



TOPIC: **Supreme Court Decision Clarifies Health Plans' Ability to Recover Medical Expenses Advanced on Behalf of Plan Participants Who Are Later Compensated for Injuries by Third Parties**

**EXECUTIVE
SUMMARY:**

ON MAY 15, 2006 THE SUPREME COURT OF THE UNITED STATES
DECIDED THE CASE OF *SEREBOFF V. MAMSI MEDICAL SERVICES, INC.*

THAT DECISION UPHELD HEALTH AND WELFARE PLANS' RIGHTS UNDER ERISA'S REMEDY PROVISIONS TO RECOVER MEDICAL EXPENSES PAID BY THE FUNDS ON BEHALF OF PARTICIPANTS WHO SUBSEQUENTLY RECEIVE REIMBURSEMENT FOR THEIR INJURIES FROM THIRD PARTIES; AT LEAST WHERE THE FUND SEEKS TO RECOVER PARTICULAR SOURCES OF MONEY WITHIN THE PARTICIPANT'S POSSESSION AND CONTROL. HOWEVER, THE CONDITIONS WHICH APPLY TO SUCH RECOVERY MAY MAKE THE REAL WORLD EFFECT OF THE DECISION OF LIMITED PRACTICAL VALUE.

THIS ISSUE OF *MULTI-ELERT* IS INTENDED TO ADVISE YOU OF THAT DECISION AND IT'S PRACTICAL APPLICABILITY AND IMPACT.

PURPOSE: **INFORMATIONAL**

CATEGORY: **COURT DECISION**

ISSUER: **SUPREME COURT OF THE UNITED STATES**

TARGET AUDIENCE: **TRUSTEES OF AND PLAN ADVISORS TO MULTIEMPLOYER HEALTH AND WELFARE PLANS**

FORWARD COMMENTS TO: **Multi-Elert@nccmp.org**

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FOR ADDITIONAL BACKGROUND SEE: **ATTACHED FILES CONTAINING THE *SEREBOFF* DECISION AND THE AMICUS BRIEF FILED BY THE NCCMP**

U. S. Supreme Court's Decision in *Sereboff* Addresses Subrogation Question for Health and Welfare Plans: When Can ERISA Plans Recover Reimbursements of Medical Payments Advanced on Behalf of Participants Injured by Third Parties?

In a unanimous decision handed down on Monday, May 15, 2006, the U. S. Supreme Court ruled that, *in some circumstances*, ERISA health and welfare plans may recover money they advance to pay medical expenses on behalf of a participant injured by a responsible third party. The Court said recovery is available under the equitable remedies inherent in ERISA Section 502(a)(3), at least where the fund seeks to recover an identified source of money that is in the participant's possession. This issue of *Multi-Elert* will examine the implications of this decision and identify the practical impact that Trustees and plan professionals will face as a result of *Sereboff*.

Background

Marlene Sereboff and her husband were covered under a health insurance plan sponsored by Mrs. Sereboff's employer and administered by Mid-Atlantic Medical Services, Inc. (MAMSI). The plan pays medical expenses incurred by its covered participants subject to an "Acts of Third Parties" provision. This provision is triggered when a plan participant is injured by a third party (typically in an auto accident). The plan permits advance payment of the injured participant's medical expenses but requires the participant to repay to the plan the benefits paid on his or her behalf in the event she recovers from a third party in a lawsuit, settlement or otherwise.

When the Sereboffs were injured in an automobile accident, the plan paid medical benefits on their behalf. The Sereboffs filed a liability claim against third parties seeking recompense for injuries they sustained in the accident. MAMSI sent a letter to Mrs. Sereboff informing her of the plan's lien against any recovery from the suit. During the lawsuit, MAMSI sent additional correspondence to the Sereboffs and their attorney confirming its reimbursement position and detailing the expenses paid by the plan. In total, MAMSI paid almost \$75,000 in covered medical expenses on the Sereboffs' behalf. The Sereboff liability suit against the third parties was settled for \$750,000. The Sereboffs and their attorneys never paid MAMSI any money to satisfy the lien.

An Apparent Split in the Circuits

MAMSI filed suit to recover the amounts paid on behalf of the Sereboffs under ERISA Section 502(a)(3). Since their attorney disbursed the settlement money directly to the Sereboffs, MAMSI filed for a temporary restraining order and injunction requiring them to set aside from

the lawsuit proceeds the amount of benefits paid by MAMSI. The Sereboffs agreed to set up the amount of the lien in an interest bearing account until the District Court ruled on the case. The District Circuit eventually ruled in MAMSI's favor and ordered the Sereboffs to pay the amount of the lien with interest, reduced by MAMSI's share of the attorney's fees and the court costs the Sereboff's incurred in the personal injury lawsuit. The Sereboffs appealed and the Fourth Circuit affirmed in part. In its opinion, the Fourth Circuit noted that the Courts of Appeals are split as to whether Section 502(a)(3) permits this type of recovery.

The *Sereboff* case was certified to the U. S. Supreme Court to resolve the apparent conflict among the Courts of Appeal. The NCCMP filed an amicus brief with the Court in support of the plan's case.

The Issue in Sereboff

Under what circumstances may an ERISA fiduciary sue a plan participant for reimbursement of medical expenses paid by the ERISA plan on his behalf, where the plan participant later recovers compensation for its injuries from a third party?

The Opinion

As noted earlier, *Sereboff* is the latest in a line of cases in which the U. S. Supreme Court has addressed the scope of remedy permitted under ERISA Section 502(a)(3). In *Mertens v. Hewitt Associates*, 508 U.S. 249 (1993), the Court held that the ERISA remedy provision permitted relief only of the kind that was "typically available" in the old equity courts. The Supreme Court in *Mertens* ruled against the appellant's claim saying it was one for purely compensatory damages; that is, more in the nature of a contractual dispute and, therefore, one that would not have been upheld in the old traditional equity courts.

More recently, in *Great-West Life & Annuity Ins. Co. v Knudson*, 534 U.S. 204 (2002), the Supreme Court further fleshed out the breadth of equitable remedies available to plan administrators under ERISA Section 502(a)(3). Knudson was rendered a quadriplegic in a car accident and Great-West paid medical bills on Knudson's behalf. When Knudson prevailed in a lawsuit against a third party for compensation as a result of her injuries, a special needs trust was set up to hold \$256,745; another \$373,426 paid attorneys' fees; \$5,000 reimbursed California for medicaid payments and almost \$14,000 was sent to Great-West. Great-West did not accept payment of the \$14,000 but instead attempted to obtain reimbursement from Knudson of the medical expenses it had paid on her behalf, totaling over \$411,000. Following the *Mertens* reasoning (that is, the idea that recovery is allowed under ERISA 502(a)(3) only if it is equitable in nature), the Supreme Court first had to determine whether the restitution Great-West sought could be characterized as legal or equitable restitution. The Supreme Court said that equitable restitution seeks to impose a lien or constructive trust on "particular funds or property *in the defendant's possession*" (emphasis supplied). As noted above, \$256,745 from the *Knudson* lawsuit proceeds had been placed in a "Special Needs Trust" under California law; however, the Supreme Court held that since the proceeds from the suit were not in Knudson's possession and control, the kind of relief sought was not equitable but legal restitution and, therefore, relief was not allowed under ERISA Section 502(a)(3). Thus, the *Great-West* decision expanded upon the *Mertens* ruling to provide that in order to recover under ERISA's equitable restitution remedy provision, the funds sought must be in the possession and control of the defendant.

In *Sereboff*, the Supreme Court said that it accepted review of the case in order to resolve a split that had developed in the Courts of Appeal with respect to cases that followed *Knudson*. The Court noted that, unlike *Knudson*, the Sereboffs had agreed to preserve the requested reimbursement amount pending resolution by the Courts. This agreement meant that “possession” was not at issue. The Court also said that the plan provision requiring reimbursement between the parties made the plan’s claim more similar in nature to an “equitable lien based on an agreement” that had been available in the old equity courts, rather than a subrogation claim. Bypassing the subrogation scenario means the plan administrator does not have to jump through the many equitable “hoops” or pre-conditions that the law developed when dealing with insurance law and subrogation. Thus, it appears that the Court in *Sereboff* attempted to broaden the availability of the equitable restitution remedy available under ERISA’s Section 502(a)(3).

Further, the Court said that the plan’s “Acts of Third Parties” provision specified a particular pool of money distinct from the Sereboffs personal assets and identified the requested reimbursement as a specific portion of that pool of money (the benefits advanced and paid by MAMSI on the Sereboffs’ behalf). This provision, therefore, allowed MAMSI to follow the proceeds as they entered Sereboff’s hands and impose a constructive trust on them immediately under an equitable restitution theory. Furthermore, the Court found that the Sereboff recovery funds remained segregated (identifiable) under the trust and that the special agreed upon trust kept the assets subject to Sereboff’s possession and control.

Implications

The implications of this decision will vary for each plan, depending on the plan language describing its reimbursement provisions and the language in the written subrogation agreement with the participant, if any. How this decision applies to your plan(s), therefore, is a question that should be directed to your own fund counsel.

In general terms, the *Sereboff* decision appears to limit *Knudson* to its facts (proceeds from the third party recovery were no longer in the participant’s possession so the claim is viewed as one for personal liability). Given *Knudson*, however, the *Sereboff* decision will permit a plan to recover where money is in the participant’s possession and control. While the case does not expand the Court’s interpretation that ERISA only permits *traditional* equity causes of action, it does remove some of the old equity court’s procedural and technical barriers to recovery and provides a cause of action to the plan.

In practical terms, how are a plan’s reimbursement procedures affected? Since ERISA may be held to preempt state law, employee benefit plans may be forced to go to *federal court* to seek legal recourse in actions involving a third party recovery. Therefore, ERISA plan administrators must remain vigilant to identify those cases where a third party may be liable for the participant’s injuries. ERISA plans must ascertain as early as possible whether participants intend to institute civil suits for recovery in such cases. Only through the exercise of due vigilance and vigorous follow-through procedures can a plan intervene in the participant’s federal court case or ask for an injunction to carry out the plan’s right to equitable restitution. Together, *Sereboff* and *Knudson* teach us that ideally benefits advanced by a fund must be reimbursed to the plan from a trust or other segregated account before any proceeds from a civil recovery are distributed directly to the participant. To be in line with *Sereboff*, trustees may want to include language in the reimbursement/subrogation provision of the plan text that specifically requires participants to

hold in trust any recovery resulting from a civil action against third parties to compensate the participant for injuries sustained, pending reimbursement of the fund.

Legislative Remedy

In the past few months several plans have adopted new, more restrictive rules governing the plans' ability to advance payments on behalf of participants involved in cases in which a potentially responsible third party may be identified, pending resolution of that party's liability. In response to this trend, the NCCMP and other members of the benefits community have worked together to propose a tightly drafted legislative change that would amend ERISA Section 502(a)(3) to make it clear that subrogation actions by plan administrators to obtain reimbursements of medical expenses advanced by health and welfare plans from recoveries by third parties are within the scope of ERISA's remedy provision. A version of this proposal is included in the pension reform legislation currently pending before Congress. We will keep you informed of its progress through the legislative session.

As with all matters concerning interpretations of the law and / or regulations applicable to multiemployer plans, Plan trustees and sponsors should rely on their own attorneys and other professional advisors for advice on the meaning and application of the Sereboff case for their particular funds.

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If you have questions about the NCCMP, or about this or other issues of Multi-Elert, please contact us by phone at (202) 737-5315 or by e-mail at: nccmp@nccmp.org.
