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Equitable Remedies

High Court Arguments Debate Scope Of Suit Between Health Plan, Injured Worker

A dispute between a health plan and a worker injured by a drunken driver could have big consequences for pension recipients and people on disability—or not, depending on which lawyers manage to persuade the U.S. Supreme Court justices (*Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan,*U.S., No. 14-723, *argued* 11/9/15).

The case argued before the high court Nov. 9 asks whether plans can sue injured participants to recover the cost of health benefits from their personal injury settlements. The circuit courts have split on this question, with six courts allowing plans to bring such suits and two courts blocking these attempts as impermissible under the Employee Retirement Income Security Act.

During the arguments, the parties disputed whether the court's ruling would be limited to health plans seeking recoupment, or whether it could apply to the much larger universe of people who receive overpayments from pension or disability plans.

Both the attorney representing the injured plan participant and the attorney for the U.S. government cautioned the justices that a ruling in favor of the health plan could have a dramatic impact on retirees receiving pensions or people on disability, because it would allow plans to claw back benefits that they mistakenly overpaid to participants over many years or decades.

The attorney representing the health plan at issue made light of these arguments, maintaining that the court's ruling would be limited to instances in which health plans seek to recoup benefits paid on behalf of participants who later receive personal injury judgments or settlements from the person responsible for their injuries, as is typical following a car accident.

Plans Suing Workers. The case centers on a provision of ERISA that allows parties to sue for ''appropriate equitable relief.'' This provision is often cited in disputes over whether health plans can seek reimbursement from plan participants who have received benefits and also received a third-party settlement.

Some courts have interpreted this provision to mean that plans can't recover from an injured participant's legal settlement with an at-fault driver if the participant already has spent the money in question. According to this interpretation, a health plan can only seek an equitable lien on money that the plan participant still possesses—otherwise, the plan would be seeking money damages not allowed under ERISA.

In this case, the U.S. Court of Appeals for the Eleventh Circuit reached the opposite conclusion, allowing an ERISA-governed health plan to sue an injured participant who recovered money after being hit by a drunken driver (228 PBD, 11/26/14).

While the majority of circuit courts—including the First, Second, Third, Sixth and Seventh—agree with the Eleventh Circuit's plan-friendly approach, the Eighth and Ninth circuits have favored plan participants in these types of lawsuits, rejecting attempts by ERISA plans to recover benefits no longer possessed by the participant or beneficiary.

These cases often center on the distinction between legal relief, which is most often money, and equitable relief, which can be more complex. Plan participants such as Robert Montanile argue that plans seeking recovery from participants who have already spent their third-party settlements are merely seeking money damages, rather than a true equitable lien, which they say requires the defendant plan participant to remain in possession of the sought-after funds (214 PBD 214, 11/5/15).

In contrast, health plans such as the National Elevator Industry Health Benefit Plan point to plan terms that require participants who receive personal injury settlements to reimburse the plan for the benefits they received. They argue that participants shouldn't be allowed to evade this responsibility simply by spending their settlement money.

What's at Stake? One issue receiving attention from both sides was the scope of the court's eventual ruling—would it apply only to health plans seeking reimbursement from personal injury settlements, or would it affect the ability of a pension or disability plan to claw back benefits mistakenly overpaid to a participant over years or even decades?

Neal K. Katyal, a Washington-based partner with Hogan Lovells and a frequent litigator before the high court, argued for a limited ruling applicable only to health plans. Katyal, who represented the health plan in question, took the position that ERISA allowed these types of lawsuits only when a participant engaged in ''knowing dissipation'' of a personal injury settlement. The ruling wouldn't create hardship for retirees or dis-

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abled workers who receive an overpayment of benefits because of an error made by their ERISA-governed plan, Katyal said.

Arguing for the plan participant, Peter K. Stris, a founding partner of Los Angeles-based Stris & Maher LLP, cautioned the justices that their eventual ruling would necessarily affect workers receiving pension or disability benefits.

According to Stris, participants in these plans likely wouldn't be unduly harmed if plans act promptly in seeking reimbursement. However, a disability or pension plan that waits years or decades before attempting to collect a mistaken overpayment could create a heavy burden for an unwitting plan participant, particularly a typical participant of ''limited means,'' Stris said.

What's a Plan to Do? The case highlights a problem that can arise when a health plan pays for an injured participant's care on the condition that he or she reimburse the plan out of any personal injury settlement received from the at-fault party.

According to Stris, plans should act promptly to enforce their right to reimbursement. A plan that doesn't assert its rights in a timely fashion would be out of luck in the event a participant already spent his or her settlement money, Stris said.

However, Stris allowed that a plan might have remedies under state law if a participant acted fraudulently with respect to the personal injury settlement or the agreement to reimburse the plan.

Also arguing in support of plan participant Montanile, Ginger D. Anders, assistant to the U.S. solicitor general, said plans that are diligent about seeking reimbursement soon after any settlement wouldn't be unduly inconvenienced by a rule that prohibited them from going after money that had already been spent.

Responding to these arguments, Chief Justice John G. Roberts queried whether such a rule would provide an incentive for plan participants to spend their settlement money as quickly as possible in order to avoid reimbursing their health plan.

For his part, Katyal framed the case as one in which an injured participant acts wrongfully by knowingly frustrating the plan's attempt to collect its money. In such cases of ''playing with house money,'' ERISA provides plans with a remedy by allowing them to recover from personal injury settlements, he said.

In particular, Katyal disputed the idea that plans could protect their reimbursement rights merely by acting diligently in the face of personal injury settlements. According to Katyal, there is no established mechanism for plans to receive notice of such settlements—such as an electronic docket tracking service, as suggested by the chief justice—since most cases involving car accidents settle without creating any public records.

Signals From Justices. For their part, the justices' questions to counsel provided some—but not much—indication of the issues they found important in the case.

At several points, Justice Ruth Bader Ginsburg questioned counsel on how the plan participant had handled his money after receiving the settlement, including whether he deposited it into his personal bank account or commingled it with the rest of his assets. This suggests that Ginsburg may view the case as turning on a classic question of equity—namely, whether a plan's lawsuit sought a specifically identifiable asset in the possession of the defendant plan participant.

Justice Stephen Breyer questioned why ERISA plans are more likely to sue plan participants who obtain personal injury settlements, instead of the lawyers who represented those participants. As Breyer noted, encouraging suits against lawyers could ''solve the problem,'' because lawyers are likely to be ''awfully careful'' before spending money that they know might be the subject of a lawsuit.

Finally, Justice Anthony Kennedy raised questions about the correct priority of creditors in situations in which both a health plan and another party assert an interest in a participant's settlement.

Plan Rights, Worker Expectations. Tybe A. Brett, a participant-side attorney with Feinstein Doyle Payne & Kravec LLC in Pittsburgh, said the oral arguments focused on the health plan's right to recover without devoting the same attention to participants' expectations regarding their health plans. According to Brett, who filed an amicus brief on behalf of United Policyholders, plan participants are often surprised to learn that their plans contain these reimbursement provisions.

''The reality is that people do expect that their plans will cover them when they need medical care, and they don't really think about this reimbursement provision,'' Brett told Bloomberg BNA Nov. 9. ''They certainly don't sit in the hospital and think, 'How am I going to dissipate the funds to keep it away from the plan?' ''

Options for Plans? Jeffrey R. White, senior counsel with the Center for Constitutional Litigation P.C. in Washington, raised concerns about an issue discussed by multiple justices—namely, whether ERISA plans could best enforce their rights by bringing suit directly against the personal injury attorneys who represent plan participants.

''It's not very good for beneficiaries if that were the rule, because obviously if you're hit by a drunk driver and you're looking for an attorney to represent you, it's going to be much harder to find an attorney if the attorney might not be paid,'' White told Bloomberg BNA Nov. 9. ''Hopefully they will keep that in mind.''

White, who filed an amicus brief on behalf of the American Association of Justice, also disputed the notion that health plans will have trouble learning about personal injury settlements affecting their reimbursement rights, saying that many plans have developed ''fairly sophisticated'' methods for tracking accident reports and hospital data so that they can ''connect the dots to see if there's a possible subrogation claim.''

Patrick Strawbridge, an attorney with Consovoy McCarthy Park PLLC in Boston, offered a different per-

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spective on the ability of plan fiduciaries to discover and collect from personal injury settlements.

''Chief Justice Roberts (among others) was clearly concerned about the practicality of any rule that requires a plan to formally intervene into a case in order to prevent dissipation, in part because many tort suits settle before any public filing is made, and others that actually are commenced may be filed in any one of hundreds of different county or district courts,'' Strawbridge told Bloomberg BNA in a Nov. 9 e-mail. ''Routinely monitoring those dockets and formally intervening is very difficult and would require tremendous effort and expense.''

''Many in the benefits industry will be closely watching this case, to see how the Court balances its precedent with the obvious concerns about incentivizing beneficiaries to spend any recovery and avoid the promise to repay health care expenses that was made upon enrollment in the plan,'' added Strawbridge, who filed an amicus brief on behalf of the National Association of Subrogation Professionals and the Self Insurance Institute of America Inc.

Aaron Streett, chairman of the Supreme Court & Constitutional Law Practice Group at Baker Botts LLP, also emphasized the challenges plans would face if forced to seek out news of personal injury settlements.

''I was heartened that much of the Court's questioning focused on the difficulty that Plans would face if they were forced to continuously monitor settlements and lawsuits, as would be required by the Petitioner's rule,'' Streett said in a Nov. 9 e-mail to Bloomberg BNA.

''As we pointed out in our brief for the US Chamber of Commerce and a labor union Plan, such monitoring is simply not feasible; for example, our client, the IBEW-NECA Southwestern Health & Benefit Fund has only 11 employees administering benefits for 15,000 participants. The added costs that plans would incur in monitoring potential tort claims would necessarily result in a reduction of benefits to plan participants or an increase in premiums.''

Discouraging 'Shenanigans.' Charles F. Seemann III, a plan-side attorney with Jackson Lewis PC in New Orleans, said the court should avoid issuing a ruling that would encourage plan participants to quickly spend their personal injury settlements as a way of avoiding the obligation to reimburse their health plans.

''You don't want to have a legal principle that's set up to encourage that sort of shenanigans,'' Seemann told Bloomberg BNA Nov. 9. ''I think the best balancing here of the various policies and social goals that ERISA's designed to achieve is the proposed resolution that the plan offered here—in other words, start from the basic premise that a participant cannot frustrate an equitable right through inequitable behavior.''

Turning to the parties' disagreement over the scope of the suit, Seemann agreed with the plan that the court's ultimate ruling would be better limited to the medical reimbursement context—as opposed to the disability or pension universe—because the periodic nature of disability and pension payments provides less opportunity for willful squandering of funds.

Seemann wasn't involved in the instant litigation.

By Jacklyn Wille

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A transcript of the court's argument is at http://src.bna.com/Zw.