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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT MONTANILE, :  
Petitioner : No. 14-723

v. :

BOARD OF TRUSTEES OF THE :  
NATIONAL ELEVATOR INDUSTRY :  
HEALTH BENEFIT PLAN. :

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Washington, D.C.  
Monday, November 9, 2015

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

APPEARANCES:

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

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

NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf of  
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 pension 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 who 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 larger 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 am 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, Justice 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: There has to be some of the  
21 fund there.

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

25 JUSTICE SCALIA: There was an equitable

1 jurisdiction, so long as the person had possession of  
2 the fund at one point.

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

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

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

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

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

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

24 MR. KATYAL: Because we think that the  
25 proposition that they're trying to say is wrong, the

1 idea that when you dissipate a fund, you lose your  
2 equitable claim.

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

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

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

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

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

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

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

24 JUSTICE SCALIA: Do you have any cases?

25 MR. KATYAL: Sure. Otis itself is a case

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

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

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

1 might appear.

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

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

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

25 CHIEF JUSTICE ROBERTS: Right. I mean,

1 that's the point we have made in our precedents, but it  
2 can't -- you can't carry that so far that otherwise you  
3 would say, well, the Plan always wins.

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

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

25 And speaking of formalistic distinctions,

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

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

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

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

19 MR. KATYAL: I think very much --

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

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



1 already an equitable lien by attaches.

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

13           And this is a perfect example --

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

23           MR. KATYAL: Well, they are technical when  
24 it comes to that first question, is there an equitable  
25 claim in the first -- first instance. And so Knudson,

1 for example, says no, because there's no possession of  
2 the fund. Sereboff says here there is possession;  
3 therefore, there is.

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

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

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

23 MR. KATYAL: Right.

24 JUSTICE SOTOMAYOR: The most that I read  
25 about a substitution decree or deficiency decree is that

1 it's an ancillary jurisdiction to issue those.

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

6 MR. KATYAL: Right. Justice --

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

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

23 So that's why the tradition for cleanup  
24 jurisdiction was to label those claims specifically to  
25 say, okay, first we're going to solve our -- our

1 equitable claim, and now we're going to turn as part of  
2 our pendent jurisdiction --

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

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

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

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

1 money from the start. And then he goes and spends that  
2 money on other things. Yes, you can go after his  
3 general assets to recover that spending on other things.

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

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

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

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

1 the exception -- as Justice Story called it, that  
2 peculiar exception applies to try and basically make  
3 sure that he isn't profiting a second time from his  
4 wrongdoing.

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

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

23           And if the beneficiary spends that, well,  
24 that's not something that they're knowingly dissipating.  
25 That's very different than a circumstance like this in

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

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

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

1 that they are not entitled to lien priority. That is  
2 it.

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

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

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

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

25 And we do think, if this Court recognized,



1 as I think most of the circuits have, that we have a  
2 cause of action here, then I think it would deter people  
3 from engaging in the kind of behavior that Mr. Montanile  
4 did.

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

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

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

14 MR. KATYAL: So if --

15 JUSTICE KENNEDY: Was that your answer?

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

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

22 MR. KATYAL: Yes.

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

1 for one.

2 What happens?

3 MR. KATYAL: Well, Justice Kennedy --

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

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

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

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

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

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

1 makes -- that makes no sense.

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

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

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

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

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

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

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

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

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

1 you know, the fact that there was a rule about it didn't  
2 somehow convert it into a law claim.

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

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

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

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

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

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

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

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

24           We're not quibbling with Mertens. We're  
25 simply saying we're at least as strong as to whether

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

6 If there are no further questions.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Stris, you have four minutes remaining.

9 REBUTTAL ARGUMENT OF PETER K. STRIS

10 ON BEHALF OF THE PETITIONER

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

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

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

23 The -- the argument was made that a  
24 beneficiary of a trust commits that second wrong that he  
25 was talking about when they get a loan contractually and

1 refuse to pay it back. And what this Court said is, no,  
2 that's not typically available in equity. And, you  
3 know, it's precisely the distinction that he's trying to  
4 now push upon you to squeeze this remedy through.

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

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

16           The historical authority here is beyond  
17 dispute.

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

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



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

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

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

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

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

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

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

25           Thank you.

1 CHIEF JUSTICE ROBERTS: I'm sorry, counsel.  
2 You say he filed a cert petition. Is that on behalf of  
3 the same client this year?

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

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

13 MR. STRIS: -- in the Bilyeu.

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

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

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

25 So my -- my point only is, don't accept the

1 representation that the rule here can somehow be  
2 confined to subrogation cases.

3 Because, as an empirical matter, it cannot.

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

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

24

25



<p>48:19  <b>blocked</b> 30:13  <b>Blue</b> 56:14  <b>Board</b> 1:6 3:4  <b>body</b> 52:17  <b>bona</b> 26:6  <b>bonus</b> 8:6  <b>bought</b> 32:14  <b>bound</b> 59:16  <b>breach</b> 57:12  <b>breaches</b> 19:10  <b>break</b> 16:3  <b>Breyer</b> 22:17 23:1              23:4 24:15 25:17              25:20,23 31:22              33:4  <b>Breyer's</b> 44:11  <b>brief</b> 17:11 37:3              38:13 47:10 53:14              53:19 55:12 56:14  <b>briefs</b> 7:5 33:18              39:7 46:16  <b>bring</b> 36:7  <b>brittle</b> 39:17 51:2  <b>broad</b> 7:23 9:18  <b>broader</b> 20:16              21:16 25:22  <b>burdens</b> 27:14              58:18</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>C</b> 2:1 3:1 8:23              55:20  <b>Cal</b> 1:17  <b>called</b> 5:10 46:1              53:4  <b>careful</b> 23:6  <b>carefully</b> 12:10,12              55:18  <b>carry</b> 39:2  <b>case</b> 3:4,12,20 8:15              9:7,9 10:6,10 11:8              12:24 16:21 17:6          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