

## Chasing The Money

By Wm. Jere Tolton, III

This article examines the use of ERISA enforcement mechanisms when there has been a third-party recovery against which a constructive trust or equitable lien by agreement may lie.

# Navigating The Complexities Of Equitable Relief Under Erisa § 502(A)(3)

The Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. §§ 1001 *et seq.*, regulates the administration and enforcement of employee welfare benefit plans, including most private employer health and disability insurance plans. These types of plans frequently contain language allowing the plan, through its plan administrator or insurer, to seek reimbursement when the plan pays benefits or medical expenses to or for the benefit of a participating employee (“plan participant”) or their covered dependents.

A typical fact pattern involves a plan participant or beneficiary who sustains accident-related injuries caused by a third party, thereby incurring medical expenses that are paid by an ERISA-regulated health plan. If the participant or beneficiary then sues the third-party responsible for the injuries and achieves a recovery, whether by settlement, judgment, or otherwise, most health plans require the participant to reimburse the plan for the expenditures it made, and impose a lien against the third party recovery in the amount paid by the plan. Essentially, a condition of plan benefits is the promise to reimburse. Benefit plans can reasonably expect that participants and beneficiaries will honor their reimbursement obligations to the plan voluntarily. Most do. But when the participant or beneficiary refuses to cooperate after securing a tort settlement or disputes the reimbursement amount, a plan fiduciary may have few options other than a lawsuit to enforce the plan’s reimbursement provision to try to recover at least a portion of what was paid.

This article examines the use of ERISA enforcement mechanisms when there has

been a third-party recovery against which a constructive trust or equitable lien by agreement may lie. After a brief overview of the Supreme Court decisions in this area, the article addresses recent cases applying the remedial reach of § 502(a)(3) and offers practical tips and strategies for recovery of plan assets.

### Appropriate Equitable Relief Under Section 502(a)(3)

Equitable relief to enforce a reimbursement provision in a welfare benefit plan is permissible under ERISA § 502(a)(3). A plan fiduciary may bring a civil action under this section “to obtain other appropriate equitable relief to redress ... [or] to enforce ... any act or practice which violates ... the terms of the plan.” 29 U.S.C. § 1132(a)(3). Reimbursement provisions in ERISA plans create an equitable lien by agreement in favor of the plan against any future recovery by the plan participant. “An ERISA plan creates an equitable lien by agreement when, under the terms of the plan, one party agrees to convey a particular fund to another party.” *Arrington v. Sun Life Assur. Co. of Canada*, No. TDC-18-0563, 2019 WL 2571160, at \*14 (D. Md. June 21, 2019) (internal quotation marks and citation omitted). The enforcement of reimbursement provisions helps to ensure the financial security of health and disability plans, honors the terms of ERISA plans as written, and controls the cost of maintaining such plans for employers and their employees.

### Supreme Court Decisions Addressing the Scope of § 502(a)(3) Relief

In 1993, the Supreme Court in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), held that equitable relief under § 502(a)



**Wm. Jere Tolton, III** is a partner at Kilmer, Voorhees & Laurick, PC in Portland, Oregon. He devotes his law practice to ERISA litigation representing insurance companies and employers in benefit claims disputes, regulatory compliance issues, and fiduciary responsibilities under welfare benefit and retirement plans.

(3) is limited to the categories of relief that were typically available in courts of equity (namely, injunction, mandamus, and restitution). The Court held that plans cannot use § 502(a)(3) to impose personal liability on non-fiduciaries to recover compensatory damages for monetary losses to the plan. *Id.* at 256, 113 S.Ct. 2063.

The Court elaborated on this construction in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), in which it held that an action by a health plan's stop-loss insurer for equitable restitution under § 502(a)(3) was, in reality, an impermissible attempt to impose personal liability on a plan beneficiary, on whose behalf the health plan had paid medical expenses arising from injuries sustained in a car accident. Even though the health plan included a reimbursement provision that required the beneficiary to repay the plan after a third-party recovery, the Court held that the insurer's claims were not authorized because the "nature of the underlying remedies" was money damages – the classic form of legal relief. *Id.* at 213, 122 S.Ct. 708. The Court reasoned that a key feature of equitable restitution in the days of the divided bench (that is, before 1938 when courts of law and equity were separate) was that it imposed a constructive trust or equitable lien on "particular funds or property in the defendant's possession." *Id.* at 214, 122 S.Ct. 708. This possession requirement was not satisfied in *Knudson* because the settlement funds from which the insurer sought reimbursement were not in the beneficiary's possession. *Id.* Accordingly, the Court determined that the insurer's claim for equitable restitution could not proceed under § 502(a)(3) as the relief sought was "not equitable – the imposition of a constructive trust or equitable lien on particular property – but legal – the imposition of personal liability for the benefits that [the insurer] conferred upon [the beneficiary]." *Id.*

*Knudson* instructed that an ERISA plan's equitable lien rights attach only to an "identifiable fund" in the control or possession of the plan participant or beneficiary, meaning that the recovery must be derived from the third-party recovery, rather than the obligor's general funds. This principle was reinforced in

*Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), another instance in which an ERISA health plan sued to recover expenditures under § 502(a)(3). The fact pattern was by now familiar. The plan had paid medical expenses incurred by plan participants who suffered injuries in an auto accident. After the participants negotiated a settlement in their personal injury lawsuit against the at-fault driver, the plan claimed part of the proceeds, citing the plan's reimbursement provision. The participants refused to repay despite several letters to their attorney about the plan's lien. The plan then sued the participants in federal court under § 502(a)(3) and won.

*Sereboff* held that both the nature of the claim and the remedy sought by the plan were equitable and thus permissible. The plan was seeking reimbursement from specifically identifiable funds within the participants' control (a portion of their settlement recovery). In suing the participants for reimbursement of medical expenses paid by the ERISA plan, the Court recognized that the plan appropriately relied on constructive trust principles espousing, "that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." *Id.* at 363-64, 126 S.Ct. 1869 (quoting from *Barnes v. Alexander*, 232 U.S. 117, 121, 34 S.Ct. 276, 58 L.Ed 530 (1914)). In other words, a person who agrees to convey specific funds not yet acquired becomes a trustee upon securing possession of those funds. *Sereboff* concluded that the plan's claim for reimbursement was the modern equivalent of an action in equity to enforce a contract-based lien — that is, an equitable lien by agreement *over* funds that the participants had promised to repay. *Id.* at 360-63, 126 S.Ct. 1869 (holding that the plan fiduciary could seek reimbursement where settlement proceeds were held in an investment account); *see also*, *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 93-95, 133 S.Ct. 1537 (2013) (plan fiduciary could seek equitable relief from plan participant where a portion of the settlement funds were held in escrow and the remainder was identifiable and within his possession).

A plan is no longer pursuing "equitable relief" under § 502(a)(3), however, when it seeks to enforce its lien against the obligor's

general assets. The Court in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 577 U.S. 136 (2016), held that the plan insurer could not obtain a lien under § 502(a)(3) against a beneficiary's assets generally when the third-party settlement had already been dissipated on nontraceable items. Once the beneficiary has "dissipated" settlement proceeds on nontraceable items, the action loses the mantle of "appropriate equitable relief." 577 U.S. 136, 136 S.Ct. 651. The Court observed that the premise of an equitable lien by agreement is the constructive possession of a fund held by the defendant to which the plaintiff is entitled. Equitable liens are enforceable only against a specifically identified fund because an equitable lien "is simply a right of a special nature *over* the thing ... so that the very thing itself may be proceeded against in an equitable action." *Id.* at 145 (citing 4 S. Symons, Pomeroy's Equity Jurisprudence § 1233, at 692).

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*Montanile* serves as a cautionary tale for plan fiduciaries not to dawdle. Injured by a drunk driver, the plan participant signed a reimbursement agreement reaffirming his obligation to reimburse his employer's health plan from any tort recovery he obtained. The participant sued and obtained a \$500,000 settlement, more than enough to reimburse the medical expenses the health plan paid on his behalf. The attorney for the participant held a portion of the tort recovery in escrow while trying to negotiate with the plan to compromise



its lien. After negotiations failed, the participant's attorney warned the plan fiduciary that the reserved funds would be delivered to the client within 14 days. The fiduciary failed to take immediate steps to protect its interests, waiting six months to file suit, by which time the escrowed funds had been released to the client and spent on nontraceable items. The Court ruled that once the plan participant had spent all of the settlement money on nontraceable items, the plan's equitable lien was eliminated and the fiduciary could not rely on § 502(a)(3) to attach a lien to general assets. *Id.* at 145-146, 136 S.Ct. 651.

### Recent Efforts by Plans to Obtain “Appropriate Equitable Relief” Under § 502(a)(3)

In recent years, federal courts have generally been receptive to efforts by plan fiduciaries to enforce reimbursement provisions in benefit plans, adhering to ERISA's objective of having the terms of the plan enforced as written. *E.g., Vercellino v. Optum Insight, Inc.*, 26 F.4th 464 (8th Cir. 2022) (health plan, which paid medical expenses of plan beneficiary injured in an accident, was entitled to reimbursement from proceeds recovered in personal injury lawsuit); *Publix Super Markets, Inc. v. Figareau*, 857 F. App'x 545 (11th Cir. 2021) (enforcing an equitable lien

under a self-funded health plan where the covered participants later secured a medical malpractice settlement; declining to limit the amount of reimbursement under the lien); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Haynes*, 966 F.3d 655, 657 (7th Cir. 2020) (concluding that an equitable lien by agreement acts to carry out a contract's provisions — in this case, a health plan's subrogation and reimbursement provisions; enforcing subrogation provisions against a health plan beneficiary); *but see, GC America Inc. v. Hood*, No. 20 cv 03045, 2022 WL 910556 (N.D. Ill. Mar. 29, 2022) (dismissing a health plan's § 502(a)(3) claim for reimbursement of plan-covered medical expenses for failure to plead that the defendant had possession of the settlement funds from which the reimbursement would be paid); *Dean v. Aetna Life Ins. Co.*, No. 21 cv-363, 2022 WL 847249 (S.D. Ohio Mar. 22, 2022) (dismissing plan insurer's counterclaim for overpayment of long-term disability benefits where action was premised on state contract law and sought to recover legal damages).

Some courts recognize that the plan participant cannot defeat the plan's recovery efforts simply by combining entrusted funds with personal funds. Any commingling of wrongfully possessed funds and personal funds permits a lien on

the commingled account. *See, e.g., Zirbel v. Ford Motor Co.*, 980 F.3d 520, 524 (6th Cir. 2020) (citing *Montanile*, 577 U.S. at 144-45); *see also, Sheet Metal Workers' Health and Welfare Fund of North Carolina v. Law Office of Michael A. DeMayo, LLP*, 21 F.4th 350, 354 (6th Cir. 2021) (“[I]f a defendant only commingles the plaintiff's claimed funds with its other assets, the defendant still possesses the claimed funds, making the plaintiff's remedy an equitable one.”) (citing *Knudson*, 534 U.S. at 213-14, 122 S.Ct. 708)). Nonetheless, plan fiduciaries seeking equitable relief under a § 502(a)(3) action must act diligently to follow the money to the “specifically identified fund” or to traceable items such as a car, house, or an investment fund. *Id.* at 524 (citing *Montanile*, 577 U.S. at 149) (noting that when funds can be traced to such hard assets, the lien attaches to the asset, preserving the fiduciary's ability to recover in equity).

To hedge against the risk of funds dissipation, ERISA plans may opt to include recoupment provisions that can be utilized when the participant fails to comply with reimbursement obligations but continues to submit claims under the plan. Under this type of provision, the unreimbursed benefits are offset against future liability for covered expenses until the past obligation is resolved. As the

Ninth Circuit recognized in *Mull v. Motion Picture Industry Health Plan*, 41 F.4th 1120 (9th Cir. 2022), “self-help remedies” such as these “do not require a civil action under § 502(a)(3) to enforce.” *Id.* at 1130. In *Mull*, the health plan paid medical expenses to a dependent beneficiary after she was injured in an accident. Although the plan included an enforceable reimbursement provision to recover paid medical expenses out of third party settlement funds, the beneficiary spent those funds instead of reimbursing the plan. The plan, invoking its recoupment provision, continued processing medical claims submitted by the participant and his dependents in the usual course. But instead of making payments to the service providers, the plan applied its share of the covered expense as a credit against the unreimbursed benefits stemming from the dependent beneficiary’s accident.

The participant and his covered dependents, distressed by this turn of events, sued under ERISA’s civil enforcement provision, § 502(a)(1)(B), and “catch-all” provision, § 502(a)(3), to recover benefits withheld and compel the plan to honor future claims for covered services. Citing *Knudson* and its progeny, the plaintiffs argued that the plan’s only remedy was an equitable action for relief under § 502(a)(3), relief that was futile since the settlement funds targeted for reimbursement had already been spent on nontraceable items. Finding that the plan’s recoupment provision did not violate ERISA’s exclusive remedial scheme, the Ninth Circuit aligned itself with the “numerous” courts that have enforced similar self-help remedies without resort to judicial action under § 502(a)(3). *Id.* at 1137-38 (collecting cases). Because the plan’s terms authorized the recoupment procedure by crediting future covered expenses against the standing obligation, the “identifiable fund” requirement was not implicated. “As our court and others have recognized, plan fiduciaries may bargain for and implement self-help remedies that do not require judicial enforcement.” *Id.* at 1138.

### Practice Tips

The following are tips and strategies for the practitioner seeking to assist a plan fiduciary recover funds from a participant

or beneficiary who has received funds from a third-party settlement:

1. *Review the plan document.* Before taking any action to enforce the lien, review the plan document to ensure that it includes a provision for an equitable lien by agreement and that the lien is valid and enforceable. Anticipate that the plan participant or beneficiary may argue that the lien is not valid because it is not included in the plan document or that it was not properly established through a written agreement between the parties. *E.g., Messing v. Provident Life & Accident Ins. Co.*, 48 F.4th 670 (6th Cir. 2022) (declining to allow an equitable lien by agreement for repayment of plan benefits where no plan provision identified a particular fund to be the source of the disputed repayment obligation).

2. *Identify the lien amount.* Determine the amount of the lien and the specific funds that are subject to the lien. Be prepared to document that the lien amount is correct. Plans may include language requiring that any third-party recovery be kept separate from other funds and be held in trust until conveyed to the plan.

3. *Send formal notice of lien rights.* Make sure to secure the participant’s written acknowledgement of responsibility for reimbursing the plan in the event there is a third-party recovery. Have the participant sign a reimbursement agreement once a claim under the plan is made, when the incentive to cooperate with the plan is arguably at its peak. Send written notice to the participant informing them of the plan provisions on potential third-party recoveries. The notice should include deadlines by which the plan is to be notified of any legal action against third parties and a separate deadline by which the plan is to receive reimbursed funds following the third-party settlement or recovery.

4. *Communicate, again and again.* Establish regular communication with the participant and their attorneys. This will demonstrate due diligence on the part of the plan fiduciary that can be persuasive if legal action is required. Moreover, persistent communication about the reimbursement right may

produce a negotiated repayment plan or satisfactory recovery without the expense and risks of legal action.

5. *File suit under § 502(a)(3).* If negotiation is not successful and the participant or beneficiary is not willing to repay the funds voluntarily, consider legal action under ERISA § 502(a)(3). This may include joining the personal injury attorney as a co-defendant in the § 502(a)(3) lawsuit. An individual attorney or law firm that holds disputed settlement funds on behalf of a plan participant or beneficiary need not be a party to the plan to be subject to suit under ERISA. ERISA recognizes that nonplan defendants can be subject to liability. *See Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246 (2000) (“§ 502(a)(3) admits of no limit ... on the universe of possible defendants.”). “[T]here is no statutory barrier that prevents [the plan participant’s attorney] from being a defendant in a suit brought pursuant to § 502(a)(3) of ERISA, provided that the relief sought lies in equity.” *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Haynes*, 397 F.Supp.3d 1149, 1161 (N.D. Ill. 2019), *aff’d*, 966 F.3d 655 (7th Cir. 2020) (quoting *Longaberger Co. v. Kolt*, 586 F.3d 459, 468 (6th Cir. 2009) (abrogated on other grounds by *Montanile*)); *see also, Synchrony Financial Welfare Benefits Committee v. DeMayo Law Offices, LLP*, No. 3:21-cv-00376, 2022 WL 2600165 (W.D. N.C. July 8, 2022) (noting attorneys and law firms are subject to suit under ERISA § 502(a)(3)). Joining the participant or beneficiary, their lawyer, and the lawyer’s firm helps to avoid ambiguity about who possesses the money. A motion can be made compelling the attorney to deposit the disputed amount with the court pending the outcome of the § 502(a)(3) litigation.
6. *Trace the funds.* This can be achieved through the use of interrogatories and other discovery, or through a records subpoena of bank records. Once you have traced the funds, seek a preliminary injunction or temporary restraining order to enjoin defendants from disposing of or dissipating the funds in possession, being careful to identify the



specific funds subject to the equitable lien. Circumstances depending, try to negotiate the terms of a proposed order in which the settlement funds are preserved. Notably, in *Sereboff*, the defendants agreed to preserve \$74,869.37 of the disputed settlement funds in an investment account until the Court ruled on the merits of the § 502(a)(3) claim. 547 U.S. at 360, 126 S.Ct. 1869. If a law firm is holding settlement funds in an IOLTA while the lien issue is litigated, it may be possible to negotiate

an agreement, reduced to a stipulated order, to maintain those funds at issue in trust until further order or resolution of the litigation. But be sure to ask the court to specify the settlement funds or the funds belonging to the plan in its order requiring a defendant to retain the funds, as an order restraining the dispersing of general assets held by the defendant may be deficient.

In the end, the most important strategy is vigilance. The plan fiduciary must closely monitor the plan participant's efforts to

recover reimbursable funds from third-parties. Requesting regular status updates about a workers' compensation claim or an application for social security benefits, or tracking the progress of a negligence action against the tortfeasor that the participant seeks to hold accountable, provides the diligent fiduciary its best chance to recover reimbursement, and best opportunity to avoid litigation.



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