First things First, Let's Sue all the Lawyers – The Supreme Court Seeks Solutions to Latest Challenges to Subrogation Rights in Montanile

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The facts of the latest healthcare subrogation challenge on the Supreme Court's docket (Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan) will be familiar to many. As you may recall from our June 2015 Phia Factor article, following a motor vehicle accident, Robert Montanile's health plan paid over $120,000 on his behalf, subject to all plan terms, including a subrogation and reimbursement provision. Mr. Montanile hired an attorney to bring a claim on his behalf, and that attorney secured a settlement of $500,000.00.

Mr. Montanile hired a second attorney to negotiate with the Plan to resolve its equitable lien by agreement. When those negotiations reached an impasse, Mr. Montanile's attorneys notified the Plan that they would be disbursing funds directly to Mr. Montainle unless the Plan filed suit within 14 days. Eventually, though outside of the requested 14 day timeframe, the Plan did file suit to enforce its rights, and found itself facing the argument that its rights were no longer enforceable because Mr. Montainle had spent the settlement proceeds by the time suit was filed. Both the district court and 11th Circuit Court of Appeals in Atlanta sided with the Plan and ordered full reimbursement.

Mr. Montanile appealed to the United States Supreme Court, seeking to resolve a question that has divided courts across the country for years: "Whether an action by an ERISA fiduciary against a plan participant to recover an overpayment by the plan seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3), where the fiduciary has not identified a particular fund that is in the participant's possession and control at the time that the fiduciary asserts its claim."

The split amongst the federal circuits on the current question is wide, with some jurisdictions holding that funds that have been comingled with a plan participants general assets can no longer be recovered by a benefit plan (*Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012)), to others where judges have suggested that participants and/or their attorneys be jailed after disbursing funds and refusing to live up to reimbursement obligations outlined in plan terms (*Central States v. Lewis*, 745 F.3d 283 (7th Cir. 2014)). The latter case is probably the most entertaining reading in all of ERISA caselaw.

Subrogation recoveries play a huge role in keeping self-funded health plans viable. Every year hundreds of millions of dollars come back into plans for the payment of future benefits for plan participants via the subrogation recovery process. By holding other parties and insurance carriers responsible for the damages they and their insureds have caused, self-funded benefit plans are able to keep costs to participants down. A significant factor in getting as much money back into the Plan as possible is the keeping the recovery process itself cost-effective, by ensuring that injured participants and their attorneys don't create unnecessary hoops for the plan to jump through or insist that they incur unreasonable or unnecessary costs. Mr. Montainle proposes a dramatic change to that structure, which would require plans to invest significantly more time and resources to pursue recoveries, and give participants who can spend their recoveries quickly a mechanism to escape their obligations under the terms of their benefit plan. Recognizing the devastating impact such a decision could have on the viability of self-funded plans across the industry, NASP and SIIA filed an *Amici Curiae* brief with the United States Supreme Court in support of the Board of Trustees of the National Elevator Industry

Health Benefit Plan. The brief can be viewed at http://www.scotusblog.com/wp-content/uploads/2015/10/14-723_amicus_resp_NationalAssociationofSubrogationProfessionals.authcheckdam.pdf.

'Appropriate Equitable Relief'

The basis of the dispute is that relief under section 502(a)(3) of ERISA is limited to 'appropriate equitable relief' to enforce the terms of the plan. In prior cases the Supreme Court has decided this means the type of relief 'typically available in equity' and has specifically restricted a plan from seeking to collect from the general assets of a plan participant, instead allowing the plan to enforce an 'equitable lien by agreement' (the agreement being the plan terms) on a 'specifically identifiable fund', distinct from the general assets of the plan participant. In the context of healthcare subrogation, the specifically identifiable fund is typically a tort settlement. In many cases, plans, participants and attorneys work together to appropriately distribute a tort settlement in a manner agreeable to all involved. The question here is if a participant and an attorney disburse and spend those funds, with knowledge of the plan's claim, does that disbursement defeat the plan's reimbursement claim because there is no longer a 'specifically identifiable fund' in the participant's possession and control? Or does the lien attach immediately at the point at which the participant gains control of settlement funds, such that later spending the money is irrelevant to, or indeed a violation of, the plan's rights? Usually a participant comes into control of a settlement fund by directing an insurance carrier to issue a check to the participant or their attorney.

Mr. Montanile and his supporters have argued that, practically, there are few if any cases where funds will be disbursed if a plan properly notifies interested parties of its lien because attorneys are ethically bound to hold disputed funds in trust for the protection of their clients as well as third parties like a health plan. Ironically, Mr. Montanile makes that claim despite the fact that he and his attorneys did just that, disbursing the funds while fully aware of the plan's interest!

The Problem for Plans

While there are many reasonable and ethical attorneys out there, there are also many who are unwilling to do the extra work that may be required to appropriately resolve an equitable lien by agreement, especially if funds are limited. The vast majority of tort cases are accepted by plaintiff's attorneys on a contingency fee basis, typically one-third of the gross recovery. This means that resolution of liens is often functionally wasted time for an attorney who has already earned their fee on a case.

Threats to disburse funds and let the plan and the (often uninformed or confused) patient come to an agreement are all too common. There are multiple states where the code of professional responsibility does not require that a plaintiff's attorney (or, for that matter, a defendant or insurance carrier on notice of a plan's interest) hold funds in trust pending amicable resolution or a court order. Other states allow an attorney to disburse the funds to their client if they believe there may be any possible defense to the interest asserted by the plan, no matter the actual merit of that defense if it is later adjudicated. As a practical matter, enforcing a reimbursement interest after funds have been disbursed will never be a first choice for plans and will rarely lead to an optimal recovery. So, if, as counsel for the Plan freely admitted during oral argument, this is a 'second-best' remedy that plans will seek to avoid if possible, is the outcome really that important for self-funded employers seeking to keep their plans affordable? Absolutely!

As anyone regularly involved in the negotiation of reimbursement and subrogation actions will be able to tell you, most if not all plan participants against whom a plan might seek to recover are functionally judgment proof once settlement funds have been spent because of the large sums typically involved. It is therefore vital, first, that the Plan act quickly to protect its interest, but second, that the involved parties not be incentivized to race to spend the settlement funds to frustrate the interests of the plan and the purpose of ERISA.

Do Plans have Other Realistic Options?

In oral argument, many of the justices focused on the practical aspects of pursuit of a plan's interest were Mr. Montanile to succeed. A number of arguments were presented regarding alternatives plans may have to enforce their rights, including intervening in state court tort actions, filing temporary restraining orders to prohibit a participant or attorney from disbursing funds or filing suit immediately upon settlement of a claim for adjudication of a lien. Justice Breyer seemed particularly interested in potential plan remedies directly against a malfeasant attorney, rather than against a judgment-proof plan participant. Unfortunately, that particular potential remedy is actually the subject of a separate disagreement between federal courts, and may need to be heard by the Supreme Court in the near future. Thankfully, assumptions that it would 'probably be pretty easy' to monitor tort claims for all plan participants were quickly corrected in two relevant and common contexts.

Locating Cases for Potential Intervention

First, there are cases where a participant has retained an attorney and a lawsuit has been filed. While there are some systems, like WestLaw, that can provide some national coverage for searching for state civil suits, there are some states with no state court docket coverage on these systems (14 with no access on WestLaw), and not every state with some coverage has full coverage. The vast majority of tort actions will be filed in state court, and so many plans, particularly large plans with participants in multiple states, would face substantial challenges even locating these actions to potentially intervene. These records are generally compiled on the city or county level, and not all courts provide access electronically. Certainly it would not be as straightforward to monitor all potential lawsuits, as was suggested by one of the justices, as just 'punching in' a participant's name.

Second, there are the majority of subrogation cases in which no suit is ever filed, even if the participant has an attorney. There are no public records for these cases. Imagine the all too common scenario where a participant is so injured that it is immediately clear that the relevant policy's limits would be insufficient to compensate for a loss. In those cases it's common for settlement to occur within 45 days from the date of injury or loss. There are circumstances under which a health plan may not even have been billed by providers within that timeframe, let alone have the capacity to ensure proper handling of the funds by the participant in advance of dissipation.

Both of these situations were thoroughly addressed in an *Amici Curiae* Brief filed by the National Association of Subrogation Professionals and the Self-Insurance Institute of America in favor of the plan. The plan's attorney pointed the court to statistics provided in that brief regarding the fact that more than 50% of personal injury claims resolve without any filing of suit, and the even greater number that resolve without trial, and, therefore, without any judgment. When funds are exchanged quickly it can make it easy for plans to remain in the dark until the funds have been disbursed, and parties would have every incentive to do so if Mr. Montanile is successful in this case.

Impact on Other Types of Plans

A question raised by the two sides in oral argument is whether or not a decision in this case will bind reimbursement/overpayment actions in the context of pension and disability cases. In pension cases, payments are generally made in error by the plan so that small computational errors result in additional funds being paid with each benefit check. With disability cases, payments are made by the Plan for eligible claims, but under federal law, the plan cannot impose a lien on the social security disability benefits later received by a participant even though those benefits are considered a double recovery relative to the benefits under the plan. It was suggested that half of the cases that create the basis for the circuit split that the court was asked to resolve in *Montanile* relate to disability benefits, and so any rule would need to address both types of interest.

Mr. Montanile spent substantial time discussing the apparent inequities of reimbursement in such cases, when participants on fixed incomes sometimes need to repay plan benefits they had been receiving for decades. The Supreme Court declined to hear the appeal in a disability case, *Bilyeu*, a few years ago after being presented with the argument that *Bilyeu* would present a poor vehicle to resolve the question ultimately presented in *Montanile*. The question of what 'specifically identifiable fund' the plan seeks reimbursement from is unclear in the disability and pension contexts, unlike the healthcare subrogation context. Ultimately, the question of reimbursement for disability claims may need to be answered in another case as some courts, including the 9th circuit in *Bilyeu* have found that there was no 'specifically identifiable fund' for the Plan to assert its lien on, and so dissipation is not the relevant question in that context.

Challenges to Plans Ability To Enforce Their Rights in Court

One more point raised in the NASP/SIIA brief is the increasing complexity of private, self-funded 'ERISA' plans being able to enforce their rights in state court and intervene as Montanile and his supporters suggest they should. Earlier this year, in another case in which NASP and SIIA filed an *Amici Curiae* brief advocating for review, the Supreme Court declined to hear a case (*Wurtz v. Rawlings Company, LLC*, 761 F.3d 232 (2nd Cir. 2014)) which would resolve a circuit split on whether complete preemption applies to subrogation matters. This split creates problems for plans that may not be able to enforce their rights in certain 'anti-subrogation' state jurisdictions, but would be left without the ability to remove an action to federal court to see their rights enforced. Similar arguments have been made in other circuits which call into question the Plan's clear ability to enforce its rights before settlement funds are disbursed, see *Walsh, Knippen, Pollock & Cetina, Chartered v. International Union of Operating Engineers, Local 399 Health and Welfare Trust Fund*, No. 14 C 8232 (N.D. Ill. Apr. 15, 2015), finding that removal to federal court of an action adjudicating the enforceability of state law contrary to the terms of the plan was improper because the patient's attorney, not the Plan, was the plaintiff in the action.

Ultimately, because plans, with the support of NASP and SIIA, have been successful in protecting rights outlined in their plan documents, some participants and attorneys are going to continue to attempt to defend extreme strategies when it comes to finding ways around reimbursement. In particular, many participants and attorneys have pushed back following the Supreme Court's decision in *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, (2013), in which the court determined that with the appropriate language a plan may even have the ability to enforce a lien for the entire amount of the settlement, such that a participant and their attorney receive no portion of the recovery. While such provisions certainly help to control plan costs and maintain the viability of establishing these self-funded plans, participants and

attorneys continue to push back as they see what they believe to be increasingly unfair results in individual cases.

We're looking forward to the Supreme Court's ruling in Montanile, which will likely be released in Spring 2016.