



A Year Later . . . Montanile Remembered, Lessons Learned

By: Christopher M. Aguiar, Esq.

Things were going so well. In the game of subrogation cases being heard by the Supreme Court of the United States, self-funded benefit plans under the purview of ERISA were on a roll. First, it was *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), then *U.S. Airways v. McCutchen*, 133 S. Ct. 1537 (2013). Some even considered *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) to have been unfairly viewed as a loss for the subrogation industry because despite a decision against Great West Life, it provided the blue print followed by *Mid Atlantic Medical Services, Inc.* to elicit the favorable decision that led to the recovery in *Sereboff*. As is the case in most games, momentum can be lost in the blink an eye.

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Often times, when the momentum is heavily in one's favor, the successors eventually let their guard down. Enter *Montanile v. Board of Trustees of Nat. Elevator Industry Health Benefit Plan*, 136 S. Ct. 651 (2016). Montanile was the victim of an accident with a third party who was driving under the influence of alcohol. Montanile's benefit plan paid approximately \$120,000 in medical claims arising from the accident. Following the accident, he sued the driver of the vehicle and obtained a settlement in the amount of \$500,000. Settlement negotiations between Montanile and the Plan broke down and his attorney warned the Plan that he intended to disburse the funds to Montanile. The Plan did not respond until almost seven months later when it filed a lawsuit in which the Plan argued that even though Mr. Montanile had spent some or all of the settlement funds, the Plan still had a right to the funds. The Supreme Court disagreed, stating that the Plan would have had an equitable right if it had "immediately sued to enforce the lien against the settlement fund then in Montanile's possession" and that suing Montanile to attempt to attach his general assets was a legal remedy not available to the Plan under ERISA 502(a)(3). *Id.* at 658.

Immediately following the period when the Court announced that it would be granting certiorari and hearing arguments in *Montanile*, subrogation experts rationalized what they had hoped would be the outcome; mainly, that the highest court in the land would not put forth a decision that effectively allowed plan participants to take the money and run – but we all knew better; and the Court affirmed our fears; that the Plan's equitable remedy may be extinguished when funds are disbursed.

In the almost fourteen months since *Montanile*, there has not been much movement. The case has been cited in several briefs and other cases, but there is nothing of a significant nature to report. That said, in the interest of keeping the issue fresh in everyone's mind and not allowing the importance of a benefit plan's third party recovery rights take a back seat, let us take the opportunity to recall the keys to a successful recovery program and some best practices – many of which have received favorable treatment in the few cases that have addressed the problem created by *Montanile*.

Plan Language

Perhaps the most important thing to remember is that *Montanile* did not actually change the law. Plan language continues to be the most important consideration in determining whether a plan has a right to 100% reimbursement. Regardless of whether the funds have been disbursed to the participant and/or whether they have been spent on non-traceable assets, if a plan's language is inadequate, the plan will not be able to enforce its right to a full reimbursement. *Montanile* did not change the decision in *McCutchen*, which clearly stated, "In a §502(a)(3) action based on an equitable lien by agreement—like this one—the ERISA plan's terms govern. Neither general un-just enrichment principles nor specific doctrines reflecting those principles—such as the double-recovery or common-fund rules invoked by *McCutchen*—can override the applicable contract." 133 S. Ct. at 1540. Ensuring your plan's language is as strong as possible remains imperative to maximizing recoveries.

Investigation is the Key

The Supreme Court in *Montanile* disagreed with the Plan's assertion that its equitable remedy should be enforceable regardless of the whereabouts of the settlement fund and did not appear to have any pity for the burden on the Plan to protect its right. The Court stated:

... The Board protests that tracking and participating in legal proceedings is hard and costly, and that settlements are often shrouded in secrecy. The facts of this case undercut that argument. The Board had sufficient notice of Montanile's settlement to have taken various steps to preserve those funds. Most notably, when negotiations broke down and Montanile's lawyer expressed his intent to disburse the remaining settlement funds ... unless the Plan objected ... The Board could have – but did not – object. Moreover, the Board could have filed suit immediately, rather than waiting half a year.

Montanile at 662.

The Court's statements here seem to indicate a pretty clear burden on plans to engage in their own investigations and take any and all steps necessary to protect their interests though it does seem to leave the door open for some flexibility in its decision in a situation where perhaps the facts are different. For example, would the Court have ruled differently if the Plan did not "have sufficient notice" of Montanile's settlement? This appears to have been the case in *AirTran Airways, Inc. v. Elem*, 767 F.3d 1192 (2014). In *Elem*, the attorney ultimately obtained a settlement of over \$500,000 against the responsible driver but told AirTran that the settlement had been for the insurance policy limit of \$25,000. He then inadvertently sent a copy of the \$475,000 check of which he had neglected to advise AirTran. In this case, there appears to have been overt acts to deceive the Plan with regard to the settlement. Would the Court have ruled the same way if faced with these facts?

Regardless, to avoid situations like this, the Plan **MUST HAVE** an effective investigation unit. All too often investigations are halted based on an insufficient self-report. Everyone can agree that a participant that falls down the stairs at home does not present a recovery opportunity; but what if that person's "home" is a rental apartment and the "fall down the stairs" resulted from a broken stair and faulty railing in the main hallway? If the investigation unit is ill-equipped to ask the right questions or identify when someone is masterfully crafting answers to avoid the question without lying, a plan will miss recovery opportunities.

And the Key to Investigation is Data

A high quality investigation unit is a pivotal part of any recovery process, but access to a plan's data is where it all begins. The Court's decision in *Montanile* effectively put a ticking clock on a plan's recovery rights. The earlier a plan is involved, the better chance it will have to be aware of potential recovery opportunities and on top of the availability and whereabouts of the potential recovery funds. The most effective way to do that is to both be able to access claims data and also be able to expertly analyze and identify opportunities in the data. When paired with the most cutting edge technology and resources, data can be utilized to find out about recovery opportunities quickly and put a plan in the best position to succeed.

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Funds Disbursed? ... All May Not Be Lost ...

Certainly, *Montanile* threw subrogation professionals a bit of a curveball, but most of us knew this curveball was in the arsenal. Ensuring that you can trace the funds is always the best option; but since *Montanile*, some courts have reminded us that even if the funds are disbursed, a plan may still have some options. First, the Supreme Court in *Montanile* held that a plaintiff can “enforce an equitable lien only against specifically identified funds that remain in the defendant’s possession or against traceable items that the defendant purchased with the funds.... A defendant’s expenditure of the entire identifiable fund on non-traceable items ... destroys an equitable lien.” *Montanile*, at 658. For the Plan to lose its right of recovery, the participant must spend the money on items that cannot be traced. So, if the participant purchases a car, property, or asset of some sort, the plan may still be able to enforce its right.

Further, even if the funds are disbursed, the Plan may have a claim for accounting or disgorgement of profits. In *Homampour v. Blue Shield of California Life and Health Insurance Company*, the Northern District of California stated the following:

Montanile does not entirely foreclose plaintiffs’ claim. Plaintiffs have not alleged how or from what funds plaintiffs seek to recover disgorgement of profits. It is possible that plaintiffs will present evidence demonstrating that the profits they seek to disgorge are specifically identifiable and within defendants’ possession.

Slip Copy, 2016 WL 4539480 at 8



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Finally, even in a circumstance where a plan's equitable remedy is completely lost, the plan may still have a legal remedy under a breach of contract theory. In *Unitedhealth Grp. Inc. v. MacElree Harvey, Ltd.*, the U.S. District Court for the Eastern District of Pennsylvania noted that "assuming Ms. Neff had at that point already dissipated the settlement recoveries, then, pursuant to *Montanile*, the Plan could seek legal redress against Ms. Neff for breach of contract." *Slip Copy*, 2016 WL 4440358 at 7,

Conclusion

Subrogation, like many cost containment options, is complicated. Understanding the legal framework, the differences between the remedies that may be available, the advantages and drawbacks to the different options and utilization of different remedies, and having all the resources to recover effectively can be incredibly burdensome. It requires experience, technical aptitude with data, and access to legal resources necessary to protect the plan's rights. *Montanile* served as a painful reminder; but all is not lost. A plan can take steps to protect itself, maximize its recovery dollars, and ensure compliance with its fiduciary duty to enforce the terms of the plan and ensure its viability. ■

Christopher Aguiar is an attorney with The Phia Group, LLC. Since 2005 he has managed thousands of subrogation and third party recovery cases nationwide and spearheaded negotiations between plan participants, plaintiffs' counsel, and plan administrators on matters of State and Federal Law as well as ERISA Preemption, recovering millions of dollars on behalf of benefit plans. Since receiving his license to practice law in the State of Massachusetts in 2014, Chris has also handled plan drafting and plan consulting matters ranging from plan language analysis, claims appeal assistance, balance billing defense, pre-payment claim negotiations, overpayment recovery, stop loss, PPO, and administrative service agreements.

