Does Equity Allow an ERISA Plan to Seek Reimbursement from a Participant's General Assets?

CASE AT A GLANCE

Many employee benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) allow plan sponsors to recover plan assets wrongly in the hands of participants. Under ERISA, however, the judicial remedies available to a plan sponsor to enforce this right are limited to an injunction or "other appropriate equitable relief," a phrase that typically does not include money damages. The Supreme Court must decide whether any equitable remedies allow a plan sponsor to recover from a participant's general assets when the participant has dissipated the particular assets belonging to the plan.

Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan
Docket No. 14-723

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From: The Eleventh Circuit

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ISSUE

Does a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seek "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), if the fiduciary has not identified a particular fund that is in the participant's possession and control at the time the fiduciary asserts its claim?

FACTS

With the promulgation of the Federal Rules of Civil Procedure in 1938, federal courts abolished the procedural distinction between law and equity that had persisted for centuries. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. Pa. L. Rev. 909 (1987). Since that time, most scholars have advocated for the abolishment of lingering distinctions between law and equity, on the ground that they introduce an unnecessary formalism into American law. Samuel L. Bray, *The Supreme Court and the New Equity,* 68 Vand. L. Rev. 997 (2015). In particular, these scholars advocate that courts should no longer be required to struggle with the question of whether a remedy was available in a court of law—such as a typical award of money damages—or in a court of equity—such as an injunction or a reward of restitution.

Despite this chorus, the distinction between law and equity persists. It is perhaps most prominent in the jurisprudence of the Seventh Amendment, which guarantees a right to a jury trial only "[i]n Suits at common law." Even after 1938, Congress has continued to embed the distinction in new statutory language, forcing courts to grapple with obscure historical questions about the respective powers of the Chancellor and of common law courts.

This case presents just such a question. The Employee Retirement Income Security Act of 1974 (ERISA) allows plan sponsors to sue participants to enforce a plan's terms, but under a provision providing only the limited remedies of an injunction or "other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). This case tests whether allowing a plan to recover from a participant's general assets when the particular funds being sought have been dissipated is "appropriate equitable relief."

ERISA governs the administration of employee benefit plans by imposing on employers and other plan administrators a fiduciary duty to act in the best interests of plan participants. Paradigmatically, this duty requires ERISA fiduciaries to ensure that participants are paid all the benefits they are due. But it also includes an obligation not to pay too much, to ensure that adequate funds are left for the claims of other participants. See Dep't of Labor, PWBA, Advisory Opinion 77-08, 2 (Apr. 4, 1977), 1977 ERISA LEXIS 56 (holding that ERISA imposes an obligation "to recover erroneous payments made from a plan").

The plaintiff here, the Board of Trustees of the National Elevator Industry Health Benefit Plan (the Plan), sought to fulfill that duty by recouping medical payments that it made on behalf of defendant Robert Montanile, an employee injured in an automobile accident. After the Plan made its payments, Montanile recovered $500,000 dollars in settlement of a tort action against the drunk driver who caused his injury. The Plan asserted that a term in the Summary Plan Description required Montanile to reimburse the Plan out of these funds. Montanile disagreed, contending that the summary did not control, and that the governing Plan documents did not include such a requirement.

After several months of failed negotiations, Montanile's attorney threatened to disburse the settlement funds to Montanile in 14 days if the Plan had not filed suit. Inexplicably, the Plan did not respond or take any other action for over six months. During that period, Montanile's attorney disbursed the funds and Montanile spent them on daily living expenses and child care for his young daughter.

The Plan sued six months later seeking to assert an equitable lien against the settlement funds. By that time, however, Montanile was no longer in possession of any but a small portion of the settlement funds. Because an equitable lien cannot be asserted against dissipated funds, moreover, Montanile contended that the Plan was not seeking "appropriate equitable relief," 29 U.S.C. § 1132(a)(3), and thus had no standing to sue under ERISA. The district court rejected this argument, holding that the Plan was seeking equitable relief because "[t]he settlement proceeds represent an identifiable fund to which the Plan's lien attached."

On appeal, the Eleventh Circuit affirmed. Based on its recent decision in *AirTran Airways, Inc. v. Elem,* 767 F.3d 1192 (11th Cir. 2014), the court held that "the settlement funds were 'specifically identifiable,' and a plan participant's dissipation of the funds thus 'could not destroy the lien that attached before' the dissipation." Montanile petitioned the Supreme Court for review.

CASE ANALYSIS

Both Montanile and the Plan contend that recent Supreme Court precedent compels a result in their favor. For Montanile, the key cases are *Mertens v. Hewitt Associates,* 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co. v. Knudson,* 534 U.S. 204 (2002). In *Mertens,* the Supreme Court laid down the governing principle for interpreting the scope of the "appropriate equitable relief" available under 29 U.S.C. § 1132(a)(3): it is to be "those categories of relief that were *typically* available in equity." In *Great-West,* the Court evaluated the claim of an ERISA plan to reimbursement out of the funds a beneficiary recovered in tort, but that had been used to pay creditors or allocated to a "Special Needs Trust," rather than distributed to the beneficiary. Because an equitable action for restitution allowed a plaintiff to recover only the "particular funds or property in the defendant's possession," rather than to impose general personal liability, and because none of the funds were in the defendant's possession, the Court denied recovery. Montanile contends that the same "tracing" rule means that the Plan cannot recover assets that have been dissipated, and which he no longer possesses.

The Plan by contrast points to *Sereboff v. Mid Atlantic Medical Services,* 547 U.S. 356 (2006), which evaluated a similar reimbursement claim by an ERISA plan. In *Sereboff,* however, the funds the Sereboffs recovered in tort were "set aside and preserved in the Sereboffs' investment accounts." That meant that—even though the equitable remedy of restitution was still unavailable (because, like in *Great-West,* Mid Atlantic could not "trace" the funds from its own hands into the hands of the beneficiary)—Mid Atlantic could seek a different equitable remedy by enforcing the "equitable lien by agreement" that attached to the funds as soon as they came into the Sereboffs' possession. The Plan here contends that it too can enforce an "equitable lien by agreement" on the funds that came into Montanile's possession, even though they were subsequently dissipated, because *Sereboff* removes the need to satisfy any equitable tracing rules.

But neither *Great-West* nor *Sereboff* is directly on point. Unlike the beneficiary in *Great-West,* Montanile actually did possess the relevant funds at one time. And unlike the beneficiary in *Sereboff,* Montanile subsequently dissipated those funds, so that he no longer possesses them.

The Court has never addressed the situation here, where Montanile once possessed the relevant funds but no longer does. In other words, at equity, can the Plan enforce an equitable lien by agreement on funds that Montanile possessed, but then dissipated?

To answer that question, the parties advance fundamentally different conceptual frameworks. For Montanile, the question is primarily historical: In the days of the divided bench, did equity courts enforce equitable liens by agreement when the defendant possessed the particular funds sought at some point, even if the funds were subsequently dissipated? Montanile trots out venerable nineteenth-century precedent and several dusty old tomes to answer the question—*Pomeroy's Equity Jurisprudence, Jones on Liens, the Restatement (First) of Restitution, Tiedeman on Equity Jurisprudence.* According to Montanile, these sources show that an equitable lien historically could not be enforced against a defendant's general assets if the particular funds sought were dissipated.

By contrast, the Plan largely bypasses history and focuses instead on policy arguments, starting from the "time-honored maxim" that "equity suffers not a right to be without a remedy." Consistent with that maxim, the Plan contends that Congress intended ERISA to honor the clear terms in a plan document. Subverting that purpose will lead to perverse results, giving plan participants an incentive to resist payment for the sole purpose of dissipating their assets before the Plan can bring suit. In short, restricting the Plan's recovery merely because Montanile spent all of the funds makes no sense, asserts the Plan. After all, money is fungible, and so the Plan should be able to recover from Montanile's general assets.

To be sure, the Plan does not cede the ground of history entirely. As the Plan points out, the equitable remedy of surcharge allowed recovery from the general assets of a trustee who breached his fiduciary duties, and at least one equitable decision allowed recovery from a constructive trustee who, like Montanile, had dissipated the relevant funds. *Meier v. Meyer,* 43 N.W.2d 502 (Neb. 1950). Moreover, equitable tracing rules allowed recovery from assets that had been commingled with the misappropriated funds. The Plan urges that these principles should be extended to allow the enforcement of a lien on dissipated assets.

Nor does Montanile cede entirely the ground of policy. The Plan's concern that ERISA beneficiaries will stymie legitimate collection efforts by opportunistically dissipating their assets is misguided, Montanile contends, because plans can sue to enjoin such dissipation. Only if a plan sleeps on its rights—as the Plan did here—is there a possibility that it will forfeit its recovery. Moreover, enforcing the equitable tracing rules here makes sense, because lienholders enjoy priority over other creditors, a privilege that should not extend to any assets beyond those specifically claimed.

But the weakness of these arguments made on the other side's turf is apparent. The Plan's examples of equitable recovery from a defendant's general assets are not directly on point, and the Plan can point to no cases in which an equitable lien by agreement was enforced on dissipated funds. Similarly, Montanile's policy argument implausibly assumes that ERISA plans will magically know whenever a beneficiary has recovered assets to which the plan is entitled, and will be able to sue in time to halt opportunistic dissipation. At the end of the day, the dispute resolves simply to history versus policy. That is, should the Court enforce the technical boundaries of equity jurisprudence as it was implemented in the days of the divided bench? Or should it instead view equity as a set of flexible principles that evolve to achieve reasonable policy goals?

SIGNIFICANCE

The immediate significance of this case is that it will determine the scope of the remedies available under ERISA. Several amicus briefs highlight the large number of ERISA plan participants who will be rooting for the Court to limit a plan's ability to obtain reimbursement of benefits paid: disabled individuals who subsequently receive Social Security disability payments and retirees who are overpaid by a pension or 401(k) plan, for example, as well as injured participants like Montanile who recover in tort. All of these groups will benefit if ERISA plan sponsors cannot seek recovery from a participant's general assets, but are instead limited to the traceable product of the particular funds they subsequently recover.

But this outcome would not be an unmitigated good for ERISA plan participants, who will find that it also limits their ability to sue in some circumstances. For example, although other ERISA provisions allow participants to recover money damages, they too must rely on 29 U.S.C. § 1132(a)(3) in some circumstances. For example, in *Mertens*—the case that originally interpreted the "appropriate equitable relief" standard—the Court established that participants may bring a claim against ERISA *nonfiduciaries* only under § 1132(a)(3), and thus only to recover "appropriate equitable relief."

This category of cases is not small, because service providers who contract with an ERISA plan are not considered fiduciaries while they are negotiating their contract. See, e.g., *Hecker v. Deere & Co.,* 556 F.3d 575 (7th Cir. 2009). Any participant contending that a service provider's compensation is excessive must therefore sue under § 1132(a)(3), and the remedies available to such a participant will be further limited if Montanile prevails here. If the Court opts to limit the relief available under § 1132(a)(3), therefore, it will benefit both ERISA plans and participants in certain situations.

A broader implication is that this case will test the Court's commitment to perpetuating the historical distinction between law and equity. Once again, the Court is faced with a choice about how to address the lingering remnants of the divided bench in our judicial system. This is the same choice underlying each of the Court's prior decisions interpreting § 1132(a)(3), stretching back to *Mertens:* The choice to enforce either "the general goals of ERISA," as the Court perceives them, or "the 'fine distinctions' borne of the days of the divided bench."

Moreover, this fundamental question about how best to interpret what Congress means by "equitable relief" has implications for the scores of other federal statutes that contain similar phrases and thus implicate the law-equity divide. From the Administrative Procedure Act's waiver of sovereign immunity for "relief other than money damages" (*Dep't of the Army v. Blue Fox,* 525 U.S. 255 (1999)), to the Judiciary Act of 1789 conferring on federal courts jurisdiction over "all suits … in equity" (*Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.,* 527 U.S. 308 (1999)), to the Seventh Amendment's guarantee of trial by jury in suits at law (*Granfinanciera v. Nordberg,* 492 U.S. 33 (1989)), this dichotomy arises in numerous places in the Court's jurisprudence.

No single case in this series can define the Court's approach. But few of these cases have presented the relevant interpretative issues so starkly. In *Montanile v. Board of Trustees,* the Court must choose between the historical approach, which seeks to import the particulars of equity jurisprudence from a prior age into modern doctrine, and the purposivist approach, which instead uses the flexible principles of equity to achieve the statute's purposes as the Court perceives them today. The answer that the Court gives will provide significant hints about how the Court intends to continue drawing the line between legal and equitable remedies.

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In October, the Court heard a number of interesting cases. Below we highlight some of the more engaging exchanges between the justices and the advocates during *Campbell-Ewald Co. v. Gomez* (14-857). *Campbell-Ewald Co.* presented the Court with the issue of whether a defendant's settlement offer that provides complete relief moots a plaintiff's case.

Justice Anthony Kennedy: It seems that you want us to write an opinion saying that a settlement offer is equivalent to a judgment. And we've had cases, like the *Kokkonen* case, in which there was a settlement approved by the court, case dismissed, then the settlement was not performed. They went to court seeking an injunction. The court said, no, no. You have a contract. You have to file again. You have to go into a different court. You have to start all over again. A settlement offer and a settlement contract and a settlement agreement are different from a judgment, and you do not have a judgment.

Mr. Gregory Garre: Well, Your Honor, I think that the accepted principle is that a settlement moots the case and requires the court to dispose of the case. I mean, I think that's the accepted principle.

Justice Kennedy: But you didn't pursue that. You didn't apply under the rules for a judgment. And if you want us to write an opinion and say, oh, well, a settlement offer is the same as a judgment, that just doesn't equate with the Federal Rules of Civil Procedure or with our cases like the *Kokkonen* case.

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Chief Justice John Roberts: If you're getting everything you want, what is the case or controversy? What is the live dispute in which you have a personal stake toward the terms we use under Article III?

Mr. Mitchell: The live dispute is in obtaining a court judgment that incorporates that relief that's been offered.

Chief Justice Roberts: So well, what is it you're worried about, that they won't make good on the offer?

Mr. Mitchell: The mere offer of complete relief does not have anything to do with mootness. Even if the plaintiff and the defendant agree on what the proper judicial relief should be, the only question in that situation is whether the court should enter judgment for the plaintiff, not dismiss the case for lack of jurisdiction.

Justice Samuel Alito: Suppose Mr. Garre right now were to take a big stack of cash out of his briefcase, or a certified check, and present that to you. Would there be any case left then?

Mr. Mitchell: There might be a defense on the merits if Mr. Garre's client can say, we've paid the debt.

Justice Alito: There would be a case or controversy? If this were an individual action and … the amount of potential damages are undisputed, and the plaintiff has received that amount from the defendant, no dispute about it, there wouldn't be a live case or controversy.

Mr. Mitchell: The defendant would have a defense on the merits. He could plead accord and satisfaction. He could plead res judicata. ■