Will the United States Supreme Court follow *Sereboff* or will its forthcoming opinion allow subrogation against plan beneficiaries in ERISA litigation?

By John M. Pesek-

The United States Supreme Court recently granted *certiorari* in a case from the Eleventh Circuit Court of Appeals regarding whether an ERISA plan can enforce its equitable lien against a plan member after the member's personal injury settlement funds have been dissipated prior to the plan's cause of action for reimbursement. *See Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 593 Fed. Appx. 903 (11th Cir. 2014), cert. granted, 135 S. Ct. 1700 (2015).

Following the United States Supreme Court's decision in *Sereboff v. Mid. Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006), courts have issued different and conflicting rulings as to whether an ERISA plan's claim for equitable relief must comply with strict tracing requirements, which require the plan member to be in control of settlement funds at the time of the plan's claim for equitable relief, or if the ERISA lien attached immediately upon receipt of the settlement funds regardless of whether or not the plan member had actual or constructive possession of those funds.

The plaintiff, in *Montanile*, relied on several opinions from the Middle District of Florida, holding that an ERISA plan's claim for equitable relief must be strictly traced to settlement funds still in actual or constructive possession of the plan member. *See Space Gateway Support v. Prieth*, 371 F. Supp. 2d 1364 (M.D. Fla. 2005); *Culp, Inc. v. Cain*, 414 F. Supp. 2d 1118 (M.D. Ala. 2006).

The Eleventh Circuit held that settlement funds are "specifically identifiable" and a plan member's dissipation of those funds does not destroy the equitable lien which attached prior to dissipation of those funds. *See Montanile*, 593. Fed. Appx. at 908 (citing *AirTran Airways, Inc. v. Elem*, 767 F.3d 1192, 1198 (11th Cir. 2014)).

The Eighth Circuit Court of Appeals has previously ruled plan members

must have actual or constructive possession of settlement funds in order for the ERISA plan to assert its lien. *See Treasurer v. Goding*, 692 F.3d 888, 896 (8th Cir. 2012) (holding that if the plan member no longer has the property at issue in their possession, then the claim is legal and not equitable, and a plan member's attorney may be liable if they specifically agreed to honor the plan's subrogation right).

The Ninth Circuit Court of Appeals has taken a similar position as that of the Eighth Circuit.   *See Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012). The First, Second, Third, Sixth, and Seventh Circuits have issued rulings similar to that of the Eleventh Circuit in *Montanile*.

Even though the Supreme Court will only address the issue as it relates to personal injury settlement funds, the application of its holding will likely impact other ERISA actions. For example, may the plan administrator look to other sources of member income, such as Social Security benefits, for recovery of plan expenditures? *See Dillard's Inc. v. Liberty Life Assur. Co.*, 456 F.3d 894, 901 (8th Cir. 2006). (holding that as long as the plan specifically identifies a particular third party fund separate

from that of the defendant's general assets, the plan is entitled to reimbursement from the amount of overpayment.) Therefore, through its forthcoming opinion, the Supreme Court may finally interpret its tracing requirement as set forth in *Sereboff*, thus, ending the conflicting interpretations now existing among the Circuits.

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