

# IN PURSUIT OF BENEFIT PLAN OVERPAYMENTS

*Employers' Advisor Blog Archives*  
April 8, 2015

Benefit overpayments can (and often do) result from pension calculation errors that inflate a participant's lump sum distribution or monthly pension payment. Overpayment scenarios are common in the disability and group health plan contexts as well.

Under the Employee Retirement Income Security Act (ERISA), fiduciaries have an obligation to protect the fiscal integrity of employee benefit plans; therefore, when an overpayment occurs, the plan's fiduciaries must attempt to recover the overpayment on behalf of the plan. A fiduciary that fails to pursue recovery of the overpayment may, depending on the circumstances, be liable to the plan for the improper payment.

A fiduciary should take the following actions when it learns of an overpayment:

1. Review the terms of the plan with respect to overpayments. More often than not, the governing plan documents and administrative service agreements will address overpayments. Improper payments to health care providers are addressed in the health care provider agreements between the plan (or third-party administrator) and network providers. Where a plan document addresses overpayments, the plan's terms must be followed, unless those terms are contrary to ERISA.
2. Demand repayment from the participant or the person, if not participant, who has received the repayment on the participant's behalf such as, for example, an attorney, trustee, or health care provider. In addition, fiduciaries should determine whether future benefits under the same plan (or other plans) can be reduced as a means of recouping the overpayment.
3. Determine whether the plan has the right to file suit to recover the overpayment and, if so, whether it makes practical sense for the plan to incur the associated legal expenses.

If a fiduciary is unsuccessful in securing a recovery after taking all reasonable measures to recover the overpaid amount, the fiduciary may have an obligation to repay the plan from its own funds. Where the overpayment is caused by the negligence of a plan service provider, the plan may have the right to recover some or all of the overpayment from the service provider.

Whether a plan has the right to sue a participant to recover a benefit overpayment often depends on whether the fiduciary can trace the overpayment to a particular fund that is in the participant's possession and control at the time the fiduciary asserts the plan's right to repayment. Eight of the thirteen federal circuit courts have addressed this issue. Six courts, including the U.S. Court of Appeals for the Second Circuit, which governs New York, Connecticut and Vermont, have held that a repayment suit is viable even if the improper benefit amounts have been spent. The two others would require a fiduciary to identify a specific fund that is within the possession and control of the participant.

The U.S. Supreme Court recently agreed to hear a case that will resolve the difference of opinion among the eight federal circuit courts that have ruled on this issue. The case before the Supreme Court involves a medical plan participant who was seriously injured when a drunk driver ran a stop sign and struck his automobile. The participant sued the drunk driver and eventually settled his claims for \$500,000. The fiduciaries of the medical plan then asserted a right to be reimbursed for the

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medical benefits the plan had paid on his behalf, but by the time the plan filed suit, the participant had spent most of the settlement money. The participant argued that the plan could not enforce the repayment obligation because he had spent the funds the plan sought to recover. The court disagreed with the participant and held for the plan, ruling that a plan was not required to identify a specific fund controlled or possessed by the participant in order to enforce the plan's recovery provision. *Board of Trustees of the National Elevator Industry Health Benefit Plan v. Robert Montanile* (11<sup>th</sup> Cir. 2014).

A participant's dissipation of overpaid benefits is not currently fatal to a recovery claim that is governed by the law of the First, Second, Third, Sixth, Seventh and Eleventh Circuits. In the Eighth and Ninth Circuits, a participant's dissipation of amounts that represent overpaid benefits defeats a recovery claim. While the weight of authority (6-2) favors a plan's right of recovery, employers should not assume that the Supreme Court will agree. In any event, employers are well-advised to expeditiously pursue overpayment recoveries where there is a risk that funds will be spent or dissipated.