

Attorneys React To High Court ERISA Reimbursement Ruling

Law360, New York (January 20, 2016, 10:54 PM ET) -- The U.S. Supreme Court ruled Wednesday in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan* that a retirement plan cannot sue under the Employee Retirement Income Security Act for reimbursement of medical expenses from a third-party settlement that a plan participant has already spent. Here, attorneys tell Law360 why the Supreme Court's ruling is significant.

Luke D. Bailey, Strasburger & Price LLP

"Because an ERISA health plan's right of subrogation is based on ERISA Section 502(a)(3)'s provision for 'other equitable relief,' it is enforceable as an equitable lien upon the participant's recovery, not as a claim for monetary compensation. Monetary compensation would be 'damages,' which historically were available in courts of law, not equity ... Whether a plan participant could defeat subrogation by spending down the recovered fund before a court enforced the ERISA plan's equitable lien has been an open issue. Yesterday's *Montanile* opinion established that traditional equitable remedies do not generally include enforcing an equitable lien against a party's assets when the fund against which the lien was enforceable has been spent. Thus, an ERISA plan should assert its equitable claim as early as possible, e.g. by joining the participant's lawsuit."

Richard J. Birmingham, Davis Wright Tremaine LLP

"The Supreme Court, applying principles of equity, reaches an absurdly inequitable result here. If the funds were dissipated on nontraceable assets, the plan has no recovery. As Justice [Ruth Bader] Ginsburg noted, the Supreme Court had the opportunity to simplify this area of law and do the right thing, i.e. pay the plan as agreed. Instead, the Supreme Court's decision creates an incentive for secret settlements and quick squandering of assets. What is a plan to do? One suggestion would be to change the plan requirements and the reimbursement agreement to require 14 days advance notice before any legal or settlement recoveries can be disbursed and have the claimant contractually personally agree and guarantee that such reimbursement can be satisfied from his or her general assets, as well as from any traceable funds of the legal recovery or settlement. The Supreme Court, in *Lockheed v. Spink*, previously approved the payment of early retirement benefits conditioned on an employment release, so there is authority for adding additional conditions before a distribution is made. One thing is for certain — the Supreme Court's opinion will complicate plan drafting and reimbursement agreements and will lead to increased litigation with an incentive for secret settlements."

Angela Bohmann, Stinson Leonard Street LLP

“When I was in law school, we learned that law and equity courts merged years ago. Unfortunately, that is not true of claims under Section 502(a)(3) of ERISA. ERISA litigators: Keep those equity treatises handy. Under *Montanile*, medical plans — and disability plans, as well — will have to monitor subrogation claims closely and take prompt action to protect their rights. And as suggested by Justice Ginsburg’s dissent, participants who dissipate the settlements they receive from third party tortfeasors are more likely to be able to avoid their obligation to reimburse their benefit plans than those who retain their settlements for future expenses.”

J. Stewart Borrow, Kelley Drye & Warren LLP

“SUPREME COURT TO PERSONAL INJURY PLAINTIFFS: SPEND THE MONEY AND RUN! The U.S. Supreme Court held in *Montanile* that a medical plan’s equitable lien cannot reach a participant’s personal assets once a personal injury settlement fund was depleted. The plan’s case was hurt due to (a) failing to object to the plaintiff attorney’s proposed payment of the funds to the plaintiff within a number of days and (b) waiting six months to sue the participant. To avoid a similar situation, plans either need to seek an injunction against dissipating settlement funds before their disbursement or sue in state court to recover the funds.”

Tad Devlin, Kaufman Dolowich & Voluck LLP

“Based on the USSC ruling, under ERISA, strict tracing — i.e., identifying a fund within the possession and control of the member/participant — is required. ERISA plans should implement more aggressive methods of payment detection and/or seek alternative means of issuing conditional payments through coordination of benefits procedures and protocols. Without the strict tracing requirement for ERISA reimbursement claims, the scope of potential liability would have potentially extended beyond plan members/participants to include any party who possessed the funds subject to an equitable lien, including attorneys representing plan members. Under the *Montanile* decision, proof and tracing issues will likely become more frequent and could result in incentivizing quick spending of plan money to avoid tracing and reimbursement claims.”

Charles Dyke, Nixon Peabody LLP

“Under *Montanile*, an ERISA health plan can specify a right of reimbursement against specific monies a participant recovers from a third party tortfeasor, but if the participant spends the money on non-traceable items before the plan has taken legal action, the reimbursement right evaporates. One lesson for sponsors of self-insured plans is to get involved in the enforcement process immediately. Insurers have become sophisticated about this. Employers who rely on vendors to administer their self-funded health plans should make sure a process is in place, so that action can be taken before assets are dissipated.”

Michael Graham, McDermott Will & Emery LLP

“This decision will likely lead to a new round of litigation to determine when a fund is properly co-mingled with the third party recovery or what types of assets will be deemed traceable assets, like a car

or a home. The decision is also likely to push plan fiduciaries to take action on reimbursement and subrogation rights more quickly after learning of a third party recovery so as to preserve their right to assert an equitable remedy against an identifiable, traceable fund. My prediction is that plan administrators and fiduciaries will attempt to draft additional safeguards into benefit plans to preserve all remedies available to recover these reimbursement and subrogation rights.”

Robert Guite, Sheppard Mullin Richter & Hampton LLP

“The court’s decision is significant in that it resolved the circuit split by adopting the minority position that strict tracing, identifying a specific fund within the possession and control of the participant, is required. Given this ruling, ERISA plans will be required to implement more aggressive methods of monitoring claims to determine if settlements have been reached. ERISA plans will have to act promptly to ensure that settlement funds in the participant’s possession are preserved rather than relying on reimbursement agreements signed by plan participants that, under the former majority view, were valid equitable liens by agreement.”

Doug Haloftis, Barnes & Thornburg LLP

“In *Montanile*, the court narrowly interpreted the scope of ‘equitable’ doctrines that could be employed to pursue a plan participant’s general assets when the participant had recovered damages against a third-party and then dissipated those funds. The court’s decision today makes it more difficult for plan fiduciaries, even after it had the opportunity to expand the meaning of ‘equitable relief’ to include ‘legal remedies’ but soundly rejected this approach, claiming that Congress’s intent was much narrower when it limited plan claims to those sounding in ‘equity.’ With the court now having clarified its view for the third time, the ‘cat and mouse game’ will continue between participants awarded a recovery against third-parties and plan fiduciaries seeking to attach those funds, potentially placing billions of dollars of recoveries at risk and cause increases in medical insurance premiums.”

Jonathan Igoe, Armstrong Teasdale LLP

“Today’s U.S. Supreme Court ruling means that plan fiduciaries must take prompt action to prevent a participant from spending settlement funds until after the plan is repaid. A participant’s subrogation agreement is insufficient alone. The opinion might leave open recovery in the event the participant commingles the settlement funds with his/her general assets.”

Timothy F. Kennedy, Montgomery McCracken Walker & Rhoads LLP

“This decision significantly weakens an employer’s recovery rights. This is true even where a plan may have strong and effective subrogation provisions. Now that dissipation of settlement proceeds is a viable defense to an ERISA plan’s claim for reimbursement, employers will need to implement more aggressive procedures for tracking and detecting participant settlement amounts. Employers with ERISA plans may also find it necessary to review their coordination of benefits and subrogation provisions to reflect new ways for granting conditional payments. One other interesting point was the fact that the court appears to agree with the 11th Circuit that — in the case of a health plan — the SPD is often the only written document and is therefore enforceable as though it were the plan document. This is a nice

clarification for ERISA practitioners after the Supreme Court's decision in *Cigna Corp. v. Amara*, holding that an SPD was not enforceable."

Gene R. La Suer, Davis Brown Koehn Shors & Roberts PC

"The practical impact of the Montanile decision will be to force insurance plans to flag all payments that could be related to a claim against a third party and refuse to pay the medical provider until an agreement is reached on repayment to the plan. For lawyers, simply following time tested practices should prevent dissipation of assets that should be used for repayment to a plan. When dealing with subrogation, always make a timely demand on the plaintiff's attorney for subrogation and when possible, reach agreement with the attorney on repayment. Absent an agreement for repayment, always file a lien and notify all parties of the lien. Never allow assets to be released to the plaintiff in a case without a settlement agreement on where the proceeds will be paid."

Robert H. Louis, Saul Ewing LLP

"This case can be described by paraphrasing an old legal adage: careless plan administrators make bad law. Mr. Montanile recovered a verdict for an auto accident, and the plan requested reimbursement of benefits paid. The parties negotiated, but couldn't agree on repayment, so Montanile's lawyer paid the funds to his client, hearing no objection from the administrator. Montanile apparently spent the money. The Supreme Court said the plan had a lien only against the fund, and since the fund was gone, so was its lien. The administrator slept on its rights long enough to lose them."

Craig C. Martin, Jenner & Block LLP

"Notwithstanding its journey through the legal history of the divided bar, Montanile's practical implication is quite clear: A plan must take quick legal action to preserve its subrogation rights by filing lawsuits seeking to impose constructive trusts or similar remedies. The ruling puts a bad-faith quick spender in a better position than a conscientious participant who preserves disputed funds until the dispute is settled, and will increase legal costs by incentivizing litigation."

Hugh Murray, McCarter & English LLP

"The Supreme Court's ruling is a strong reminder to plan administrators and other plan fiduciaries to promptly pursue reimbursement of covered expenses from participants who recover from third parties. The court expressed confidence that its ruling limiting a plan's ability to recover from a participant's general assets would not harm those plans, specifically noting that in the past decade plans have developed more robust safeguards to ensure such payment. In light of this ruling, plan administrators and fiduciaries likely have a duty to review plan policies, adopt new policies if appropriate, and aggressively seek equitable remedies to maximize repayment."

D. Michael Reilly, Lane Powell PC

"Boiled down to the key holding, today's Supreme Court decision in Montanile reminds one seeking reimbursement of funds to 'follow the money.' The ruling is bad news for ERISA plans seeking

reimbursement from a plan participant, especially when the funds have dissipated. The ruling also applies to 'equitable liens by agreement.' Based on this decision, ERISA plans and insurers of plans need to identify the funds quickly, object to any disbursement of those funds, and according to the Supreme Court, bring suit 'immediately.'"

Michelle L. Roberts, Springer & Roberts LLP

"The saying goes that possession is nine-tenths of the law. When it comes to an ERISA plan's enforcement of a subrogation provision, Montanile confirms that possession is ten-tenths of the remedy. Montanile has huge implications for ERISA benefit plans seeking to enforce subrogation provisions against plan participants. Time is now of the essence. If a plan participant dissipates the disputed funds on nontraceable items, a plan fiduciary cannot attach an equitable lien by agreement against a participant's general assets. The takeaway for both plan participants and ERISA plans seeking reimbursement is clear: Hurry!"

Karen Scheffler, Olshan Frome Wolosky LLP

"The Supreme Court's ruling today in Montanile should put employee benefit plan trustees on notice that they must not delay in seeking reimbursement of plan paid medical expenses against a participant who, after being injured by a third party, later recovers money from the third party for his/her injuries. Plans should include a clear right of subrogation and require participants to notify the plan of legal process against third parties. Additionally, plan trustees should develop administrative safeguards to ensure timely action."

Mark Schmidtke, Ogletree Deakins Nash Smoak & Stewart PC

"One problem with the decision is that in many cases, benefit plans do not know about a third party recovery until after it has occurred and after the money is spent. The decision encourages all sorts of gamesmanship by participants and leaves plans in these circumstances with few viable options except, where appropriate under the plan, to withhold benefits in the first place until third party recovery options are exhausted. That option certainly does not benefit participants who need their benefits to pay current bills."

Eric Serron, Steptoe & Johnson LLP

"Montanile will give participants an incentive to dissipate settlement recoveries as quickly as possible on non-traceable items like consumable goods, services and vacations. To minimize the threat of dissipation, plans will have to carefully monitor participant suits against third parties and bring suit to enforce their subrogation rights at the earliest possible time, which will not be cost-effective for smaller claims. The decision could also make it harder for pension plans to recover pension overpayments made to participants. There is a silver-lining for defendants in fiduciary litigation. In rejecting the plan's broad reading of Amara, eight Justices reaffirmed Mertens and characterized Amara's discussion of ERISA Section 502(a)(3) as dictum. Montanile will thus be cited as authority for reversing the trend in the lower courts to recognize monetary remedies against ERISA fiduciaries under Section 502(a)(3)."

Andrew P. Sherrod, Hirschler Fleischer PC

“The Montanile decision builds upon the Supreme Court’s prior rulings on the scope of ‘appropriate equitable relief’ under ERISA and provides important clarification regarding a fact pattern that is commonly faced by benefit plans and their participants. Montanile is significant because it ruled that even when the plan has an ‘equitable lien by agreement’ pursuant to plan terms or a reimbursement agreement, it still must identify specific funds that are in the participant’s possession or which can be traced to items purchased with funds to which the plan’s equitable lien attached. The plan is not able to recover from the participant’s general assets. Thus, when the participant spends the money received from a third party before the plan can sue to enforce its lien, the plan will not be able to recover. While this ruling may create an unsavory incentive for participants to spend away funds on non-traceable items — food, vacations, etc. — the Supreme Court noted that Congress could have drafted the ERISA provision differently to allow plans more expansive remedies, but did not. This decision will likely result in increased lobbying efforts by ERISA plans and their insurers to expand the remedies available to recover such funds.”

Erin Sweeney, Miller & Chevalier Chtd.

“Today the Supreme Court made it clear in Montanile that the only fail safe method for an employee benefit plan to ensure that a participant repays a lien by agreement for medical benefits is for the plan to proactively file a lawsuit or injunctive action against the participant. The decision also places a premium on proactive litigation monitoring and will require employee benefit plans to expend resources in a race to attach any third party recovery before the participant is able to dissipate the recovery.”

Rene E. Thorne, Jackson Lewis PC

“Although the decision demonstrates that the justices remain unwilling to expand ERISA’s ‘appropriate equitable relief’ provision into a damages free-for-all, Montanile does reaffirm the high court’s earlier rulings that plan fiduciaries can seek equitable relief for recoupment of medical expenses through a well-drafted, equitable lien agreement in the plan documents. However, Montanile also makes clear that plan fiduciaries need to act expeditiously to track and recover from third party settlements medical expenses paid on behalf of a plan participant. Once the funds are fully dissipated, enforcement of a judgment will be treated more like a claim money damages than equitable relief, and the plan might be left without a remedy, at least under ERISA.”

Kate Winslow, Ford & Harrison LLP

“Today’s ruling is one of timing. This holding effectively allows plan participants to escape reimbursement obligations if the plan fails to enforce its lien on third-party settlement funds before they are dispersed and the participant burns through the windfall. The majority held that once the participant spent the settlement amounts on food and travel, the slow-moving plan sought ‘legal’ not ‘equitable’ relief to recover the now-‘nontraceable’ funds in violation of ERISA Section 502(a)(3). Plans seeking reimbursement would be well advised to move quickly lest [the high court]’s historically narrow interpretation of ‘equitable relief’ — or a wanderlust plaintiff — removes the funds from the Plan’s ‘equitable’ reach.”