No. 14-723

IN THE

Supreme Court of the United States

ROBERT MONTANILE,

Petitioner,

v.

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a beneficiary of a benefit plan governed by the Employee Retirement and Income Security Act of 1974 (ERISA) can defeat enforcement of the plan's valid equitable lien by agreement—after the lien attached—by spending the funds subject to the lien.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

TABLE OF AUTHORITIES—Continued

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BRIEF FOR RESPONDENT

INTRODUCTION

Respondent Board of Trustees of the National Elevator Industry Health Benefit Plan paid over \$120,000 of Petitioner Robert Montanile's medical bills when he was injured by a drunk driver. The Plan did so on the express condition that Montanile reimburse the Plan out of any tort recovery he obtained. Montanile subsequently recovered a \$500,000 settlement from the drunk driver and his insurance.

In this Court, Montanile agrees that at the time he received the settlement funds, he was under a duty in equity, enforceable by ERISA's civil remedies, to use it to repay the Plan. Montanile nonetheless argues that he successfully voided this duty, and his written agreement memorializing it, because he spent the settlement money (or, at least, most of it) before the Plan sued him to recover the money that it had paid on his behalf. That self-interested argument—that a beneficiary may break his promises to a plan with impunity—has no support in this Court's cases, in equity, or in common sense.

When a beneficiary like Montanile does not live up to his promises, Congress authorized the plan fiduciary to enforce the plan's reimbursement provision against the unwilling beneficiary through ERISA's Section 502(a)(3), which allows a plan fiduciary "to obtain other appropriate equitable relief" to "enforce * * * the terms of the plan." 29 U.S.C. § 1132(a)(3)(B). Such a suit, this Court has explained, is equivalent to an action in equity to enforce an "equitable lien by agreement"—a traditional and appropriate equitable remedy. *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1544-45, 1547 (2013). The question presented is whether Montanile's dissipation of the funds allows Montanile to escape his otherwise-enforceable reimbursement obligation.

The answer under the statute, this Court's caselaw, and historical equity practice is no. To establish its right to recover, the Plan had to prove three things—and only three things: (1) Montanile agreed to repay money out of any third-party tort settlement, (2) the settlement fund from which Montanile agreed to make repayment was specifically identified, and (3) Montanile came into possession of that fund. *See Sereboff* v. *Mid Atl. Med. Servs.*, 547 U.S. 356, 363-364 (2006).

Montanile's argument is also contrary to a cardinal principle of equity jurisprudence. The first maxim of equity is that " 'equity suffers not a right to be without a remedy.'" *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1879 (2011) (quoting Richard Francis, *Maxims of Equity* 29 (1st Am. ed. 1823)); *see also Marbury* v. *Madison*, 5 U.S. 137, 163 (1803) (" 'It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit * * * when ever that right is invaded.' ") (quoting 3 William Blackstone, *Commentaries* *23). And yet, that is precisely what Montanile asks this Court to hold.

Montanile's equitable argument—that a plan's right to enforce a reimbursement obligation terminates the moment a beneficiary spends the money—rests on principles that apply to a *different* type of equitable remedy: restitution for unjust enrichment. *See Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204 (2002). Equitable restitution for unjust enrichment examines whether certain funds can be traced to the present possession of a defendant. However, *Sereboff* clarified that the "strict tracing rules" described in *Great-West* were applicable *only* to equitable restitution—not equitable liens by agreement. 547 U.S. at 364. *Great-West* had "simply described in general terms the conditions under which a fiduciary might recover when it was seeking equitable restitution"; "[t]here was no need * * * to catalog all the circumstances in which equitable liens were available in equity." *Id.* at 365. It "concluded only that equitable *restitution* was unavailable because the funds sought were not in [the beneficiary's] possession." *Id.* (emphasis added). There was no such requirement for an equitable lien by agreement. *Id.* at 364-365.

The Plan's interpretation of ERISA to permit recovery here stays true to this Court's teaching that the plan terms are "at the center of ERISA."

McCutchen, 133 S. Ct. at 1548. The Plan required reimbursement from a tort recovery as a condition of its upfront payment of Montanile's medical bills; Montanile received a tort recovery and declined to honor his reimbursement obligation. To ensure that the Plan's right to reimbursement is not "'without a remedy'" under the statute, the Court should affirm. *CIGNA*, 131 S. Ct. at 1879 (citation omitted).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in the addendum to this brief.

STATEMENT

1. Petitioner Robert Montanile was a beneficiary of a welfare benefit plan administered by the Respondent, the Board of Trustees of the National Elevator Industry Health Benefit Plan. Pet. App. 2a-3a. The Plan is self-funded, J.A. 38, which means that "it does not purchase an insurance policy from any insurance company in order to satisfy its obligations to its participants." *FMC Corp.* v. *Holliday*, 498 U.S. 52, 54 (1990). Like all plans governed by ERISA, the Plan's Trustees must "preserve [Plan] assets to satisfy future, as well as present, claims" and "take impartial account of the interests of all beneficiaries." *Varity Corp.* v. *Howe*, 516 U.S. 489, 514 (1996).

To carry out that fiduciary duty, J.A. 43-44, the Plan's Trustees have adopted Plan provisions that ensure the Plan's assets are not used to pay for medical expenses that should be—and can be—reimbursed through other sources. J.A. 45-49. The Plan provides that when a beneficiary is injured through the fault of another, "the Plan is only obligated to provide covered benefits resulting from that

* * * injury that exceed any amounts recovered from another party." J.A. 45. But the Plan also recognizes it can be unfair for a beneficiary's medical bills to accumulate while a legal claim winds its way through the courts. The Plan therefore offers to advance benefits to its injured beneficiary so long as the Plan's rights are protected. J.A. 46.

The Plan is explicit. It states that "[a]cceptance of benefits from the Plan for an injury or illness by a covered person, without any further action by the Plan and/or the covered person, constitutes an agreement that any amounts recovered from another party" will "promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan." *Id.* The Plan also provides that, by virtue of the beneficiary's reimbursement agreement, "[a]mounts that have been recovered by a covered person from another party are assets of the Plan." J.A. 45. And the Plan clarifies that it is owed reimbursement in full "without reduction for attorneys' fees, costs, expenses or damages claimed by the covered person, and regardless of whether the covered person is made whole or recovers only part of his/her damages." J.A. 46.

The Plan goes even further, actively ensuring that Plan beneficiaries are aware of the obligations they undertake when they accept advance medical benefits. It states that "[p]rior to advancement of a benefit by the Plan to a covered person * * * for any expense or loss for which there may be a claim against another party, a covered person must execute a written document acknowledging the Plan's right of recovery." J.A. 47. The Plan also makes its standard acknowledgment form available on its website. *See* National Elevator Industry Benefit

Plans, Acknowledgment of Summary Plan Description Provisions/Subrogation, https://goo.gl/epoSAB. The Plan is clear, however, that a beneficiary is obligated to reimburse the Plan even if the beneficiary does not execute the written acknowledgment. J.A. 48.

2. When Montanile was injured by a drunk driver, he asked the Plan advance his medical expenses and signed an acknowledgment "agree[ing] to reimburse, in full, [the Plan] to the extent of any recovery * * * as a result of any legal action or settlement or otherwise." J.A. 51. In reliance on Montanile's explicit agreement to reimburse it, the Plan paid $121,044.02 of Montanile's medical bills while Montanile's suit against the drunk driver and his claim for underinsured motorist benefits proceeded. J.A. 39-40.

Montanile eventually settled his legal claims for $500,000. J.A. 40. But rather than honor his reimbursement obligation, Montanile stonewalled, hiring an attorney who resisted the Plan's reimbursement rights at every turn. First, the attorney demanded that the Plan answer several detailed questions—some involving multiple subparts—proving its entitlement to reimbursement. J.A. 68-74. The Plan sent the attorney many of the requested documents, including the Plan provisions outlining Montanile's reimbursement obligation. J.A. 24.

Montanile's attorney then asserted that the reimbursement obligation was unenforceable. *Id.* The Plan disagreed, but offered to compromise its lien. J.A. 24-25. Montanile's attorney made a counteroffer, which the Plan rejected in favor of its own, best-and-final offer to settle the case. J.A. 25.

Montanile refused to accept the Plan's settlement proposal. Instead, Montanile's attorney made an ultimatum shortly after New Year's: If the Plan did not sue in 14 days, he would release the settlement funds to Montanile. J.A. 25. And when the Plan did not immediately respond, Montanile's attorney made good on his threat. *Id.*; J.A. 78-80.

In dispersing Montanile's settlement, his counsel looked out for all of Montanile's creditors—except the Plan. Montanile's attorneys took $200,000 off the top as a 40% contingency fee. J.A. 78. They also took $63,788.48 as reimbursement for their costs. J.A. 79. Montanile's attorneys then ensured that $1,213.22 in Montanile's out-of-pocket medical expenses were paid. J.A. 78. And they set aside $37,581.95 to repay various personal loans Montanile had taken out, to satisfy a child-support lien, and to bring current Montanile's back union dues. J.A. 79. And even with all of those deductions, Montanile received $197,416.35—more than enough to repay the Plan's lien. *Id.*[1]

3. The Plan sued Montanile in July 2012, seeking to enforce his reimbursement obligation. Pet. App. 24a-25a. Montanile primarily asserted three defenses to the Plan's action. First, he argued that the documents the Plan relied on did not create an enforceable equitable lien by agreement. Pet. App. 26a. Second, he argued that the Plan's six-month delay in bringing suit barred enforcement of

[1] Montanile misleadingly claims that less than $90,000 remained to compensate him for his injuries. Montanile Br. 5. That figure ignores that Montanile claims to have received—and spent—the over $100,000 belonging to the Plan. J.A. 79.

its lien under laches. Pet. App. 34a. Finally, he argued that he had spent most of his settlement, which, in his view, prevented the Plan from obtaining an equitable lien by agreement. Pet. App. 35a; *see also* J.A. 57 (Montanile's admission that he still possessed a "small portion" of his settlement).

The District Court disagreed. It held that the Plan documents created an enforceable equitable lien by agreement. Pet. App. 25a-30a. It further held that it was "unaware of any authority * * * that provides a basis to conclude that * * * [the Plan's] timeframe for filing suit was unreasonable, inexcusable, or prejudicial" as to justify laches. Pet. App. 34a.

The District Court then turned to Montanile's dissipation argument. It recognized that there were substantial questions as to whether Montanile had, in fact, dissipated his settlement. His counsel's disbursement sheet, for instance, "raise[d] more questions than [it] answer[ed]." Pet. App. 35a n.2. But following the "overwhelming majority of circuit courts," the District Court held any dispute over dissipation was "immaterial when a fiduciary asserts an equitable lien by agreement." Pet. App. 40a. So long as Montanile had possessed the funds at some point—and he had—Montanile could not evade the Plan's lien by spending the money he had promised to turn over. Pet. App. 42a. The court therefore entered judgment in the Plan's favor in the amount of $121,044.02. Dkt. No. 46 (Final Judgment).

4. Montanile appealed to the Eleventh Circuit, which affirmed. Pet. App. 1a-18a. On appeal, Montanile abandoned the laches argument he had advanced in the District Court. He argued instead that the Plan's documents did not create an equitable lien

by agreement, and that, even if they did, his alleged dissipation of the settlement funds prevented the Plan from obtaining an enforceable lien. Montanile C.A. Opening Br. 15-36.

The Eleventh Circuit, like the District Court before it, disagreed. It held that the Plan documents created an enforceable equitable lien by agreement. Pet. App. 12a-17a. And applying its recent decision in *AirTran Airways Inc.* v. *Elem*, 767 F.3d 1192 (11th Cir. 2014) (reprinted at Pet. App. 46a-76a), it held that Montanile's claimed dissipation could not defeat the Plan's otherwise valid lien. Pet. App. 10a-11a.

In *Elem*, the Eleventh Circuit rejected a dissipation argument identical to Montanile's. The court of appeals held that "[i]t matters not whether the settlement funds have since been disbursed or commingled with other funds." Pet. App. 53a. Rather, "[a]s soon as the settlement fund was identified, the plan imposed an equitable lien over that fund even though it was in the hands of the beneficiaries." Pet. App. 54a. And the " '[p]roperty to which the lien attached may be converted into other property without affecting the efficacy of the lien.' " *Id.* (quoting *Funk* v. *CIGNA Grp. Ins.*, 648 F.3d 182, 194 (3d Cir. 2011)). As a result, even where a plan beneficiary "willfully refuse[s] to abide by the terms of" a plan, the beneficiary's "dereliction * * * could not destroy the lien that attached" before dissipation. *Id.*

5. Montanile petitioned for *certiorari*. In his petition, Montanile did not argue that the Plan's lien was barred by laches. Montanile also affirmatively abandoned his argument that the Plan documents did not create an equitable lien by agreement,

Pet. 11 n.4, a strategic concession Montanile admits that he made in order to "maximize the likelihood of further review," Montanile Br. 13 n.8. Montanile instead elected to present a single question: Whether he could defeat the Plan's otherwise-valid lien by claiming to have spent the settlement funds on things other than complying with the repayment obligation he acknowledges was valid. Pet. i. On the express understanding that Montanile's petition was limited to the dissipation question, the Plan agreed *certiorari* was warranted. Resp. Cert. Br. 14.

This Court granted the writ. 135 S. Ct. 1700 (2015).

SUMMARY OF ARGUMENT

Plan fiduciaries may enforce plan reimbursement provisions by suing participants and beneficiaries under ERISA Section 502(a)(3) for "appropriate equitable relief." That statutory phrase incorporates "those categories of relief that were *typically* available in equity." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993). The District Court awarded just that type of relief to the Plan: an equitable lien by agreement. And the Eleventh Circuit rightly affirmed. This Court should, too. The decision below is consistent with the Court's caselaw, ERISA's text, and its purpose; it follows historical equitable practice at the time of the divided bench; and it avoids the burdens on plans, beneficiaries, and courts alike that Montanile's approach would impose.

I. Montanile claims error because, despite his promise to reimburse the Plan out of any settlement proceeds, he dissipated the settlement fund after making that promise. He argues that the dissipation precludes the Plan from seeking equitable relief under *Great-West*, 534 U.S. 204. To be sure, *Great-West* did hold that an ERISA plaintiff pursuing an *equitable restitution* theory must trace the promised fund to the defendant's present possession. *See id.* at 213. But this Court made clear in *Sereboff* that there is no such requirement for *equitable liens by agreement*. *See* 547 U.S. at 364-365. Montanile's argument based on the tracing rules for equitable restitution is "improperly mixing and matching rules from different equitable boxes." *McCutchen*, 133 S. Ct. at 1546.

To establish the equitable lien, the Plan had to prove three things: (1) Montanile agreed to repay money out of any third-party tort settlement, (2) the settlement fund from which Montanile agreed to make repayment was specifically identified, and (3) Montanile came into possession of that fund. *See Sereboff*, 547 U.S. at 363-364. Because the Plan established all three, it was entitled to enforce its lien.

This result is both simple and correct. It allows plan fiduciaries to enforce ERISA plans according to their terms. It holds plan participants to their promises. And it honors ERISA's text and purpose.

II. Enforcing the Plan's equitable lien by agreement is also entirely consistent with "the standard current works" and cases from "the days of the divided bench." *Great-West*, 534 U.S. at 212, 217. Historical equitable practice would not leave the Plan without a remedy; equity's first, foundational maxim is that " 'equity suffers not a right to be without a remedy.' " *CIGNA*, 131 S. Ct. at 1879 (quoting Francis, *Maxims of Equity* 29).

To that end, in equity, an equitable lien by agreement attached—and a remedy was available in equity—as soon as the promisor received the pledged fund. Neither the lien itself nor its enforcement in equity required the promisor to possess the fund at the time of suit. And even if a promisor dissipated the fund, equity provided subsidiary remedies—such as substitutionary monetary decrees and deficiency judgments—to hold the promisor to his agreement. Nothing in historical equity practice would leave a promisee like the Plan without recourse or condone a promisor like Montanile walking away from his agreements with impunity. For this reason also, the Plan was rightly awarded an equitable lien by agreement.

III. Finally, the decision below comports with common sense. If Montanile's view were adopted, plan-administration costs would increase because a plan would have to trace the present location of a promised fund every time it wanted to enforce a reimbursement obligation. And if the plan did not act fast enough to seek the extraordinary and drastic remedy of a preliminary injunction, the plan would lose its right to reimbursement. This in turn could threaten plan stability, increase premiums, and—most perversely—discourage employers from offering benefits plans that provide advance payments for medical expenses. That result should be rejected.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH ERISA'S TEXT, ITS PURPOSE, AND THIS COURT'S CASELAW.

A. *Sereboff* Confirms That The Court Of Appeals Was Correct.

1. *Sereboff* the last of a trilogy of cases (*Mertens*, *Great-West*, and *Sereboff*) that define the meaning of "equitable relief" in ERISA Section 502(a)(3). None supports a present-possession requirement for the equitable remedy at issue here: the equitable lien by agreement.

a. *Mertens* did not involve equitable liens by agreement. Rather, a group of pension plan beneficiaries brought suit under Section 502(a)(3) against a non-fiduciary for "monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties." 508 U.S. at 255. The question presented was whether this request fell within the parameters of Section 502(a)(3).

The Court held that it did not. Although the Court had "never interpreted the precise phrase 'other appropriate equitable relief'" in ERISA, it had "construed the similar language of Title VII * * * to preclude 'awards for compensatory or punitive damages.'" *Id.* (quoting *United States* v. *Burke*, 504 U.S. 229, 238 (1992), in turn referencing 42 U.S.C. § 2000e-5(g)). The Court construed ERISA Section 502(a)(3) consistently with Title VII. It concluded that "equitable relief" in ERISA Section 502(a)(3) means "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256.

b. Next came *Great-West*—which also did not involve equitable liens by agreement. There, Great-West, as assignee of an ERISA plan, filed a Section 502(a)(3) action against the Knudsons, beneficiaries of the plan. The plan paid the Knudsons' medical expenses following a car accident, and the Knudsons later reached a substantial tort settlement with a third party for their injuries. Great-West sought specific performance of the plan's reimbursement provision out of that settlement. But the settlement funds at issue had already been distributed to the Knudsons' attorney and a special needs trust established under state law. 534 U.S. at 207-208.

Great-West argued that it could nonetheless pursue a Section 502(a)(3) claim against the Knudsons because it was seeking restitution, a remedy traditionally available in equity. The Court disagreed, reasoning that the type of restitution that Great-West sought was legal in nature. *Id.* at 213. The Court explained, "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214.

That rule disposed of Great-West's claims because the Knudsons "never had possession or control of the funds identified for recovery (the settlement)." *Thurber* v. *Aetna Life Ins. Co.*, 712 F.3d 654, 664 (2d Cir. 2013) (describing *Great-West*); *accord Great-West* Br. of *Amicus Curiae* in Support of the Judgment Below By Invitation of the Court 23, 2001 WL 740878 (the Knudsons "did not in fact ever receive any money in the tort suit"). *Contra* Montanile Br. 25 n.15; U.S. Br. 15. Instead, "[a]s the order of the state court approving the settlement makes clear, the disbursements from the settlement were paid by two checks, one made payable to the Special Needs Trust and the other to respondents' attorney." *Great-West*, 534 U.S. at 214.[2] "The kind of restitution that petitioners seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents." *Id.*

c. Finally, there is *Sereboff*. The plaintiff was an ERISA plan administrator, Mid Atlantic, who brought a Section 502(a)(3) action against plan beneficiaries, the Sereboffs, to enforce the plan's reimbursement provision against a third-party tort settlement. The Court recognized that the case "involved facts similar to those" in *Great-West*. 547 U.S. at 362. Yet the Court unanimously concluded that, unlike in *Great-West*, the plaintiff in *Sereboff* was entitled to relief because it was seeking the right equitable remedy: an equitable lien by agreement. *Id.* at 363-365, 369. In so holding, the Court made three key rulings.

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[2] Montanile disputes the significance of this fact, suggesting that the Knudsons had at least constructive possession over the funds held by their attorney. *See* Montanile Br. 25 & n.15. But Great-West never made that argument, it played no role in the Court's decision, and, in any event, because the state court directed how the Knudsons' settlement funds were to be disbursed, *see* 534 U.S. at 214, the Knudsons had no ability to direct a different disposition.

First, the Court held that "the nature of the recovery" that Mid Atlantic pursued was equitable because "it sought its recovery through a constructive trust or equitable lien on a specifically identified fund." *Id.* at 363. To be sure, the fund was "within the possession and control of the Sereboffs." *Id.* Possession had played a key role in the analysis in *Great-West* because that case involved equitable restitution; "one feature of equitable restitution was that it sought to impose a constructive trust or equitable lien on 'particular funds or property in the defendant's possession.'" *Id.* at 362 (quoting *Great-West*, 534 U.S. at 213). But *Sereboff* adopted no similar requirement for the different form of equitable relief it addressed, equitable liens by agreement. *Sereboff* held that so long as the plaintiff "seek[s] to recover a particular fund from the defendant," the "nature of the recovery" is equitable. *Id.* at 363.

Second, the Court identified three elements of an equitable lien by agreement that made the "basis for [the] claim" equitable. *Id.* There must be a promise "'to convey a specific object.'" *Id.* (quoting *Barnes* v. *Alexander*, 232 U.S. 117, 121 (1914)). If the "object" is a fund, it must be a "particular fund, distinct from the [defendant's] general assets." *Id.* at 364. And finally, the defendant must come into possession of the fund. *Id.* When those requirements are met, the plaintiff can "follow" the money "into the [defendant's] hands" and "impose * * * a constructive trust or equitable lien" "as soon as the settlement fund [is] identified." *Id.* (brackets added by *Sereboff* removed) (quoting *Barnes*, 232 U.S. at 123).

Third, after explaining why the "nature of the recovery" and the "basis for [the] claim" were equitable, *id.* at 363, the Court reiterated that it was *not* adopting for equitable liens by agreement the "strict tracing rules" that *Great-West* had held were applicable to equitable restitution, *id.* at 364. *Sereboff* explained that *Great-West* did not "catalog all the circumstances in which equitable liens were available in equity"; it "simply described in general terms the conditions under which a fiduciary might recover when it was seeking equitable restitution." *Id.* at 365. But "an equitable lien sought as a matter of restitution, and an equitable lien by agreement * * * [are] different species of relief." *Id.* at 364-365 (quotation marks omitted). And no one—not even the Sereboffs—had ever "suggested * * * that any tracing was historically required when an equitable lien was imposed by agreement." *Id.* at 365 (emphasis removed) (quoting the Sereboffs' reply brief). Thus, "restitutionary tracing rules" did not apply to equitable liens by agreement. *Id.*

d. Montanile and the United States view this line of cases differently. They would stretch *Great-West*'s language suggesting a defendant must have present possession of the disputed fund to encompass every form of equitable relief available under Section 502(a)(3). *See* Montanile Br. 23-26; U.S. Br. 13-16. But *Great-West* is not so broad. *Great-West* addressed equitable restitution and equitable restitution alone. *See id.* at 214 (explaining requirements "for restitution to lie in equity"); *id.* at 229 (Ginsburg, J., dissenting) (recognizing that the equitable claim at issue was based on unjust enrichment only: "Great-West sued to recover an amount representing the Knudsons' unjust gain, rather than Great-West's loss); *see also Great-West* U.S. Br. 10, 14, 2001 WL 506039 (same). No one—not the parties, not the *amici*, and not any member of the Court—mentioned equitable liens by agreement even once. *Cf. Great-West* U.S. Br. 24, 2001 WL 506039 (discussing only the type of "equitable lien" that is "intended to prevent unjust enrichment").

In addition, Montanile and the United States unduly minimize *Sereboff*'s third ruling, which rejected *Great-West*'s tracing rules for equitable liens by agreement. They argue that *Sereboff* rejected only restitution's requirement that the funds be traced from *the plaintiff's* hands. And they contend that, in any event, *Sereboff* left untouched the language in *Great-West* that the nature of the recovery is equitable only if the defendant presently possess the disputed fund. Montanile Br. 26-29; U.S. Br. 13-17. *Great-West* and *Sereboff* squarely refute this portrayal.

Great-West mentioned tracing exactly once, when it explained that "a plaintiff could seek restitution in equity * * * where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." 534 U.S. at 213 (emphasis removed). Thus, although equitable restitution also required that the identified money "belong[ed] in good conscience to the plaintiff," the *tracing* component required that the funds at issue be "in the defendant's possession." *Id.*

Sereboff declined to apply that principle to equitable liens by agreement. Indeed, *Sereboff* distinguished *Great-West* on just that ground: "the Court concluded only that *equitable restitution* was unavailable because the funds sought *were not in Knudson's possession*." 547 U.S. at 365 (emphases added). For equitable liens by agreement, by contrast, a plan fiduciary need not prove that the fund is presently in the defendant's possession. Rather, the fiduciary is " 'authorized to seek payment of his debt from the property *or its value*.' " *Id.* at 367-368 (emphasis added) (quoting *Walker* v. *Brown*, 165 U.S. 654, 666 (1897)).

2. The decision below closely hews to this Court's precedents. As the District Court ruled, and the Eleventh Circuit affirmed, Montanile promised to reimburse the Plan for his medical payments out of a specific fund: the third-party recovery he received. Pet. App. 15a, 17a, 28a, 43a. Accordingly, the Plan could " 'follow' a portion of the recovery 'into [Montanile's] hands' 'as soon as [the settlement fund] was identified,' and impose on that portion a constructive trust or equitable lien." *Sereboff*, 547 U.S. at 364 (quoting *Barnes*, 232 U.S. at 123) (second alteration by *Sereboff*). The equitable lien "attached not later than" "the moment the fund was received." *Barnes*, 232 U.S. at 121, 122; *see also* U.S. Br. 20 n.4 (agreeing that "the lien attached when the funds came into petitioner's possession") (ellipsis and quotation marks omitted). And because Montanile indisputably came into possession of the settlement fund, the Plan was " 'authorized to seek payment' " in the form of the fund's " 'value.' " *Sereboff*, 547 U.S. at 368 (quoting *Walker*, 165 U.S. at 666). Dissipation of the settlement proceeds did not bar the Plan's recovery. Pet. App. 11a, 53a-55a.

B. The Decision Below Honors ERISA's Text and Purpose.

ERISA Section 502(a)(3) allows the Plan to seek "appropriate equitable relief" from Montanile. The court of appeals rightly held that the Plan sought just such relief. Its decision upholds the foundational principles of "uniformity," "efficiency," and "predictability" that drive ERISA. *Conkright* v. *Frommert*, 559 U.S. 506, 518 (2010).

1. The Plan's approach to Section 502(a)(3) gives full meaning to the phrase "equitable relief." It forces a Plan to take the bitter with the sweet, and incorporates the elements of equitable claims that limit the available remedy in ways that regular breach-of-contract actions at law do not. A plan fiduciary seeking to impose an equitable lien by agreement cannot simply point to any contractual breach and demand damages as compensation. Instead, the fiduciary must prove that the defendant has failed to honor a promise to pay the fiduciary money out of a specific fund that came into the defendant's hands. *See Sereboff*, 547 U.S. at 363-364. An equitable lien by agreement focuses on recovery of the promised fund, rather than the monetization of the harm caused by a breach; that distinction makes the remedy available in equity distinct from the remedy available at law.

2. a. The Plan's approach also comports with core ERISA principles. ERISA " 'is built around reliance on the face of written plan documents.' " *McCutchen*, 133 S. Ct. at 1548 (quoting *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995)). This Court has time and again reiterated the importance of that reliance. If a plan is administered and enforced according to its terms, the expectations of the participating employers, fiduciaries, employees, and beneficiaries are protected. This works to the benefit of everyone: it "enable[s] plan beneficiaries to learn their rights and obligations at any time." *Curtiss-Wright*, 514 U.S. at 83. It " 'induc[es] employers to

offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime.'" *Conkright*, 559 U.S. at 517 (quoting *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002)). And it fulfills "ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents." *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 150 (2001).

The Plan at issue here requires Montanile "to reimburse the Plan in full for benefits advanced by the Plan" out of "any amounts recovered from another party." J.A. 46. Holding Montanile to that obligation despite his spending the promised fund would preclude him from "overrid[ing] plain contract terms" through what he perceives to be a loophole in the system. *McCutchen*, 133 S. Ct. at 1548. That result is what this Court refused to countenance in *McCutchen*. "Nothing in the statute suggests Congress intended that section 502(a)(3)'s limitation of the [plan's] recovery to 'appropriate equitable relief' would upset the[ ] contractually-defined expectations." *Admin. Comm. of Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan* v. *Shank*, 500 F.3d 834, 839 (8th Cir. 2007). Rather, "if the agreement governs, the agreement governs," and "hewing to the parties' exchange yields 'appropriate' as well as 'equitable' relief." *McCutchen*, 133 S. Ct. at 1547.

b. Allowing an equitable lien by agreement in these circumstances would also further ERISA's "repeatedly emphasized purpose" "to protect contractually defined benefits." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985). A fiduciary is obligated by statute to enforce the Plan by its terms. *See* 29 U.S.C. § 1104(a)(1). And by requiring individual beneficiaries to meet their reimbursement commitments under the plan, the fiduciary is honoring its "duty to all beneficiaries to preserve limited plan assets" and "prevent * * * windfalls for particular employees." *Conkright*, 559 U.S. at 520 (citing *Varity*, 516 U.S. at 514). As Judge Colloton wrote for the Eighth Circuit, "[r]eimbursement and subrogation provisions are crucial to the financial viability of self-funded ERISA plans, and * * * a fiduciary * * * must 'preserve assets to satisfy future, as well as present, claims,' and must 'take impartial account of the interests of all beneficiaries.'" *Shank*, 500 F.3d at 838 (quoting *Varity*, 516 U.S. at 514).

3. In arguing to the contrary, both Montanile and the United States ascribe significance to the fact that Congress has not amended Section 502(a)(3) to overrule this Court's prior decisions. They suggest that this legislative inaction should preclude the relief the Plan seeks here. *See* Montanile Br. 46-47; U.S. Br. 28-29. This argument is wrong twice over.

First, there has not been any reason for Congress to act. This Court's precedents permit a Plan to enforce its reimbursement provision through an equitable lien by agreement. And the circuit courts have overwhelmingly held—by a six-to-two margin—that dissipation does not preclude a 502(a)(3) equitable lien by agreement remedy. *See supra* at 8, 13-19.

Indeed, Congress's supposed refusal to amend ERISA Section 502(a)(3) to overrule *Mertens* and *Great-West* is irrelevant precisely because of the Court's later decisions that recognize additional available equitable remedies. *Mertens*, which excluded compensatory relief from Section 502(a)(3)'s reach even though such relief was available under the common law of trusts, 508 U.S. at 256-257, was followed by *Varity* and *Harris Trust Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000). *Varity* held that employees' breach-of-fiduciary-duty claims seeking individual relief were permissible under Section 502(a)(3) because ERISA was intended to be *more generous* than the common law of trusts. *See* 516 U.S. at 497 ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection"). And *Harris Trust* held, unanimously, that participants and beneficiaries could bring Section 502(a)(3) claims against third-party non-fiduciaries for "rescission," "restitution * * * of the purchase price with interest, and disgorgement of * * * profits," 530 U.S. at 243, because Section 502(a)(3) "incorporate[s] common-law remedial principles," *id.* at 252.

The pattern repeated after *Great-West*. After a five-justice majority there held that a plan's assignee could not seek equitable relief through a claim of restitution for unjust enrichment because Great-West had not satisfied the strict restitutionary tracing rules, 534 U.S. at 212-214, a unanimous Court concluded in *Sereboff* that those strict tracing rules were inapplicable to equitable liens by agreement, 547 U.S. at 364-365. As the Court later reiterated in *McCutchen*, "principles of unjust enrichment give way when a court enforces an equitable lien by agreement." 133 S. Ct. at 1547. Neither Montanile nor the United States point to a failed amendment attempt post-dating *Sereboff* or *McCutchen*.

Moreover, in *CIGNA*, 131 S. Ct. 1866, the Court effectively limited *Mertens* and *Great-West* to their facts. It concluded that an injunction requiring a plan fiduciary to pay money to a beneficiary was an equitable remedy. *Id.* at 1880. In explaining why, the Court likened the plan fiduciary to a trustee and the ERISA plan to a trust, and observed that a suit against a trustee about the trust's terms was historically within the equity courts' exclusive jurisdiction. *Id.* at 1879. The Court then reasoned that "the remedies available to those courts of equity were traditionally considered equitable remedies." *Id.* And it explained that "the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief." *Id.* at 1880. Indeed, the fact that it was *compensatory* did not either: "Equity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." *Id.*[3]

Second, in any event, the inference that Montanile and the United States ask this Court to draw is an

[3] Montanile's merits brief (but not his petition) argues that a party may never recover from a participant or beneficiary under ERISA § 502(a)(2). Montanile Br. 19. The United States echoes that argument and further insists that even equitable surcharge against a participant is unavailable in these circumstances because plan participants and beneficiaries do not have "fiduciary obligations." U.S. Br. 20 n.5. These arguments overlook that ERISA defines "fiduciary" to include everyone who "exercises any authority or control respecting management or disposition of [a plan's] assets." 29 U.S.C. § 1002(21)(A)(i). A participant or beneficiary like Montanile fits that definition precisely. *See* J.A. 45 ("[a]mounts that have been recovered by a covered person from another party are assets of the Plan"). The Court therefore should not foreclose the enforcement of reimbursement obligations through Section 502(a)'s other remedies.

unjustifiable one. After all, "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381 n.11 (1969); *see also Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 114 (1989) ("failure to act on the proposed bill is not conclusive of Congress' views"). Yet that is the evidence on which Montanile and the United States rely. The Court should reject their calls to attribute to the 1974 enacting Congress the views of later Senators or Representatives.

* * *

Through ERISA, "Congress included various safe-guards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.'" *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 137 (1990) (quoting S. Rep. No. 93-127, at 36 (1973)). Interpreting Section 502(a)(3) as Montanile requests would do the opposite of "completely secur[ing]" these rights; it would result in just the type of "improbable results" that this Court has eschewed when interpreting ERISA. *Curtiss-Wright*, 514 U.S. at 84. The Court should avoid an improbable result here and adopt the Plan's sensible view of the statute, which has been endorsed by a majority of the courts of appeals.

II. ENFORCING THE PLAN'S LIEN DESPITE MONTANILE'S CLAIMED DISSIPATION IS CONSISTENT WITH HISTORICAL EQUITY PRACTICE.

Enforcing the Plan's equitable lien by agreement is not only consistent with this Court's cases and ERISA's structure and design, but also "the standard current works" and cases from "the days of the divided bench." *Great-West*, 534 U.S. at 212, 217.

A. The Decision Below Is Consistent With Time-Honored Maxims Of Equity.

The foundational maxim of equity is that "'equity suffers not a right to be without a remedy.'" *CIGNA*, 131 S. Ct. at 1879 (quoting Francis, *Maxims of Equity* 29); *see also Miers* v. *Brouse*, 271 S.W.2d 419, 421 (Tex. 1954) (calling this the "first maxim of equity"). The decision below ensures that the Plan's reimbursement right is not left without an enforcement remedy. Montanile and the United States, however, ask the Court to hold the opposite: That *even though* the Plan documents created an equitable lien by agreement over Montanile's tort settlement, and *even though* Montanile had an equitable obligation to turn the settlement over to the Plan, the Plan has no remedy in equity because Montanile broke his promise faster than the Plan sued him for it. Montanile never explains why equity would give the Plan no remedy whatsoever for his breach—because equity courts would not have done so. *Infra* at 29-46.

Another maxim of equity is that "equity looks to intent rather than to form," a principle that "pervades * * * the entire system of equity jurisprudence." 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 378, at 40 (Spencer W. Symons ed., 5th ed. 1941) (1883) (hereinafter, Pomeroy). The decision below did just that. It prioritized Montanile's clearly expressed intent to repay the Plan for the medical expenses it advanced over the formality of tracing rules. And in this way the decision below followed yet another maxim: "equity imputes an intention to fulfill an obligation." *Id.* § 420, at 182. Under this maxim, it "should be presumed that [Montanile] intended to do right, rather than wrong;

to act contentiously, rather than with bad faith; to perform his duty rather than to violate it." *Id.* In other words, the question of the Plan's lien should not be of strict tracing, as Montanile suggests, "but of compelling [Montanile] first to restore the trust property, treating that as something which he had no power to commingle with other funds, but must keep whole and make up so long as he has any funds or property out of which to do so." *City of Lincoln* v. *Morrison*, 90 N.W. 905, 907 (Neb. 1902).

Affording the Plan a remedy, moreover, would not render Section 502(a)(3)'s distinction between legal and equitable remedies superfluous. *Cf.* U.S. Br. 25-26. The maxim that equity suffers not a right without a remedy applies only where "the right * * * exists before the equitable remedy [is] invoked." *Sappenfield* v. *Goodman*, 2 S.E.2d 13, 16 (N.C. 1939). A plan would not be permitted to invoke the maxim where the plan documents do not create an equitable lien by agreement or where the beneficiary never receives the pledged fund. *See infra* at 30. But here, the Plan's equitable right to the fund *does* exist, and indisputably so. Applying the maxim therefore simply ensures that Montanile is not better off for having broken his promise instead of keeping it. Denying the Plan a remedy, meanwhile, would contravene the very maxim that is the "source of the entire equitable jurisdiction." 2 Pomeroy § 424, at 185. The Court should reject the illogical and inequitable result Montanile and the United States propose.

B. A Judgment Against General Assets Is Not Necessarily A Legal Remedy.

Montanile's primary argument is that an equitable lien by agreement may be enforced "only against the specifically identifiably property that is the subject of the agreement, or its traceable product." Montanile Br. 30-31. He premises this argument on a simplistic dichotomy: All remedies that operate against a defendant's general assets are legal, while all remedies that operate against specific property are equitable. *See id.* at 35-36. That dichotomy is demonstrably false.

Legal remedies could—and did—operate against specific property. Replevin, for instance, was an action at law to return wrongfully taken, specifically identified property to the plaintiff. 77 C.J.S. *Replevin* § 1; *see also*, *e.g.*, *General Motors Acceptance Corp.* v. *Vaughn*, 193 N.E. 483, 486 (Ill. 1934); *Vaiden* v. *Bell*, 24 Va. 448, 451 (1825). Similarly, ejectment was a legal suit that allowed the plaintiff to recover possession of particular premises. *E.g.*, *Lundberg* v. *Wolbrink*, 50 N.W.2d 168, 169 (Mich. 1951); *Smith* v. *Robinson*, 13 Ark. 533, 541 (1853).

By the same token, equitable remedies could—and did—operate against a defendant's general assets. Equitable surcharge, for instance, was an equitable remedy allowing a plaintiff to recover from a trustee for breach of his fiduciary duties. 4 Pomeroy § 1080, at 229; George Gleason Bogert, *et al.*, *The Law of Trusts & Trustees* § 862 (hereinafter, Bogert). And this Court has held that an equitable surcharge is available under Section 502(a)(3) *even though* the trustee would be required to pay the judgment out of his general assets; "the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief." *CIGNA*, 131 S. Ct. at 1880.

Indeed, for the very equitable remedy at issue here—equitable liens by agreement—courts in the days of the divided bench recognized that "[t]o dedicate property to a particular purpose, to provide that a specified creditor and that creditor alone shall be authorized to seek payment of his debt from the property *or its value*, is unmistakably to create an equitable lien." *Walker*, 165 U.S. at 666 (emphasis added). Thus, not only was the property itself tied up in the equitable lien; its "value" was as well. *See generally* 1 George E. Palmer, *The Law of Restitution* § 2.14, at 176 (1978) (hereinafter, Palmer). That is why, in *Barnes*, the Court upheld an equitable lien by affirming a "decree that Mrs. Barnes was liable to the appellees for $6250." 232 U.S. at 119. That was the value of the promised fund, and that was the amount ordered as a monetary judgment.

C. Possession Of The Identified Fund At The Time Of Suit Is Not A Prerequisite To Enforcement Of An Equitable Lien By Agreement.

Montanile contends that he unilaterally dissolved the Plan's equitable lien by agreement by spending most of the settlement money before the Plan filed suit. Montanile Br. 30-35; *see also* U.S. Br. 18-21. That, too, is incorrect.

1. An equitable lien by agreement arises through "every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a

security for a debt or other obligation." 4 Pomeroy § 1235, at 696. And for agreements secured by property that the promisor does not yet own, the agreement "constitute[s] an equitable lien upon the property * * * acquired at a subsequent time." *Id.* § 1236, at 699-700.

Where a promisor agrees that a later-acquired fund will stand as security for his promise, the promisor becomes "a trustee as soon as he gets title to" the fund. *Barnes*, 232 U.S. at 121. In other words, the lien comes into being and "attache[s] not later than" "the moment the fund [i]s received." *Id.* at 121, 122. At that moment, the lien is enforceable. *See, e.g.*, *McColgan* v. *Bank of Cal. Nat'l Ass'n*, 281 P. 381, 385 (Cal. 1929) ("the equitable lien * * * attached and became enforceable" at the same time).

These authorities thus confirm that there are three—and only three—elements of an enforceable equitable lien by agreement: (i) a promise to pay money, (ii) out of a specifically identified fund, (iii) that comes into the possession of the defendant. *See Sereboff*, 547 U.S. at 363; *Barnes*, 232 U.S. at 121-123; *see also supra* at 15-17. Once those three elements are met, the plaintiff in equity is "authorized to seek payment" in the form of the fund's "value." *Sereboff*, 547 U.S. at 367-368 (quoting *Walker*, 165 U.S. at 666). No tracing or proof of present possession is required.

2. In arguing the contrary, Montanile relies heavily on treatises emphasizing that an equitable lien typically operates against an identified fund or its traceable proceeds. Montanile Br. 32-33 (discussing 4 Pomeroy §§ 1233-1234 and *Restatement (First) of Restitution* § 161 cmt. c (1937)). But neither of these

sources says that a lienholder has *no* remedy in equity when the identified fund has been dissipated. Other treatises recognized that "occasionally tracing will end in simple money judgment, for example, where the substituted asset cannot be reached because it has been sold or consumed." 1 Palmer § 2.14, at 176. In such cases, "a judgment either *for [the asset's] value* or the proceeds of its sale is the only relief available." *Id.* (emphasis added). Equity courts would not turn a claimant away simply because a defendant had spent the disputed fund after it came into his possession.

Indeed, the Nebraska Supreme Court rejected an argument identical to Montanile's. In *Meier* v. *Meyer*, 43 N.W.2d 502, 504 (Neb. 1950), the defendant induced the plaintiffs to make a loan through fraudulent mortgage notes. The plaintiffs brought suit in equity to reclaim the fund, and the defendant asserted that he "used the money for his own purposes" and "urge[d] that if the plaintiffs may recover at all from him all that recovery must be limited to that portion of the fund which was not used by him and which remained in his bank account after he was notified of the claim of plaintiffs." *Id.* at 505.

Finding the argument "novel and unusual to say the least," the Nebraska Supreme Court disagreed. *Id.* It recognized that "[t]he effect of the [defendant's] contention is to say that funds may come into the hands of a constructive trustee and he may escape liability * * * by dissipating them before notice of a call for an accounting." *Id.* And even though the defendant had "cited in support of the proposition the controlling authorities wherein the purpose is to trace and recover an identifiable fund," the court concluded that "[n]either the authorities cited nor any others sustained the contention." *Id.* The court therefore required repayment out of the defendant's general funds. *Id.*

Many other equitable cases have likewise recognized that where a promisor has commingled the promised fund with his general assets, the promisee may resort to the entire commingled assets without further tracing. This Court, for instance, has held that where a defendant wrongfully commingles another's property with his own, the true owner may seize the *entire* commingled mass to satisfy his judgment, leaving the wrongdoer to separate out his share. *The Idaho*, 93 U.S. 575, 585-586 (1876). Others have held the same. *Roth* v. *Wells*, 29 N.Y. 471, 491-492 (1864); *Hart* v. *Ten Eyck*, 2 Johns Ch. 62, 108 (N.Y. Ch. 1816), *rev'd on other grounds as reported in*, *Woodcock* v. *Bennett*, 1 Cow. 711, 744 n. a (N.Y. 1823). Thus, the fact that a claimant cannot trace a fund to an independent, segregated account does not render the claimant's cause unenforceable in equity.

3. Montanile's next gambit is to rely on the *Restatement (First) of Restitution* § 215 for his argument that dissipation destroys the Plan's lien. Montanile Br. 34-35. But as its title suggests, the *Restatement of Restitution* focuses on principles governing *restitution*—that is, the principles that govern remedies against "[a] person who has been unjustly enriched at the expense of another." *Restatement (First) of Restitution* § 1.

The equitable lien by agreement is not premised on restitution or unjust enrichment. Dobbs explicitly contrasts the two, noting the equitable lien by agreement in order "to distinguish it from the equitable lien imposed by the courts to prevent unjust enrichment." 1 Dan B. Dobbs, *Law of Remedies* § 4.3(3), at 601 (2d ed. 1993) (hereinafter, Dobbs). And so this Court has held that principles governing unjust enrichment are "'beside the point' when parties demand what they bargained for in a valid agreement." *McCutchen*, 133 S. Ct. at 1546 (quoting *Sereboff*, 547 U.S. at 368); *accord Restatement (Third) of Unjust Enrichment & Restitution* § 2(2) (2011). Montanile thus does the very thing that this Court warned against in *McCutchen*: He attempts to apply unjust-enrichment principles to an action that does not sound in unjust enrichment. Montanile's citation to inapposite *Restatement* provisions thus does not support the argument that his dissipation rendered the Plan's equitable lien by agreement unenforceable.

In any event, the *Restatement* provision that Montanile cites describes a rule of creditor priority, rather than lien enforceability. *See Restatement (Third) of Unjust Enrichment & Restitution* § 60(3) (rule under heading of "Priority"); *id.* par. tbl. (explaining that former *Restatement (First) of Restitution* § 215(1) is now *Restatement (Third) of Unjust Enrichment and Restitution* § 60(3)). The Plan is not seeking priority over any of Montanile's other creditors, *see infra* at 35, so Montanile's supposedly on-point precedent has no bearing on this case.

4. In the end, Montanile's argument fails for an entirely practical reason: Equity recognizes that money is fungible. Even if a plaintiff's money cannot be traced to the purchase of a particular product, the defendant's overall assets have been augmented from the defendant's possession of the plaintiff's money. The wrongdoer was able to use the plaintiff's mon-

ey—rather than his own—to pay for his purchases. In that way, the wrongdoer's general assets are a product of the plaintiff's wrongfully taken funds. *See* Kingsley A. Taft, Note, *A Defense of a Limited Use of the Swollen Assets Theory Where Money Has Been Wrongfully Mingled With Other Money*, 39 Colum. L. Rev. 172, 180-182 (1939).

Consistent with this insight, numerous courts held that plaintiffs could recover their money from defendants without identifying the funds in the defendants' hands or an identifiable product.[4] Courts adopting this "swollen-assets doctrine" sensibly concluded that recovery is permitted even where—like Montanile—the defendant claimed that the plaintiff's funds were traceable to assets in the hands of a third party. *Word* v. *Sparks*, 82 S.W.2d 5, 8

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[4] *See Squire* v. *American Express Co.*, 2 N.E.2d 766, 257-258 (Ohio 1936) ("It is not necessary to be able to identify the particular money deposited nor to show that the amount purported to have been received was converted into specific cash, when such amount is commingled with general funds of the bank. This is the rule prevailing in most jurisdictions.") (citations omitted); *First Trust Co. of Lincoln* v. *Exchange Bank*, 254 N.W. 569, 575 (Neb. 1934) ("The trust fund having been mingled with the general mass of bank assets which were thus augmented and enhanced, resort may be had in equity to impress thereon a preferred claim payable from such general mass of bank assets."); *Eastman* v. *Farmers' State Bank of Olivia*, 221 N.W. 236, 237 (Minn. 1928) ("The burden of proof goes no farther than to require plaintiffs to show that the money actually came into the hands of the bank."); *Orr* v. *St. Louis Union Trust Co.*, 236 S.W. 642, 649 (Mo. 1921) ("We are persuaded that, as to such part of her trust funds as were mingled with testator's general property, and cannot now be traced, his entire estate is liable * * *."), *overruled on other grounds by*, *State* v. *Cross*, 366 S.W.2d 434 (Mo. 1963).

(Ark. 1935). The traced assets, the court explained, "greatly enhanced" the defendant's other holdings "and necessarily swelled them." *Id.* As a result, the "trust funds were not dissipated or wasted, but are still part of the assets of the [defendant]." *Id.* Under this equity precedent, all the Plan had to prove was that its promised settlement funds were once in Montanile's possession, a fact Montanile conceded. J.A. 25.

Courts at equity sometimes declined to adopt the swollen-asset doctrine in cases where the defendant was insolvent because it gave the plaintiff's claim priority over that of the defendant's general creditors. *See*, *e.g.*, *Nonotuck Silk Co.* v. *Flanders*, 58 N.W. 383, 385-386 (Wis. 1894); *Slater* v. *Oriental Mills*, 27 A. 443, 443-444 (R.I. 1893). That concern is not implicated here. Montanile is not insolvent; the Plan is not seeking priority over anyone else; and there is no need to determine whether the Plan would have priority if were seeking such status in a hypothetical bankruptcy proceeding. The Plan simply seeks a declaration that it has a valid lien against Montanile's assets. Montanile's ability to satisfy the Plan's judgment is a matter to be addressed when the Plan pursues enforcement, not before.

In short, the swollen-assets doctrine prevents the fiction of strict tracing from trumping the reality of money's fungibility. *See* 2 Dobbs § 6.1(3), at 15 ("If the swollen assets approach only operated to redress a wrong to the plaintiff, that approach would be accepted without dispute."); Taft, *supra*, at 189 ("[p]erhaps the formalism of the 'strict tracing' theory may be justified to protect general creditors * * * but certainly that formalism should not be applied as to negative use of the 'swollen assets' theory, where substantial justice requires it"); Varro H. Rhodes, Comment, *Trusts—Tracing of Assets—Preference*, 30 Mich. L. Rev. 441, 451 (1931) (calling the swollen-assets doctrine "morally and practically justified" where it "does not leave the general creditor in a worse position"). This doctrine, from the days of the divided bench, fully supports the result reached below. Allowing the Plan's lien without regard for tracing is therefore perfectly consistent with historical equity jurisprudence.[5]

D. The Plan Is Also Entitled In Equity To A Substitutionary Monetary Decree Or Deficiency Judgment.

Even if Montanile's asserted dissipation destroyed the Plan's equitable lien—and it did not—the Plan would still be entitled to a substitutionary monetary decree or deficiency judgment. Such remedies were traditionally available in equity when a lien was no longer enforceable or the pledged fund was insufficient to satisfy the promisor's obligations.

1. a. A substitutionary monetary decree was available in equity when a promisor had dissipated or destroyed property to which a lien had attached.

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[5] To be sure, tracing remains an important tool for plans in many respects. Tracing allows a plan to recover plan assets from transferees who accepted them despite knowing of a plan's lien or who gave no consideration for the transfer. 2 Dobbs § 6.1(2), at 7. Tracing also allows the plan to secure a first-priority lien on property purchased with the plan's assets. Bogert § 862. But these are simply practical benefits of a plan being able to trace; tracing is not a prerequisite to an enforceable equitable lien by agreement.

Writing for the Massachusetts Supreme Judicial Court, Justice Holmes explained that where a plaintiff's complaint seeks "the recovery of an identified fund, wherever it may be found," the plaintiff's claims do not fail simply because "the fund is gone, and has been misappropriated by * * * the defendants." *Otis* v. *Otis*, 45 N.E. 737, 737 (Mass. 1897). Rather, "[u]nder these circumstances, the plaintiff has a right to compensation as alternate relief, and is entitled to a decree against all the parties concerned." *Id.* Justice Story gave another example of this remedy: "if, pending a suit for specific performance of an agreement for a demise of quarries, a part of the subject-matter of the demise is abstracted, compensation may be obtained therefor by a supplemental bill." 2 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England & America* § 794, at 2 (Isaac F. Redfield ed. 10th ed. 1870) (hereinafter, Story); *see also id.* § 798, at 7 (a substitutionary monetary decree is available in equity where vendor of land wrongfully transferred property to bona fide purchaser without notice).[6]

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[6] *See also Sargent* v. *Wood*, 81 N.E. 901, 902 (Mass. 1907) (recognizing the "right to compensation as alternate relief"); *Federal Trust Co.* v. *Baxter*, 257 N.W. 368, 370 (Neb. 1934) (a monetary decree for the value of property alienated through its transfer to an innocent purchaser was available "as a substitute" for the transferred property); *Shafer's Appeal*, 110 Pa. 382, 386-387 (Pa. 1885) (acknowledging a procedure whereby "[w]hen the defendant has put it out of his power to perform [a] contract, the bill will be retained, and it will be referred to a master to assess the damages"); *Woodcock* v. *Bennett*, 1 Cow. 711, 755 (N.Y. 1823) (same).

b. Contrary to the United States' claims (Br. 24), these substitutionary monetary decrees were equitable remedies. The Massachusetts Supreme Judicial Court, for instance, repeatedly held that "[o]rdinarily a proceeding to enforce * * * a constructive trust or equitable lien, or in the alternative, to obtain compensation for the wrongful use of property subject to such a trust or lien, is within the scope of general equity jurisdiction." *Locke* v. *Old Colony Trust Co.*, 193 N.E. 892, 895 (Mass. 1935); *see also Jones* v. *Jones*, 7 N.E.2d 1015, 1018 (Mass. 1937) ("And if money so received is not traceable into specific property, alternative relief by compensation for wrongful use of the money is within such jurisdiction."). The Arkansas Supreme Court, too, has held the remedy against a promisor who has destroyed a lien is "a suit in equity." *Bank of Marion* v. *Beck*, 136 S.W.2d 188, 189 (Ark. 1940). Such a suit, Justice Story observed, was an exception, based on the "peculiar equity" of the circumstances, to the general rule that the equity courts did not award damages. 2 Story § 794, at 2.

As a result, courts sitting in equity *rejected* arguments like the United States' that a claimant had to go to the law courts to recover on a dissipated or destroyed lien. New York has several such examples. *See Woodcock*, 1 Cow. at 755; *Wiswall* v.

McGowan, Hoff. Ch. 125, 133 (N.Y. Ch. 1839).[7] And the Alabama courts held such an action was not, as the United States contends (Br. 24), an action at law for trover. *Clark* v. *Johnson & Latimer*, 61 So. 34, 36 (Ala. App. 1913). Substitutionary monetary decrees, in short, were awardable in equity as equitable remedies, not legal ones.

2. a. Plaintiffs like the Plan also had resort to a deficiency judgment when insufficient value remained in a pledged fund to satisfy the promisor's obligation. In equity, the lien functioned as a "charge or hypothecation" on the promised fund, akin to a mortgage. 4 Pomeroy § 1234, at 695. The traditional way to levy on the lien was to foreclose it, obtaining a judicial decree that the fund should be sold and the proceeds transferred to the plaintiff. *Id.* § 1228, at 681-682.

At times, the sale of the fund would not be sufficient to satisfy the plaintiff's lien. In such cases, "the plaintiff is allowed * * * a personal judgment for the amount of the deficiency, without further suit." *Id.* § 1228, at 683; *see also* 1 Palmer § 1.5, at 20 (recognizing that in some cases an "equitable lien may be more advantageous because the plaintiff has a money claim to the extent not satisfied through enforcement of the lien"). Nor was the deficiency judgment an all-or-nothing proposition. A plaintiff

[7] Respondent and the United States both rely on New York law, for seemingly contradictory propositions. The United States cites *Hovey* v. *Elliott*, 23 N.E. 475, 478 (N.Y. 1890), as providing that an action on a dissipated lien is an action at law. U.S. Br. 24, 33. But *Hovey* discussed actions at law in relation to the applicable statute of limitations only; it did not purport to resolve the law-equity question. *See* 23 N.E. at 142.

could obtain "an equitable lien on the property coupled with a money judgment," a procedure Dobbs explains was equivalent to "a constructive trust with a money judgment for any deficiency in value." 1 Dobbs § 4.3(3), at 602 & n.6. In this way, the "[d]ifferent forms of relief can be combined so as to assure the victim of the wrong the full recovery to which he is entitled." 1 Palmer § 2.14, at 176.

b. Montanile and the United States nonetheless argue that although a deficiency judgment was available in equity, it was legal in nature. Montanile Br. 37-39; U.S. Br. 21-24. Both misunderstand the history of the remedy and its role in equity practice.

At one time, this Court had held that federal courts could not enter deficiency judgments absent a statute or court rule because chancery courts in England could not do so. *See Orchard* v. *Hughes*, 68 U.S. 73, 77 (1863); *Noonan* v. *Lee*, 67 U.S. 499, 509 (1862). But the Court also recognized the injustice of that result, and it promptly issued Equity Rule 92 in April 1864—later renumbered as Equity Rule 10—to address it. *See White* v. *Ewing*, 69 F. 451, 454 (6th Cir. 1895) (noting Rule 92's adoption); *Lane* v. *Equitable Trust Co. of N.Y.*, 262 F. 918 (C.C.A. 8th 1919) (noting Rule 92's renumbering). Under the Rule, "[i]n suits for the foreclosure of mortgages, or for the enforcement of other liens, a decree [could] be rendered for any balance found to be due to the plaintiff over and above the proceeds of the sales" of the property that was subject to the lien and "execution [could] issue for the collection of the same" out of the defendant's general assets. Fed. Equity R. 10 (1912).

Far from proving that deficiency judgments were unavailable in equity, the Court's actions reflect the equity system's flexibility. Equity's original purpose was to free litigants from the overly rigid remedies and forms of action available in the law courts—that is, to shift traditionally legal relief into the realm of equity. Equity's genius was in "its power to enlarge the scope of these ordinary forms of relief, and even to contrive new ones adapted to new circumstances, * * * with its unlimited control over the form and material of its judgments," which provided "enormous advantages over the narrow, inflexible, and artificial methods of the common law." 1 Pomeroy § 116, at 155-156.

Montanile and the United States' argument appears to be that the "appropriate equitable relief" available under Section 502(a)(3) is not just limited to those remedies that were available in the days of the divided bench, but those remedies that were available in the *earliest* days of the divided bench. But *Mertens* contains no such limitation. It held that Section 502(a)(3) authorizes all of the remedies that were "*typically* available" in the days of the divided bench. 508 U.S. at 256. The end point for the days of the divided bench, at least in the federal system, is September 16, 1938, with the creation of "one form of action—the civil action." Fed. R. Civ. P. 2 (1938). At that time—and for a number of decades leading up to that time—the deficiency judgment was typically available in the equity courts.

Montanile and the United States' rule is also unworkable. They do not say *when* the historic equity law embraced by Section 502(a)(3) cuts off. Is the cut off English chancery practice at the time of Independence? The promulgation of the first Judiciary Act? Some later time? *Cf. Mertens*, 508 U.S. at 257 n.7 (indicating that "equitable relief" should be interpreted to "correspond to the state of the law when ERISA was enacted"). Montanile and the United States do not offer answers. Yet, for an inquiry focused on historic equity practice, it is hard to think of a more helpful guide than the historic rules this Court promulgated to govern equity practice.

3. Montanile and the United States also argue that substitutionary monetary decrees and deficiency judgments are not equitable remedies, but instead are simply part of equity courts' ancillary or "clean up" legal jurisdiction. *See* Montanile Br. 37-39; U.S. Br. 21-25. Not so.

Both Montanile and the United States overlook *CIGNA*, where this Court provided a generalized inquiry for determining whether a remedy is "appropriate equitable relief": Is the remedy the plaintiff seeks under Section 502(a)(3) "'exclusively equitable'"? 131 S. Ct. at 1880 (citation omitted). For the substitutionary-monetary-decree and deficiency-judgment remedies the Plan seeks here, the answer to that question is yes.

Substitutionary monetary decrees and deficiency judgments are exclusively equitable because they flow directly from equity's jurisdiction over equitable-lien claims. As noted, an action to establish and enforce an equitable lien is equivalent to an action to foreclose on the lien, and "all matters pertaining to the foreclosure of a mortgage are inherently of equitable jurisdiction," including "proceedings instituted, as in this case, for relief against fraud." *McCormick* v. *Hartley*, 6 N.E. 357, 359 (Ind. 1886); *see also Lembeck & Betz Eagle Brewing Co.* v. *Sexton*, 184 N.Y. 185, 190 (1906) ("[a]n action in equity to foreclose a chattel mortgage * * * is doubtless a remedy which a mortgagee may properly invoke"). As in *CIGNA*, the substitutionary monetary decree and deficiency judgment the Plan seeks are exclusively equitable and thus available under Section 502(a)(3).

In addition, Pomeroy confirms that substitution monetary decrees and deficiency judgments were, as a class, typically and exclusively available in equity. He dedicates an entire chapter of his equity treatise to "remedies in which the final relief is pecuniary, but is obtained by the enforcement of a lien or charge upon some specific property or fund." 4 Pomeroy § 1413, at 1061 (capitalization altered). He explains that these classes of remedies, including "suits to enforce the various equitable liens," are "*all purely equitable*, *and therefore belong to the exclusive jurisdiction*" of the equity courts, even though "the *final* relief is pecuniary and so resembles the ordinary relief at law." *Id.* (first emphasis added). That is because the remedy is "obtained through preliminary proceedings, forming a part of the judgment, which belong solely to the procedure and jurisdiction of equity." *Id.* Pomeroy further contrasts these exclusively equitable remedies with another group, "in which the final relief is wholly pecuniary and is obtained in the form of a general pecuniary recovery." *Id.* § 1416, at 1070 (capitalization altered); *compare also id.* § 146, at 198 (listing those remedies in "the exclusive jurisdiction" of equity, including "equitable liens") (capitalization altered), *with id.* § 174, at 235-236 (listing those remedies that belong to the concurrent jurisdictions of law and equity, which do not include equitable liens). Pomeroy thus confirms that substitutionary monetary decrees and deficiency judgments were both "typically," *Mertens*, 508 U.S. at 256, and "'exclusively,'" *CIGNA*, 131 S. Ct. at 1880 (citation omitted), available in equity at the time of the divided bench.

4. Montanile's and the United States' fallback position is that if the Court concludes that a substitutionary monetary decree or deficiency judgment is appropriate, a remand is necessary to determine their availability in this case. Montanile Br. 39-42; U.S. Br. 32-34. It is not.

As for a substitutionary monetary decree, the United States argues that the Plan must show that Montanile dissipated his settlement with knowledge of the Plan's claim and with the intent to deprive the Plan of its recovery. U.S. Br. 33-34. Wrong. For the equitable remedy recognized in *Otis* and other cases, all the Plan must show is that its fund has been "misappropriated" through Montanile's actions. *Otis*, 45 N.E. at 737. And it has.[8]

But even if the United States' knowledge and intent requirements were the law, the Plan proved both of them. Montanile knew of the Plan's claim many times over, yet spent the Plan's money anyway. *See* J.A. 24-25 (attorney's attempts to negotiate claim on Montanile's behalf); J.A. 35 (constructive knowledge from Plan documents); J.A. 51 (acknowl-

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[8] The United States erroneously assumes a claim for a substitutionary monetary decree is an action at law for trover. *Supra* at 39. Even for such actions, however, there is no *mens rea* requirement. *See* 90 C.J.S. *Trover and Conversion* § 8 ("[I]t is not essential to conversion that the motive or intent with which the act was committed have been wrongful, corrupt, or bad.") (footnotes omitted).

edgement form); J.A. 76 (Montanile's admission that he spent "[m]ost" of the Plan's money).

The same is true for a deficiency award. The United States says that the Plan should be required to show that Montanile "still possesses a portion of his recovery." U.S. Br. 33. But Montanile admitted that below. He conceded at the summary-judgment stage that he still possessed a "small portion of the proceeds realized from the settlement of his claims." J.A. 57. That is enough, even under the United States' view, for a deficiency judgment to be proper.[9]

Perhaps aware of these flaws, Montanile claims that a deficiency judgment would be improper because the Plan took too long to bring its suit. Montanile Br. 39-42. But Montanile raised a laches claim below, the District Court rejected it, and Montanile did not press it on appeal. *See* Pet. App. 34a; Montanile C.A. Br. 15-36. He cannot reraise it again in this Court under the guise of resisting a deficiency judgment. *See Adickes* v. *SH Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). If the Court concludes a substitutionary monetary decree or a deficiency judgment is proper,

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[9] Montanile and the United States point out that the Plan did not explicitly request a substitutionary monetary decree or deficiency judgment in its pleadings. Montanile Br. 37; U.S. Br. 32. But that is of no moment, because under both modern and historic practice, a request for an equitable lien encompasses a request for a substitutionary monetary decree and a deficiency judgment. *See* Fed. R. Civ. P. 54(c); *Otis*, 45 N.E. at 737.

all it need do is affirm the Eleventh Circuit's judgment.

III. ACCEPTING MONTANILE'S VIEW WOULD GREATLY INCREASE THE BURDENS ON PLANS AND THE COURTS.

The decision below is consistent with ERISA's text, this Court's caselaw, and traditional equitable practice. But most of all, it makes good sense. This Court has repeatedly emphasized Congress' goal of ensuring that ERISA plans are administered and enforced according to their terms. Montanile, however, asks this Court to "interject other additional issues into ERISA litigation," *Conkright*, 559 U.S. 519, by requiring a plan fiduciary to trace the present location of the promised fund every time it wants to enforce the plan's reimbursement provision. That requirement would burden beneficiaries, plans, and courts alike. It is the antithesis of "ERISA's objective of efficient plan administration," *Egelhoff*, 532 U.S. at 149 n.3, and should be rejected.

A. Montanile's Approach Will Discourage Employers From Offering Benefits And Will Lead To Higher Premiums.

1. Montanile and his *amici* try to minimize the negative effects that their approach would have on ERISA plans. But there can be no serious dispute about the impact. Any hurdle to efficient plan administration "might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987). That possibility is enough to avoid a result that "could work to the detriment of plan beneficiaries." *Ingersoll-Rand*, 498 U.S. at 142.

Montanile invites just that result here, by limiting plans' ability to recover reimbursements from beneficiaries. Estimates suggest that plans recover a significant sum—more than $1 billion annually—under reimbursement provisions. *See Sereboff* Br. of *Amicus Curiae* America's Health Ins. Plans, Inc. *et al.* in Support of Respondent, 2006 WL 460877, at *3 n.3. That is why so many authorities have recognized that "[r]eimbursement and subrogation provisions are crucial to the financial viability of self-funded ERISA plans." *Shank*, 500 F.3d at 838; *accord Zurich Am. Ins. Co.* v. *O'Hara*, 604 F.3d 1232, 1238 (11th Cir. 2010). Even critics of plan reimbursement rights admit that reimbursement protects plan solvency: "[A]n insuring entity * * * that receives substantial subrogated recoveries into its coffer will be financially healthier than one that lacks those recoveries." R.M. Baron, *Public Policy Considerations Warranting Denial Of Reimbursement to ERISA Plans: It's Time to Recognize The Elephant In The Courtroom*, 55 Mercer L. Rev. 595, 630 (2004). "Reimbursement inures to the benefit of all participants and beneficiaries by reducing the total cost of the Plan." *O'Hara*, 604 F.3d at 1237-1238.

The rule Montanile advocates—barring reimbursement where a beneficiary has spent down the promised fund—will *reduce* reimbursement recoveries and *increase* plan costs. Even a small increase in plan costs has potentially serious adverse effects: "[E]ach one percent increase in managed care plans' costs * * * results in a potential loss of insurance coverage for about 315,000 individuals." Health Economics Practice, Barents Group, LLC, *Impacts of*

Four Legislative Provisions on Managed Care Consumers: 1999-2003, at iii (1998).

2. Limiting plans' ability to enforce reimbursement provisions by permitting beneficiaries' dissipation will also likely raise premiums—a fact Montanile's *amici* dispute, but one that is both well-accepted and obvious. Insurers set premiums by projecting future expected losses. *See* Gary Wickert, *ERISA and Health Insurance Subrogation* § 1.04, at 1-39 (5th ed. 2013). Higher reimbursement rates drive down expected losses. *See id.* Conversely, each dollar the plan fails to recover results in a smaller pool of funds for beneficiaries. *McCutchen* Br. of *Amicus Curiae* Blue Cross Blue Shield Ass'n *et al.* in Support of Petitioner, 2012 WL 3875234, at *12. So if Montanile (or any beneficiary) "were relieved of his obligation to reimburse [the plan] for the medical benefits it paid on his behalf, the cost of those benefits would be defrayed by other plan members and beneficiaries in the form of higher premium payments." *O'Hara*, 604 F.3d at 1238. In other words, all of the Plan's other beneficiaries would have to chip in to cover the $120,000-plus windfall that Montanile—and any other similar beneficiary—would receive by having the Plan pay for his medical expenses and spending the tort settlement funds meant to repay those expenses on other things.

B. The Other Remedies Supposedly Available To Plans Are Inefficient And Unreliable.

Montanile and his *amici* tell the Court that adopting their position is unlikely to change the status quo because there are alternative mechanisms for plans to enforce reimbursement provisions. *See, e.g.*, Montanile Br. 44-45; U.S. Br. 29-31. But the only alternatives Montanile and his supporters offer are costly and uncertain; they fail to ensure that plans will recover the amounts owed.

1. Montanile would put the onus on the plans to hunt down funds after beneficiaries improperly spend them and essentially create an accounting of what the beneficiary purchased with them. Montanile Br. 44-45. This encourages gamesmanship of the worst kind; it would convert ERISA into a game of cat-and-mouse that rewards deceptive individual beneficiaries at the expense of all beneficiaries.

As this case demonstrates, even when participants are fully aware of their reimbursement obligation, they will often avoid complying with it and set up roadblocks to try to prevent plans from being able to enforce the obligation. Montanile challenged the Plan's ability to seek reimbursement of any kind under the plan documents, despite signing a separate acknowledgement in which he clearly promised to reimburse the Plan. J.A. 50-51. He also claimed that he did not have to reimburse the Plan until it met a non-existent requirement to prove compliance with ERISA's anti-inurement provision. *See* Pet. App. 34a. In other words, there was no dispute that Montanile had agreed to reimburse the Plan; the only question was whether Montanile could find some legal loophole barring the Plan from enforcing his agreement.

This pattern repeats again and again in ERISA reimbursement cases. Before this Court ruled in *McCutchen* that beneficiaries could not use unjust-enrichment defenses to defeat plan reimbursement provisions, beneficiaries commonly argued that plans were entitled to reimbursement only out of the portion of a tort settlement that was allocated to the payment of medical expenses, which was often, unsurprisingly, very little. As the United States recognized in its brief in *Sereboff*: "[T]he full reimbursement provision avoids the potential for strategic behavior in structuring a settlement by the insured and tortfeasor, who generally will have little reason to resist classifying damages as flowing from something other than medical costs." *Sereboff* U.S. Br., 2006 WL 460876, at *30 n.15.

Dissipation is simply the latest in this long line of avoidance tactics. Montanile would require plans to prove in every case that the beneficiary had actual and present possession of the fund that the defendant promised to repay. And if the fund had been used to purchase an asset, the plan would have to prove that fact. The resources required to resolve these factual inquiries would not just cut down on reimbursements and make administration less predictable; they also would dramatically increase the litigation burden on plans and courts alike.

This Court already has rejected interpretations of ERISA that have that effect. The Court explained in *Conkright*, for example, that ERISA "encourag[es] resolution of benefits disputes through internal administrative proceedings rather than costly litigation." 559 U.S. at 517; *accord FMC*, 498 U.S. at 65 (ERISA is designed to "avoid 'endless litigation,'" not to multiply it) (quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)). For that reason, the Court reversed a decision that had the effect of "interject[ing] other additional issues into ERISA litigation," thereby "increas[ing] litigation costs." *Conkright*, 559 U.S. at 518-519.

Montanile's present-possession rule has all of the ills that the Court criticized in *Conkright* and like cases. His approach would "further complicate ERISA proceedings." *Id.* at 519. It " 'would undermine the congressional goal of minimizing the administrative and financial burdens on plan administrators—burdens ultimately borne by the beneficiaries.' " *Egelhoff*, 532 U.S. at 150-151 (quoting *Ingersoll-Rand*, 498 U.S. at 142). And it would "unduly discourage employers from offering ERISA plans in the first place." *Conkright*, 559 U.S. at 517 (quoting *Varity*, 516 U.S. at 497).

2. Montanile's next supposed solution is for plans to seek preliminary injunctions against beneficiaries as a matter of course as soon as the beneficiary receives the funds from a tort settlement. Montanile Br. 3, 22 n.13. But plans often do not know when a case will settle, when funds will be disbursed to the beneficiary, whether the beneficiary will honor his reimbursement obligation, and how quickly the beneficiary will spend the money on things other than repaying the plan. Montanile's proposal overlooks, among other things, the narrowness of the window of time available to a plan to make such a filing. If the plan acts too soon, the case is not yet ripe. *See generally City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983) (to satisfy Article III's case-or-controversy requirement, the plaintiff's "injury or threat of injury must be both 'real and immediate,' and not 'conjectural' or 'hypothetical' "). If the plan acts too late, the funds will have been dissipated—as they were here. *See* J.A. 57.

Even assuming the plan succeeds in filing an emergency motion in that narrow sliver of time, "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* v. *NRDC*, 555 U.S. 7, 24 (2008). There is no guarantee that a court will award the plan such a drastic remedy even when dissipation of the promised fund is imminent. *See Great-West*, 534 U.S. at 208 (district court denied Great-West's motions for a temporary restraining order and preliminary injunction). Nor is there any guarantee that a court will grant the relief in a timely manner. *See Central States, Se. & Sw. Areas Health & Welfare Fund* v. *Lewis*, 745 F.3d 283, 288 (7th Cir. 2014) ("The preliminary injunction was not issued until ten months after the suit had been filed[.]").

In response, both Montanile and the United States suggest that the fund need be in the defendant's possession only when the case is filed. *See* Montanile Br. i; U.S. Br. 7. But they cite no authority to support their line drawing. If a court can award an equitable lien by agreement only if the promised fund is *presently* in the defendant's hands, then presumably the fund must be in the defendant's possession when judgment is rendered. Indeed, that is the only way Montanile's argument makes any sense because, in this case, he admitted to possessing the funds in his answer, and then only later, at summary judgment, did he deny possession. *Compare* Compl. ¶ 15 (Dkt. No. 1) ("all or part of the settlement proceeds are within the actual or constructive possession of Defendant Montanile"), *and* Answer ¶ 15 (Dkt. No. 11) (admitting same), *with* J.A. 57 ("Montanile denies that he is in actual or constructive possession of any but a small portion of the proceeds realized from the settlement of his claims."). So even if a plan does everything that Montanile says it is supposed to do—that is, move immediately for injunctive relief—the plan *still* may not recover the promised fund if the beneficiary dissipates the fund before final judgment.

3. Montanile and the United States also contend that the rules of professional responsibility governing attorney conduct suffice to ensure settlement funds are not prematurely dissipated. Montanile Br. 42-44; U.S. Br. 31. They assume, of course, that beneficiaries always inform their tort-suit lawyers about any reimbursement obligation. And they assume that the professional rules in fact bar a lawyer from dissipating the fund. But the answer is not so clear.

Montanile declares without citation that "tort settlements are typically released to and spent by an injured ERISA participant only after the plan has been notified that the lien (or its amount) is disputed and then fails to act." Montanile Br. 43. But not all states require an attorney to notify third-party creditors of a settlement prior to distribution of the fund to the beneficiary-client. In fact, Connecticut *forbids* such pre-distribution notification. *See Silver* v. *Statewide Grievance Comm.*, 1995 WL 416270, at *2-*4 (Conn. Super. Ct. Jul. 6, 1995), *aff'd*, 679 A.2d 392 (Conn. Ct. App. 1996). And even where an attorney is permitted or obligated to provide notice to potentially interested third-parties, the ethical rules are not uniform about an attorney's obligation to withhold funds from the client. Courts have offered "[w]idely disparate answers" on the question, with some holding that "a lawyer has no duty to a client's third party creditors and is required to follow a client's instructions even if the instructions violate the terms of an assignment agreement between the client and the creditor." M. Colette Gibbons & Elin

Brenner, Am. Bar Ass'n, *Divided Loyalties: A Lawyer's Duties to A Client's Creditors*, 10 Prob. & Prop., Dec. 1996, at 24. In the District of Columbia, for example, a lawyer may withhold funds arising out of a client's contractual obligation to pay *only if* the agreement is "joined in or ratified by the lawyer." D.C. Ethics Opinion 293 (Feb. 2000), https://goo.gl/m2BHw8. And where the attorney is found to violate her ethical obligations, bar discipline does not necessarily result in repayment of the fund.

Past experience bears out the inadequacy of the rules of professional conduct to avoid dissipation. Although Montanile asserts (again without citation) that "[p]ersonal injury attorneys virtually never release funds without first giving the plan an opportunity to act," Montanile Br. 42, the caselaw shows otherwise. Attorneys time and again have proven either unwilling to abide by their ethical obligations or at least willing to stretch the limits of those obligations to the breaking point. *See, e.g.*, Pet. App. 47a (*Elem*) (beneficiary "and her attorney conspired to hide and disburse settlement funds"); *Central States*, 745 F.3d at 285, 287 (beneficiary's attorney "refus[ed] to honor the subrogation lien" and "willfully ignored the plan's lien against the settlement proceeds"); *ACS Recovery Servs., Inc.* v. *Griffin*, 723 F.3d 518, 521 (5th Cir. 2013) (en banc) ("Rather than help [the beneficiary] comply with the Plan, his attorney devised an artful attempt to insulate the settlement proceeds from the reimbursement provision."). Neither Montanile nor his *amici* offer any way to stop these bad-faith actors—yet another reason to reject their approach.

Beneficiaries, moreover, do not need Montanile's self-help dissipation solution to protect themselves from plans that sleep on their rights. The traditional, equitable affirmative defense of laches protects defendants from "unreasonable delay by [a] plaintiff in prosecuting a claim or protecting a right of which the plaintiff knew or should have known, and under circumstances causing prejudice to the defendant." 1 Dobbs § 2.4(4), at 103. And courts routinely evaluate the defense in ERISA reimbursement cases, as the District Court did below. *See* Pet. App. 34a; *see also*, *e.g.*, *Bd. of Trustees of the Nat'l Elevator Indus. Health Benefit Plan* v. *McLaughlin*, No. 12-4322, 2014 WL 284431, at *4 (D.N.J. Jan. 24, 2014) (considering and rejecting a laches defense to a plan's reimbursement claim); *Anderson* v. *First Unum Life Ins. Co. of Am.*, No. 5:12–CV–00208–SWW, 2014 WL 130490, at *3 (E.D. Ark. Jan. 14, 2014) (same). That Montanile's laches defense was not successful on his particular facts is no reason to adopt his spend-the-fund remedy in all cases.

4. Montanile's final contention is that the Plan could have simply exercised its right to subrogation or intervened in Montanile's tort lawsuit to protect its reimbursement interests. Montanile Br. 45; *see also* U.S. Br. 30. But that is not the bargain Montanile struck with the Plan. The Plan "has a right to first reimbursement out of any recovery," and "[a]cceptance of benefits from the Plan * * * constitutes the covered person's agreement to file a claim for benefits against any party who is liable for the injury or illness to the covered person." J.A. 46. Montanile cannot after-the-fact renege on that agreement by arguing that the Plan had other options available to it.

Moreover, the other-options argument works both ways. Montanile, too, had other options available to him if he wanted to challenge the validity of his reimbursement obligation. For example, he could have sued the Plan under ERISA Section 502(a)(1)(B) "to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Or he could have sued under Section 502(a)(3)(A) "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan." Either path would have allowed him to test whether the Plan documents, in fact, created a reimbursement obligation. The Plan, which had already fulfilled its end of the bargain, should not be the one saddled with bringing litigation to ensure that Montanile fulfills his end, too.

5. At bottom, Montanile's position boils down to the proposition that the actions of beneficiaries can trump the terms of a plan and void a reimbursement obligation. *See* Pet. App. 34a. Beneficiaries can cut off a plan's equitable remedy by simply spending the settlement fund on whatever they may choose, and the plan's equitable remedy will therefore remain available only so long as the beneficiary does not spend the plan's money.

As the Court held in *Varity*, "[w]e are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law." 516 U.S. at 515. The Court should reach the same holding here. An ERISA plan may enforce an equitable lien by agreement as soon as a promised fund reaches the beneficiary's hands, and the beneficiary's subsequent dissipation of that fund does not defeat the plan's claim.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

ERISA § 502, 29 U.S.C. § 1132, provides in pertinent part:

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(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;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

* * * *