Finally an ERISA Subrogation Victory for Plaintiffs!

By David L. Place, J.D.
Director of Lien Resolution

Montanile v. Board of Trustees of National Elevator, 577 U.S. (2016)

In the post *McCutchen* world wherein trial attorneys find themselves at the mercy of ERISA Plans and their recovery vendors it was with a measure of dread that we anticipated another unfavorable ruling from the U.S. Supreme Court.(http://www.synergysettlements.com/erisa-subrogation-once-again-before-the-u-s-supreme-court/) However, and from the most unlikely friend to the plaintiff's bar, Justice Clarence Thomas, the opinion in *Montanile* delivered to ERISA Plans a serious setback to their avarice and their overreaching recover y efforts. In *Montanile* the Court found that should the plaintiff fully exhausted the settlement funds so that the funds are no longer in the possession and control of the plaintiff, then the ERISA Plan cannot make a claim against the plaintiff since the subject of their claim, the settlement fund, is fully dissipated.

> "We hold that, when a participant dissipates the whole settlement 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."
> *Id*. at pg 2.

The facts of this case are tragic and typical of the kind of situation most plaintiff attorneys often find themselves dealing with in their cases. Mr. Montanile was severely injured when a drunk driver collided with his vehicle. Mr. Montanile incurred substantial medical bills, of which his ERISA Plan paid $121,044.02. During the course of litigation Mr. Montanile executed an additional agreement reaffirming the reimbursement language contained in his ERISA Plan's contract. Eventually the personal injury action was settled for $500,000 from all sources, including Mr. Montanile's UIM coverage. After attorney fees and costs Mr. Montanile was to net $240,000.00. Trial counsel began negotiations with the ERISA Plan but was unable to reach an agreement. Trial counsel then notified the ERISA Plan in writing that he would disburse the remainder of the funds to Mr. Montanile unless the Plan objected within fourteen (14) days. The Plan failed to respond and the funds were disbursed. Six (6) months later the ERISA Plan filed suit in federal district court against Mr. Montanile by which time Mr. Montanile contends the settlement funds were spent. The ERISA Plan asserted that despite Mr. Montanile spending all the settlement funds they can still recover the amount of their claim from his general assets. Appropriately Justice Thomas writing for the majority reaffirmed that ERISA requires "appropriate equitable relieve" and a claim against Mr. Montanile's general assets is not authorized.

This well-reasoned and well written opinion makes it expressly clear the requirements and limitations placed on an ERISA Plan's recovery efforts. As we noted in our previous blog the Court

was concerned with the cost ERISA Plan's might incur if their recovery efforts were limited to funds "in the possession and control" of the plaintiff. Justice Thomas addressed that squarely and accurately characterizing the ERISA recovery industry.

> "More than a decade has passed since we decided *Great-West*, and plans have developed safeguards against participants' and beneficiaries' efforts to evade reimbursement obligations. Plans that cover medical expenses know how much medical care that participants and beneficiaries require, and have the incentive to investigate and track expensive claims. Plan provisions—like the ones here—obligate participants and beneficiaries to notify the plan of legal process against third parties and to give the plan a right of subrogation.
>
> The Board protests that tracking and participating in legal proceedings is hard and costly, and that settlements are often shrouded in secrecy. The facts of this case undercut that argument. The Board had sufficient notice of Montanile's settlement to have taken various steps to preserve those funds. Most notably, when negotiations broke down and Montanile's lawyer expressed his intent to disburse the remaining settlement funds to Montanile unless the plan objected within 14 days, the Board could have—but did not—object. Moreover, the Board could have filed suit immediately, rather than waiting half a year."
> *Id*. at pg 14.

It is important to note, as the Court does repeatedly, that Mr. Montanile's counsel kept the ERISA Plan informed, cooperated with signing additional agreements, gave fourteen (14) days' notice, and even gave them an opportunity to object before he disbursed the remaining settlement funds.

This opinion is likely to encourage quicker action by the ERISA Plan's and their recovery vendors. Though the Court is clear in stating:

> "[D]efendant dissipat[ion] [of] the entire fund on nontraceable items … eliminated the lien. Even though the defendant's conduct was wrongful, the plaintiff could not attach the defendant's general assets instead. Absent specific exceptions not relevant here, "where a person wrongfully dispose[d] of the property of another but the property cannot be traced into any product, the other . . . cannot enforce a constructive trust or lien *upon any part of the wrongdoer's property*." Restatement §215(1), at 866 (emphasis added); see also *Great- West*, 534 U. S., at 213–214 (citing Restatement §160)."
> *Id*. at pg 9

ERISA Plan Administrators and recovery vendors will also note that the Court made it clear that had they taken more aggressive action, and sooner, then their recovery rights may have been preserved.

> "The Board had an equitable lien by agreement that attached to Montanile's settlement fund when he obtained title to that fund. And 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."
> *Id*. at pg 7

This is opinion finally provides some guidance to the trial bar on how to address ERISA subrogation claims. Here the Court recognizes that a plaintiff who honors the contractual obligations of their ERISA Plan but is unable to reach a final resolution regarding their subrogation/repayment demand is not stuck in perpetual limbo following resolution of the underlying personal injury action. If trial counsel provides a reasonable opportunity for the Plan to enforce its recovery rights, here the Court found fourteen (14) days to be reasonable, then exhausting that separately identifiable settlement fund on nontraceable items prevents the ERISA Plan from seeking a recovery.

The term "nontraceable" is only defined in this opinion as items "like food or travel" whereas "traceable" items are defined as "identifiable property like a car." (*Id.* at pg 8). However, the court does make it clear that simply comingling the settlement funds with general assets is not to be considered exhausting the fund on "nontraceable" assets (*Id.* at pg 13). Unfortunately, this does not provide much guidance for plaintiff's who use their settlement funds to purchase an annuity, or place the entirety of the settlement in a Special Needs Trust. However, given the clear requirement that the settlement funds be in the "possession" and under the "control" of the plaintiff indicate that both the proceeds of an annuity purchase as well as the funds in Special Needs Trust are "nontraceable" within the Court's meaning in *Montanile*.

> *"[A]ll t*ypes of equitable liens must be enforced against a specifically identified fund in the defendant's possession. See 1 Dobbs §4.3(3), at 601, 603."
> *Id*. at pg 10.

And when the Court wrote:

> "[E]quitable liens by agreement … depend on "the notion . . . that the contract creates some right or interest in or over specific property," and are enforceable only if "the decree of the court can lay hold of " that specific property. 4 Pomeroy §1234, at 694–695.
> *Id.* at pg 8

In this case the majority held that it was unable to determine from the record how much of the subject settlement funds were dissipated by Mr. Montanile prior to the Plan's suit. The case was remanded to the trial court to determine,

> "whether Montanile kept his settlement fund separate from his general assets or dissipated the entire fund on nontraceable assets." *Id.* at pg 14

To avoid this confusion trial counsel should have the plaintiff keep the settlement funds in a separate account so when it is fully exhausted there is no uncertainty for the ERISA Plan to color.

Though this SCOTUS opinion is quite clear on many points, it does illustrate the complex nature and exacting steps that must be taken by trial counsel in seeking to resolve reimbursement demands from ERISA Plans. Trial counsel is encouraged to seek the guidance of experts in the area of ERISA lien resolution so that their clients can take advantage of this encouraging clarification by the Court.