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Recovering Third-Party Payments After *Montanile*



BY DAVID LEVIN, JOAN NERI AND MONICA NOVAK

Health plans typically include provisions requiring that a plan participant reimburse the plan when the participant receives third-party payments for injuries that were already covered and paid for under the plan. However, the Supreme Court's recent decision in *Montanile v. Bd. of Trs. of Nat'l Elevator Indus.*, 136 S. Ct. 651, 2016 BL 14200 (2016), illustrates that plan subrogation and reimbursement provisions do not guarantee that the plan will recover the third-party payment from the participant. If plan fiduciaries delay their efforts to recover the third-party payment, the participant may be able to defeat recovery by spending the money on untraceable purchases. We explore below the implications of the *Montanile* decision and the steps a plan sponsor and plan fiduciaries can take to increase the plan's likelihood of recovery.

David R. Levin is a partner in Drinker Biddle's Employee Benefits & Executive Compensation Practice Group in Washington. He can be reached at David.Levin@dbr.com. Joan Neri is counsel with Drinker Biddle's Employee Benefits & Executive Compensation Group and Financial Services ERISA Team in Florham Park, N.J. She can be reached at Joan.Neri@dbr.com. Monica A. Novak is an associate in Drinker Biddle's Employee Benefits & Executive Compensation Practice Group in San Francisco. She can be reached at Monica.Novak@dbr.com.

What Happened in *Montanile*

Robert Montanile was a participant in the National Elevator Industry Health Benefit Plan (the ''plan''), an Employee Retirement Income Security Act plan administered by a Board of Trustees (the ''board''). Montanile was injured by a drunk driver, received medical benefits of more than $120,000 from the plan and subsequently obtained a $500,000 settlement from the drunk driver. Montanile signed a reimbursement agreement acknowledging his obligation under the plan's subrogation provisions to reimburse the plan if he obtained a third-party recovery. The board sought reimbursement under the terms of this agreement, but the negotiations were not successful. Montanile's attorney informed the board that the funds recovered from the third-party settlement would be transferred to Montanile unless the board filed an objection within 14 days. The board did not object, and the recovery fund was transferred to Montanile.

Six months after the close of negotiations, the board sued Montanile in federal district court, seeking repayment of the medical benefits paid by the plan. The board brought the action under ERISA § 502(a)(3), which allows an ERISA plan fiduciary to seek an injunction to stop any act or practice which violates ERISA or the plan terms, or to obtain ''other appropriate equitable relief'' to enforce ERISA's requirements or the plan terms. Because Montanile had allegedly spent almost all of the settlement funds on nontraceable goods, the board sought a court order for Montanile to reimburse the plan from his general assets. The district court entered judgment for the board, and the U.S.

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Court of Appeals for the Eleventh Circuit affirmed the district court's order. The appellate court ruled that plan fiduciaries can enforce an equitable lien once the lien attaches, even if the specific funds to which the lien attached have been spent.

The Supreme Court Weighs In

The Supreme Court agreed to review the case to resolve a circuit split on the question of whether an ERISA fiduciary can enforce an equitable lien against a participant's general assets under these circumstances. The Supreme Court held that, despite the fact that the plan's terms and Montanile's reimbursement agreement created a valid equitable lien for which enforcement under ERISA § 502(a)(3) would be appropriate, ERISA § 502(a)(3) did not permit the board to seek recovery from Montanile's general assets to enforce the lien.

The Court's rationale was that, for an ERISA plan to bring an action under ERISA § 502(a)(3) for appropriate equitable relief to enforce the terms of the ERISA plan, the ERISA plan must both (1) have an equitable basis for its claim and (2) seek a remedy that is equitable in nature. The Supreme Court agreed that there was an equitable basis for the claim but ruled that a remedy against the participant's general assets was money damages and not equitable relief. Because neither the district court nor the appellate court had made findings of fact as to whether Montanile actually had dissipated the entire amount of the settlement on nontraceable items, the case was remanded for a determination on this issue.

What *Montanile* Means for Plan Sponsors and Plan Administrators

Based upon the holding in *Montanile*, a plan fiduciary can seek equitable relief to recover a third-party payment that is deposited and traceable but cannot seek equitable relief to recover the third-party payment from the participant's general assets when the recovery is not traceable. So, what can plan sponsors and plan administrators do to decrease the likelihood that they will end up in the same position as the board in *Montanile*? Below, we recommend a few steps that plan sponsors and plan administrators can take to ensure that their plans' subrogation and reimbursement provisions are offering the most protection possible in light of *Montanile*.

- **Review Plan Subrogation and Reimbursement Provisions—What Does Your Plan Say About Its Right to Recover From Third-Party Settlements?**

The *Montanile* Court laid out a two-prong test for a plan to bring a claim for reimbursement under ERISA § 502(a)(3)—the plan must both have an equitable basis for its reimbursement claim and seek an equitable remedy to redress the claim. In *Montanile*, the conflict centered on the second prong of the test, but the first prong also is essential to pursuing a claim to obtain reimbursement (or other appropriate equitable relief) with respect to a plan participant. Plan sponsors should review their plan documents to ensure that the subrogation and reimbursement provisions are appropriate and specific to the types of benefits provided under the plan. If a plan does not reserve the right to recover third-party settlements from participants who receive plan benefits (or the plan does not otherwise enter into reimbursement agreements with participants), the plan may well not be able to seek an equitable remedy under ERISA § 502(a)(3). Also, the summary plan description should include an explanation of the plan's recovery rights so that plan participants are made aware of their reimbursement obligation.

- **Review Plan Procedures for Pursuing Reimbursement—How Does Your Plan Respond When a Participant Receives a Third-Party Settlement?**

A key lesson from *Montanile* is that even the most well-drafted, plan-protective subrogation and reimbursement provisions are ineffective if your plan fiduciary does not use them. The *Montanile* Court highlighted the board's failure to act when Montanile's attorney informed the board that the funds would be paid to Montanile unless the board took action. Plan fiduciaries and plan sponsors should review their plan administrative procedures related to subrogation and reimbursement to ensure that the plan:

(1) requires participants and beneficiaries to notify the plan when a third party may be liable for the injury or illness for which the plan has paid benefits,

(2) has procedures in place to investigate and track recoverable claims and

(3) follows procedures for claiming reimbursement from participants and beneficiaries in a timely manner (i.e., before a participant or beneficiary has the opportunity to dissipate settlement funds).

If the plan's procedures are less than adequate on this issue, the plan sponsor should consider revising the procedures.

A plan's administrative procedures also may include requiring participants and beneficiaries to enter into separate reimbursement agreements to acknowledge their obligations to the plan, and may include engaging a service provider to handle reimbursement claims that exceed a certain monetary threshold. In any event, *Montanile* reminds plan sponsors and plan administrators that they should not only review the plan's subrogation and reimbursement procedures but also assume an active role in carrying out those procedures in order to monitor their effectiveness and ensure that they continue to provide as much protection to the plan as possible.

- **Consider Adding Plan Language That Provides a Basis to Seek Relief Under ERISA § 502(a)(2).**

Montanile dealt with the question of when a plan can obtain relief under ERISA § 502(a)(3), which is limited to equitable remedies. However, a plan sponsor also might be able to obtain relief against a participant who dissipates a third-party recovery to which the plan is entitled on a different basis—ERISA § 502(a)(2). Although, to date, there is no

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case law analyzing this approach, plan sponsors may want to consider it.

ERISA § 502(a)(2) allows a plan fiduciary to seek relief against another fiduciary for violating a fiduciary duty, and the relief available under ERISA § 502(a)(2) is not limited to equitable relief. Under ERISA, an individual (including a participant) who exercises control over ''plan assets'' is a fiduciary within the meaning of ERISA § 3(21). There is case law supporting the proposition that a plan can define as plan assets amounts due and owing to the plan. In the reimbursement context, a participant's recovery from a third party—at least to the extent that the plan paid benefits for the injuries or illness caused by the third party—could be defined as plan assets under the terms of the plan.

With these concepts in mind, a plan could include language that specifically states that (1) amounts recovered by a participant from a third party are considered a plan asset, and (2) the participant is, therefore, a fiduciary of the plan with respect to amounts recovered from third parties. The plan fiduciary could then enforce these provisions by bringing an action under ERISA § 502(a)(2) against the participant—in his or her fiduciary capacity, even if the participant dissipates the third-party recovery. Because ERISA § 502(a)(2) provides a cause of action for money damages and equitable remedies, the plan fiduciary could sue for the amount of reimbursement, whether or not the participant had dissipated the third-party recovery. If a court accepted this approach—especially recognizing the judiciary's willingness to enforce plan terms, rather than rewriting the plan—it would eliminate the problem presented in *Montanile*, where equitable relief was not available to recover the third-party payment expended by the participant on nontraceable items. Of course, because this approach has not yet been tested in the courts, we cannot predict its success. On the other hand, there is no apparent downside to including the additional language in the plan document (and highlighting it in the SPD) and thereby providing a basis for claims under ERISA § 502(a)(2) and § 502(a)(3).

Conclusion

The ruling in *Montanile* not only underscores the importance of timely enforcement of plan subrogation provisions but also demonstrates that other steps may need to be taken to protect a health plan's recovery right. That said, health plan sponsors are well advised to review and, where necessary, modify plan reimbursement provisions to ensure they enable the plan to seek recovery and to actively enforce those provisions.