No. _____

In the
Supreme Court of the United States

BERNARD MCLAUGHLIN,
Petitioner,
v.

NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN BOARD OF TRUSTEES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. After Third Circuit had affirmed an Order in favor of an ERISA plan by recharacterizing it as a monetizing of a lien rather than a personal money judgment, did the Court err by not correcting the ERISA Plan's misuse of that Order when the Plan docketed it under a state law available only for money judgments, contrary to ERISA's prohibition on relief at law.

2. Did the Third Circuit err by not permitting the Participant discovery on whether the Plan's withholding of benefits as a set-off had reached the point whether his indebtedness to the Plan had been satisfied.

LIST OF ALL PARTIES

The parties are as they appear in the caption and consist of the trustees of a qualified ERISA Plan, the National Elevator Industry Benefit Plan, and the Plan's participant, Bernard McLaughlin.

LIST OF ALL PROCEEDINGS

1. *Board of Trustees of the National Elevator Industry Health Benefit Plan v. Bernard McLaughlin*, Civ. No. 12-4322 (D.N.J. January 21, 2014), *aff'd* No. 14-1308 (3d Cir. October 1, 2014), *cert. denied*, *Bernard Mclaughlin v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 135 S. Ct. 1405 (2015)

2. *Board of Trustees of the National Elevator Industry Health Benefit Plan v. Bernard McLaughlin*, Civ. No. 12-4322 (D.N.J. February 8, 2016), *aff'd* No. 16-1352 (3d Cir. January 6, 2017)

3. *Bernard McLaughlin v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, Civ. No. 3:16-3121 (D.N.J. October 13, 2016), *aff'd* No. 16-4108 (3d Cir. April 11, 2017).

4. *Board of Trustees of the National Elevator Industry Health Benefit Plan v. Bernard McLaughlin*, Civ. No. 12-4322 (D.N.J. December 20, 2017), *aff'd* No. 18-1083 (3d Cir. May 21, 2019)

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BASIS FOR JURISDICTION IN SUPREME COURT

The Third Circuit's rendered it opinion on May 21, 2019. No orders have been entered respecting rehearing or granting an extension of time to file the within petition. This Court's jurisdiction is invoked under 28 U.S.C.S. § 1254(1).

STATUTES

Tile 29 United States Code § 1132(a)(3)(B)(ii) states:

> A civil action may be brought--
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> * * * * *
>
> **(3)** by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

N.J. Stat. Ann. 2A:16-11 states:

> The Clerk of the Superior Court shall keep a book known as a civil judgment and order docket in which shall be entered, an abstract of each judgment or order for the payment of money, submitted for entry, including a judgment or

> order to pay counsel fees and other fees or costs, entered from, or made in, the Superior Court. A judgment of the Special Civil Part of the Law Division shall not be entered unless it is docketed in the manner specifically provided for Special Civil Part judgments. A judgment or order for the payment of money is one which has been reduced to a fixed dollar amount. Any judgment for periodic payments where a total amount has not been fixed shall not be considered as having been reduced to a fixed dollar amount unless a judgment fixing arrearages has been entered. The entry required by this section shall constitute the record of the judgment, order or decree and a transcript thereof duly certified by the clerk of the court shall be a plenary evidence of such judgment, order or decree.
>
> The clerk shall also make an entry upon the civil judgment and order docket indicating the nature of every judgment or order and an entry on return showing execution of process and the date when such judgment or order was entered.

N.J. Stat. Ann 2A:16-18 states:

> Every judgment, or order for the payment of money, entered in the Superior Court, Chancery Division, from the time of its entry upon the civil judgment and order docket, and every decree or order for the payment of money, of the former court of chancery, from the time it was signed, shall have the force, operation and effect of a judgment of the Superior Court, Law Division,

and execution may issue thereon as in other cases.

STATEMENT OF CASE

This is an ERISA subrogation case that has been before the Third Circuit four times and that has resulted in the entry of a personal judgment against the participant, who never recovered medical expenses as an element of damages in his tort case, and which the Plan is now setting up for personal execution by docketing the judgment despite failing to credit employer contributions to the health plan against the indebtedness, all contrary to ERISA.

The plaintiff is a self-funded ERISA plan and the defendant is a participant in that plan who obtained a product liability settlement against which the Plan asserted a lien for medical expenses that it paid. The Third Circuit had affirmed what would ordinarily be a money judgment against the Participant by recharacterizing it as the monitorization of a lien, so as to avoid ERISA's prohibition against legal remedies. The Plan then docketed the Order under state laws available only for money judgments, thereby giving the Order those same characteristics of a personal money judgment that the Third Circuit ostensibly stripped from it, and transforming the order for a lien into an order for a money judgment that ERISA does not empower federal courts to enter. The Third Circuit refused to correct this misuse of its Order, contending that the Participant waited too long between the August 2, 2017 docketing of the Order and filing his motion for relief, which was denied by the District Court on December 20, 2017.

The Plan is withholding payment of medical expenses as a set-off against the Participant's indebtedness while still collecting employer contributions on behalf of the Participant. The Third Circuit also denied as time-barred the Participant's requested for discovery to determine whether the collecting contributions exceed the amount of indebtedness. Plaintiff petitions for certiorari from the Third Circuits' toleration of a misuse of its order that brought it outside the scope of relief that federal courts are statutorily authorized to award by ERISA, and from the Third Circuit's toleration of the Plan's unjust enrichment at the expense of the Participant and his employer.

The defendant had intentionally, and on notice to the Plan, excluded medical expenses as an element of damages in his product liability case (App. 69) because he has no duty to protect the Plan's interests in the personal injury case and consistent with state collateral source rules, *Perriera v. Rediger*, 778 A.2d 429 (N.J. 2001). The Plan asserted a lien against that recovery nonetheless and the District Court entered an Order on January 24, 2014 for judgment in favor of the Plan. (App. 76) The United States Court of Appeals for the Third Circuit affirmed (App. 66) and the United States Supreme Court denied certiorari. *Board of Trustees of the Nat'l Elevator Industry Health Benefit Plan v. McLaughlin,* 590 Fed.Appx. 154 (3d Cir. 2014) cert. denied __ U.S. __, 135 S. Ct. 1405 (2015) (hereinafter "*McLaughlin I*"). The Order that was entered by the District Court did not reduce the Plan's claim to a sum certain. It read:

> ORDERED that the motion of Plaintiff Board of Trustees of the National Elevator Industry Health Benefit Plan for summary judgment, (Doc. No. 20), is GRANTED; and it is
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> ORDERED that the motion of Defendant Bernard McLaughlin for summary judgment, (Doc. No. 22), is DENIED; and it is
>
> ORDERED that JUDGMENT be entered in favor of Plaintiff Board of Trustees of the National Elevator Industry Health Benefit Plan.

(App. 87-88)

Because this Order is incapable of execution, the Plan induced the District Court to enter another Order on December 21, 2015, without filing a formal motion. That Order read:

> ORDERED that Plaintiff the Board of Trustees of the National Elevator Industry Health Benefit Plan recover from the Defendant Bernard McLaughlin the amount of forty five thousand three hundred forty-seven dollars and eighty-nine cents ($45,347.89); and it is
>
> ORDERED that Judgment be entered in favor of Plaintiff Board of Trustees of the National Elevator Industry Health Benefit Plan.

(App. 64-65) The Participant appealed the denial of his motion to vacate, arguing among other things that this Order was a money judgment prohibited by ERISA. That Order was affirmed by the Third Circuit, which held:

> While it would seem that such a money judgment would originally be deemed a legal

> judgment prohibited by ERISA, the District Court was acting pursuant to our opinion in *Funk*[1] which permitted it to enforce a lien-by-agreement against property other than the res to which the lien attached. It follows logically that the District Court needed to indicate the amount of the lien in order to do so. That, together with the underlying equitable relief requested by the Plan, causes us to view the judgment at issue here as one that merely monetizes the lien and does not run afoul of ERISA.

Board. of Trustees of the Nat'l Elevator Industry. Health Benefit Plan v. McLaughlin, 674 Fed. Appx. 189, 192 (3d Cir. 2017) (hereinafter *McLaughlin II*). (App. 36) The Third Circuit affirmed the December 21, 2015 Order by ruling that it was not a money judgment.

In the meantime, the Plan withheld payment of medical expenses as a setoff against the Participant and also against the Participant's son, who, as a minor, was eligible to receive benefits under his father's plan. The Third Circuit relied upon principals of insurance law to hold that the son was in privity with the father and so was estopped from challenging the set-off, without referencing any point of equity or the law of Trusts that allows set-offs, especially against persons other than the debtor, and without considering the Plan's fiduciary duty owed to the son. *McLaughlin v.*

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[1] *Funk v. CIGNA*, 648 F.3d 182 (3d Cir. 2011), abrogated by *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 136 S. Ct. 651, 656 at n.2

Board. of Trustees of the Nat'l Elevator Industry. Health Benefit Plan, 686 Fed App'x 118 (3d Cir. 2017) (*McLaughlin III*) (App. 20)

Which brings us to the instant case. *McLaughlin II* was decided on January 6, 2017. On August 2, 2017, the Clerk of the New Jersey Superior Court wrote to the Participant to advise that the Plan had docketed the December 15, 2017 District Court Order, something which is available only for personal judgments as an aid to execution. (App. 18) Participants had also learned informally that the Plan continued to collect employer contributions but not credit them towards the Participant's indebtedness and had roughly calculated that, if this were true, the Plan may have recouped three times the amount of the indebtedness.

The Participant moved before the District Court on December 20, 2017 for relief from its December 15, 2015 Order because it was being misused by the Plan in violation of the Third Circuit's instruction that the Order merely monetized a lien. The docketing of this Order was something of which the Participant was unaware prior to receipt of the August 2, 2017 letter from the Clerk. The Participant also asked for leave to conduct discovery as to whether the contributions by his employer had wiped out his indebtedness. The District Court denied the Participant's motion as untimely as to both points and the Third Circuit affirmed on that basis. (App. 1)

The Third Circuit rejected the Participant's argument that the docketing of the judgment was an actionable event for a motion for relief, and that the one year period for a Rule 60(b) motion had expired

because the underlying District Court Order (though not the Third Circuit opinion recharacterizing that Order) had been entered more than a year earlier. The Third Circuit also held that the eleven months plaintiff had waited after the entry of the Order barred him from asking for discovery on whether the set-off had been satisfied.

The Participant petitions for certiorari from the May 21, 2019 opinion of the Third Circuit. The Third Circuit's failure to protect the integrity of its ruling in *McLaughlin II*, that the Order merely monetizing the amount of its lien, means that the Third Circuit has allowed the Plan a personal money judgment, contrary to the statutory power of a federal courts under ERISA. It is questionable whether ERISA permits set-offs, which are a state law contract remedy rather than equitable relief,[2] but even if it does, there is no time limit to argue that a judgment has been satisfied. ERISA permits a participant to petition for equitable relief against a plan, and the Third Circuit's refusal to allow the Participant to explore this possibility means that the Plan is being unjustly enriched at the expense of the employer and participant by keeping unearned moneys rather than crediting them to the Participant's indebtedness.

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[2] Two of the cases abrogated in *Montanile*, 136 S. Ct. 656 at n.2 involved set-offs, *Funk*, supra, (set-off to remedy a mistaken overpayment of benefits); *Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654 (2d Cir. 2013)(set off to compensate for receipt of state disability payments). Because the money that was the subject of the set-off was not in the participant's possession, no lien could be asserted against it.

REASONS FOR GRANTING THE PETITION

ERISA contains no provisions for liens, coordination of benefits, or third-party actions. A plan is entitled to "equitable relief" to "enforce the terms of the plan". 29 U.S.C.S. § 1132(a)(3)(B)(ii). The Supreme Court has defined "equitable relief", in the context of actions by ERISA plans against their participants for reimbursement from tort recoveries, by a two-prong test. The nature of the recovery is an equitable lien upon a specific fund in the defendant's possession, rather than damages paid from general assets, and the basis for the claim must be equitable restitution rather than contractual restitution, that is, the participant must have something that unjustly enriches him and that belongs in good conscience to the Plan under the rules of equity rather than contract. *Great-West Life v. Knudsen*, 534 U.S. 204, 212-13, 122 S. Ct. 708, 714 (2002). The Supreme Court repeated this two-prong test in *Sereboff v. Mid Atlantic Medical Services*, 547 U.S. 356, 363, 126 S. Ct. 1869, 1974 (2006) and *Montanile v. Board of Trustees of National Elevator Industry*, 136 S. Ct. 651, 657 (2016).

The Third Circuit disregarded both prongs. In *McLaughlin I*, it required the Participant to pay medical expenses to the Plan, despite acknowledging that he had not recovered medical expenses from the tortfeasor in the state tort action. *McLaughlin I* awarded contractual restitution rather than equitable restitution because the claim was based on the wording of the plan rather than a finding that the defendant held money that belonged in good conscious to the Plan. *Montanile* later noted, "The plan may demand

reimbursement, however, when a participant recovers money from a third party *for medical expenses*." 136 S. Ct. 655 (emphasis added).

In *McLaughlin II*, the Third Circuit paid lip service to the principal that ERISA Plans may not obtain personal judgments within the "nature of the recovery" prong, but when it came to enforcing that limitation, it failed to follow through. A personal judgment against the Participant for a sum certain is an award of damages rather than an equitable lien to enforce rights in an existing fund. The Third Circuit's recharacterizing the December 15, 2015 Order as a monetization of a lien was strained, but the Participant could hope that the Court would stand by it after they were informed that the Plan had docketed this Order as a judgment. The abstract of the docketed judgment available through the Superior Court's public records website confirmed that judgment has been entered against the defendants in the amount of $45,347.89. (App. 19).

Federal judgments are considered "foreign judgments" under New Jersey law, N.J. Stat. Ann. 2A:49A-26, and may be docketed as would a state court judgment, whereupon they may be enforced in the same manner as a state judgement. N.J. Stat. Ann 2A:49A-27. Only money judgments can be docketed. N.J. Stat. Ann. 2A:16-11 and N.J. Stat. Ann. 2A:16-18 both refer to judgments and orders "for the payment of money" as the only sort of judgments that can be docketed with the Clerk of the New Jersey Superior Clerk. Once the Plan docketed the Order, it assumed the same effect as a money judgment and can be

executed upon as such. N.J. Stat. Ann. 2A:16-18 provides:

> Every judgment, or order for the payment of money, entered in the Superior Court, Chancery Division, from the time of its entry upon the civil judgment and order docket, and every decree or order for the payment of money, of the former court of chancery, from the time it was signed, *shall have the force, operation and effect of a judgment of the Superior Court, Law Division, and execution may issue thereon as in other cases.*

(emphasis added). A docketed judgment is also publicly searchable as a personal money judgment. N.J. Stat. Ann. 2A:16-11

Liens, on the other hand, are recorded with the County Clerk, not with the Clerk of the Superior Court, according to procedures that vary with the type of lien being asserted. N.J. Stat. Ann. 46:26A-2; N.J. Stat. Ann. 46:26A-4. When the Plan docketed the Order with the Clerk of the Superior Court, rather than recorded it with the County Clerk, it overreached because the statutes that permit the docketing gave its equitable lien the effect of a money judgment by operation of law.[3] It acted in defiance of the Third Circuits's instructions.

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[3] *Montanile* rejected the argument that, because equity courts have historically been empowered to enter money judgments, such judgments are "equitable relief" under ERISA, 136 S. Ct. 660-61.

The Plan's action changed the nature of the Order from the monitization of a lien to a money judgment, thereby taking it outside of a Court's authority under ERISA. The Third Circuit held that the Participant's application to vacate was time barred under Fed.R.Cv.P.60(b)(3) because it was made more than one year after the entry of the Order and eleven months after the Third Circuit's affirmance (though only three months after the Participant became aware that it had been docketed). But Rule 60(c) requires only that the motion be made within a reasonable time, and the three months between the notification of the docketing from the Clerk and the filing of the motion for relief is hardly unreasonable, given that the integrity of the Third Circuit's order is at issue.

Information that was not in a useable form came Participant's way that the Plan was continuing to collect contributions from his employer that were not being credited towards his indebtedness to the Plan. Though the Participant was aware that his medical expenses were not being paid, he was not aware that the Plan's continued to receive employer contributions. This meant that the Plan was collecting an unearned premium and that his indebtedness was satisfied by his employer (which may give the employer rights against the Participant but does not mean that the Plan gets to do with the money as it wants). The Participant asked for an Order compelling discovery on this matter to learn whether the employer's contributions may have reached the point where they satisfied his indebtedness to the Plan.

Circuit precedent supported the Participant's request. *Sunderland v. City of Philadelphia*, 575 F.2d 1089 (3d Cir. 1978) observed that Rule 60(b)(5) motions are not subject to time limits, noting "[A] district court does not have discretion to require two satisfactions, and the opposing party has suffered no prejudice from the moving party's delay in raising the satisfaction issue." 575 F.2d 1090-91. But, again, the Third Circuit ruled that the Participant had waited too long before asking for relief.

The Participant does not request that the Court determine whether an ERISA plan is entitled to use self-help contract remedies such as set-offs or anticipatory breach. If one accepts that the only remedies allowed under ERISA are those Congress specified in 29 U.S.C.S. § 1132 (which does not allow self-help), see *Aetna Health v. Davila*, 542 U.S. 200 (2004), then the Plan could not withhold medical expense payments from the Participant and his son and the Third Circuit should not have ratified such an action in *McLaughlin III*. But as a practical matter, the amount of medical expenses withheld to date probably far exceeds the Participant's $45,000 indebtedness to the Plan, and the Participant wished only to obtain the discovery necessary to show that the judgment has been satisfied and the Plan must reinstated medical benefits. Judgments will often not be satisfied until some time after they have been entered, here, after payments over several years. The appropriate judicial response upon learning that a judgment may have been satisfied is not to hold that the defendant is time-barred from investigating this possibility.

The Participant expects to argue before the District Court, if this matter is remanded, that the Plan continues to be unjustly enriched by accepting the employers contributions without providing benefits in return, and his statutory entitlement to equitable relief requires that the Plan credit these payments to his indebtedness. The Plan expects also to argue if this matter is remanded that the District Court should order that the its December 21, 2015 be removed from the docket of the Clerk of the New Jersey Superior Court because the docketing turned the Order monetizing the lien into a judgment at law.

Certiorari should be granted because the Third Circuit has repeatedly misapplied the Supreme Court's instructions on what constitutes equitable relief under ERISA, calling for an exercise of the Court's discretionary supervisory power. An Order of the District Court has been docketed as a personal money judgment in favor of an ERISA Plan against a Participant to enforce an obligation arising strictly in law under the terms of the plan rather than in equity. This exceeds the authority given by Congress to the courts to enter only equitable relief to enforce violations of ERISA plans. Though the indebtedness has probably been satisfied, the Third Circuit has refused to allow the Participant to investigate and has instead allowed the Plan to continue to withhold payment of medical expenses. The only explanation given by the Third Circuit is that the plaintiff waited too long under F.R.Cv.P. 60(b)(5) and (6) before making applications that have no time limit under F.R.Cv.P. 60(c).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for certiorari be granted.

Respectfully submitted,

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