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## ERISA Beneficiary's Dissipation of Settlement Proceeds Precludes ERISA Plan Health Insurer from Enforcing Its Reimbursement Rights

By John K. DiMugno

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Attorneys who practice personal injury law must cope with the effect of various liens on their clients' recovery. In order to settle claims, attorneys must either pay off or negotiate a reduction in these liens. If they do not do so, the lien holder, usually a workers' compensation insurer, will enforce the lien against the plaintiff's general assets after the settlement funds are disbursed.

However, in a victory for insureds and personal injury claimants, the United States Supreme Court recently created an exception to this general rule in favor of enforceability of reimbursement rights against a plaintiff's general assets in *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 651 (2016). The Court's holding applies to health care liens under employer-provided health insurance policies governed by the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq.—often the largest lien on a plaintiff's recovery from third-parties and thus the largest obstacle to settlement of personal injury claims. The Court held that ERISA, § 502(a)(3), 29 U.S.C.A. § 1132(a)(3), which authorizes recovery of "appropriate equitable relief," does not permit an ERISA plan administrator to recover the amount of health care benefits paid on behalf of a plan participant from the participant's general assets after the participant dissipates the proceeds of a settlement with a third-party tortfeasor on nontraceable items, such as food and travel. The Court reasoned that allowing recovery from the insured's general assets would constitute legal, not equitable, relief.

### Legal Background

The *Montanile* decision marks the fifth time the Supreme Court has addressed the scope of "appropriate equitable relief" under § 502(a)(3), and the fourth time the Court has considered attempts by ERISA plan fiduciaries to obtain reimbursement from a participant's third party recovery. Each of the previous three reimbursement cases were factually distinguishable from *Montanile*.

The Court first examined the meaning of “equitable relief” in § 502(a)(3) in *Mertens v. Hewitt Associates*, 508 U.S. 248, 261, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). In *Mertens*, the Court held that § 502(a)(3) allows recovery only of traditional equitable relief, such as an injunction or restitution.

In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), the Court applied the *Mertens* decision’s narrow view of equitable relief to an ERISA plan’s reimbursement provision for the first time. The *Knudson* case is factually similar to *Montanile* with one critical difference—in *Knudson* the plan participant never actually possessed the funds, while in *Montanile* the participant possessed the funds and later spent them on nontraceable items. The plan in *Knudson* therefore sought a money judgment from the participant. The Court held that the judgment was a legal, not an equitable remedy, rejecting the plan’s contention that the money judgment was a form of restitution. The Court explained that equity allows restitution only when “money or property identified as belonging in good conscience to the [plan] could clearly be traced to particular funds or property in the [beneficiary’s] possession.”<sup>1</sup>

A few years later, in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 126 S.Ct. 1869, 164 L.Ed.2d 612 (2006), the Court permitted reimbursement recovery. In *Sereboff*, like *Montanile*, the plan sought to enforce an “equitable lien by agreement.” However, in *Sereboff*, the plan sought to recover a specifically identifiable fund within the participant’s possession and control. In *Montanile*, by contrast, the participant completely dissipated the funds before the district court had the opportunity to grant relief.

Most recently, in *US Airways, Inc. v. McCutchen*, 569 U.S. \_\_\_, 133 S.Ct. 1537, 185 L.Ed.2d 654 (2013), the Court again allowed a plan to enforce an equitable lien by agreement on specifically identifiable funds, this time to pay for attorney fees incurred in recovering the money. In so ruling, the Court emphasized that common law equitable rules apply only because the plan language was silent on the allocation of attorney fees. If the plan had unambiguously prohibited recovery of attorney fees, the plan language would have controlled.

Under *Mertens*, *Knudson*, *Sereboff*, and *McCutchen*, the plan would have been able to enforce an equitable lien by agreement had the plan attempted to obtain time to *Montanile*’s settlement funds while they were still in his possession. However, none of the Court’s prior rulings addressed “whether a plan is still seeking an equitable remedy when the defendant, who once possessed the settlement fund, has dissipated it all, and the plan then seeks to recover out of the defendant’s general assets.”

### **The Court’s Opinion**

The *Montanile* Court, in an opinion authored by Justice Thomas with only Justice Ginsburg dissenting, answered the question in the negative. To resolve the question, the Court “turn[ed] to standard equity treatises.” The Court found that while the while the basis for the plan’s claim was equitable, the remedy sought—an equitable lien by agreement against *Montanile*’s general assets—was not. Quoting from Pomeroy’s *Equity Jurisprudence*, the Court characterized an

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<sup>1</sup> *Id.*, at 213, 122 S.Ct. 708.

equitable lien, including an equitable lien by agreement, as “simply a right of a special nature *over* the thing ... so that the very thing itself may be proceeded against in an equitable action.” Since Montanile’s dissipation of the settlement fund eliminated the specific property that was the subject of the lien, the Court concluded that the lien no longer existed. The mere fact that Montanile’s dissipation of the funds was wrongful did not, in the Court’s view, justify allowing the plan to attach Montanile’s general assets. The plan’s only remedy was a personal claim against Montanile—“a quintessential action at law.”

The Court rejected the plan’s contention that the requirement of a specific, identifiable fund does not apply to equitable liens by agreement, as distinguished from equitable liens imposed on property a defendant misappropriates from plaintiff. Justice Thomas explained that in *Sereboff* the Court recognized that equitable liens by agreement have different elements of proof than other forms of equitable liens. Plaintiffs seeking to enforce equitable liens by agreement need not, for example, prove that they originally possessed the subject property which was improperly acquired by the defendant. *Sereboff*, however, “left untouched the rule that *all* types of equitable liens must be enforced against a specifically identified fund in the defendant's possession.”

### **Comment**

The *Montanile* decision will have significant practical consequences. In prohibiting enforcement of equitable liens by agreement against a plan participant’s general assets, the Court adopted a minority rule. Plan administrators seeking to preserve plan assets by enforcing their reimbursement rights now must do nationwide what previously was required only in the Eighth<sup>2</sup> and Ninth<sup>3</sup> Circuits: Proactively monitor plan participants’ attempts to recover from third parties, and when participants are close to recovering from third parties, immediately seek to have a constructive trust or equitable lien placed over the recovery. When the proceeds are dissipated, the plan will have to attempt to trace the proceeds to specific purchases, such as a car or other hard assets, that can be attached.

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<sup>2</sup>*Treasurer, Trustees of Drury Industries, Inc. Health Care Plan & Trust v. Goding*, 692 F.3d 888 (8th Cir. 2012).

<sup>3</sup> *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012).