

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ROBERT MONTANILE, :

4 Petitioner : No. 14-723

5 v. :

6 BOARD OF TRUSTEES OF THE :

7 NATIONAL ELEVATOR INDUSTRY :

8 HEALTH BENEFIT PLAN. :

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10 Washington, D.C.

11 Monday, November 9, 2015

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:04 a.m.

16 APPEARANCES:

17 PETER K. STRIS, ESQ., Los Angeles, Cal.; on behalf of
18 Petitioner.

19 GINGER D. ANDERS, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; for
21 United States, as amicus curiae, supporting
22 Petitioner.

23 NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf of
24 Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 14-723, *Montanile v. The Board of Trustees of the National Elevator Industry Health Benefit Plan*.

Mr. Stris.

ORAL ARGUMENT OF PETER K. STRIS
ON BEHALF OF THE PETITIONER

MR. STRIS: Thank you, Mr. Chief Justice, and may it please the Court:

In this ERISA case, a fiduciary has sued a beneficiary to establish and enforce an equitable lien by agreement.

As this Court has repeatedly acknowledged, an equitable lien is enforceable only against specific property and its traceable product in the defendant's possession.

JUSTICE GINSBURG: Mr. Stris, there's some fuzziness about the facts in this case, and maybe at the outset you can clarify them.

Different figures are given about how much money from this settlement was actually delivered to your client. And also, what did your client do with it? Did he put it with his general assets, or did he keep it

1 in a separate fund?

2 Maybe you can start by answering those
3 questions.

4 MR. STRIS: I think I can, Justice Ginsburg.

5 So I -- I want to start with what's in the
6 record, and then I want to add some color that I think
7 will provide context.

8 So as far as what's in the record, there was
9 a genuine issue of -- of material fact on how much
10 dissipation there was. One thing that's clear from the
11 record is that --

12 JUSTICE GINSBURG: Before we get to
13 dissipation, how much did he receive?

14 MR. STRIS: Yes. So that's clear, he
15 received over time, after all expenses were out, about
16 \$200,000.

17 JUSTICE GINSBURG: 200.

18 MR. STRIS: I think that's clear from the
19 record.

20 What's also clear procedurally -- and this
21 is important, and this is Page 64 of the Joint
22 Appendix -- is that he took the position in opposing
23 summary judgment that he has very little of the money
24 remaining, and he cited a declaration and an attached
25 sheet that I admit are confusing.

1 JUSTICE KAGAN: And -- and this \$200,000,
2 did he put it in a general account or was it set aside
3 in a specific account?

4 MR. STRIS: It is nothing in the record to
5 indicate that, but I think as far as the rules work, it
6 wouldn't matter because the rules for equitable lien by
7 agreement, the tracing rules, are actually very robust,
8 Justice Kagan. And so as equity evolved, you cannot
9 dissipate money by putting it in its own account and
10 spending it. Something called the "lowest intermediate
11 balance rule" developed to prevent against precisely the
12 kind of mischief that we would reasonably worry about.

13 JUSTICE GINSBURG: But Mr. Stris, it does
14 make a difference, because if he just put it, say, in
15 the bank account where he had all of his other money,
16 then how -- how could we say that he spent all of the
17 proceeds on childcare and living expenses? If you have
18 one mixed pot, how can we say, oh, yes, this came from
19 the settlement and not from his general funds?

20 MR. STRIS: It's a very fair question,
21 Justice Ginsburg. And there -- there are settled
22 tracing rules at equity, and it worked as follows:

23 If you took money and it was cash and you
24 put it in a bank account, what was presumed was that,
25 unless your total cash assets dipped below the amount

1 that you got, that the spending that you did was not out
2 of that, the creditor's rights were not impaired.

3 So the only way we would prevail on
4 remand -- I want to be clear about the modesty of the
5 position that we're taking here. The only way we would
6 prevail on remand is if he got the money and he spent it
7 down -- all of his money, not just the settlement but
8 all of the cash that he had -- down below the -- the
9 amount of the settlement.

10 That's why this is very important.

11 JUSTICE GINSBURG: Well, what --

12 CHIEF JUSTICE ROBERTS: Well, I -- I don't
13 know if it's the right Latin phrase or -- "pro tanto" or
14 something. I mean, you would lose -- it -- it -- it
15 doesn't have to spend it all the way down. Whatever is
16 left would be subject to tracing.

17 MR. STRIS: Yes, Mr. Chief Justice, that's
18 correct. But the point I was trying to make is, there
19 is a big difference between the way equity worked, which
20 was to have a sensible rule below its intermediate
21 balance, and what I view as the extreme swollen asset
22 theory, that never was applied at equity, that my friend
23 Mr. Katyal is advocating.

24 Under the swollen asset theory, if you get
25 new money in the future, if you spend below the lowest

1 intermediate balance but then you start earning income,
2 people can come and garnish your wages. So the -- the
3 point that I'm making here is that the equity
4 lien-by-agreement remedy is actually far more robust
5 than one would think if one read the briefs of the other
6 side.

7 JUSTICE KENNEDY: Equitable lien by
8 agreement.

9 Was there an agreement -- do you think
10 there's an agreement here because of the Plan?

11 MR. STRIS: I think the -- that issue, we've
12 lost. So I mean, you know -- I think that's another
13 important point, Justice Kennedy. We hear a lot about a
14 promise-breaking by beneficiaries. And that happens.
15 And those are legitimate concerns. But from where I'm
16 sitting, I see a lot of cases where there's
17 promise-breaking by fiduciaries, where they take a
18 reimbursement provision that's preempted in an insured
19 plan and then try and enforce it, or where they try and
20 enforce a provision that doesn't apply by its own terms.

21 So when we're thinking from the perspective
22 of, is this a sensible rule that is consistent with the
23 broad purposes of ERISA, I think it very much is because
24 if you take the ability of fiduciaries to reach the
25 general assets of participants --

1 JUSTICE KENNEDY: Just as a background
2 matter, when we left, as I understand, Great --
3 Great-West, we left -- left the issue open. If the
4 beneficiary receives a check that by mistake is three
5 times more than it should be, but he may think it's a
6 bonus, he may not understand; he spends it all. Is
7 there an -- or is there a legal action that the Plan can
8 take to recover that money?

9 MR. STRIS: Yes. If -- if -- if I could not
10 answer it yes or no for a minute, and I promise I'll
11 come back to a yes or no. I think it's a very important
12 question, because this happens all the time in the
13 pension context.

14 So the first thing I'm going to tell you is
15 that usually when that's the case, there is an error on
16 the part of the Plan. And our view is even if there
17 were no remedy, that it's not consistent with the
18 purposes of ERISA or the way historical equity practice
19 worked to make the participant the insurer of that type
20 of error.

21 Now, there are remedies, and here's what
22 they are under ERISA. The first one is a set-off
23 remedy. And in exception II C of the Great-West
24 opinion, you -- this Court made that very clear.

25 JUSTICE KENNEDY: For future payments.

1 MR. STRIS: Against future payments. And --
2 and that's used repeatedly in pending and disability
3 cases --

4 JUSTICE KENNEDY: Suppose that weren't
5 available.

6 MR. STRIS: Okay. So if that's not
7 available, if -- if you have a case where there's
8 outright fraud -- and I don't think that's your -- your
9 fact pattern. But if you have a case where there is
10 outright fraud -- and I've seen these, where a
11 participant receives money because they claim that
12 someone is still alive, but they're actually dead, I
13 think that there is a remedy there, because in terms of
14 outright fraud --

15 JUSTICE KENNEDY: In law.

16 MR. STRIS: Well, the second prong of Davila
17 wouldn't be satisfied.

18 So ERISA does not -- ERISA's broad
19 preemptive sweep does not go so far as to stop plans
20 from policing outright fraud.

21 Now, the more difficult issue is your
22 question --

23 JUSTICE KENNEDY: Right.

24 MR. STRIS: -- which is, what if there's not
25 outright fraud? What is -- what is the obligation of

1 the beneficiary who gets that check and knows it's three
2 times, you know, what I got, like, this can't be right.
3 You know, if -- if the beneficiary is a bad actor and
4 says, you know, I'm going to get one over on the Plan,
5 and I'm going to keep this money, and I'm going to spend
6 it, in the rare case where that person was of limited
7 means and they spent the money down and it was
8 dissipated, I think unfortunately, I would have to say
9 that I -- I think a plan would not have a remedy. But
10 the reality is that's a very rare case.

11 JUSTICE KENNEDY: And -- and -- and because
12 State law, legal remedies are preempted by ERISA?

13 MR. STRIS: Yes. That's essentially --
14 that's essentially the regime.

15 JUSTICE KENNEDY: Is that a position that's
16 generally accepted, or is this an arguable point?

17 MR. STRIS: From the perspective of this
18 Court's cases, or -- or --

19 JUSTICE KENNEDY: Yes. Yes.

20 MR. STRIS: Well, I mean, I think the -- the
21 letter of your cases --

22 JUSTICE KENNEDY: I -- I thought
23 Great-Western had left that open.

24 MR. STRIS: Yes. So I think that's fair.
25 The letter of your cases does not bind -- does not bind

1 us here. I'm -- I'm not making a pure statutory stare
2 decisis argument, but if --

3 JUSTICE KENNEDY: I'm just asking, is there
4 a rule in the courts of appeals, or in the -- in the
5 legal system generally, or -- or are they divided on
6 this, or just nothing written on it?

7 MR. STRIS: Well, in the context of ERISA,
8 how you would rule on this case would determine that
9 issue. And so the -- the circuits are split. That's
10 why I think the issue is very important. This is not
11 just a subrogation matter. This is an issue that will
12 have dramatic impact in the pension and the disability
13 context as well.

14 CHIEF JUSTICE ROBERTS: Counsel, if -- if
15 you prevail here and are representing a fund, what would
16 you advise them to do so they don't confront this result
17 in the future?

18 MR. STRIS: Yes. It's -- it's -- it's a
19 good question. And I do advise funds. And I think that
20 there is a simple answer, which is funds that are
21 responsible and sophisticated will do exactly what
22 they've always done. And this is a very important
23 point: Funds are always worried about dissipation.
24 Health insurers have always been worried, and here's
25 why.

1 The -- the mine run of individuals who get a
2 large tort settlement -- this is just a reality of
3 life -- they're effectively judgment-proof except for
4 that tort settlement. So the remedy doesn't matter. In
5 other words, even if you had a compensatory damages
6 remedy in most cases, once that money is spent, you've
7 got nothing. So what health insurers and plans have
8 done since well before Great-West and has continued to
9 do it after Great-West is, when a medical claim is
10 submitted, they investigate it carefully. And they look
11 and flag the ones where there is likely a tort -- there
12 could be a tort recovery. They monitor them carefully,
13 either internally or through outside subrogation agents.
14 And they act promptly.

15 And, you know, I'm not going to say it's not
16 a dance, because we see a lot of litigation in this area
17 because there is a lot of money passing through, but
18 plans have faced this problem since before Great-West.
19 These policy arguments about how this is a concern about
20 dissipation were made in Great-West. And I just think
21 they're -- they're substantially overrun.

22 CHIEF JUSTICE ROBERTS: When you say "they
23 act promptly," what do they act promptly to do? And is
24 it always the case that they can act promptly enough?

25 MR. STRIS: No. The -- you know, whatever

1 rule you pick, there will be cases where we don't like
2 the result on both sides. I can give you examples on
3 the -- on the other side as well. But --

4 CHIEF JUSTICE ROBERTS: Well, presumably in
5 the -- in the hypothetical, your -- your opposing
6 counsel will be advising the recipient to, I -- I
7 suppose, spend it right away, because then there won't
8 be anything left; it will have been dissipated, or put
9 it in different accounts, or -- or commingle it with,
10 you -- you know, a variety of things. And I'm just
11 wondering if the solution you're advocating is going to
12 make life a lot more complicated and expensive for the
13 funds, which is, of course, contrary to the idea of
14 preserving the assets.

15 MR. STRIS: I -- I understand that point.
16 I -- I think the answer is, no, not in any meaningful
17 way. And -- and here's why. You ask what you do.
18 Well, you write letters, and you put people on notice of
19 your lien. And a lot of people are affected by that,
20 lawyers --

21 JUSTICE GINSBURG: How do -- how do you put
22 people on notice? That's a --

23 MR. STRIS: Pardon?

24 JUSTICE GINSBURG: That's a legal concept.
25 A letter is one thing. But how -- what is -- what is

1 necessary? What is the action necessary? Is it going
2 into court and say, enjoin this person from spending any
3 of that money?

4 MR. STRIS: Here's what plans do, and here's
5 what plans should do: They -- they write a letter. The
6 minute they find out there's a settlement, they contact;
7 they ask to be paid. If they're not paid immediately,
8 they say put this money in escrow because we have a
9 dispute. If the person says no, you have a pretty good
10 idea that you might have a problem, and you go into
11 court.

12 And this is a perfect example with regard to
13 Mr. Montanile. There was six months of negotiation,
14 several letters where it was said, hey, if -- if you
15 don't -- if we don't decide by this date, we're going to
16 distribute the money.

17 CHIEF JUSTICE ROBERTS: How -- how do you
18 find -- how does the Plan find out that there's been a
19 settlement?

20 MR. STRIS: Well, they -- they find out in
21 many ways. So a lot of cases actually result -- include
22 where there's large dollars amounts, and a lawsuit is
23 actually filed.

24 But in cases where no lawsuit is filed,
25 there's traditional --

1 CHIEF JUSTICE ROBERTS: I'm sorry. The
2 lawsuit between whom and whom?

3 MR. STRIS: A State court lawsuit is filed.

4 CHIEF JUSTICE ROBERTS: You mean by the
5 beneficiary to recover --

6 MR. STRIS: The tort.

7 CHIEF JUSTICE ROBERTS: -- the tort claim?

8 MR. STRIS: Yes.

9 CHIEF JUSTICE ROBERTS: And how is the Plan
10 notified of that?

11 MR. STRIS: Well, because of the risks that
12 we're talking about right here in this dialogue, plans
13 are very sensitive to making sure that the minute that
14 there's a potential subrogation recovery, they write
15 letters to everyone: To the participant, to the
16 participant's lawyer, to the tortfeasor, the
17 tortfeasor's lawyer, the insurer. And they say we have
18 a lien, and please notify us if anything happens.

19 JUSTICE KENNEDY: Do they, heavily?

20 MR. STRIS: In some cases they do some; some
21 cases they don't. That's ultimate --

22 JUSTICE KENNEDY: But they say they do,
23 anyway?

24 MR. STRIS: Well, I've -- I've seen both.
25 Look, I -- I don't actually think it's a pretty

1 controversial point. There are some people, no matter
2 where they're sitting, that misbehave. And so I have
3 seen participants who break promises absolutely. And
4 also, I've seen plans that are trying to enforce
5 provisions that are not enforceable.

6 CHIEF JUSTICE ROBERTS: Would it basically,
7 ignoring the impact of that letter by a beneficiary, be
8 a basis for the sort of fraud action you were talking
9 about earlier?

10 MR. STRIS: No. I don't think so. I
11 believe --

12 CHIEF JUSTICE ROBERTS: So the -- the
13 beneficiary, even the beneficiary's counsel gets a
14 letter saying, by the way, we have a lien on this, you
15 know, good luck. I hope you recover a fair amount. But
16 if you do, make sure you put it in a separate account.
17 Make sure you notify us.

18 And -- and if the beneficiary or the lawyer
19 just ignores that, that's not a basis for fraud?

20 MR. STRIS: It would depend on the facts of
21 the case. You know, I -- merely ignoring the letter,
22 I'm not so sure. But I guess I keep coming back to the
23 same point. This is a legitimate problem. I don't mean
24 to -- to demean that at all, but this has always been a
25 problem. And because of the fact that most people who

1 have these moneys are of limited means, the compensatory
2 damages remedy is -- is of very little help.

3 And so plans came to this Court in
4 Great-West and said, oh, well this is going to be a
5 disaster if there's a present possession requirement.
6 And yet, it hasn't proven to be the case because people
7 in their circumstances act promptly, and in most
8 instances, they're able to protect their rights.

9 JUSTICE KAGAN: Mr. Stris --

10 JUSTICE ALITO: This may be where the law
11 leads us. But in your brief, you try to make the
12 argument that this is equitable in the ordinary sense of
13 the word. And I don't understand that. What sense does
14 all of this make?

15 MR. STRIS: Okay. So that's a fair point,
16 but I -- I would put it a little bit differently. What
17 I would say is that I think a fair-minded policymaker
18 could certainly pick the rule that we're describing.
19 I'm not going to get up here and tell you that it's the
20 rule that I would pick, but I think a fair-minded
21 policymaker could -- and particularly, Justice Alito,
22 when you appreciate that it's a rule that's going to
23 apply to all cases, not just subrogation. I think the
24 case for this as a policy matter becomes much stronger
25 in the pension context.

1 The reason I make that point is I know that
2 I'm running up against this counterintuitive view that
3 how can our -- how can our position, even if it's what
4 the cases say, even if the unbroken line of history
5 means this, how can it not be totally at odds with
6 the -- the core purpose of ERISA? And I think it's not.
7 It may not be the better policy in your view, but it's
8 certainly one that is consistent with the spirit of
9 ERISA, and so the decision that needs to be made is:
10 What is this line of cases that this Court has decided?
11 What did they say?

12 And I think repeatedly from Great-West to
13 Sereboff, you reiterated in CIGNA that in nonfiduciary
14 cases, a lien is not equitable relief unless it's
15 against property in the defendant's possession. You
16 have adopted a historical test.

17 And so unless applying it here is so
18 obviously at odds with the purposes of ERISA, I think
19 that applying that test, the unbroken line of
20 authorities tell us that the rule is you can only
21 enforce these liens against specific property or its
22 traceable product.

23 If I could reserve.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Anders.

1 ORAL ARGUMENT OF GINGER D. ANDERS
2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING PETITIONER

4 MS. ANDERS: Mr. Chief Justice, and may it
5 please the Court:

6 If I could just start with Justice Alito's
7 question about what -- what sense this framework makes,
8 in limiting available relief to equitable relief in
9 ERISA, Congress, I think, contemplated that there
10 wouldn't be a remedy for plan breaches in every case.
11 And so the framework this Court developed was to
12 distinguish between equitable relief on the one hand and
13 things like damages that, clearly, Congress didn't mean
14 to include in the relief that would be available.

15 And so -- I think it's been true since
16 Great-West when this Court interpreted equitable relief
17 pretty narrowly that a beneficiary will have an
18 incentive in some cases to structure a settlement in
19 order to avoid paying reimbursement to the Plan. But
20 it's also been true since Great-West that because of
21 that, plans have a need to counter those incentives by
22 diligently protecting their rights.

23 And so I think the way that the Court rules
24 in this case is not going to affect the existence of
25 those incentives on the part of beneficiaries or the

1 need for plans to be diligent. So I think it's
2 important to keep in mind here that the only reason this
3 issue comes up in this case is that the Plan wasn't
4 diligent, that the Plan waited for months when it knew
5 that it had a reimbursement claim, and that that was
6 being disputed. It didn't seek an injunction. It
7 didn't file suit.

8 So yes, I think this is a situation that is
9 unlike the mine run of cases where we see that plans
10 since Great-West have developed measures that they can
11 take in order to protect their rights.

12 JUSTICE GINSBURG: Ms. Anders, in
13 Great-West, the government filed on the side of the
14 Plan. What led the government to shift its position?

15 MS. ANDERS: I think in Great-West, I think
16 we were taking a somewhat broader view of equitable
17 relief than the court ended up adopting in that case.
18 And so as we get here today, we've taken this position
19 because we think it is absolutely the logical
20 consequence of Great-West and Sereboff together.

21 JUSTICE KENNEDY: So you took your position
22 because of Great-West?

23 MS. ANDERS: That's absolutely right. In
24 Great-West, the Court said that when the funds are not
25 in the beneficiary's possession, the Plan cannot enforce

1 an equitable lien -- cannot get equitable relief against
2 the Plan. And it relied on equitable authorities that
3 said, quoting, "If the property or its proceeds have
4 been dissipated so that no product remains, the
5 plaintiffs may not enforce a constructive trust or
6 equitable" --

7 JUSTICE ALITO: Probably what --

8 CHIEF JUSTICE ROBERTS: You thought -- you
9 thought --

10 JUSTICE ALITO: I'm sorry.

11 CHIEF JUSTICE ROBERTS: But you thought
12 Great-West adopted a -- a narrower understanding of what
13 equitable meant in this context than you thought was
14 appropriate.

15 MS. ANDERS: I think at the time we were
16 arguing for a broader understanding. But as we -- as we
17 come here today, of course, nobody has -- has argued
18 that Great-West or Sereboff should be overturned, or
19 Mertens, for that matter. And so we think the
20 consequence of those two decisions is that there will
21 not be relief in a case in which the Plan participant
22 has dissipated the funds.

23 JUSTICE GINSBURG: But would you -- say,
24 what is the government's position on commingling?
25 There's no -- the beneficiary gets the check, puts it in

1 his bank account, together with whatever else he has in
2 there. So how do we tell if he's dissipated?

3 MS. ANDERS: I agree with my friend that the
4 commingling rule at equity, I think, reflected the fact
5 that once funds have been dissipated, the lienholder can
6 no longer collect. So the way it worked was that if you
7 had funds in your account that -- and you spent them,
8 that at first it would be presumed that you were
9 spending your own money.

10 But -- but once you got down below the
11 amount that -- that was originally subject to the lien,
12 the lienholder would only be able to enforce against
13 whatever remained in that account even if it wasn't
14 sufficient to satisfy the lien amount.

15 So it's basically the same dissipation rule
16 that applies in cases that don't involve commingling.

17 JUSTICE BREYER: Why can't -- in a case
18 where there's no time problem -- forget the delays and
19 so forth -- but like this one, the Plan sue the lawyer?
20 I mean, if there was \$500,000 and the lawyer received
21 200,000 -- but he certainly received it with notice.
22 It's not any kind of good-faith purchaser -- why can't
23 they get it back from him?

24 MS. ANDERS: I think there may be situations
25 in which the Plan could sue the lawyer.

1 JUSTICE BREYER: Why couldn't they normally
2 in my situation?

3 MS. ANDERS: I think they probably could.

4 JUSTICE BREYER: All right. If they could,
5 then doesn't that solve the problem for them because
6 lawyers will be awfully careful not to dissipate the
7 funds if, in fact, they're going to be subject to the
8 lawsuit?

9 MS. ANDERS: Well, I think that's right, and
10 I think lawyers also have ethical rules that -- that
11 prevent them from -- from dissipating funds --

12 JUSTICE SCALIA: But wait a minute. I mean,
13 if they can get it from the lawyer immediately, why
14 can't they get it from the lawyer at -- at the end of
15 the day? I mean, do you mean that -- that the -- the
16 fund can get back not only what the beneficiary
17 receives, but also what he has paid his lawyer?

18 MS. ANDERS: No. I just mean that -- that
19 if the funds are in the lawyer's possession, the lawyer
20 is the agent of -- of the -- of the beneficiary, I think
21 in that situation, equity would permit the plaintiff,
22 the lienholder to trace that -- that lien amount.

23 JUSTICE SCALIA: To -- to get the whole
24 amount from the lawyer, right, so leaving the lawyer
25 without his fee?

1 MS. ANDERS: Yes. I -- I think that could
2 be correct. I mean --

3 JUSTICE KENNEDY: I thought in most States,
4 the lawyer has a lien on the fee. His lien is prior --
5 I may be wrong. His -- his lien, the lawyer's lien is
6 prior to the --

7 JUSTICE SCALIA: Yeah.

8 MS. ANDERS: I think --

9 JUSTICE SCALIA: That has to be or nobody
10 would take these cases.

11 (Laughter.)

12 MS. ANDERS: That may be correct. I
13 don't -- I don't think this situation has come up very
14 much. But I --

15 JUSTICE BREYER: I don't see why it would
16 be. There is a fund. The fund belongs to person X.
17 The lawyer knows it belongs to person X. Nonetheless,
18 the lawyer takes \$200,000 out of the money that belongs
19 to person X and gives 300,000 to the client.

20 I assume the client is more likely to spend
21 money down than the lawyer, because lawyers tend, in
22 general, to have a largely bank account than poorer
23 clients. So therefore, I do not see why they wouldn't
24 sue the lawyer.

25 But they aren't, so there's something I

1 didn't understand; hence, I a.m. asking the question.

2 MS. ANDERS: All right. Well, I don't think
3 -- I don't think it's come up very much, but I do think
4 it's possible that in some situations, plans may be able
5 to sue the lawyers. They can sue other --

6 JUSTICE SCALIA: I think it must depend on
7 how the agreement reads, and I can't imagine the
8 agreement wouldn't -- wouldn't require the beneficiary
9 to turn over the net. Not the gross, but the net
10 recovery, what -- what he receives after paying legal
11 fees.

12 MS. ANDERS: Well, I think a lot of these
13 plans are going to disclaim a common fund or -- or --
14 you know, they're going to disclaim their -- their --
15 any obligation to have the attorneys' fees counted
16 against them. So the -- the person is not --

17 JUSTICE BREYER: I'm --

18 MS. ANDERS: -- going to -- the entire
19 amount --

20 JUSTICE BREYER: -- thinking in my mind --

21 MS. ANDERS: -- but just to -- just to make
22 a -- a broader --

23 JUSTICE BREYER: There is a model. There is
24 a -- two diamond rings belonging to a trustee. They end
25 up being given to the cousin. The lawyer has them in

1 his safe. I do not believe that no matter what the
2 agreement between the cousin and the lawyer, the lawyer
3 can take the diamond ring that belongs to somebody
4 else -- and he knows it -- and put it in his pocket, no
5 matter what the agreement.

6 MS. ANDERS: Right. He's not a bona fide
7 purchaser for value in that situation.

8 But I think the Plans do have many other
9 remedies in these situations. They can trace against --
10 against any third party who takes the -- the property
11 with notice of the lien. They -- they could monitor the
12 litigation. They can intervene in these suits. They
13 can seek injunctions. These are all things that the
14 Plan here did not do.

15 And just to -- to pick up on a point that my
16 friend was making, I do think that this is a situation
17 in which reasonable policymakers could differ. There
18 are legitimate concerns on both sides. It is absolutely
19 a legitimate concern that in some cases a plan may not
20 be able to recover even if it has diligently protected
21 the rights. But --

22 CHIEF JUSTICE ROBERTS: All -- all of those
23 things you say -- all of those things you say the Plan
24 can do, though, are -- are a lot more complicated than
25 simply saying they should be able to recover that to

1 which they're entitled under the agreement. And when
2 you get into -- we've noted before that we try to avoid
3 complicating the procedures in this area, for the simple
4 reason that nobody has to set up one of these plans.
5 And if they don't know, you know, how much it's going to
6 cost in advance and all of them just say, well, it's not
7 worth it, and if I've got to go and file injunctions or
8 this or that every time somebody makes a -- has a tort
9 recovery, you know -- but I'm not going to do it. I
10 won't set up one of these plans.

11 MS. ANDERS: Well, I think -- I think an
12 important point, Your Honor, is that no matter how the
13 Court rules here, the Plans are going to have those
14 obligations and they're going to have those burdens,
15 because Great-West permits beneficiaries to structure
16 their settlements to avoid paying reimbursement to the
17 Plan.

18 So because of that, ever since Great-West,
19 Plans have taken these measures and -- and they will
20 continue to take them even if the Court rules for
21 Respondents.

22 JUSTICE SCALIA: What are the concerns on
23 the other side, which you have mentioned and -- and
24 which your -- your friend also mentioned? What are
25 they?

1 MS. ANDERS: So one concern, as you said, is
2 that -- that whatever rule the Court announces, it's
3 going to apply in the pension and disability benefit
4 context too. And in that situation, the Plan may be
5 making overpayments to beneficiaries over a long period
6 of time. And the beneficiary may spend the money
7 without knowing that she's going to be responsible for
8 reimbursing it later, or -- or that it's not her money
9 to spend in a sense. And so in that situation, I think
10 a policymaker could be concerned that -- about a plan
11 being able to go -- go back months or years later and --
12 and get reimbursement from the beneficiary.

13 So I think, you know, this is really a
14 question for Congress. But what Congress could do is it
15 could weigh that potential against the downside to the
16 Plan, the fact that, since Great-West, they have -- they
17 have had these obligations, they have needed to
18 diligently protect their rights, and, I think, in the
19 mine-run of cases, they've been able to do so.

20 So I think those are the things that
21 Congress could weigh in looking at the policy -- policy
22 concerns on either side of this.

23 And that's why we think those concerns
24 really shouldn't drive the analysis here. The --

25 JUSTICE KAGAN: Ms. Anders, could I -- could

1 I shift gears a little bit and -- and just ask: The
2 test that we've set up is whether a remedy is typically
3 available at equity. And there's been some
4 back-and-forth, I think, about what that means.

5 What does it mean?

6 MS. ANDERS: I think "typically available in
7 equity" meant remedies that were considered to be
8 equitable in nature. And so it certainly did not
9 include, as this Court said in Merten, the type of --
10 Mertens, the type of -- relief, such as deficiency
11 judgments or lien destruction damages, that that Court
12 thought of as legal to the end of the -- the time of the
13 divided bench.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Katyal.

16 ORAL ARGUMENT OF NEAL K. KATYAL

17 ON BEHALF OF THE RESPONDENT

18 MR. KATYAL: Thank you, Mr. Chief Justice,
19 and may it please the Court:

20 Three things are undisputed.

21 First, that Montanile signed a form saying,
22 quote, "I agree to reimburse in full the Plan from any
23 settlement."

24 Second, the Plan provides that such funds
25 are, quote, "Assets of the Plan not distributable to any

1 person without the Plan's written release."

2 And third, under Sereboff, that the Plan
3 would have an enforcement claim under 502(a)(3) if
4 Montanile still possessed the funds.

5 What we're disagreeing about is whether
6 Montanile's decision to commit a second wrong of
7 spending the Plan's money himself has made him
8 judgment-proof. And the answer is no for a very simple
9 reason: When a right under equity has attached and a
10 defendant then knowingly frustrates that equitable
11 claim, it is absolutely part of equity to permit that
12 claim. This reflects the cold reality that the
13 defendant took actions that blocked an otherwise valid
14 claim in equity.

15 JUSTICE SOTOMAYOR: I -- I have no idea
16 where you think this lien attached. Do you think it
17 attached at the fund, immediate -- the whole 500,000, or
18 the amount of that 500,000 that ended up in his pocket,
19 or that 500,000 minus what, if anything?

20 MR. KATYAL: So it -- it's -- Barnes says
21 that the -- that the lien attaches at the moment that he
22 is -- that he has gotten title to the thing. He gets
23 title to the thing when there is a \$500,000 settlement.
24 Settlement, of course, that we didn't know about, but
25 that he nonetheless did.

1 Our only --

2 JUSTICE SOTOMAYOR: So your position is at
3 that moment it goes to the lawyer, it's his money, all
4 500,000. You're entitled to whatever --

5 MR. KATYAL: To a -- to a lien of \$121,000
6 on it.

7 And so our claim is not that we have some
8 general remedy at law that we can get compensatory
9 consequential damages or punitive damages. It's limited
10 by the lien itself.

11 And that is the rule in equity, that when
12 someone frustrates a valid claim in equity by taking
13 actions to dissipate the fund, you can get --
14 recover the value of that fund. You can't recover more
15 than that. So this is the bitter with the sweet that
16 when -- when you make an equitable claim like this, you
17 have to be limited by all the rules of equity.

18 So in addition to that, Justice Sotomayor,
19 we couldn't, for example, try and attach the asset, try
20 and attach and file a lawsuit, until he actually took
21 possession of the funds.

22 JUSTICE BREYER: So I -- I found a list. On
23 this list I have, one, there is the fund, 500,000 in it.
24 It belongs to the company, not to him.

25 Now, he takes the fund and he begins to

1 distribute it with the aid of his lawyer. Some of the
2 money goes to the lawyer. If that money is still there,
3 I imagine you could get it.

4 Some of the lawyer's goes to his bank
5 account. If, in fact, that bank account has not gone,
6 from the time he put it there to the time you sue, below
7 \$121,000, you can get it. Indeed -- and if it has gone
8 below, you can still get it even if there's a penny, but
9 you can only get the penny.

10 If he has taken the 121,000 out of it and
11 given it to a person with knowledge, for example, his
12 wife or children, and it is in their bank account, I
13 guess you could get it.

14 And indeed, if they have got and bought with
15 it some tangible item that you can trace it to, I guess
16 you can get it.

17 But what we could not find and, in fact, if
18 you can't find any of those, you could still sue him
19 under State law, under State fraud statutes, and recover
20 in damages. That's at law. And maybe you can do it
21 even under such a remedy where it's much more mixed up
22 than the other side was prepared to give you credit for,
23 in which case, you have State law remedies at law.

24 Now, what I could not find is a case
25 embodying the theory you are now advancing, that he

1 simply gets the damages even where he doesn't have any
2 of the remedies that I just mentioned.

3 MR. KATYAL: So -- so first of all, we're
4 not advancing that theory, Justice Breyer. You cannot
5 get -- we're not advancing a damages theory whatsoever.
6 All we're saying is that you can recover the value of
7 the lien itself when someone frustrates an equitable
8 claim that otherwise exists.

9 And we point to three different traditions
10 in equity that permit you to do that: substitutionary
11 monetary decrees, deficiency judgments, and swollen
12 assets. All of those reflect the basic idea that
13 someone shouldn't profit from their second wrong, their
14 wrongdoing of dissipating a fund.

15 So look, there is a -- they're absolutely
16 right. The general rule is that you can't recover from
17 general assets. That is absolutely right. But there's
18 an urban legend that -- that I think the briefs try and
19 spin around that rule, to say that that general rule
20 encompasses a situation when someone acts wrongfully to
21 dissipate a fund, as to which someone has a claim.

22 And that circumstance, just as Holmes's
23 opinion in *Otis* says, he says, if the complaint, quote,
24 "seeks the recovery of an identified fund, that
25 complaint will not fail because the fund is gone and

1 misappropriated by the defendants. Rather, under those
2 circumstances, the plaintiff has a right to compensation
3 as alternative relief."

4 That's not damages --

5 JUSTICE SCALIA: That would be wonderful, if
6 he said "has an equitable right to compensation." I
7 mean, you know, that sounds like cleanup to me.

8 MR. KATYAL: No, it's not, Justice Scalia.
9 I think it's not, for several reasons.

10 Number one is, of course, in that case, the
11 entire fund was gone. So if it were cleanup
12 jurisdiction, there had to be something to pend to.
13 There had some ancillary jurisdiction, some equitable
14 claim. There had to be some fund that was still
15 remaining in order for there to be something to pend to.
16 There wasn't there. The entire fund was gone.

17 JUSTICE SCALIA: Is -- is -- is that the
18 requirement?

19 MR. KATYAL: Well, I think that otherwise --

20 JUSTICE SCALIA: Is some of the fund there?

21 MR. KATYAL: Otherwise, Your Honor, there
22 wouldn't have been any reason -- there is a requirement
23 that, in order for --

24 JUSTICE SCALIA: There was an equitable
25 jurisdiction, so long as the person had possession of

1 the fund at one point.

2 MR. KATYAL: I don't think that there's --

3 JUSTICE SCALIA: And then -- and when the
4 suit is completed, it's discovered that all of the fund
5 is gone.

6 MR. KATYAL: No, your Honor. If -- if their
7 argument is right, and this is something that Judge
8 Posner has said, for example, in -- in describing this
9 in the Medtronic case. In order for ancillary
10 jurisdiction to exist, there has to first be a valid
11 equitable claim. And then, for the convenience of the
12 parties, you can resolve a legal claim.

13 In Otis there was no equitable claim under
14 their theory, which -- which is, you -- you know, if the
15 fund is gone, there's no lien that it's attached. It's
16 gone. It's dissipated.

17 So -- and then it also say, you know, it's a
18 remarkable that they say that all of these cases are
19 cleanup jurisdiction.

20 JUSTICE SCALIA: Wait. If -- if -- if
21 there's no equitable cause of action for them, why is
22 there for you?

23 MR. KATYAL: Because we think that the
24 proposition that they're trying to say is wrong, the
25 idea that when you dissipate a fund, you lose your

1 equitable claim.

2 Our point is that is -- that's generally
3 true; not true in a circumstance when a defendant
4 frustrates an otherwise valid equitable claim.

5 JUSTICE SCALIA: So -- so you ought to be
6 able to bring suit in equity without asserting that the
7 person ever had the fund in his hands.

8 MR. KATYAL: Well, you can't do that, of
9 course.

10 JUSTICE SCALIA: You say, he owes me the
11 money.

12 MR. KATYAL: You can't do that, of course,
13 as Knudson says. And -- and that's a standard rule.
14 We're not here --

15 JUSTICE SCALIA: You're saying even if you
16 know the person has dissipated all the funds, you can
17 sue for the equitable lien, even if you know the funds
18 are all gone?

19 MR. KATYAL: Correct, Your Honor. As long
20 as that was a knowing dissipation, that that's what
21 happened. And that's what the substitutionary momentary
22 cases --

23 JUSTICE SCALIA: Do you have any cases?

24 MR. KATYAL: Sure. Otis itself is a case
25 that does that. Justice Homes's opinion, Justice Story

1 has a description of other cases in his treatise.
2 Our -- our brief talks about the Baxter case and the --
3 and the Bank of Marin case. These are the closest
4 analogue to this case, because they're not the general
5 rule about can you recover from general assets; they're
6 about the specific rule, can you profit from your
7 wrongdoing when an equitable lien by attachments is --
8 or an equitable lien by agreement is already attached.

9 CHIEF JUSTICE ROBERTS: It has to be pretty
10 easy for you to protect yourself, doesn't it, as soon as
11 at some suitable time after the injury you do write a
12 letter to the person and say, look, you need to know
13 that if you sue somebody, the money is ours, and because
14 we have these rights of subrogation, or let us know if
15 you're going to, and we'll show up in court with you
16 and -- and -- and help you?

17 Where -- see, I guess it would probably be
18 pretty easy to -- to monitor it yourself. I mean, the
19 court's computerized dockets, you just punch in
20 "Montanile," and -- and whenever that pops up on the
21 docket and you find out right away. It's certainly long
22 before the case is resolved. It -- it doesn't --
23 I mean, I -- I think your friend has -- has a
24 significant point that it's actually not as hard as it
25 might appear.

1 MR. KATYAL: So -- so three things, Your
2 Honor. First, we're not grounding our argument in the
3 policy of things. We do think that the policy
4 consequences are -- are important, but we think that if
5 the test is what's traditionally available in equity,
6 these three specific lines of authority that we're
7 pointing to answer that question.

8 But as to the policy concerns, we think
9 exactly as you said to my friend on the other side.
10 There are two big problems with that. Number one is
11 Plans don't get noticed about when settlements occur.
12 In the amicus brief from NASP explains most auto
13 accidents, for example, are settled without any public
14 record, without any lawsuit being filed whatsoever. So
15 you can't exactly type it into Westlaw or something like
16 that. So that's one problem.

17 The other is that it becomes very expensive
18 for Plans to monitor this stuff. And Plans are, you
19 know, some for profit entity. Every dollar that you
20 spend that the Plan has to spend on monitoring or
21 writing these letters or filing lawsuits or filing TROs
22 is a dollar that is taken away from innocent Plan
23 beneficiaries, people who have done --

24 CHIEF JUSTICE ROBERTS: Right. I mean,
25 that's the point we have made in our precedents, but it

1 can't -- you can't carry that so far that otherwise you
2 would say, well, the Plan always wins.

3 MR. KATYAL: Right. I'm certainly not
4 trying to do that. All I'm saying is that the policy
5 arguments here, I do think, are substantial and have
6 weight. The amicus briefs, before you say, over a
7 billion dollars each year is recovered through these
8 reimbursement actions. And -- and if you adopt their
9 plan, then as you were saying as to my friend, you're
10 going to just tell the client -- you are -- telling the
11 Montaniles of the world, spend that money right away.
12 Settle the case at 10:00, and by 10:01 spend all the
13 money. And in that circumstance, then Plans are out of
14 luck. Innocent beneficiaries, that means, are out of
15 luck, and people like Mr. Montanile get a double
16 recovery. And equity is not so brittle. There is no
17 tradition in equity that supports this idea.

18 As, Justice Alito, you were saying, how
19 could this make any sense? It didn't make sense at
20 equity. Equity has always been more flexible than that.
21 It's always recognized the idea that people shouldn't be
22 able to profit from their wrongdoing, and that rights
23 have remedies, and avoiding formalistic distinctions.

24 And speaking of formalistic distinctions,
25 the Solicitor General's rule is as formalistic as it

1 gets because they say you can get the remedy out of
2 general assets as long as the lawsuit is filed in time
3 for -- the lawsuit is filed -- is filed at a time when
4 there was possession of the fund. That is --

5 JUSTICE SCALIA: Mr. Katyal, equity itself
6 is a formalistic distinction. I mean, to -- to argue
7 that -- that we shouldn't make formalistic distinctions
8 in trying to figure out whether particular relief is
9 equitable relief or not, I don't -- that's
10 incomprehensible to me.

11 MR. KATYAL: Well, Justice Scalia, as
12 Justice Frankfurter says, equity, quote, "assures
13 mechanical rules and depends on flexibility." Every
14 equity treatise -- look at Pomeroy, for example, of
15 Section 111. All the other treatises say --

16 JUSTICE SCALIA: Pomeroy doesn't -- doesn't
17 support you as --

18 MR. KATYAL: I think very much --

19 JUSTICE SCALIA: -- Pomeroy's quotes are
20 contrary to what you --

21 MR. KATYAL: -- very much it does. There is
22 not a quote from Pomeroy or from any of the other
23 treatises that deal with this situation when someone is
24 trying to profit from their second wrong, when there is
25 already an equitable lien by attaches.

1 And, you know, for example, Pomeroy, just on
2 the flexibility interchange, were saying, Section 111,
3 "Equity has followed the true principle of contriving
4 its remedy so they shall correspond both to the primary
5 right of the injured party and to the wrong by which
6 that right has been violated. It has therefore never
7 placed any limits on the remedies it can grant either
8 with respect to their substance, their form or their
9 extent, but it's always preserved the elements of
10 flexibility and expansiveness so that they can be
11 modified to meet the requirements of every case."

12 And this is a perfect example --

13 CHIEF JUSTICE ROBERTS: Well, I don't know
14 that you can read our precedence in this area to say
15 that they're very flexible. I mean, Sereboff, the
16 difference between equitable lien for restitution and
17 equitable lien by agreement, you -- you know, you can
18 get, you know, deficiency judgments as opposed to legal
19 judgments, and whether one's sort of an adjunct to the
20 equitable action or freestanding. It's an area where
21 the -- the equity rules strikes me as very technical.

22 MR. KATYAL: Well, they are technical when
23 it comes to that first question, is there an equitable
24 claim in the first -- first instance. And so Knudson,
25 for example, says no, because there's no possession of

1 the fund. Sereboff says here there is possession;
2 therefore, there is.

3 We don't quibble with any of that. Here as
4 this case comes to the Court, everyone agrees -- that's
5 the third point I made at the outset -- everyone agrees
6 there was an equitable lien by agreement. The only
7 thing we're disagreeing about is whether or not by
8 spending all the funds we've lost our remedy.

9 And with respect to that question, they have
10 general precedents which say you can't go after general
11 assets. We agree with that. The relevant question is,
12 when someone has wrong -- when -- when -- when a valid
13 equitable lien by agreement attaches and then someone
14 acts to dissipate that, can they profit from their
15 wrong.

16 JUSTICE SOTOMAYOR: The -- the essence of
17 Great-Western -- I don't know if I'm reading it rightly
18 or not. I'll certainly be corrected by the author and
19 dissenters if I'm not. But it seemed to me that they're
20 basically saying, whatever remedy you have has to be an
21 equitable remedy.

22 MR. KATYAL: Right.

23 JUSTICE SOTOMAYOR: The most that I read
24 about a substitution decree or deficiency decree is that
25 it's an ancillary jurisdiction to issue those.

1 Is that consistent with saying it's
2 equitable? Isn't it just a legal claim that equity
3 sometimes permitted an -- an equitable court to
4 exercise, but wouldn't it still be legal --

5 MR. KATYAL: Right. Justice --

6 JUSTICE SOTOMAYOR: -- and not within --
7 within the -- the scope of ERISA?

8 MR. KATYAL: Justice Sotomayor, this is,
9 again, part of the urban legend that -- that's being
10 developed around this. There is no case that says that
11 a substitutionary monetary decree is a legal judgment or
12 is ancillary. To the contrary, cases that we're citing
13 such as Baxter and Otis suggest that it is an equity not
14 in that. And -- and indeed, if there's any doubt about
15 this, I -- I suggest that you'd have to say it's equity,
16 because the tradition for ancillary, which was pendent
17 jurisdiction was, if an equity court was going to decide
18 a legal claim, they had to label it as a legal claim
19 because of the Seventh Amendment reasons, because
20 otherwise, they might, you know, there's -- there's all
21 sorts of jury trial issues that come up.

22 So that's why the tradition for cleanup
23 jurisdiction was to label those claims specifically to
24 say, okay, first we're going to solve our -- our
25 equitable claim, and now we're going to turn as part of

1 our pendent jurisdiction --

2 JUSTICE SOTOMAYOR: I'm still a little bit
3 confused by all of this. In my mind, you get money when
4 somebody gives it to you. And I -- I know that a lawyer
5 is an agent, but the agent is keeping a piece of the
6 money. You can still go after the client for the piece
7 the lawyer took?

8 MR. KATYAL: So with -- with respect to
9 the -- the lawyer piece is much more complicated. And
10 this goes to Justice Breyer's question. I mean, there's
11 actually a circuit split on this question about can you
12 go after the lawyer, and the reason why you may not be
13 able to go after the lawyer is the lawyer is not a party
14 to the underlying agreement.

15 And that's what I think the Eighth Circuit
16 says in contradistinction to others. And so that's --
17 that -- that it is -- that is not a great remedy. And,
18 of course, it requires the lawyer to be on notice of the
19 Plan and all the reimbursement obligations and the like.

20 Under equity, Justice Sotomayor, I think the
21 idea is that when someone has made a valid promise to --
22 for these funds, such as here, Montanile knew that he
23 was playing with house money. He knew that these
24 weren't his -- this wasn't his money; it was the Plan's
25 money from the start. And then he goes and spends that

1 money on other things. Yes, you can go after his
2 general assets to recover that spending on other things.

3 And that is something amply supported by
4 these three different traditions in the case law. Those
5 are the closest analogs to what's going on here when
6 someone has dissipated and frustrated a -- an action
7 that -- that otherwise existed.

8 JUSTICE GINSBURG: Can you say again, when
9 does the lien attach? Is it when the tortfeasor pays --
10 gives it -- the check to the lawyer, or is it when the
11 beneficiary actually gets the 200,000?

12 MR. KATYAL: Well, I don't think that the
13 answers are clear on that, but I do think it's when
14 he takes -- I think the most this Court has said it's
15 when he takes title to the thing. And presumably, he
16 takes title to the thing at the moment that the check is
17 given to the lawyers.

18 Now if, at that moment, Justice Ginsburg,
19 say the bank account of the lawyer was hacked and the
20 \$500,000 settlement was gone, our view is his general
21 rule then kicks in. In that circumstance, we cannot
22 recover. The only thing we're saying is that when a
23 defendant knowingly dissipates a fund as to which
24 someone else has a claim, it's in that circumstance that
25 the exception -- as Justice Story called it, that

1 peculiar exception applies to try and basically make
2 sure that he isn't profiting a second time from his
3 wrongdoing.

4 That's why the claim is a very limited one
5 at equity. It's just a -- it's a -- and again, it's
6 only limited to the amount of the lien. You can't go
7 more than that. You can't have punitive damages and the
8 like, and it's encumbered by all the defenses in the
9 equity. We have to take the bitter with the sweet, so
10 laches and unconscionability. All of that would be
11 standard defenses that are available to such an action.

12 Now, my friend on the other side has said,
13 well, this is going to reach disability situations.
14 Absolutely not. I mean, I think you have a variety of
15 amicus briefs before you that say that there's a
16 specific statute, 407(a), which prohibits liens against
17 Social -- Social Security Disability overpayments. He
18 says it's going to reach pension overpayments. Again,
19 that's not our rule. Our rule in -- in those -- in
20 those circumstances, a pension plan is overpaying a
21 beneficiary.

22 And if the beneficiary spends that, well,
23 that's not something that they're knowingly dissipating.
24 That's very different than a circumstance like this in
25 which someone is dissipating a fund as to which they --

1 someone -- as to which the Plan has an underlying lien
2 against. And that's why it's a -- it's a very limited
3 rule. It's one that tracks the tradition at common law.
4 Both Otis talks about misappropriation, and Baxter talks
5 about wrongful dissipation when someone has a valid lien
6 against you. And as well, the Orr case, for the swollen
7 assets theory and the like.

8 Now, my friend on the other side says in his
9 brief, well, then why in the world are we spending so
10 much time -- are all these equity cases spending so much
11 time on tracing? And our view is very simple on that.
12 Tracing makes a lot of sense. In the lion's share of
13 cases, tracing becomes very important because you don't
14 have a defendant who is acting wrongfully and knowingly
15 dissipating a fund. And so the Plan or whoever the
16 trustee is wants to -- wants to go after general assets
17 but then can't, unless they can trace them to a specific
18 asset.

19 Tracing is just a lien-priority doctrine.
20 It's nothing more than that. The Restatement that my
21 friend cites on the other side that is cited in Knudson
22 in Section 215 is as clear as day. It just talks about
23 lien priority. It doesn't say that there is no claim if
24 general -- if -- if someone dissipates a fund. It says
25 that they are not entitled to lien priority. That is

1 it.

2 And look, we agree with that. We're not
3 here trying to say we have a priority over other
4 asset -- over other creditors. We're just simply saying
5 we are to use the language of the Restatement, a
6 "general creditor."

7 CHIEF JUSTICE ROBERTS: So you don't have
8 priority over other creditors. So if Mr. Montanile owes
9 somebody money, he -- it's all right if he takes money
10 from the fund and pays that debt?

11 MR. KATYAL: Well, we are then -- you know,
12 as long as we can't trace it in a world of no tracing.
13 So there's obviously some funds here that we may able to
14 trace, because as the interchange with Justice Ginsburg
15 was suggesting, it's not totally clear what was spent
16 and what isn't.

17 But with respect to the rest, yes. I mean,
18 we have to take the bitter with the sweet, and that
19 means we are a general creditor out of general assets.
20 It's not like we get first priority over those assets,
21 which is why this remedy is at best a second-best one
22 for us. I mean, the ideal is, of course, to prevent
23 someone from dissipating the funds altogether.

24 And we do think, if this Court recognized,
25 as I think most of the circuits have, that we have a

1 cause of action here, then I think it would deter people
2 from engaging in the kind of behavior that Mr. Montanile
3 did.

4 JUSTICE KENNEDY: I just want to be clear:
5 I understand your position and your answer.

6 Fund has -- has a claim for reimbursement
7 from the accident proceeds. Accident proceeds put into
8 the bank account of the Plan beneficiary, the injured,
9 the person who was injured in the accident. He also has
10 another creditor.

11 You're -- you stand evenly with that
12 creditor?

13 MR. KATYAL: So if --

14 JUSTICE KENNEDY: Was that your answer?

15 MR. KATYAL: Well, it is in the situation of
16 a dissipated fund. So obviously, if we can trace -- and
17 this is why tracing is still important.

18 JUSTICE KENNEDY: Well, it's -- it's your
19 example. The case is settled at 10:00 in the morning.
20 At 10:30 in the morning, it's in the bank account.

21 MR. KATYAL: Yes.

22 JUSTICE KENNEDY: Nothing has been spent,
23 but there's a creditor. And the creditor's claim is
24 equal to the Plan's claim, and there's only enough money
25 for one.

1 What happens?

2 MR. KATYAL: Well, Justice Kennedy --

3 JUSTICE KENNEDY: I thought you would have
4 priority.

5 MR. KATYAL: I would if -- it sounds like we
6 could trace that fund. That is, the fund hasn't been
7 spent in that circumstance.

8 JUSTICE KENNEDY: It's traceable. It's in
9 the bank account.

10 MR. KATYAL: Right. So then -- and that --
11 that's exactly right. So we would have priority over
12 that \$500,000, in that circumstance, over other
13 creditors.

14 My only point is if we're in the
15 Montanile-like situation in which he has -- let's say he
16 spent down that entire fund and there's another creditor
17 who also -- Montanile owes money to. Once that happens,
18 we are -- we can only recover just like the other
19 general creditor. And that's what the Restatement says.
20 That's all it says.

21 It does not say that if a fund is
22 dissipated, that there is no claim anymore. That would
23 be contrary to the whole idea as Justice Alito's
24 question was, about what equity is all about. That
25 makes -- that makes no sense.

1 An equity is not that brittle, Justice
2 Scalia. I understand that there are traditions in
3 equity and there are certain rules. But at the end of
4 the day, there -- it was never that formalistic and --
5 and -- and have the idea that someone could profit so
6 much from their wrongdoing in frustrating an equitable
7 claim that otherwise exists.

8 JUSTICE KAGAN: But it seems, Mr. Katyal,
9 that you are relying on remedies that really developed
10 very late in equity's life. In other words, you know,
11 equity was going along, and there were these very formal
12 rules distinguishing it from the legal world. And then
13 as it progressed, there were -- people thought we need
14 some cleanup authority, or maybe even people just
15 thought these rules aren't working in the way that we
16 want them to work. So equity got a little bit less
17 equitable as it approached the merger with law.

18 But that, I think, is not really what we've
19 meant when we've said we're looking to things that are
20 typically equitable. You know, not like the last throes
21 of equity as it was becoming a legal system.

22 MR. KATYAL: So, Justice Kagan, I'd spot you
23 that with respect to swollen assets, you know, which
24 does come around in the 1930s, and so maybe there's an
25 argument there. But -- but for example, substitutionary

1 monetary decrees, Justice Holmes's opinions in 1897,
2 exactly the same year as Barnes, the Chief Justice's
3 opinion that was the foundation for Sereboff. And
4 indeed, it has a tradition that goes back to
5 Justice Story's 1828 treatise, which cites earlier cases
6 even still.

7 So I don't think that we're relying that.

8 JUSTICE KAGAN: Well, you take the -- the
9 deficiency judgments, which, I take it, was a rule was
10 needed to give equity that authority, because everybody
11 thought equity didn't have that authority.

12 MR. KATYAL: Well -- well, even if you can
13 make that argument about deficiency judgments, which
14 I'll respond to in a moment, you can't make it about
15 substitution or monetary decrees, which is a distinct
16 body in equity.

17 And with respect to that, in 1864,
18 absolutely. This Court promulgated Equity Rule 92,
19 which allowed for deficiency judgments. But I think the
20 fact that they had to issue a rule doesn't somehow make
21 it a law claim, as my friend says. I mean, after all,
22 Rule 73, promulgated in 1864, was a rule about
23 preliminary injunctions. And I certainly think
24 preliminary injunctions were available in equity, and,
25 you know, the fact that there was a rule about it didn't

1 somehow convert it into a law claim.

2 So I think the very fact that this Court
3 issued a rule called Equity Rule 10 is suggestive of the
4 -- of the fact that this is a tradition in equity.

5 Now, look, if there's some doubt about this,
6 if there's some doubt on the traditions, and they've
7 got -- I don't think they have a single case, but even
8 if you thought they did, that said that we were
9 prohibited -- that we were prohibited from making these
10 claims at equity, I think you should err on the side of
11 recognizing the claim.

12 Why? For three reasons. One, because as
13 the Solicitor General's brief in Sereboff said, the
14 point of ERISA is to try and give effect to written
15 plans and their determinations. And if there's doubt
16 into the -- as to what the equity tradition is, you
17 should read it in light of trying to enforce Plan terms.
18 That is the pages 23 and 24 of their brief. It is
19 consistent with the way this Court approaches, for
20 example, Title VII cases and the like.

21 The second is that, again, all we're seeking
22 here is a remedy. We're not trying to get more than
23 what would have been otherwise available at equity.
24 Our -- our view is that when someone frustrates an
25 otherwise equitable claim, we can only try and reinstate

1 that claim. You can't get more from it because of their
2 second wrongdoing. So I think we're giving effect to
3 what equity is all about.

4 And then, third -- and this goes back to
5 your last question to Ms. Anders, you said, you know,
6 what was -- what was the -- what does "typically
7 available at equity" mean? And you know, that test
8 comes from Mertens. Mertens isolates three examples of
9 what was traditionally available as equity -- at equity:
10 mandamus, injunction, and restitution.

11 Now, if you look at mandamus, for example,
12 there are precedents from this Court making -- that --
13 that suggest that equity -- that equity didn't recognize
14 mandamus. You know, this Court twice in the nineteenth
15 century in Hine and Downs both said that -- said that
16 twice.

17 And I think that's a good textual clue that
18 when there's doubt as to whether something is actually
19 traditionally available at equity or not, you should err
20 on the side of recognizing it as traditionally
21 available, as this Court did in the foundational Mertens
22 test.

23 We're not quibbling with Mertens. We're
24 simply saying we're at least as strong as to whether
25 something was traditionally available at equity as

1 mandamus. Because in mandamus, two cases from this
2 Court suggested it wasn't traditionally available, and
3 yet, the Court still, in Mertens, used that as one of
4 its three examples.

5 If there are no further questions.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Stris, you have four minutes remaining.

8 REBUTTAL ARGUMENT OF PETER K. STRIS

9 ON BEHALF OF THE PETITIONER

10 MR. STRIS: Thank you, Mr. Chief Justice.

11 I'd just like to make two brief points. The
12 first one is that the historical authorities are
13 unquestionably on our side. And it was interesting
14 hearing my -- my friend Mr. Katyal go straight to the
15 substitutionary monetary remedy. I want to say a couple
16 things about this:

17 First, if you look carefully, the exact
18 argument he's making was rejected by the holding of this
19 Court in Great-West. This is Section II C of the
20 Court's opinion. It's kind of a lesser-known part of
21 the opinion.

22 The -- the argument was made that a
23 beneficiary of a trust commits that second wrong that he
24 was talking about when they get a loan contractually and
25 refuse to pay it back. And what this Court said is, no,

1 that's not typically available in equity. And, you
2 know, it's precisely the distinction that he's trying to
3 now push upon you to squeeze this remedy through.

4 So let's look at the substitutionary
5 monetary decree cases he talks about.

6 Not a single one of them involves an
7 equitable lien by agreement. They -- they don't involve
8 an agreement. They're restitutionary cases. So that's
9 also interesting to me that he criticizes our side
10 talking about the -- the Restatement of Restitution,
11 Section 215, whereas we talk about Pomeroy. We talk
12 about Jones on liens. We talk about the Person case.
13 It's an 1880 case on page 35 of the Blue brief. It's an
14 equitable lien by agreement case.

15 The historical authority here is beyond
16 dispute.

17 And -- and I guess the last thing I'll say
18 on this is look at the Shafer's Appeal cases. It's one
19 of his lead cases on page 37, note 6. It says that
20 substitutionary monetary relief is legal.

21 So I -- I think if you look at the cases,
22 not that I would wish that upon anyone, they -- they
23 really do not even credibly support the proposition
24 historically.

25 So where does that leave us? I mean, I

1 think I was honest from minute one when I got up here.
2 The only reason that you would contort the standard that
3 you've developed -- let's be honest; you know, spot me
4 this -- you have to believe our position is
5 fundamentally inconsistent with the purpose of ERISA.
6 If you do, then I have a problem.

7 But here's where we're at. Mr. Chief
8 Justice, you made a very strong policy argument about
9 why my rule is no good. With respect, I think I could
10 make a very strong policy argument about why
11 participants who prove a clear bad-faith brief by a plan
12 should get consequential damages. I could make that
13 argument. I think I could make it very persuasively.
14 But that's not what we're here to do. We're here to
15 apply the historical test.

16 So let's end, essentially, with, I think, a
17 key concession that Mr. Katyal makes about the
18 disability context.

19 So if you look at this case and you say,
20 well, all this subrogation, I don't know. These
21 arguments that the Plans have ways to protect
22 themselves, maybe they're right, but maybe they're
23 onerous. And, you know, I'm just not sure if it's going
24 to add to the cost of plans.

25 Go look at the disability cases. Because I

1 was stunned when Mr. Katyal got up here and said, oh,
2 well, the disability cases are different, like this
3 doesn't extend to them. He filed a cert petition with
4 respect with this Court in the Bilyeu case, which was
5 one of the circuit split cases that's here. Half of the
6 circuit split cases involve the disability context.

7 So I'll end with this: What does that tell
8 you? The fact that you look at these disability cases
9 and you see that money is being advanced and it's being
10 spent before the lien even attaches, and yet they're
11 made part of the circuit split, and in this case
12 Respondent is not willing to defend that as a policy
13 position, I think what it tells you is that fair-minded
14 people could disagree as to where you want to place the
15 risk.

16 And so when we go and look at this and we
17 think about it in terms of burdens, if there is any
18 reasonable position, as you look at this, that a rule
19 that says you can essentially go after general assets,
20 means that some meaningful number of fiduciaries will
21 abuse that to assert rights they don't have or to delay,
22 then I think you need to go with the clear line of
23 historical authorities.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: I'm sorry, counsel.

1 You say he filed a cert petition. Is that on behalf of
2 the same client this year?

3 MR. STRIS: It's not on behalf of the same
4 client, no. But it -- it shows that the disability
5 cases are governed by precisely the same legal rule,
6 since for him to suggest that the legal rule that you're
7 going to decide here would not also -- also apply in
8 disability cases, flies in the face of the precise
9 position he took when he filed the cert petition --

10 CHIEF JUSTICE ROBERTS: Well, I'm just
11 trying to --

12 MR. STRIS: -- in the Bilyeu.

13 CHIEF JUSTICE ROBERTS: Are you saying that,
14 because he represented a different client and took a
15 position in that case, he's somehow bound by that here?

16 MR. STRIS: Oh, no, no. Certainly not.
17 What I'm saying is we have a circuit split. And half of
18 the cases are subrogation, and half of them are
19 disability. So the Court's recognized that the legal
20 principle in this case will not only apply in
21 subrogation cases but they'll apply in disability cases.

22 And Mr. Katyal recognizes that because he
23 represented a party in one of those cases.

24 So my -- my point only is, don't accept the
25 representation that the rule here can somehow be

1 confined to subrogation cases.

2 Because, as an empirical matter, it cannot.

3 CHIEF JUSTICE ROBERTS: Well, I would be
4 surprised by the proposition that lawyers are somehow
5 collaterally estopped if they take a particular position
6 on behalf of one client from taking a different position
7 in a different case.

8 MR. STRIS: No. Most certainly that's true.
9 And perhaps I've miscommunicated.

10 We have a circuit split which led to the
11 Court granting this case, and all of the cases purport
12 to resolve the same question presented. Half of them
13 are in the subrogation context; half of them are in the
14 disability context. So I don't -- I don't see how one
15 could credibly take the position that you can decide
16 this case and it would not affect the mine run of
17 disability cases, because they're part of precisely the
18 same circuit split. It's the same issue.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 11:04 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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