

CIRCUIT COURT HOLDS PLAN ENTITLED TO RECOUPMENT OF OVERPAYMENT

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In 2016, the Supreme Court held, in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, that Section 502(a)(3) of the Employee Retirement Income Security Act allows a plan to recover an overpayment of benefits where the funds remain in the payee's possession or can be traced to property acquired with the funds. A recent decision by the Sixth Circuit Court of Appeals applies the *Montanile* decision to an overpayment of benefits from a pension plan.

In *Zirbel v. Ford Motor Co.*, an alternate payee under a qualified domestic relations order received an overpayment of \$243,000 from a pension plan sponsored by Ford Motor Company. After taxes were withheld from the distribution, the remaining proceeds were ultimately placed in a retirement account, invested in mutual funds, gifted to the alternate payee's children, and used to pay more taxes. After discovering the overpayment, the plan committee invoked a plan provision providing "In the event of an error that results in an overpayment of benefits to a Member, the amount of the overpayment shall be returned to the Retirement Fund, without limitation, except the Committee shall have discretionary authority to reduce any repayment amount from a Member" and sought to recover the \$243,000 overpayment amount. The alternate payee appealed the decision through the plan's administrative claims procedure, which was ultimately denied by the plan committee. As part of the administrative claims process, the alternate payee was provided the opportunity to apply for a hardship waiver, but she failed to do so.

Applying an arbitrary and capricious standard of review, the Appeals Court held that the plan committee's decision to seek recoupment was permissible. As to the issue of tracing the overpaid funds, the Appeals Court rejected the argument that commingling the overpayment with other investments defeated the equitable lien running in favor of the plan. Regarding the portion of the overpayment used to pay taxes and to make gifts to the alternate payee's children, it appears the alternate payee failed to argue that these portions of the overpayment were no longer traceable at the district court level and, therefore, the Appeals Court held that the argument had been waived.

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The decision in *Zirbel* demonstrates the importance in having a full and fair administrative claims process and following that process in seeking to recover overpayments. Although the *Zirbel* decision provides additional favorable precedent for plans seeking to recover overpayments, we expect that recouping overpayments will nevertheless remain challenging in many cases due to the fact-intensive process of tracing any overpayment.