

No. 12-526



In The  
**Supreme Court of the United States**

**FIRST-UNUM LIFE INSURANCE COMPANY**

*Petitioner*

vs.

**LEAH BILYEU**

*Respondent*

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

**RESPONDENT'S BRIEF IN OPPOSITION**

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## QUESTION PRESENTED

Petitioner First Unum Life Insurance Company ("Unum") insured a long-term disability plan, subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). The Plan paid benefits to Respondent Leah Bilyeu for two years and then terminated her benefit payments. Bilyeu spent the income replacement benefits on her usual and ordinary living expenses consistent with the purpose of the Plan. A year and half after the Plan stopped paying benefits, the Social Security Administration awarded Bilyeu disability benefits, including retroactive benefits that covered a period overlapping with the period the Plan paid benefits. Unum claimed the Social Security Administration award caused an undesignated portion of the Plan's prior payments to become overpayments triggering the Plan's reimbursement agreement, which would have entitled the Plan to an equitable lien by agreement on any of the overpayments still in Bilyeu's possession.

*The question presented is:* Did the Ninth Circuit correctly hold that an equitable lien by agreement can only attach to specific and identifiable funds in the participant's possession?

# TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES .....	iii
INTRODUCTION .....	1
STATEMENT OF THE CASE.....	4
REASONS FOR DENYING REVIEW .....	12
I. The Facts of this Case Do Not Permit Resolution of the Question Presented by Unum .....	12
II. The Ninth Circuit's Analysis Is Con- sistent with the Decisions of Other Cir- cuits .....	14
III. The Question Presented Is Not Outcome Determinative.....	19
A. The District Court Can Decide this Case Without Resolving the Question Presented.....	19
B. The Case May Be Resolved Based on Unum's Failure to Identify a Specific Portion of Targeted Funds to which Unum Is Entitled .....	22
IV. The Impact of the Ninth Circuit's Deci- sion Is Overstated.....	24
CONCLUSION.....	28

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Barnes v. Alexander</i> , 232 U.S. 117 (1914) .....	23
<i>Bilyeu v. Morgan Stanley Long Term Disability Plan</i> , 683 F.3d 1083 (9th Cir. 2012).....	<i>passim</i>
<i>CIGNA Corp. v. Amara</i> , 131 S. Ct. 1866 (2011) .....	13
<i>Cusson v. Liberty Life Assurance Co. of Boston</i> , 592 F.3d 215 (1st Cir. 2010).....	<i>passim</i>
<i>Funk v. CIGNA Group Ins.</i> , 648 F.3d 182 (3d Cir. 2011) .....	<i>passim</i>
<i>Gilchrest v. Unum Life Ins. Co. of Am.</i> , 255 F. App'x 38 (6th Cir. 2007) (unpublished) .....	15
<i>Great-West Life &amp; Annuity Ins. Co. v. Knudson</i> , 534 U.S. 204 (2002).....	6, 7, 13, 14, 16
<i>Gutta v. Standard Select Trust Ins. Plans</i> , 530 F.3d 614 (7th Cir. 2008) .....	<i>passim</i>
<i>Longaberger Co. v. Kolt</i> , 586 F.3d 459 (6th Cir. 2009).....	8, 9, 15, 16, 17
<i>Philpott v. Essex County Welfare Bd.</i> , 409 U.S. 413 (1973).....	8, 9, 18
<i>Sereboff v. MidAtlantic Medical Services, Inc.</i> , 547 U.S. 356 (2006).....	<i>passim</i>
<i>Treasurers, Trustees of Drury Indus., Inc. Health Care Plan and Trust v. Goding</i> , 692 F.3d 888 (8th Cir. 2012) .....	10, 15

## TABLE OF AUTHORITIES – Continued

	Page
STATUTES	
29 U.S.C. § 1132(a)(1)(b) .....	10
29 U.S.C. § 1132(a)(3) .....	2, 6, 7, 12
42 U.S.C. § 407(a) .....	9, 18, 19
42 U.S.C. § 423(d)(1)(A) .....	26
42 U.S.C. § 423(d)(2)(A) .....	26
OTHER AUTHORITIES	
4 John Norton Pomeroy, <i>A Treatise on Equity</i>	
§ 1235 (5th ed. 1941) .....	23
53 C.J.S. <i>Liens</i> § 19 (2012) .....	23
Regulatory Settlement Agreement .....	21

## INTRODUCTION

Review should be denied because deciding this case will not answer the question Petitioner presents. Petitioner's question relies on a false factual predicate and presents an issue that is not outcome determinative in this case. In addition, the purported split in the Circuits sidesteps the issue in this case, is relatively narrow, and poorly defined. Review at this juncture is premature. Finally, contrary to Petitioner's unsupported allegations, the Ninth Circuit's decision will not have catastrophic effects on the insurance industry.

The core flaw in Unum's petition is that it presents an issue not addressed by the Ninth Circuit. Unum seeks a determination of whether an equitable lien by agreement can be enforced if the defendant dissipates the sought-after fund *after* the lien attaches. But those are not the facts of this case. Unum stipulated Bilyeu had dissipated her Plan benefits before she was awarded Social Security disability benefits. Pet 8a. The Ninth Circuit explained, "Bilyeu asserts, and Unum has not refuted, that Bilyeu has spent the overpaid benefits. Unum, therefore, is not seeking to recover a specified fund that is preserved and in Bilyeu's possession." Pet. 21a (footnote omitted). Bilyeu did not dissipate the sought-after funds after Unum's right to a lien arose. Bilyeu properly spent her Plan benefits on living expenses before she was entitled to Social Security disability benefits and before the Plan had a right to a lien.

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The purported split in the Circuits cannot withstand scrutiny. Unum urges that other Circuits have held the remedy of an equitable lien by agreement remains an available remedy “even if the participant spends the funds subject to the lien before the fiduciary can sue to recoup them.” Pet. 3. Unum draws a temporal line not present in any case. The issue is whether funds were in the participant’s possession when the lien could have attached – not when the Plan sought to enforce the lien. The Circuits do not disagree that funds dissipated after the lien attaches do not defeat the lien, but funds not in the participant’s possession before the lien attaches are not subject to the lien.

All of the Circuits, including the Ninth Circuit, apply the three requirements for an equitable lien by agreement set forth in *Sereboff v. MidAtlantic Medical Services, Inc.*, 547 U.S. 356 (2006). To the extent the Circuits appear to produce different outcomes, the differences turn on factual issues, not legal analysis. This is no surprise because this Court has taught that whether a party can enforce an equitable lien by agreement under 29 U.S.C. § 1132(a)(3) turns on the particular facts of each case. The Ninth Circuit reaching a different result when applying *Sereboff* to facts not present in the other Circuits’ cases illustrates the Court’s lesson.

Resolution of the question presented is not necessary for the District Court to decide this case. The resolution of the merits of Bilyeu’s claim for benefits requires determining whether her disability is mental

as Unum concluded or physical as the Social Security Administration determined. If physical, Bilyeu is owed Plan benefits and Unum will recover its overpayment as an offset against those benefits. If mental, Unum and the Social Security Administration were not paying benefits for the same disability barring application of the reimbursement agreement, which is predicated on other benefits being paid for the same disability. Even if the merits of Bilyeu's claim were not outcome determinative, on remand, Unum's claim to an equitable lien by agreement is likely to fail for an independent reason. The Ninth Circuit found Unum failed to meet two requirements for an equitable lien by agreement. In addition to Bilyeu not being in possession of any funds to which a lien might attach, Unum failed to identify a portion of a particular fund over which it sought to assert a lien.

Just as it exaggerates the Circuit split, Unum overstates the potential impact of the decision. The decision below will not cause the collapse of the insurance industry. It does not provide an incentive to beneficiaries to spend benefits they do not have a right to spend. And, it does not undermine any purported return-to-work incentive in any plan. The circumstances under which an insurer making a fair determination of a claim would be unable to recover its overpayment due to an award of Social Security disability benefits should be very rare.

Finally, Unum has not been deprived of any remedy under the Plan or *Sereboff*. On remand, Unum will have an opportunity to satisfy the *Sereboff*



criteria and seek an equitable lien by agreement. And, if Bilyeu prevails on her claim for benefits, Unum will recover its overpayment as an offset against the benefits owed Bilyeu.

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### STATEMENT OF THE CASE

1. Bilyeu worked for Morgan Stanley and participated in its long-term disability plan (the "Plan"). Pet. 42a. The Plan is governed by ERISA. Pet. 42a. Morgan Stanley funds the Plan with an insurance policy (the "Policy") issued by Unum. Pet. 42a.

Plan participants who qualify for benefits receive a monthly benefit equal to 60-percent of their monthly pre-disability earnings less "Other Income Benefits." Pet. 42a. "Other Income Benefits" are defined in the Policy as benefits paid for the same disability, which may include Social Security disability benefits. Pet. 42a; Arizona District Court Docket No. ("Dkt. No.") 29-1 at 22.

The Policy requires participants who qualify for benefits to apply for Social Security disability benefits. Pet. 43a. While the claim for Social Security benefits is pending, the Policy states Unum will estimate the amount of Social Security benefits and deduct it from the participant's monthly benefits. Pet. 42a.

The Policy gives participants the option of receiving an unreduced benefit by executing the reimbursement agreement referenced in the Policy. Pet. 42a. According to Unum, "Plans offer this option so that participants can manage their cash flow while the government, or another insurer, processes their disability claims." Pet. 26. The reimbursement agreement applies to all "Other Income Benefits" and explains that a final determination "may result in an overpayment by the Insurer." Pet. 13a. A participant who elects this option promises "to pay the Insurer any overpayment resulting from my receipt of benefits from other sources, as outlined in my policy" and "agree[s] to reimburse the Insurer for such overpayment within thirty (30) days of my receipt of such funds." Pet. 13a. Further, the participant acknowledges that if the Insurer is not reimbursed within 30 days, "the Insurer may reduce future benefits under the policy in order to recover the overpaid benefits." Pet. 14a.

Bilyeu applied for disability benefits claiming a physical disability (Behçets disease, a rare immune system disorder causing debilitating symptoms). Pet. 4a. Bilyeu qualified for benefits under the Plan. Pet. 42a. The Plan paid benefits from October 14, 2004 to November 14, 2004 and again from January 4, 2005 to December 27, 2006. Pet. 42a. During the latter period, Unum required Bilyeu to apply for Social Security disability benefits. Pet. 42a. Unum gave Bilyeu the option of receiving a reduced benefit or

executing the reimbursement agreement. Pet. 43a. Bilyeu executed the agreement. Pet. 43a.

Unum did not identify any portion of any Plan payment as an amount potentially subject to the reimbursement agreement. Unum terminated Bilyeu's benefits in December 2006 claiming Bilyeu's disability is a mental/nervous disorder subject to a two-year limitation on the duration of benefit payments. Pet. 4a. A year and half after Unum terminated benefits, by which time Bilyeu had "dissipated at least a portion of her [long-term disability] benefits," the Social Security Administration determined Bilyeu is entitled to disability benefits based on her physical disabilities, including Behçets disease. *In the Case of Bilyeu*, 2008 SSA (ALJ Dickinson). The Social Security Administration specifically found Bilyeu's mental impairments did not qualify her for benefits. *Id.*

2. Under 29 U.S.C. § 1132(a)(3), a plan fiduciary may seek appropriate equitable relief to enforce terms of a plan. Under certain conditions, appropriate equitable relief may include an equitable lien by agreement. This Court addressed the limits of appropriate equitable relief, as relevant here, in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In *Knudson*, the petitioner sought equitable relief in the form of an equitable lien or constructive trust. The Court found the relief sought was not equitable because the respondents are not in possession of the sought-after funds because they had never come into the respondent's possession or were

distributed into a special needs trust. *Knudson*, 534 U.S. at 214.

*Sereboff* distinguished between traditional equitable restitution and equitable liens by agreement. Equitable restitution typically required the plaintiff to trace the funds at issue from the plaintiff's possession to an identifiable fund in the defendant's possession and control. *Sereboff*, 547 U.S. at 362-63. But tracing the funds from the plaintiff's to the defendant's possession is not necessary for an equitable lien by agreement. *Id.* at 364-65. *Sereboff* imposes three criteria on an ERISA fiduciary seeking to enforce an equitable lien by agreement against a plan participant: 1) the plan must identify a particular fund, distinct from the participant's general assets; 2) the plan must identify a particular share of that fund to which the fiduciary is entitled; and 3) the Plan participant must be in possession of the fund to which the fiduciary is entitled. Pet. 7 (citing *Sereboff*, 547 U.S. at 364).

At the time *Bilyeu* was decided, four Circuits had applied the *Sereboff* criteria to ERISA plan claims seeking to impose equitable liens by agreement under 29 U.S.C. § 1132(a)(3). All four required the sought-after funds be in the participant's possession when the lien attached. *Cusson v. Liberty Life Assurance Co. of Boston*, 592 F.3d 215, 231 (1st Cir. 2010) (applying *Sereboff* rather than *Knudson* based on the sought-after funds being in the respondent's possession); *Funk v. CIGNA Group Ins.*, 648 F.3d 182, 195 (3d Cir. 2011) (finding Funk was in receipt of the

sought-after funds); *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614, 621 (7th Cir. 2008) (noting Gutta received other income benefits simultaneously with plan benefits); *Longaberger Co. v. Kolt*, 586 F.3d 459, 457 (6th Cir. 2009) (“Longaberger’s equitable lien attached to the settlement fund when it was identified and received”). Of the four cases, only *Cusson* and *Funk* involved, as here, overpayment of benefits resulting from an award of Social Security benefits. And of those two, only *Cusson* sought to impose a lien on funds that had belonged to the fiduciary. *Funk* imposed a lien on Social Security benefits.

*Cusson* comes closest to the facts of this case. *Cusson* is the only case in which a Plan sought to impose a lien against its overpayments caused by a Social Security award, rather than against third-party funds. The key factual difference is Bilyeu was not in possession of the sought-after funds when the Plan’s lien arose. In *Cusson*, Liberty satisfied *Sereboff*, because the sought-after funds were in *Cusson*’s possession, and Liberty’s agreement targeted specific funds and identified a specific portion of those funds to which Liberty was entitled. *Cusson*, 592 F.3d at 230. *Cusson* acknowledged 42 U.S.C. § 407(a) bars claims against Social Security benefits. *Id.* at 231 (citing *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416 (1973)).

*Funk* is alone in imposing an equitable lien by agreement on Social Security disability benefits. *Funk* involved reimbursement of an overpayment created by an award of Social Security disability

benefits. Applying the *Sereboff* criteria, *Funk* found an equitable lien by agreement. *Funk*, 648 F.3d at 195. Funk was in possession of the Social Security disability benefits that caused CIGNA's payments to become overpayments. CIGNA identified the Social Security benefits as the sought after fund. *Funk* did not consider whether 42 U.S.C. § 407(a) barred CIGNA's lien. *Funk* enforced a lien directly against Social Security disability funds. *Id.* The Third Circuit is alone in ignoring 42 U.S.C. § 407(a) and *Philpott*.

*Longaberger* did not involve reimbursement of an overpayment or Social Security disability benefits, but applied the *Sereboff* criteria. *Longaberger* interpreted *Sereboff* to allow imposition of an equitable lien by agreement as soon as the participant comes into possession of the funds, if the agreement identifies a particular fund distinct from the participant's general assets and a particular share of the fund to which the insurer is entitled. *Longaberger*, 586 F.3d at 467. *Longaberger* found the Plan's agreement identified a specific fund in the participant's possession and control, which belonged in good conscience to the Plan. *Id.* at 469. *Longaberger* did not allow post-attachment dissipation of the fund to defeat the lien.

Gutta received his Plan disability benefits and other ERISA group disability benefits simultaneously. *Gutta*, 530 F.3d at 621. Applying *Sereboff*, *Gutta* found the Plan lien attached as soon as Gutta received duplicate benefits. *Id.* The Plan identified a portion of a specifically identifiable fund, distinct from Gutta's general assets, in Gutta's possession

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that rightfully belonged to the Plan. Gutta's subsequent commingling and dissipation of the Plan's overpayments did not defeat the Plan's lien.

Since *Bilyeu*, the Eighth Circuit applied *Sereboff* in a case not involving a disability plan, Social Security benefits, or a reimbursement claim against a plan beneficiary. *Treasurers, Trustees of Drury Indus., Inc. Health Care Plan and Trust v. Goding*, 692 F.3d 888 (8th Cir. 2012). *Goding* found: 1) a plan had no subrogation rights against someone not a party to the subrogation agreement (*id.* at 895), 2) seeking to recover from a non-beneficiary not in possession of the sought after funds is not equitable (*id.* at 897); and 3) ERISA does not permit state law causes of action to enforce a subrogation agreement. *Id.* *Goding* does not address enforcement of an equitable lien by agreement against a beneficiary who dissipated funds before the lien attached.

3. Bilyeu brought a civil action in the District Court of Arizona under 29 U.S.C. § 1132(a)(1)(b) challenging her benefit termination. Pet. 6a. Unum denied the allegations of the complaint and counter-claimed seeking to recover an alleged overpayment, claiming it had a right to equitable restitution of its overpayment. Pet. 7a; Dkt. No. 5 at 18. Bilyeu admitted Unum had a right to equitable restitution and conceded Unum's right to recover overpayments in her possession at the time of the Social Security award. Dkt. No. 30 at 9, 12; Ninth Circuit Opening Brief at 18. Unum refused to accept the overpayments still in Bilyeu's possession.

The District Court dismissed Bilyeu's claim for failure to exhaust her administrative remedies.<sup>1</sup> The District Court also entered judgment on the counterclaim awarding Unum \$36,597.82, which represented the sum of its claimed overpayments. Pet. 48a. The District Court did not tie that award to any particular fund identified by Unum or to any particular funds in Bilyeu's possession when Unum's lien would have attached. Pet. 48a. The District Court did not impose an equitable lien or constructive trust. Pet. 48a.

Bilyeu appealed to the Ninth Circuit. Applying *Sereboff*, the Ninth Circuit identified "at least three criteria for securing an equitable lien by agreement:" 1) a promise by the beneficiary to reimburse the fiduciary for benefits paid under the plan in the event of a recovery from a third party; 2) the reimbursement agreement must "specifically identif[y] a particular fund, distinct from the [beneficiary's] assets," from which the fiduciary will be reimbursed; and 3) the funds specifically identified must be "within the possession and control of the [beneficiary]." Pet. 18a. The Ninth Circuit concluded *Sereboff* does not permit enforcement of an equitable lien against general assets when the specifically identified funds are no longer in a beneficiary's possession when the lien attached. Pet. 23a. *Bilyeu* concluded the District

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<sup>1</sup> The Ninth Circuit reversed the District Court's dismissal of Bilyeu's claim and remanded for a determination on the merits. Unum does not challenge the Ninth Circuit's ruling on this issue. Pet. 11.



Court had not properly applied *Sereboff* and had improperly granted legal relief. The Court found Unum had not satisfied *Sereboff*'s second and third criteria and remanded Unum's claim to allow Unum to satisfy *Sereboff*'s criteria for obtaining equitable relief. Pet. 26a.

Assuming Unum can satisfy *Sereboff*'s criteria, the Ninth Circuit's instructions on remand allow Unum to impose an equitable lien by agreement not just on the sought-after funds, but on "assets to which the overpaid benefits can be traced." Pet. 26a. The Ninth Circuit's analysis does not permit post-attachment dissipation of sought-after funds to defeat an equitable lien by agreement.

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## REASONS FOR DENYING REVIEW

### **I. The Facts of this Case Do Not Permit Resolution of the Question Presented by Unum.**

The Ninth Circuit did not consider the question Unum presents. The funds to which Unum seeks to attach a lien were not in Bilyeu's possession when the lien would have attached. Unum ignores this critical fact. The question Unum presents is whether an equitable lien by agreement can be enforced under 29 U.S.C. § 1132(a)(3) "if, *after the lien attached*, the defendant dissipated the sought-after fund." Pet. i (emphasis added). The question presented relies on a

false predicate because Bilyeu did not dissipate funds after a lien attached.

Unum's claim that Bilyeu "brazenly" broke her promise to pay back any overpayments and tried to "insulate herself against suit by spending the money she accepted" is not supported in the record. *See* Pet. 2. Unum stipulated Bilyeu spent her Plan benefits before receiving Social Security benefits. Pet. 8a, 47a. Bilyeu spent the disability benefits on her living expenses as the Plan intended. Unum cannot laud itself for allowing participants to "manage their cash flows" (Pet. 26), and then impugn the participants for doing so. Pet. 2. When Bilyeu spent her contractual benefits, the payments were not overpayments and Bilyeu had every right to spend the benefits.

That Bilyeu spent the Plan benefits before being awarded Social Security benefits is the lynchpin of the Ninth Circuit's analysis. The Ninth Circuit interpreted *Knudson*, *Sereboff*, and *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) to require that the sought-after funds be in the beneficiary's possession to provide a res to which a lien could attach. Pet. 23a. That Unum's lien arose when Bilyeu was awarded Social Security benefits is undisputed. Pet. 7, 15; *See* Brief for The American Council of Life Insurers, *et al.* at 14 ("repayment obligation is triggered by the participant's receipt of [Social Security] benefits"). That Bilyeu had dissipated the Plan benefits before the lien attached is also undisputed. Pet. 8a, 21a, 47a. The Ninth Circuit concluded that because Unum was not seeking to recover funds in Bilyeu's possession,

Unum was “seeking ‘the imposition of personal liability,’ rather than enforcement of an ‘equitable lien on particular property.’” Pet. 22a (citing *Sereboff*, 547 U.S. at 362 (quoting *Knudson*, 534 U.S. at 214)).

In reaching its conclusion the Ninth Circuit did not consider whether an equitable lien by agreement can be enforced if, after the lien attaches, the defendant dissipates the sought-after fund. The Ninth Circuit simply required Unum to show that the funds to which it sought to impose a lien were in Bilyeu’s possession when the lien would have attached. Again, the instructions on remand suggest that if Unum had identified a particular fund in Bilyeu’s possession to which its lien attached, Unum would be allowed to trace those funds to other assets if Bilyeu had dissipated those funds after the lien attached. But the Ninth Circuit did not expressly address that issue.

## **II. The Ninth Circuit’s Analysis Is Consistent with the Decisions of Other Circuits.**

The alleged split in the circuits is narrower than Unum portrays and not directly affected by this case. The Ninth Circuit acknowledged a trend in other circuits interpreting *Sereboff*’s tracing rules, but concluded the issue was not relevant here. The Ninth Circuit acknowledged “a number of circuits interpreted *Sereboff*’s discussion of tracing rules as a signal that a fiduciary can assert an equitable lien – presumably against a beneficiary’s general assets – even if the beneficiary no longer possesses the specifically

identified funds. Pet. 22a-23a (citing *Funk*, 648 F.3d at 194 n.14; *Cusson*, 592 F.3d at 231; *Longaberger*, 586 F.3d at 466; *Gutta*, 530 F.3d at 621; *Gilchrest v. Unum Life Ins. Co. of Am.*, 255 F. App'x 38, 44-45 (6th Cir. 2007) (unpublished)). But the Court went on to explain that the “tracing issue in *Sereboff* was whether Mid Atlantic could obtain an equitable lien against specifically identified funds when Mid Atlantic had never possessed those funds itself.” Pet. 23a. The Ninth Circuit concluded that issue “has no relevance here.” *Id.* (citing *Sereboff*, 547 U.S. at 364-65). The issue is not relevant because any funds that may constitute Unum’s overpayment were transferred directly from Unum to Bilyeu. No third-party funds were involved. The tracing issue raised in *Sereboff* and the other Circuits is not present in this case.

Unum is correct that four circuits have addressed the issue of the available relief when a participant dissipates the identified funds after the lien attaches.<sup>2</sup> But that is not the issue presented in *Bilyeu* because Bilyeu dissipated Unum’s funds before a lien would have attached. That factual distinction informs the reason the other circuits’ cases are irrelevant to the Ninth Circuit’s analysis. Unum stipulated in the

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<sup>2</sup> Unum suggests *Goding* adds to the circuit split, but *Goding* did not consider the tracing issue the Ninth Circuit identified in the other four circuits. *Goding*, 692 F.3d at 897. Nor does *Goding* address the issue addressed by the Ninth Circuit, whether an equitable lien by agreement can be enforced against a beneficiary who dissipated funds before the right to a lien arises.

District Court that by the time the Social Security Administration awarded Bilyeu benefits, she had dissipated her Plan benefits. Pet. 8a, 43a. *Cusson*, *Funk*, *Longaberger*, and *Gutta*, never addressed the effect on the enforcement of an equitable lien by agreement of the beneficiary not being in possession of the Plan's funds when the Plan's lien attached.

All of the other Circuits have required, as a condition of imposing an equitable lien by agreement, that the sought after funds be in the possession of the participant when the lien attached. In *Bilyeu*, the Ninth Circuit agrees. *Bilyeu* found *Sereboff* requires the plan to identify funds "within the possession and control of the [beneficiary]." Pet. 18a (quoting *Sereboff*, 547 U.S. at 363).

*Cusson* concluded the funds do not have to be in the defendant's possession when suit is filed, but implied the funds have to be in the defendant's possession when the lien attaches. *Cusson* acknowledged *Sereboff* requires the participant to be in possession of the funds before a plan can seek equitable relief. *Cusson*, 592 F.3d at 230-31 (distinguishing between legal relief in *Knudson* and equitable relief in *Sereboff* based on defendant's possession of the funds sought). *Cusson*'s conclusion that *Sereboff* rather than *Knudson* applies implies *Cusson* was in possession of the funds sought, which satisfied the third *Sereboff* criterion. Except for not explicitly finding *Cusson* was in possession of the funds sought, the *Cusson* analysis does not differ from *Bilyeu*. *Bilyeu* does not reject Unum's claim to an equitable lien by agreement. The

Ninth Circuit remanded to allow Unum to make the factual showing necessary to satisfy the second and third *Sereboff* criteria.

Applying *Bilyeu*'s analysis to the facts in *Longaberger*, the Ninth Circuit would have reached the same conclusion as the Sixth Circuit because the funds at issue in *Longaberger* were in the participant's possession when the lien attached and only later dissipated. *Longaberger* interpreted *Sereboff* to allow imposition of an equitable lien by agreement as soon as the participant comes into possession of the funds, if the agreement identifies a particular fund distinct from the participant's general assets and a particular share of the fund to which the insurer is entitled. *Longaberger*, 586 F.3d at 467. *Longaberger* found the Plan's agreement identified a specific fund in the participant's possession and control, which belonged in good conscience to the Plan. *Id.* at 469. *Longaberger*'s legal analysis does not differ from *Bilyeu*'s. *Longaberger* applies the same three criteria from *Sereboff* as *Bilyeu*. *Longaberger* correctly concluded that dissipating funds after a lien attached does not defeat an equitable lien by agreement. That conclusion comports with the remand instructions in *Bilyeu*.

*Gutta* did not involve an overpayment caused by an award of Social Security benefits. *Gutta* received other group disability insurance benefits simultaneously with Plan benefits. *Gutta*, 530 F.3d at 621. The benefit Plan provided that duplicate benefits would reduce the Plan's obligation. *Gutta* was found to be in

possession of the overpaid benefits when the insurer's lien attached.<sup>3</sup> *Id.* at 621. *Gutta* concluded that dissipating funds after a lien attached does not defeat an equitable lien by agreement. *Bilyeu* does not address the effect of dissipation or commingling of the insurer's funds *after* its lien attached because *Bilyeu* dissipated Unum's funds *before* the Social Security Administration awarded benefits. But the Ninth Circuit's instructions on remand allow Unum to trace its overpayments to other assets in *Bilyeu*'s possession when the lien attached. Pet. 26a. *Bilyeu* is not directly at odds with *Gutta*. On remand, Unum can still obtain the relief permitted in *Gutta*.

*Funk* does not provide a reason to review *Bilyeu*. *Funk* permitted a lien against Social Security benefits. To that extent, *Bilyeu* disagrees with *Funk* but is in agreement with *Cusson*, which acknowledged 42 U.S.C. § 407(a) bars claims against Social Security benefits. *Cusson*, 592 F.3d at 231 (citing *Philpott*, 409 U.S. at 416). Plainly, *Bilyeu* and *Cusson* would not permit an insurer to impose a lien over Social Security disability benefits, but that is not the question

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<sup>3</sup> *Philpott* found 42 U.S.C. § 407(a) protected Social Security benefits from creditors even when commingled with other assets. Because there was no comparable provision applicable to *Gutta*'s other disability payments, the plan benefits were subject to the lien by agreement when paid and the plan could recover those funds even if the specific disability payments had already been commingled or expended so long as there were other funds in *Gutta*'s possession over which the lien could attach.

Unum presents.<sup>4</sup> The Third Circuit did not consider the issue presented in *Bilyeu*. But the Ninth and Third Circuits agree *Sereboff* is the proper framework to analyze equitable liens by agreement and that funds must be in the participant's possession when the lien attaches to impose a lien. *Funk*, 648 F.3d at 193.

### **III. The Question Presented Is Not Outcome Determinative.**

#### **A. The District Court Can Decide this Case Without Resolving the Question Presented.**

A resolution of the question presented is not necessary to the District Court's determination in this case. Unum's claimed right of reimbursement depends on the Other Income Benefits provision, which only applies to other income benefits "payable as a result of the *same* disability for which [Unum's] policy pays a benefit." Dkt. No. 29-1 at 22 (emphasis added). Unum, therefore, only has a right to reimbursement if it paid benefits for the same disability for which the Social Security Administration paid benefits.

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<sup>4</sup> *Funk* allowing a lien against Social Security benefits is plain error. Unum does not seek a lien against Social Security benefits and Amici acknowledge a lien against Social Security benefits is impermissible under 42 U.S.C. § 407(a). See Brief for The American Council of Life Insurers, *et al.* at 14; Brief of Sun Life Assurance Company at 13.



Under the terms of the reimbursement agreement, Unum may recover its overpayments from future benefits as a setoff. A participant agrees:

If I fail to pay the Insurer the overpayment within the thirty (30) day period specified above, I understand that the Insurer may reduce future payments under the policy in order to recover the overpaid benefits. Pet. 14a.

Unum terminated Bilyeu's benefits claiming it was a mental/nervous condition. Pet. 4a. The Social Security Administration found Bilyeu did not qualify for benefits based on her mental impairment and awarded benefits based on her physical disabilities. *In the Case of Bilyeu*, 2008 SSA (ALJ Dickinson). If Unum's claim decision was correct, the Social Security Administration did not pay benefits for the same disability as Unum and the Other Income Benefits provisions and reimbursement agreement were not triggered.

Unum does not challenge the Ninth Circuit's reversal of the District Court's decision dismissing Bilyeu's claim for benefits. The District Court must determine if Unum's claim decision finding Bilyeu's disability is mental was correct. If the District Court finds Bilyeu's disability is mental, then Unum did not pay benefits for the same disability as the Social Security Administration, the reimbursement agreement does not apply, and Unum has no right to impose an equitable lien by agreement. If the District Court finds Bilyeu's disability is physical, Bilyeu

prevails on her claim and Unum can recover its offset from the benefits due, which will exceed the amount of the prior overpayments.

Thus, Unum still has a remedy, even if it cannot satisfy *Sereboff*. Unum may recover its overpayment from the benefits due Bilyeu. Because the Social Security Administration has determined that Bilyeu has a physical disability and Unum is required to defer to the Social Security Administration's determination,<sup>5</sup> that Unum will recover under this provision is a near certainty.

By asserting a claim for reimbursement, Unum is necessarily claiming that it paid benefits for the same disability as the Social Security Administration and cannot dispute that Bilyeu's disability was physical. Bilyeu will be entitled to continued benefits. Unum is certain to recover its overpayment under the terms of the Plan as an offset against the benefits due Bilyeu. The only alternative is Unum does not have a right to reimbursement. Whichever decision the District Court reaches, the case will be resolved without needing a resolution of the question presented.

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<sup>5</sup> According to a contractual agreement reached prior to this lawsuit between Unum and 49 states, including Arizona, Unum is obligated to give deference to the Social Security disability determination, thus virtually guaranteeing that Bilyeu will prevail on remand and the lien may be satisfied via setoff. See Regulatory Settlement Agreement, available at <http://www.unum.com/settlementagreement/> (last viewed on December 29, 2012) Section B(2)(b)(3).

**B. The Case May Be Resolved Based on Unum's Failure to Identify a Specific Portion of Targeted Funds to which Unum Is Entitled.**

*Sereboff*'s third criterion, that the sought-after funds must be in the respondent's possession for a lien to attach, was not the sole basis for the Ninth Circuit's opinion. The Ninth Circuit remanded the case affording Unum "the opportunity to establish that it has identified a particular fund (the second criterion) and that the overpaid long-term disability benefits, or assets to which the overpaid benefits can be traced, remain in Bilyeu's possession (the third criterion)." Pet. 26a. Thus, even if this Court reversed the Ninth Circuit's decision on the third criterion, Unum would still have to satisfy the second criterion before being entitled to enforce an equitable lien by agreement.

Unum does not challenge the Ninth Circuit's application of *Sereboff*'s requirement that to enforce an equitable lien by agreement, the plan must identify a particular share of a specific fund, distinct from the participant's general assets to which a lien attaches. That part of *Bilyeu*'s analysis is in accord with the other Circuits. On remand this case may be decided on the second *Sereboff* criterion without reaching the question presented.

Unum's overpayments did not exist until Bilyeu received Social Security disability benefits. Only then did part of Unum's previously paid benefits become

overpayments. *Bilyeu* found the overpayments are an undifferentiated component of a larger fund and never existed as a distinct fund. Pet. 19a (citing 53 C.J.S. *Liens* § 19 (2012) (“In order that an equitable lien may arise by contract, the agreement of the parties must deal with some *specific property*, and it is also essential that the property or fund intended to be appropriated or charged *should be identified or described with a reasonable degree of certainty*.” (emphasis added) (footnote omitted)); 4 John Norton Pomeroy, *A Treatise on Equity* § 1235, p. 696 (5th ed. 1941) (explaining that an equitable lien applies to “some *particular property*, real or personal, or *fund*, therein described or identified” (emphasis added)); *Sereboff*, 547 U.S. at 264 (holding that the requirements for an equitable lien by agreement were satisfied because “the plan specifically identified a *particular fund*.” (emphasis added)); *Barnes v. Alexander*, 232 U.S. 117, 121 (1914) (holding that “a contract to convey a *specific object* even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing.” (emphasis added))).

*Bilyeu* observed that in Unum’s view it could not impose a lien against its overpayments until they came into existence once *Bilyeu* received her social security benefits. Pet. 19a. And *Bilyeu* explains the problem with that view is the claimed overpaid benefits are not a particular fund. Pet. 19a. Unum cannot identify a particular fund because when Unum made payments to *Bilyeu* it did not differentiate between funds to which she had an absolute right

and funds that might be subject to a lien if they became an overpayment in the future. In essence, Unum paid monies in gross to Bilyeu, which incorporated the funds that might become subject to a lien. When Bilyeu received her Social Security benefits, Unum knew the amount of its overpayments, but not which portion of the benefits it had paid constituted the overpayments or whether any portion of its benefits, which might have included overpayments, were in Bilyeu's possession. In fact, Unum stipulated at least some of its benefits were not in Bilyeu's possession. Unum failed to identify a specific portion of a designated fund in Bilyeu's possession to which its lien could have attached. On remand, this case will be decided on the second *Sereboff* criterion if Unum is unable to identify its overpayments as a particular share of a specific fund distinct from Bilyeu's general assets.

#### **IV. The Impact of the Ninth Circuit's Decision Is Overstated.**

Unum and Amici speculate the Ninth Circuit's decision will cause a collapse of disability insurance for employees. That hyperbole is unsupported by the record.

The terms of the Plan already provide a means to avoid losing overpayments. The Plan permits an offset of benefits pending determination of Social Security Administration benefits by the estimated amount of those benefits. That is the default position

under the Plan. Pet. 10. As Unum describes it, the option of taking an unreduced payment pending the Social Security Administration's determination is a gratuitous benefit offered to help participants manage cash flow. Pet. 26. Plans potentially can avoid the imagined catastrophic effects of *Bilyeu* by curbing their generosity and adhering to the default position of estimating and taking an offset pending the Social Security Administration's decisions, although such actions would obviously create a hardship on participants who often have to wait lengthy periods of time while their Social Security claims are adjudicated.

Unum suggests that *Bilyeu* creates a "perverse incentive" by "encourage[ing] participants to spend all of their overpayments as soon as they arrive." Pet. 30. As with most of Unum's analysis, that argument ignores that benefits do not arrive as overpayments. Unum praises itself for advancing benefits to help manage participants' cash flow pending the Social Security Administration's decision, but characterizes using the benefits for that purpose as brazen and perverse. Most participants live paycheck to paycheck before becoming disabled. When that income is reduced to 60-percent, it should not be a surprise that the participants still spend all their income as it arrives.

The circumstances under which an insurer would not be able to recover overpayments due to an award of Social Security disability benefits are and will be exceptionally rare. First, a claimant must qualify for benefits under both the ERISA disability plan and the

Social Security Administration. The latter is plainly more difficult to obtain because the statutory definition of disability in the Social Security Act (42 U.S.C. § 423(d)(1)(A)) is much narrower than any plan definition. See Brief for the American Council of Life Insurers, *et al.* at 3 (“disability insurance generally uses a somewhat less stringent definition of disability than [Social Security]”). Second, the Social Security award must be made *after* the plan has ceased paying benefits. If the plan participant is still receiving benefits, the plan can recover any overpayment caused by the award of Social Security benefits from future plan benefits. Third, the Social Security disability benefits must be paid for the same disability, for which the plan paid benefits, otherwise, the Other Income Benefit provision does not apply.

If all of those criteria are met, it means the insurer stopped paying benefits to a participant who is by definition unable to engage in any gainful work that exists in the national economy. 42 U.S.C. § 423(d)(2)(A). The award of Social Security disability benefits that causes an “overpayment” is strong evidence the plan’s termination of benefits was error. Once the error is corrected, any overpayment will be recovered. If the error is not corrected, even with the Social Security benefits, the participant does not enjoy a windfall because plan benefits have been improperly denied. The insurer is, in fact, unjustly enriched by the amount of benefits wrongfully denied the participants.

Unum suggests that *Bilyeu* undermines the return-to-work incentive built into the Plan, *i.e.*, only paying 60 percent of pre-disability income as benefits. Pet. 30. Unum claims that a benefit amount of 60 percent of pre-disability income is designed to “encourage beneficiaries to return to work as soon as possible.” Pet. 30. Because as a condition of receiving those benefits, beneficiaries must prove themselves incapable of returning to work, the amount of benefit only works as an incentive if beneficiaries return to work while they are still disabled. That is perverse.

The Ninth Circuit’s decision does not undermine the Plan’s return-to-work incentive because the 60-percent benefit is not the incentive to return to work. The purpose of the 60-percent benefit is to deter non-meritorious claims. The proof that the 60 percent is not a return-to-work incentive is that the Plan offers a Work Incentive Benefit. The Plan provides for up to 100 percent of pre-disability earnings for the first 12 months a beneficiary returns to work. The explicit purpose is “to encourage [participant’s] return to work.”

For the majority of American workers who live paycheck to paycheck, the 60-percent benefit does not create an incentive to return to work. It creates an economic mandate to continue to work despite their disabilities to avoid economic ruin. *Bilyeu* will not affect any return-to-work incentive.

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**CONCLUSION**

For the foregoing reasons, the petition for *certiorari* should be denied.

Respectfully submitted,

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