Follow the Money:
Challenges for Trustees After Montanile

by Philip R. O’Brien
The U.S. Supreme Court decision in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan* has important implications for self-funded ERISA health plans. This article, the second of a two-part series, examines how trustees can protect their health plan’s right to recover claims costs from an award or settlement to a participant.
The Employee Retirement Income Security Act (ERISA) gives a self-funded health plan the right to be reimbursed for claims costs if an injured participant receives an award or settlement from the party responsible for the injuries. But the U.S. Supreme Court decision in January 2016 in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan* makes it clear that ERISA’s “equitable lien by agreement” is against a specific fund and, once that fund is gone or cannot be traced to other specific property, the equitable lien also is gone.

In light of *Montanile*, trustees and professional service providers need to review carefully and possibly revise subrogation and reimbursement provisions in plan documents and summary plan descriptions (SPDs) in order to increase chances of successful reimbursement.

**Put Plan on Firm Footing**

For example, what does the plan say about its right to recover from third-party settlements? To bring a successful 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. Although *Montanile* centered on seeking a remedy, it is essential that a plan have a basis for making the claim.

So sponsors should review plan documents to be sure all provisions are specific to the types of benefits the plan provides and that this language is mirrored in the SPD. To avoid being put in a situation like the one in *Montanile*, where the plan has no remedy under ERISA against a participant who breaches the equitable lien, plan sponsors should require participants to:

- Notify the plan promptly about any recoveries against a third party
- Provide periodic status updates
- Seek the plan’s consent to both the settlement and distribution of the settlement proceeds to the participant.


**Redouble Administrative and Legal Efforts for Reimbursement**

The unfortunate lesson in *Montanile* is that even the most well-drafted plan provisions are ineffective if the plan fiduciary does not enforce them. Failing to timely pursue and collect settlement proceeds could itself become the basis for a breach-of-fiduciary-duty claim brought by other plan participants.

Given Justice Clarence Thomas’ admonition to trustees for their slow reaction in seeking reimbursement from *Montanile*, it’s apparent self-funded ERISA health plans will have to spend more time, effort and expense in asserting and protecting equitable liens by agreement.

Personnel on the front lines of processing claims must recognize injuries most commonly associated with third-party and work-related claims. Tools such as red flagging certain treatment codes and reviewing loss-of-time requests can tip off plans early so they can contact participants promptly. Asking participants with certain types of injuries to fill out a questionnaire can lead to vital information through contacts with attorneys, insurance companies and law enforcement offices.

Once potential, as well as actual, claims are identified, internal procedures should be reviewed to ensure that the plan:

- 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 advanced claims
- Has the resources and ability to investigate and track recoverable claims
- Follows procedures pursuing reimbursement from participants and beneficiaries in a timely manner (early and often, before a participant or beneficiary has the opportunity to spend settlement funds).

Plans should always attempt to obtain a signed subrogation and reimbursement agreement (SRA) from the participant. Nothing under ERISA prohibits plan documents from requiring a signed SRA as a condition for paying benefits. The plan also can require the plan member’s attorney to sign the acknowledgment, although, in the author’s experience, such a request is met with resistance. While the plan can say it won’t advance claims unless the participant has signed the SRA, the benefits of obtaining an SRA may be outweighed by a plan’s contractual obligations to timely submit claims to contracted health care providers in order to take advantage of prenegotiated discounted rates.

Liability insurance adjusters (who may provide medical payments and/or personal injury protection coverage) representing the participant and the responsible party, as well...
as any legal counsel for the participant, should be notified promptly and updated periodically as to the itemization of the plan’s claims paid out and the basis for the plan’s reimbursement rights.

The plan must retain legal counsel well-versed in ERISA self-funded plan rights and be prepared to take action quickly if circumstances warrant. Coordination between administrative offices and legal counsel is extremely important in order to track the sometimes long and arduous process of these types of injury claims. Montanile is a textbook case on how timing is vital: Plans now must be more proactive in formally asserting legal rights in federal court rather than being deferential and allowing the process to work itself out with simply an expectation of getting paid in the end.

Can a participant play “keep-away” with award money? Montanile certainly did it successfully. However, such a gambit is at the participant’s—and his lawyer’s—considerable risk.

The most notable worry for self-funded plans is the arbitrary deadline the participant set in Montanile. It could be argued that the Supreme Court approved the artificial 14-day deadline set by Montanile’s attorney. Factually, Justice Thomas cast aspersions on the plan, given the amount of time the plan took (six months) to begin an ERISA §502(a)(3) action against Montanile.

But what if the federal lawsuit was started one day after the 14-day deadline and Montanile had already spent the money? Such a de facto “statute of limitations” would certainly be unfair and inconsistent with traditional equitable law doctrines. It is a worrisome development and all the more reason that plans must be very diligent in asserting and protecting their rights.

What Is an Attorney’s Obligation?

Under the law and/or a state’s code of attorney ethics, an attorney has an obligation to address an ERISA subrogation and reimbursement lien he or she is clearly aware of.

Equitable liens by agreement almost always originate from personal injury actions. Participants rely on attorneys to bring these actions against responsible parties and their insurance liability carriers. When hiring an attorney, the participant must sign a contingency fee contract that allows the attorney to take 33% to 40% of any proceeds from a settlement or legal proceeding. Almost always, the money funnels through the attorney’s trust account and then is distributed to the participant, the law firm and any viable lienholders.2

The identity of the participant’s attorney is basic information the plan must obtain as a matter of course in subrogation matters. The plan (and/or its legal counsel) needs to send an introductory letter and timely followup missives to that lawyer advising him or her of the plan’s subrogation and reimbursement rights. The plan also must send a list of claims the plan paid on behalf of the participant as a result of the personal injury.3

Montanile teaches trustees that they must be more aggressive in holding attorneys to their legal and ethical responsibilities. There is a strong argument under case law that if an attorney is aware of a plan’s equitable lien by agreement, the attorney ignores or disregards that lien at his or her own peril.4 A plan should always name the participant’s law firm as a party defendant in an ERISA §502(a)(3) action and include a request for preemptive injunction or a temporary restraining order from the court directing the participant’s law firm to hold all disputed money in trust until the lawsuit between the plan and the participant has been resolved. That keeps the lien amount safe.5

Participant’s counsel should also be confronted with ethical obligations to ensure that the plan’s lien is respected prior to any distribution of settlement proceeds.

Settlement proceeds commonly are paid to the participant’s attorney in trust and then allocated according to an itemized settlement statement. Many—though not all—states have adopted Rule 1.5 of the American Bar Association Rules of Professional Responsibility that if a lawyer receives funds in which a third party, such as a lienholder, claims an interest, the lawyer is obligated to notify that party. The lawyer must promptly deliver the funds to the third party.6

When identifying the plan’s right to reimbursement, plans and their legal counsel should start using language in the ABA model rule (Access ABA model rule and variations by state at www.fiebp.org/bookstore/Pages/handbook7.aspx) and their state professional rule in initial and followup written contacts with lawyers for participants.

Offset and Voluntary Repayment Schedules Are Viable Options

While a plan now must make quick decisions on whether and how to enforce its rights to recover an overpaid or subrogated amount, plans may want
to consider options other than formal legal action to compel or assure reimbursement.

Provisions can be inserted into a plan document allowing for offset against still-active participants who fail to properly reimburse the plan after obtaining money from a third-party case. Although trustees sometimes are reluctant to use this option, the circumstances surrounding Montanile will no doubt bring this issue to the forefront more often if assets are dissipated before a plan can reach them. ERISA §409, Department of Labor (DOL) opinion and congressional history clearly indicate a plan must protect its assets in order to ensure long-term financial viability for all participants and their beneficiaries. Offset also can be levied on any claims submitted by a participant’s dependents until the plan’s lien has been paid back in full. Experience shows that threat or imposition of offset gets the prompt attention of the member, who will often contact the plan’s legal counsel and inquire whether a repayment schedule can be negotiated.

If the plan has advanced payments for health services and the participant fails to cooperate (a violation of the terms of the plan’s rules and regulations and/or SPD), there may also be an option available to request refunds from providers. If a plan member fails to comply with the plan’s recovery provisions, the plan might logically argue that any payments it advanced should be refunded. The plan fiduciary could use the possibility of refunds as leverage to induce cooperation by the participant and/or his attorney. However, the success of such a tactic probably would depend upon the plan’s relationship with the health care provider and the size of the claims in question.

Benefit plans are allowed to include penalty provisions to discourage a participant’s failure to comply with reimbursement requirements. For example, the plan document could state that a participant’s failure to timely notify the plan of any claim or settlement will result in the immediate termination of any additional benefits and the forfeiture of participant status and all rights under the plan. Do existing federal rules and regulations make this impermissible for ERISA self-funded health plans? There does not appear to be anything that prevents a disability plan from implementing such a penalty as long as it is clearly defined in the plan documents. Obviously, this is a very punitive option and is more drastic than the common offset provisions that are set forth in well-crafted subrogation and reimbursement provisions.

Can a Self-Funded ERISA Health Plan Sue a Nonpaying Participant?

ERISA §502(a)(3) allows a plan to bring a case only for “equitable relief” and, after the Montanile decision, the Supreme Court seems intent on not expanding that right. In other words, the Court has decided that the term equitable as used in the ERISA statute refers to traditional courts of equity rather than the term meaning fair.

As discussed, plans will be required to enhance their monitoring efforts, review the adequacy of their present subrogation and reimbursement language, and act promptly when seeking reimbursement from plan participants. Trustees may want to consider adding plan language that provides a basis to seek relief under ERISA §502(a)(2). A number of commentators since Montanile have discussed whether plan language that would provide relief under §502(a)(2) might be effective. While there appears to be no case law confirming the viability of this approach, such an argument could parallel attempts (mostly unsuccessful) by health and pension benefit funds to declare...
employers “plan fiduciaries” based on a company’s handling of “plan assets” (for example, when money that should have been earmarked for fringe benefit contributions is spent on other corporate matters).

In confronting disputes over subrogation and reimbursement rights, the plan would argue that §502(a)(2) allows a plan fiduciary to seek relief against another fiduciary for violating a fiduciary duty, and the relief available under this ERISA section is not limited to equitable relief. To properly set the table, a plan would include language in appropriate plan documents that specifically states that (a) amounts recovered by a participant from a third party are considered to be plan assets, and (b) the participant is, therefore, a fiduciary of the plan with respect to amounts recovered from third parties. The trustees could then enforce such a provision by bringing litigation under §502(a)(2) against the participant—and maybe his or her attorney?—even if the participant dissipates the third-party recovery. If a court accepted this approach—especially recognizing the judiciary’s consistent willingness to enforce plan terms, rather than rewriting the plan—it theoretically would eliminate the problem presented in Montanile, where equitable relief was not available to recover the third-party payment already spent by the participant on nontraceable items. All assets of the participant would then be fair game.

There doesn’t appear to be any downside to including this additional language in the plan document (and highlighting it in the SPD), providing a basis for claims under §502(a)(2) as well as the traditional §502(a)(3) route. The presence of this language potentially could have a chilling effect on participants and their attorneys, which might prevent some rogue behavior and instead encourage cooperation and settlement.

**Montanile Fallout Could Extend to Pension Overpayments**

During oral arguments in Montanile, the justices were cautioned their eventual ruling could affect workers receiving pension or disability benefits. Health plan participants are not likely to be unduly harmed if plans act promptly in seeking reimbursement. However, a disability or pension plan that waits years or decades before trying to collect an overpayment creates a heavy burden for an unwitting plan participant. Because Justice Thomas’s opinion makes no clear distinction between the various types of ERISA plans in Montanile, lower courts undoubtedly will be tasked with determining exactly how far the ruling extends.

It appears that the Montanile decision could reach into situations in which an ERISA pension plan has made overpayments to beneficiaries. In the retirement as well as health context, ERISA requires that the plan fiduciary make reasonable, diligent and systematic efforts to recover plan assets. Arguably, Montanile narrows the time frame within which plan fiduciaries can enforce their right to recoupment and limits the enforcement of such rights under ERISA §502(a)(3). That makes the duty to recover plan assets more cumbersome.

In the pension arena, such instances may occur, for example, if a participant has returned to covered work after declaring his or her retirement (and therefore payments should have been suspended) or when a participant dies (and payments continue to be made—and cashed—by an estate or family member). Plans should have processes in place to quickly identify pension plan overpayments so that

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**takeaways**

- In light of the U.S. Supreme Court decision in Montanile, benefit plan trustees and professional service providers should review carefully and possibly revise subrogation provisions in plan documents and SPDs.
- To avoid having no remedy under ERISA against a participant who breaches an equitable lien, plan sponsors should require participants to notify the plan promptly about any recoveries against a third party, provide periodic status updates and get the plan’s consent to both a settlement and distribution of settlement proceeds.
- Failing to timely pursue and collect settlement proceeds could become the basis for a breach-of-fiduciary-duty claim from other plan participants.
- Plans should always attempt to get a signed subrogation and reimbursement agreement from a participant.
- Trustees must be more aggressive in holding attorneys to their legal and ethical responsibilities.
- Options other than formal legal action when attempting to compel or assure reimbursement include offsets against still-active participants who fail to properly reimburse the plan after obtaining money from a third-party case and negotiating voluntary repayment schedules.

Montanile also could affect the collection of disability or pension plan overpayments.
they can seek recovery of such amounts as quickly as possible. Administrative tools, such as subscription services that can identify participant deaths, can be particularly useful to ensure overpayments are either not made or kept to a minimum.

The *Montanile* decision could lead to a new series of lawsuits in which courts determine when settlement or other third-party proceeds are properly comingled with other assets or what can be considered traceable versus nontraceable assets.

This is yet another example of a plan facing more time-consuming and expensive tasks in order to protect its assets. If placed in this position, the plan must weigh case by case the fiduciary duty of seeking reimbursement against the time and cost involved in pursuing it.

Pension and disability plans should also explore whether other plan provisions already protect the plan from overpayment, such as future claim offset provisions, coordination of benefit sections or cooperation clauses.

### Miscellaneous Options That Have Been Floated

#### Intervening in Legal Action Against a Responsible Party

The author isn’t keen on a “solution” floated by some—that the plan intervene in the underlying (usually state) legal action the participant has brought against the party responsible for his or her injury. Doing so might lead to conflict-of-laws problems that could put into jeopardy an ERISA self-funded health plan’s unique legal status in federal courts and destroy the advantages that allow for preemption of state antisubrogation laws.

#### Subcontract Out Subrogation and Reimbursement Duties

Because of the potential increase in costs to pursue lien interests, some plans engage a separate third-party subrogation and recovery service. (Plans should be aware that administrative services agreements often subcontract subrogation and reimbursement duties to another professional provider.) If this route is seriously considered, these services should be vetted carefully since many services are not well-versed in ERISA self-funded plans and have a difficult time monitoring and collecting on cases that are not at issue. If a plan already has one of these services—because it is contractually part and parcel of the terms of the administrative services agreement—trustees, the plan administrator and legal counsel should regularly receive reports on subrogation case activity and be brought into the active decision-making process if litigation becomes possible or necessary.

### Conclusion

The road to subrogation and reimbursement success is fairly direct. A plan should maintain regular contact with the parties, know where the plan’s money is at all times and, when the right time comes and if necessary, sue the party in possession of identifiable funds that in good conscience belong to the plan.

It is trustees’ fiduciary responsibility to make reasonable, diligent and systematic efforts to ensure that the health plan gets repaid. Unfortunately, it is rarely as simple as asking for repayment and receiving it in return. Over the years, a substantial body of case law has evolved around plans’ efforts to get reimbursed. Often, plans fail in this pursuit because the controlling plan documents do not contain clear or adequate language requiring the member to repay.

Many participants’ attorneys will contend that state insurance laws prevent plans from recovering settlement or jury verdict proceeds. But these state prohibitions do not apply to self-insured ERISA plans. And therein lies the substantial legal power of these plans to enforce reimbursement rights. More often than not, settlement or award money is paid over to a participant’s lawyers, who then settle up with the plan, often after negotiating a reasonable reduction in the plan’s claim based on that particular case’s circumstances. But sometimes things go sideways, like in the *Montanile* litiga-
tion. A plan’s sound administrative foundation—and its strategic and legal agility—will determine if its reimbursement actions are successful.

Endnotes

1. Particular attention should be paid to the wording of questionnaires and SRAs, ensuring that they do not contradict subrogation and reimbursement language in the plan’s rules and regulations and/or the SPD. SRAs simply reiterate to the participant his or her duty to cooperate with and reimburse the plan if recovery is made. Failure to obtain a signed SRA, even if mandated in plan provisions, does not extinguish a plan’s equitable lien by agreement.

2. This is another reason to give timely notice of a plan’s lien to the at-fault party’s insurance carrier, as some companies will insist on the plan’s interest being satisfied as a condition to paying the injured party.

3. Some plans go as far as to insist on the lawyer signing an SRA in tandem with the participant as a means of reinforcing the plan rights. Indeed, some plans will not advance claims without the dual signature.

4. See e.g., Longaberger Co. v. Kolt, 586 F.3d 459 (6th Cir. 2009) (ERISA §502(a)(3) does not limit the individuals or entities that could be subject to a claim under ERISA, so there was no limit preventing a plan from suing an attorney for a plan participant so long as the relief sought lies in equity); Central States, Southeast and Southwest Areas Health and Welfare Fund et al. v. Lewis et al., 7th Cir., No. 13-2214, March 12, 2014 (Health plan participant and her attorney were held in contempt of court after they disobeyed a preliminary injunction ordering them to place $180,000 of their personal injury settlement in trust to satisfy the plan’s equitable lien. Judge Posner flatly rejected the defendants’ argument that their subsequent dissipation of the settlement proceeds prevented the plan from asserting an equitable lien over those proceeds under §502(a)(3) of ERISA). But other decisions hold that attorneys are not fiduciaries holding plan assets. See e.g., UFCW Local 1776 Health Plan et al. v. Deboer et al., 2008 U.S.Dist. LEXIS 73499 (E.D.Pa. Sept. 25, 2008).

5. The U.S. Solicitor General and DOL suggested that plans utilize such measures in their Montanile amicus brief to the court.

6. Comment 4 to Model Rule 1.15 states: “A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved.”

7. Act §502. (a) PERSONS EMPOWERED TO BRING A CIVIL ACTION.—A civil action may be brought . . . (2) by the Secretary, or by a participant, or fiduciary for appropriate relief under section 409. (Emphasis added.)

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