

Client Alert

A report
for clients
and friends
of the firm May 2006

Possession is Nine Tenths: U.S. Supreme Court Allows ERISA Plans To Seek Reimbursement of Participant Recoveries From Third Parties

On May 15, 2006 the U.S. Supreme Court ruled that ERISA fiduciaries may use ERISA § 502(a)(3) to enforce plan reimbursement provisions against plan participants who take possession of funds recovered from third parties that caused the injury or sickness. See *Sereboff v. Mid Atlantic Medical Services, Inc.*, Slip Op. No. 05-260 (May 15, 2006).

Background

The Sereboffs were beneficiaries of an ERISA-covered employee welfare benefit plan provided by Ms. Sereboff's employer. As a result of injuries sustained in a car accident in California, the plan paid the Sereboffs' medical expenses, which totaled nearly \$75,000. The plan's fiduciary had the right to recover payments made to the Sereboffs based on a plan provision concerning "Acts of Third Parties." The Sereboffs sued in California state court on the car accident, and ultimately settled this litigation for \$750,000. The Sereboffs refused to reimburse the plan the \$75,000 previously paid for health benefits, and instead put the money in investment accounts controlled by them.

Ruling by the Supreme Court

In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Court had previously held such claims could not be brought under ERISA § 502(a)(3)

when the money was not in the participant's possession. The Court distinguished the instant case because the Sereboffs did possess the funds. It thus held this claim was an equitable one enforceable under ERISA § 502(a)(3), reasoning:

1. ERISA § 502(a)(3) explicitly allows for enforcement through equity of a right created "by agreement," i.e., by the plan terms creating the reimbursement right; and
2. The remedy at issue was equitable because equity allowed for an equitable lien or constructive trust to be placed on funds even though they do not exist yet, if they are specifically identified, i.e., here, all recoveries from third parties that were due the plan for benefits paid.

Finally, the Sereboffs sought to impose "make whole" defenses against the reimbursement claim. The Court rejected the argument that these and similar equitable defenses to subrogation claims applied to the plan's reimbursement claim. Unlike subrogation liens which arise by law, this lien arose "by agreement" of the plan terms creating the reimbursement right on behalf of the plan. The Sereboffs also argued that this relief was not "appropriate" equitable relief under ERISA § 502(a)(3) because it contravened the "make-whole" doctrine. Unlike the subrogation argument, the Court declined to consider this latter argument, concluding it was not properly raised in the court below.

Implications for Employers & Fiduciaries

In light of *Sereboff*, employers and plan fiduciaries should make sure their plans have reimbursement provisions that create plan-based rights to enforce reimbursement claims against participants. Plan fiduciaries also will need to be diligent in enforcing these rights, including, when appropriate, seeking injunctive relief so that any funds recovered from third parties may be attached or segregated once they come into the participant's or his or her attorney's possession.

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