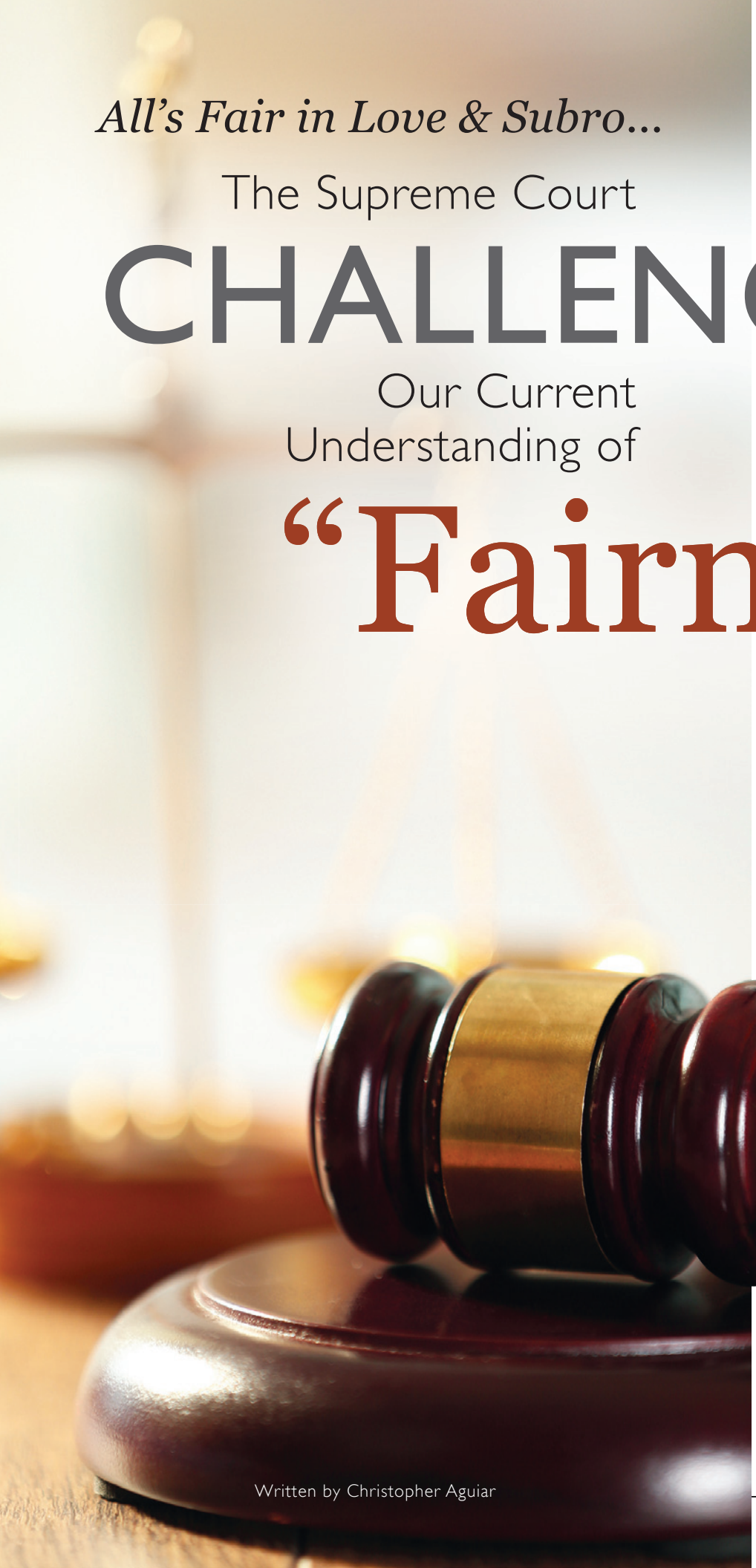
All's Fair in Love & Subro...

The Supreme Court CHALLENGES Our Current Understanding of "Fairness"



Written by Christopher Aguiar

Legal writing in statutes and case law, alike, can be difficult to understand. Phrases like 'heretofore' and 'notwithstanding' often make it quite the headache to read for those with an untrained eye. Many, including much of legal academia, argue that the law is better served with clarity. With that in mind, allow me to state this as clearly as possible: on January 20th, 2016, The Supreme Court of the United States ruled that a plan participant who receives benefits from its health plan due to injuries caused by a third party and later receives a settlement from any third party related to those injuries, may avoid reimbursing the benefit plan by simply spending the settlement money. This is true even when that plan participant knows that some or all of those settlement funds are to be reimbursed to the benefit

plan, in full. And this, the Supreme Court opines, is equitable?

In the interest of keeping this article as simple as possible, the term "equitable" is really just a fancy word for "fair." Any health subrogation representative recognizes this notion of "equity" or "fairness" all too well; they have been contending against members and their representatives with it for years. In fact, over the past few years, the concept has been interpreted overwhelmingly in favor of benefit plans. The typical scenario goes something like this: a plan participant's attorney calls the plan's subrogation representative and demands that the benefit plan reduce its right to reimbursement from the third party settlement the plan participant just received. And so the chess match begins!

The attorney goes down the checklist of arguments that was likely pulled from a form letter distributed at the latest conference for personal injury attorneys. First, the attorney claims that under the Employee Retirement Income Security Act of 1974 ("ERISA"), if the plan cannot produce every document ever even contemplated on behalf of the plan since its inception, the participant has no obligation to comply with the terms of said plan. Then, the attorney cites decisions like *Cigna Corp. v. Amara, Ark. Dep't of Human Servs. v. Ahlborn, Wurtz v. Rawlings* and others, regardless of whether the attorney's arguments are actually supported by the court's opinion – which they are often not. Baffled by the insistence of the plan that it is entitled to be reimbursed in full (despite the plan's clear language to that effect), the attorney resorts to the notion that the plan participant was not "made whole," and so the plan is not entitled to *anything*. Finally, he's left with the argument that regardless of the plan's ability to emerge victorious on any of those issues, *surely* the benefit plan understands that it has an obligation to reduce its lien in accordance with its "fair" share of the costs of pursuing the recovery – because, *naturally* – the plan could certainly not have recovered without the attorneys efforts!

Once these arguments have been defeated with the long list of cases provided to us by the Supreme Court that unequivocally state that Plan's terms control the arrangement for benefits between the plan and its beneficiaries, many lawyers will concede that the law leans in favor of the Plan and accept that the most prudent approach is to come to an amicable settlement or face federal litigation. After all, there is considerable value in avoiding the delays and costs of trial on these issues especially when the outcome is reasonably certain. A select few attorneys, however, frantically seeking just one more argument, resort to one of the most basic concepts there is. That concept is fairness. Quite simply, these attorneys argue that it is not *fair* for a benefit plan to be able to sit back and recover the money of the injured participant and their attorney. They wonder, "why should a benefit plan be able to get a free ride off the actions of the Plan participant? No fair!"

Frankly, until now, the answer to that question has been quite simple; the Supreme Court has very clearly stated that the terms of the plan define what it means to be equitable. Put more simply, by virtue of the understanding between the plan participant and the benefit plan as set forth in the terms of the plan, the plan is allowed to decide what is "fair." In most cases, then, guided by the language of an effective subrogation and recovery provision, "fair" was determined to mean that the plan was entitled to 100% recovery, up to the total amount received by the plan participant, even if that meant (practical ramifications aside) that the plan participant received none of the settlement as a result of its obligation to reimburse the plan. Regardless of the participant's damages or losses as a result of the accident, every penny of the settlement was considered the property of the plan until the plan was fully reimbursed.

In *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, however, the Supreme Court established a new idea of what "fair" actually means. Mr. Montanile was the victim of an accident with a third party who was driving under the influence of alcohol. Mr. Montanile's benefit plan paid approximately $120,000.00 in medical claims arising from the accident. Following the accident, Mr. Montanile sued the driver of the vehicle and was able to obtain a settlement in the amount of $500,000.00. The Plan and Montanile's attorney engaged in negotiations for some time, but after discussions broke down, Montanile's attorney warned the Plan that he was going to remove the funds from his trust account and disburse them to Mr. 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 any of the funds whether Montanile actually had them or not. 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." Further elaborating on the effects of delayed action by the Plan, the Court expressed no pity for the steps that a Plan might be required to take 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 Boar could have – but did not – object. Moreover, the Board could have filed suit immediately, rather than waiting half a year."*

Given all the above, it is clear that the Supreme Court disapproved of the Plan's failure to protect itself in a timely manner. Did the Court, however, give any consideration to whether it was appropriate for Mr. Montanile to spend money he knew was not his? Not only did the Supreme Court comment on the appropriateness of Mr. Montanile's actions, its opinion all but endorsed the strategy, providing a plan participant with plenty of fodder to rely on to avoid its reimbursement obligation. According to the Supreme Court, "Even though the defendant's conduct was wrongful, the plaintiff could not attach the defendant's general assets."

Despite all of the negative rhetoric pervading the health subrogation industry following this case and the Supreme Court's decision that it is "fair" for a plan participant to simply spend settlement funds that do not belong to the participant, all hope is not lost. The fact remains that strong and clear plan language prevails in circumstances where a

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self funded benefit plan takes all the steps necessary to actually preserve the settlement funds - although this case reinforces the notion that strong plan language alone is not enough. In order to ensure that benefit plans recoup all funds that were advanced on behalf of a plan participant despite those damages being the responsibility of a third party, benefit plans must have a comprehensive recovery process that ensures early identification, intervention in and constant oversight over those subrogation opportunities. Gone are the days where a benefit plan can take its time to decide whether it is willing to reduce its interest rather than file suit. No longer can subrogation claims be handled as though they are the least important aspect of a claims administration process; instead, they must now be treated with care and extreme urgency. Legal resources must be available from the outset so threats to settlement funds can be handled with creative legal arguments and assertions of ethical obligations that may force an attorney to hold settlement funds pending resolution and most importantly, so that legal action can be taken, as the Supreme Court put it, "immediately."

Make no mistake: attorneys who have been expressing righteous indignation over how "unfairly" self-funded benefit plans have treated their clients over the years will now argue that it is perfectly "fair" for their clients to avoid their obligation by spending the settlement funds received. Can you blame them? We've been beating the drum of the Supreme Court's interpretation of fairness proudly since the pendulum shifted in favor of benefit plans sometime after the Supreme Court's decision in *Great-West Life and Annuity Ins. Co. v. Knudson* in 2002. The difference here, though, is that in all the cases since Knudson, the Supreme Court has made it clear that a health plan can establish an ownership right over those funds and with this decision the Supreme Court has now seemingly provided plan participants with an incentive to do like the Steve Miller Band did in the 70's and "take the money and run."

Luckily, we in the self-funded industry have the luxury of having resources at our disposal to ensure that the plan's assets are protected and that the plan's rights are not lost. The only question is, do you have the plan language and recovery process to make sure the clock doesn't run out on your subrogation rights? ■

Christopher Aguiar is an attorney with The Phia Group, LLC. Beginning his career in 2005 and specializing primarily in subrogation recovery, Chris has managed thousands of 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.