid over \$121,000 for Montanile's medical care related to the accident. Montanile had signed a reimbursement agreement reaffirming his obligation to reimburse the Plan from any recovery he obtained "as a result of any legal action or settlement or otherwise" and accordingly, the Plan sought reimbursement from the settlement. After negotiations for the reimbursement broke down, Montanile's attorney informed the Plan that the remainder of the settlement (about \$240,000 after attorney's fees and expenses) would be paid out of the trust account directly to Montanile unless the Plan responded in 14 days. The Plan did not timely respond and the \$240,000 was paid to Montanile. **Brownstein comment:** *It is not clear why the Plan did not timely respond to Montanile's attorney. If the Plan had timely responded, we suspect that the Plan would have been able to obtain its reimbursement or, at a minimum, would have prevented the disbursement to Montanile that allowed him to dissipate the settlement funds and ultimately prevented the Plan from being able to enforce an equitable remedy for reimbursement.*

About six months later, the Plan sued Montanile, seeking (i) an equitable lien on any settlement funds or property in Montanile's possession and (ii) an order preventing Montanile from spending those funds. Montanile argued that, because he already had spent almost all of the settlement, no identifiable fund existed against which the Plan could enforce its lien. **Brownstein comment:** *Section 502(a)(3) of ERISA allows a plan fiduciary to bring a civil suit to obtain appropriate equitable relief, so the issue in the case is whether recovery from Montanile's general assets, under these circumstances, was an equitable remedy.*

The dispute progressed through the court system. The Eleventh Circuit affirmed the district court's decision,<sup>1</sup> holding that even if Montanile had completely dissipated the fund, the Plan was entitled to reimbursement from Montanile's general assets. Addressing for the first time whether an equitable remedy can be enforced against a defendant's general assets where the defendant wholly dissipates a third-party settlement on nontraceable items, the Supreme Court disagreed with the Eleventh Circuit, holding that the Plan may obtain equitable relief only if it can specifically trace the settlement amount among the participant's assets. If, as in this case, the settlement funds are not traceable among the participant's assets, then the Plan has no right of recovery. **Brownstein Comment:** *This case has been*

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*remanded to district court to determine whether any of the recovery is traceable, so it may be that the Plan ultimately will recover some amount, but that amount likely will not offset the attorneys' fees incurred to obtain that recovery. Query whether the Plan could have argued that the portion of the settlement paid to Montanile's attorney was traceable. In addition, if Montanile's accident had occurred in 2013 after the McCutchen decision, instead of in 2008, the outcome may have been different because the Plan document likely would have been revised to "fill any contractual gaps," to address the lessons evoked by McCutchen.<sup>2</sup>*

### Recommended Actions

The *Montanile* decision provides another reminder about how important it is to periodically review and update plan document language and procedures. It also is a reminder about how large the financial stakes involved in employee plan benefits are—and how important it is for a plan to protect its rights. Some recommended actions include:

- ◆ Review and, if necessary, revise plan documents and SPDs with regard to subrogation and reimbursement rights to address whether:<sup>3</sup>
  - the plan has the right to reimbursement from any third-party settlement or lawsuit on a "first dollar basis regardless of whether the claimant has been made whole for his or her injuries";
  - the plan's contractual claim includes not only the medical expenses paid by the plan, but the plan's costs and expenses, including attorney's fees, incurred in seeking reimbursement or subrogation;
  - the plan's right to reimbursement or subrogation follows after the payment of reasonable litigation-related costs and attorney's fees; and whether those attorney costs and fees are limited to some stated percentage of the gross amount sought by the plan;<sup>4</sup>
  - the plan's right of recovery extends to any amount paid by the plan that is in any way related to the injuries incurred—whether paid directly or indirectly to the injured party, the injured party's spouse, dependents, beneficiaries or estate, and whether held in trust or constructive trust for the benefit of any of those parties;
  - amounts are recoverable even if the funds have been commingled with other assets and whether the plan may recover from any available funds, without the need to trace the source of the funds; and
  - any party, who distributes funds without regard to the plan's rights of subrogation or reimbursement, will be personally liable to the plan for the amounts so distributed (specify whether these parties include not only the participant but the participant's spouse, dependents, beneficiaries, estate and any third party, including the participant's attorney).
- ◆ Revise plan documents and SPDs to require participant notice to the plan administrator within a specified number of days (e.g., 20 or 30 days) of any claim that may give rise to the plan's claim for subrogation or reimbursement.

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- ◆ Require reimbursement agreements. If already required, revise these agreements to state that the participant personally guarantees the reimbursement from the participant's general assets. Include a statement that the participant agrees to hold any settlement or recovery amounts in a fund separate from general assets until the plan's subrogation/reimbursement claims have been finally satisfied.
- ◆ Determine if it is cost-effective and appropriate to expend plan assets to modify current claims administration. If so, modify claims administration processes to more effectively track participants' legal proceedings against third parties; more rapidly identify opportunities for subrogation and reimbursement, obtain executed reimbursement agreements, ensure the filing of liens, and develop strategy as to when (and how) the plan will join a participant's lawsuit against a third party (e.g., joinder, intervention, injunction or declaratory actions).

<sup>1</sup>See, *Board of Trustees of the National Elevator Industry Health Benefit Plan v. Montanile*, 2014 WL 8514011 (S.D. Fla. Apr. 17, 2014) and *Board of Trustees of the National Elevator Industry Health Benefit Plan v. Montanile*, 593 Fed. Appx. 903 (11th Cir. Nov. 25, 2014).

<sup>2</sup> See, *U.S. Airways v. McCutchen*, \_ U.S. \_, 133 S. Ct. 1537, 2013 WL 1567371 (2013). Here, in an equitable lien action under ERISA §502(a)(3), the Court held ERISA's primary function is to "protect contractually defined benefits" so that the clear terms of the plan govern and neither general principles (unjust enrichment) nor specific principles (common fund rules) will override those plan terms. However, where the plan is silent, equitable principles may be used to fill "contractual gaps."

<sup>3</sup> Many of these recommendations are lessons from *McCutchen*.

<sup>4</sup> Although the plan language could deny the payment of the participant's attorney fees, this approach likely would discourage participants from seeking any recovery from third parties.

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*This document is intended to provide you with general information regarding Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*