"EQUITABLE" RELIEF UNDER ERISA: WHERE THE COURT'S INTERPRETATION STANDS AND THE NEED TO REDEFINE ITS ANALYSIS TO REFLECT THE TRUST-LAW BASIS OF ERISA

TABLE OF CONTENTS

I. Introduction

Section 502(a)(3) of ERISA[1] states that a civil action may be brought by a participant, beneficiary, or fiduciary "to enjoin any act or practice which violates any provision of [Title I of ERISA] or the terms of the plan, or to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of [Title I] or the terms of the plan."[2] What constitutes "appropriate equitable relief" under this section has been an intense subject of debate in the Supreme Court for twenty years. According to the Court's early jurisprudence on this question, "appropriate equitable relief" excluded the remedy of make-whole monetary relief. In *Mertens v. Hewitt Associates*, the Court held that money damages are "the classic form of legal relief" and are therefore not authorized under § 502(a)(3).[3] Two other Supreme Court cases, *Great-West Life & Annuity Ins., Co. v. Knudson*,[4] and *Sereboff v. Mid Atlantic Medical Services, Inc.*[5] similarly restricted the scope of § 502(a)(3), interpreting it as authorizing restitution in only limited circumstances.

While the Court in *Varity Corporation v. Howe*[6] merely implied the availability of a broader range of remedies under § 502(a)(3), the Court in *CIGNA Corporation v. Amara* expressly invited the District Court to consider an expanded repertoire of remedies, including money damages, reformation of the plan, and estoppel.[7] Although the Department of Labor has interpreted this decision as authorizing these remedies under § 502(a)(3), the lower courts are divided, and only when the Supreme Court squarely addresses the issue can any definite conclusions be reached about what *Amara* did or did not accomplish.

If *Amara* has indeed authorized the use of money damages against a breaching fiduciary, this result is consistent with congressional intent. In enacting its remedial provisions, Congress intended to replicate trust law. In order to determine whether a remedy is authorized under § 502(a)(3) against a fiduciary, the remedy must have been used by courts applying the law of trusts. Because courts routinely ordered money damages against a breaching trustee, that remedy is available under § 502(a)(3). Courts did not reform the terms of a trust instrument or order estoppel against a trustee, however; therefore, such remedies do not qualify as "appropriate equitable relief."

II. The Current Status of the Court's Interpretation of the Remedy Available Under ERISA § 502(a)(3)

A. Pre-*Amara* Cases

a. *Mertens*

The Court in *Mertens* interpreted "appropriate equitable relief" under § 502(a)(3) as excluding money damages. In *Mertens*, Plaintiffs were former employees of the Kaiser Steel Corporation (Kaiser) who participated in the company's retirement plan, a qualified pension plan under ERISA.[8] Defendant Hewitt Associates was the plan's actuary when Kaiser began to reduce its steelmaking operations, which led to early retirement by many plan participants. Kaiser failed to change the plan's actuarial assumptions to reflect the additional costs imposed by the retirements. Consequently, Kaiser did not adequately fund the plan, and the plan's assets became insufficient to satisfy its benefit obligations, leading the Pension Benefit Guaranty Corporation (PBGC) to terminate the plan. As a result, the plaintiffs received only the benefits guaranteed by ERISA, which were lower than the pensions owed to them under the plan.[9]

Plaintiffs sued Hewitt Associates, claiming that it had caused the losses to the plan by allowing Kaiser to choose the plan's actuarial assumptions, by failing to reveal that Kaiser was one of its clients, and by failing to disclose the plan's funding shortfall. They asserted that Hewitt Associates was liable as a nonfiduciary who knowingly participated in the plan fiduciaries' breach of their fiduciary duties, for which they sought monetary relief.[10] The Supreme Court granted certiorari on the question of whether ERISA § 502(a)(3) authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty.[11]

The *Mertens* Court seemed to answer more than simply this question, however; they seemingly answered the question of whether § 502(a)(3) authorizes suits for money damages, period. According to the Court, "what petitioners in fact seek is nothing other than compensatory *damages* . . . . Money damages are, of course, the classic form of *legal* relief."[12] The Court then explained why compensatory damages could not qualify as "appropriate equitable relief" under § 502(a)(3). The Solicitor General had argued that "equitable relief" should mean "whatever relief a court of equity is empowered to provide in the particular case at issue."[13] Because a beneficiary's action to recover losses resulting from a breach of duty has traditionally been obtained in courts of equity, the Solicitor General argued that such relief "is, by definition, equitable relief."[14] The Court rejected this reading, however, and instead articulated its now-familiar interpretation of the phrase "appropriate equitable relief": those categories of relief that were "*typically* available in equity," prior to the merger of law and equity courts.[15] It reasoned that the Solicitor General's reading of § 502(a)(3) would render the modifier "appropriate" superfluous, and would render Congress's distinction elsewhere in ERISA between "equitable" and "legal" relief meaningless.[16]

Armed with its new interpretation of "appropriate equitable relief," the Court turned to the relief requested in this case, money damages. It declared that injunction, mandamus, and restitution were typically available in equity, but not compensatory damages.[17] Therefore, the Court denied plaintiffs' claim for money damages.[18]

The procedural distinctions between legal and equitable relief and relevant here, particularly with regard to money. A plaintiff suing for damages, which are legal, is entitled to a jury.[19] If the plaintiff is successful, he receives a judgment that he files. He then levies on the defendant's property, or the sheriff seizes the property of the defendant and sells it at auction and transmits the property to the plaintiff.[20] If there is no money and no assets of the defendant sufficient to satisfy the judgment, the defendant is not in contempt of court.[21] A plaintiff suing in equity seeks a court order requiring the defendant to take some action, including paying money. While the order requires payment of money, the plaintiff does not have a right to a jury[22] and the sheriff will not levy on property. However, if the defendant does not pay, the plaintiff receives an order to show cause why the defendant should not be held in civil contempt of court.[23]

b. *Great-West* and *Sereboff*

Great-West and *Sereboff* similarly restricted the scope of relief available under § 502(a)(3). In *Great-West*, defendant Janette Knudson became a quadriplegic after a car accident.

She was covered by the Health and Welfare Plan for Employees and Dependents of Earth Systems, Inc. (Plan). The Plan covered $411,157.11 of Knudson's medical expenses, $75,000 of which was paid by the plaintiff pursuant to a stop-loss insurance agreement with the Plan.[24] The Plan included a reimbursement provision providing that the Plan would have "a first lien upon any recovery, whether by settlement, judgment, or otherwise" that a beneficiary receives from a third party. If the beneficiary recovers from a third party and does not reimburse the Plan, "then he will be personally liable to [the Plan] . . . up to the amount of the first lien."[25] Knudson received a $650,000 settlement in a tort action against the car manufacturer, which only allocated $13,828.70 to Great-West.[26] Great-West sought injunctive and declaratory relief under § 502(a)(3) to enforce the reimbursement provisions of the Plan by requiring the Knudsons to pay the Plan $411,157.11 of any proceeds recovered from third parties.[27]

The Supreme Court granted certiorari on the question of whether judicially decreed reimbursement for payments made to a beneficiary of an insurance plan by a third party is equitable relief under § 502(a)(3).[28] It held that § 502(a)(3) did not authorize such relief. It concluded that restitution was not available to Great-West because the type of restitution they sought was not a traditional form of equitable relief.[29] This qualified *Mertens*, which had stated that restitution was typically available in equity.[30] According to the Court, a plaintiff could seek restitution in equity as a constructive trust or an equitable lien "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."[31] But here, the money Great-West claimed it was entitled to – the proceeds from the tort settlement – were not in Knudson's possession; rather, the proceeds were distributed to a trust that provided for Knudson's medical care, and to Knudson's attorney. Thus, according to the Court, "the basis for petitions' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits that they conferred." According to the Court, this type of claim was not equitable but legal.[32]

In *Sereboff*, the Court affirmed its holding in *Great-West*. The facts in *Sereboff* were similar to those in *Great-West*, with a few key differences. Marlene Sereboff and her husband were involved in an automobile accident in California and suffered injuries. Their health insurance plan, Mid Atlantic Medical Services, Inc., paid their medical benefits. The Sereboffs settled a tort suit, but failed to send any money to Mid Atlantic pursuant to the Plan's reimbursement provision.[33] The Court, in an opinion written by Chief Justice Roberts, held that Mid Atlantic's suit to collect from the Sereboffs the medical expenses it had paid was properly one for equitable relief under § 502(a)(3).[34] Unlike the plaintiffs in *Great-West*, Mid Atlantic sought specifically identifiable funds that were within the possession and control of the Sereboffs, because the funds had been set aside and preserved in the Sereboffs' investment accounts.[35] Thus, the "impediment to characterizing the relief in [*Great-West*] as equitable [was] not present here."[36]

On the one hand, it is possible to characterize the holdings in both *Great-West* and *Sereboff* as limited. Much like the Court in *Mertens*, these Courts only needed to answer a specific question: whether judicially decreed reimbursement for payments made to a beneficiary of an insurance plan by a third party is equitable relief under § 502(a)(3). However, language in the opinions suggests that these cases stand for the broader proposition that money damages are generally not available under § 502(a)(3). According to the Court in *Great-West*, "[a]lmost invariably[,] suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty."[37]

c. *Varity*

Against this backdrop of Supreme Court cases that limited the scope of relief available under § 502(a)(3), the Court's decision in *Varity Corporation v. Howe* suggests that there is a broader range of remedies that can be obtained in ERISA actions.[38] In *Varity*, the petitioners were former employees of Massey-Ferguson, Inc., and a wholly owned subsidiary, Varity Corporation. The employees were all participants in Massey-Ferguson's employee welfare benefit plan. In the mid-1980's, Varity became worried that some of Massey-Ferguson's divisions were losing money and concocted a business plan to address the problem. The business plan involved transferring Massey-Ferguson's money-losing divisions and other debts to a newly created subsidiary called Massey Combines. Varity knew that Massey Combines might fail, but was not troubled by this possibility because its failure would mean the elimination of Varity's poorly performing divisions and the eradication of various debts.[39]

Among other obligations, Varity hoped the reorganization would eliminate those arising from the Massey-Ferguson benefit plan's promises to pay benefits to employees of Massey-Ferguson's money-losing divisions. Instead of terminating those benefits directly, Varity induced the failing divisions' employees to switch employers and thereby relieve Massey-Ferguson from its obligation to provide them benefits. To persuade these employees to accept the change of employer and benefit plans, Varity called them together at a special meeting to discuss Massey Combine's business outlook, its likely financial viability, and the security of their employee benefits. At the meeting, Varity assured its employees that their employee benefits would remain secure if they transferred to Massey Combines, even though Varity knew differently. After the presentation, 1,500 Massey-Ferguson employees agreed to the transfer. After two years, the Massey Combines employees lost their nonpension benefits. They sued, seeking the benefits they would have been owed under their old plan, had they not transferred to Massey Combines.[40]

The Court first held that Varity was acting in its capacity as an ERISA fiduciary when it misled the beneficiaries, and then found that Varity violated its fiduciary obligations under § 404 of ERISA. Turning to the all-important question of remedies, it next held that § 502(a)(3) authorizes ERISA plan beneficiaries to bring a lawsuit that seeks relief for individual beneficiaries harmed by an administrator's breach of fiduciary duties.[41] However, after deciding that § 502(a)(3) provided the plaintiffs with a remedy, the Court neglected to discuss the appropriate remedy; it simply affirmed the judgment of the court of appeals.[42]

Examining the relief the plaintiffs requested, and the judgment of the court of appeals, is instructive. As mentioned above, the employees sought "the benefits they would have been owed under their old, Massey-Ferguson plan, had they not transferred to Massey Combines": in other words, *money*.[43] The Court of Appeals agreed with their request, and awarded them money "to compensate them for benefits of which . . . they had been deprived" and thus to "restore[] [them] to the position they would have occupied if the misrepresentations . . . had never occurred."[44] In addition, the Court of Appeals ordered an injunction reinstating the employees as members of the Massey-Ferguson plan as it existed at the time of their retirement, in essence reforming the terms of the plan.[45] Thus, while it did not say so explicitly, the Court of Appeals, in a decision affirmed by the Supreme Court, seemed to suggest that both monetary relief and reformation of the terms of the plan qualified as equitable relief under § 502(a)(3).

B. *Amara*

While the Court in *Varity* merely *implied* that a broader range of remedies could be obtained under § 502(a)(3), the Court in *Amara explicitly* (albeit in dicta) invited the lower court to consider an expanded menu of remedies under § 502(a)(3), including money damages against a breaching fiduciary, reformation of the plan, and estoppel.

a. The Facts

Prior to 1998, CIGNA Corporation (CIGNA) had a defined-benefit retirement plan. The plan provided an employee with a defined benefit in the form of an annuity calculated on the basis of the employee's preretirement salary and length of service.[46] In November 1997, CIGNA sent a newsletter to its employees announcing its intent to create a new pension plan, which would substitute an account balance plan for the existing defined-benefit system. The newsletter said that the old plan would end on December 31, 1997, CIGNA would introduce the new plan sometime in 1998, and the new plan would apply retroactively to January 1, 1998.[47] The new plan created an individual retirement account for each employee. Each year CIGNA would contribute an amount to each employee's individual account, and the account balance would earn compound interest. Upon retirement, the employee would receive the amount then in his individual account.[48] Because many employees had already earned some old-plan benefits prior to January 1, 1998, CIGNA promised to make an initial contribution to the individual's account equal to the value of that employee's already-earned benefits.[49] The District Court found that CIGNA's descriptions of its new plan were incomplete and misled its employees.[50] In reality, the new plan saved the company money annually, the initial deposit was not the full value of the benefit that employees had earned for service before 1998, and the plan made a number of employees worse off.[51]

b. The District Court's Decision

The District Court concluded that CIGNA's representations and omissions about the plan violated ERISA § 204(h), which (at the time) forbade an amendment of a pension plan that would significantly reduce the rate of future benefit accrual unless the plan administrator also sent a written notice.[52] It also concluded that CIGNA violated ERISA §§102(a) and 104(b), which require a plan administrator to provide beneficiaries with summary plan descriptions and with summaries of material modifications that are written so that an average plan participant can understand them, and that are sufficiently accurate and complete.[53] Turning to the remedy, the District Court reformed the terms of the new pension plan's guarantee. It deleted the portion that promised participants the greater of what they had earned under the old plan *or* what they would earn via CIGNA's annual deposits under the new plan, including CIGNA's initial deposit. And it inserted a provision that guaranteed each employee what they had earned under the old plan *plus* what they would earn via CIGNA's annual deposits under the new plan, excluding CIGNA's initial deposit.[54] The District Court also ordered and enjoined the CIGNA Plan to reform its records to reflect that all class members now receive the just described benefits, and that it pay appropriate benefits to those class members who had already retired.[55]

The District Court held that ERISA § 502(a)(1)(B) provided the legal authority to enter the relief.[56] Section 502(a)(1)(B) states that "a civil action may be brought" by a plan "participant or beneficiary . . . to recover benefits due to him under the terms of his plan."[57] It reasoned that its orders awarded "benefits under the terms of the plan" as reformed.[58] The District Court also considered whether ERISA § 502(a)(3) provided legal authority to enter the relief. It decided not to answer that question, however, because (1) it had decided that the same relief was available under § 502(a)(1)(B) regardless, and (2) the Supreme Court had "issued several opinions . . . that have severely curtailed the kinds of relief that are available under § 502(a)(3)," including *Mertens*, *Great-West*, and *Sereboff*.[59]

c. The Supreme Court's Decision

The Supreme in Court in *Amara* undeniably came to two conclusions. The question is whether it also reached a third: that equitable relief under § 502(a)(3) includes money damages, plan reformation, and estoppel. First, it held that § 502(a)(1)(B) authorized the District Court to *enforce* the terms of a plan, but not to *change* those terms as the court did.[60] Second, it held that plan summaries provide communication with beneficiaries *about* the plan, but that their statements do not constitute the *terms* of the plan under §502(a)(1)(B).[61]

But the Court did not stop there: it then asked whether § 502(a)(3) would authorize the relief the District Court ordered. It began by repeating its formulation of the term "appropriate equitable relief" under § 502(a)(3) as referring to those categories of relief that, prior to the merger of law and equity, were *typically* available in equity.[62] This was nothing new. What was novel, however, were the Court's conclusions about the types of remedies typically available in equity.

The Court's decision, written by Justice Breyer, began by addressing the District Court's concern that the Court's earlier precedents narrowed the application of "appropriate equitable relief." First, the Court read the *Mertens* decision narrowly, not as barring *all* claims for money damages under § 502(a)(3), but as barring only claims for money damages against a *nonfiduciary*. The Court emphasized that in *Mertens*, the claim was one seeking money damages brought by a beneficiary against a private firm that provided a trustee with actuarial services.[63] Discussing *Mertens*, the Court concluded, "[w]e found that the plaintiff sought nothing other than compensatory damages against a *nonfiduciary*. And we held that such a claim, traditionally speaking, was legal, not equitable."[64]

Next, the *Amara* Court underscored that *Great-West*'s holding was a limited one. It stated that in *Great-West*, "[w]e noted that the fiduciary sought to obtain a lien attaching to (or a constructive trust imposed upon) money that the beneficiary had received from the tort-case defendant."[65] But "traditionally speaking, relief that sought a lien or a constructive trust was legal relief, not equitable relief, unless the funds in question were particular funds or property in the defendant's possession."[66] And since the money in question in *Great-West* was not the particular money that the tort defendant had paid, the relief sought was legal relief.[67]

The Court then distinguished both *Mertens* and *Great-West* from the case before it. Unlike *Mertens* and *Great-West*, "[t]he case before us concerns a suit by a beneficiary against a plan *fiduciary* (whom ERISA typically treats as a trustee) about the terms of a *plan* (which ERISA typically treats as a trust)."[68] According to the Court, "[i]s it the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law."[69] In addition, the Court continued, "the remedies available to those courts of equity were traditionally considered equitable remedies."[70]

After distinguishing its earlier precedents, the Court then concluded that the District Court's relief resembled three other traditionally equitable remedies: money damages (or "surcharge"), reformation of contracts, and estoppel.[71] According to the Court, the District Court's injunctions requiring the plan administrator to pay to already retired beneficiaries money owed to them under the plan as reformed resembled the traditional equitable remedy of surcharge, because "[e]quity 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."[72] Although the conclusion that "appropriate equitable relief" can include money damages was novel, it seems limited to situations in which a fiduciary violates a duty imposed on him: "[I]nsofar as an award of make-whole relief is concern, the fact that the defendant in this case, unlike the defendant in *Mertens*, is analogous to a trustee makes a critical difference."[73] Thus, the opinion does not seem to authorize money damages as a remedy under § 502(a)(3) in all situations, but only in cases involving a suit by a beneficiary against a plan fiduciary about the terms of a plan. Such a reading would preserve the result in *Mertens*, *Great-West*, and *Sereboff*.

In addition to expanding the availability of money damages under § 502(a)(3), the Court declared, for the first time, that reformation of contract and estoppel may also constitute "appropriate equitable relief" under that section. Regarding reformation of contract, the Court noted that what the District Court did "may be regarded as the reformation of the terms of the plan, in order to remedy the false or misleading information CIGNA provided."[74] It continued, "[t]he power to reform contracts . . . is a traditional power of an equity court, not a court of law, and was used to prevent fraud."[75] Regarding estoppel, the Court observed that the District Court's remedy holding CIGNA to what it had promised (that the new plan would not take from its employees benefits they had already accrued), resembled estoppel, "a traditional equitable remedy."[76] Unlike its discussion of surcharge, neither its section about reformation of contract nor its section about estoppel includes any language limiting their availability under § 502(a)(3) to situations involving a breaching fiduciary.

The Court also addressed the proper standard for determining harm under § 502(a)(3). Since the relevant substantive provisions of ERISA do not set forth a particular standard of determining harm, the Court concluded that "any requirement of harm must come from the law of equity."[77] Under the law of equity, "there is no general principle that 'detrimental reliance' must be proved before a remedy is decreed." Instead, the Court reasoned, it is necessary to look to the remedy at issue to determine the appropriate level of harm. The Court found that when equity courts used estoppel, they required a showing similar to detrimental reliance. Therefore, the Court declared that a showing of detrimental reliance is necessary before a court orders estoppel under § 502(a)(3). However, the Court observed that detrimental reliance is not necessary for a court to reform contracts or order surcharge under § 502(a)(3). The Court did find that to obtain relief by surcharge, "a plan participant or beneficiary must show that the violation injured him or her," but only harm and causation are necessary to do so.[78]

But the question remains whether the entire discussion of § 502(a)(3) is dicta. As Justice Scalia noted in his concurrence, once the Court decided that the District Court cannot base its relief on ERISA § 502(a)(1)(B), "[n]othing else need[ed] to be said to dispose of this case."[79] Language in the majority discussion itself suggestions that its discussion of § 502(a)(3) is not necessary to its holding. Its ends its opinion by admitting that "[w]hether or not the *general principles* we have discussed above are properly applicable in this case is for [the District Court] or the Court of Appeals to determine in the first instance."[80] Nonetheless, the discussion is important by virtue of its inclusion in a Supreme Court case. In order to determine Amara's significance, it is useful to consider its tone, as well as subsequent court and agency interpretations.

C. *Amara's* Significance

a. Tone

Justice Breyer's expansive rhetoric in *Amara* regarding the scope of remedies under §

502(a)(3) represents a radical departure from Chief Justice Roberts' cabined analysis in *Sereboff*. In *Sereboff*, the Chief Justice failed to challenge or recharacterize the Court's earlier decision in *Mertens*; rather, he cited *Mertens* approvingly as an example where the Court "rejected a claim that we found sought nothing other than compensatory damages."[81] In the Chief Justice's discussion of *Great-West*, he continued to interpret the scope of equitable remedies under § 502(a)(3) narrowly. According to the Chief Justice, in *Great-West* "we explained that 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."[82] But the Chief Justice then appeared to turn this "one" feature of equitable restitution into the *only* way in which a defendant could recover money under § 502(a)(3).[83]

In *Amara*, Justice Breyer rejected the Chief Justice's narrow approach. First, as explained previously, he reinterpreted and distinguished prior Supreme Court cases that had arguably limited the scope of relief under § 502(a)(3). For example, he read *Mertens* not as prohibiting all suits under § 502(a)(3) seeking compensatory damages, as the Chief Justice did, but as only barring suits against a nonfiduciary.[84] Second, he embarked on an independent inquiry that asked whether the district court's remedies were traditionally considered equitable remedies.[85] This approach stands in marked contrast to the Chief Justice inquiry in *Sereboff*, which relied on earlier court precedents such as *Mertens* and *Great-West* to define the scope of equitable relief under § 502(a)(3).

b. Court Interpretations

i. *Great-West* and *Sereboff* in Light of *Amara*

Two district courts have held that *Amara* did not change the requirement set forth in *Great-West* and *Sereboff* that in order to recover restitution under § 502(a)(3), the action must seek to restore to the plaintiff particular funds or property in the defendant's possession.[86] In *Kenney v. State Street Corporation*, the plaintiff requested "appropriate equitable relief" including in the form of restitution to the pension plan.[87] The court held that to recover restitution under § 502(a)(3), Kenney must allege that he seeks to restore to the plaintiff particular funds or property in the defendant's possession, and Kenney had not made this allegation.[88] According to the court, "*Amara*'s discussion in dictum does not change that requirement."[89] The court in *Aetna Life Insurance Company v. Kohler* reached a similar conclusion. There, the court actually cited *Amara* for the proposition that to state a claim for restitution under § 502(a)(3), "a plan must (1) specifically identify a fund, district from the beneficiary's general assets, from which reimbursement will be taken, and (2) specify a particular share to which the plan is entitled."[90] Thus, so far the courts that have addressed the issue have concluded that *Amara* did not change *Great-West* and *Sereboff's* requirements for stating a claim for restitution under § 502(a)(3).

ii. Interpretation of *Amara's* Expansion of Equitable Remedies

The few courts that have considered whether *Amara* has expanded the scope of equitable remedies available under § 502(a)(3) appear divided.[91] On the one hand, the United States District Court for the District of Columbia became the first court to hold that in light of *Amara*, a plaintiff may bring a claim for surcharge under § 502(a)(3), as long as she establishes a breach of fiduciary duty.[92] In that case, the plaintiff Clark contended that she was improperly classified in the defendant's retirement plan in Group C rather than Group B, which led to the receipt of smaller percentage credits from the Plan.[93] The defendants argued that Clark could not proceed under § 502(a)(3) because that section only provides for "appropriate equitable relief," and Clark sought to impose personal liability for money damages on the defendant.[94]

Relying on *Amara*, the court disagreed. Echoing *Amara*, it found that "simply because a plaintiff is seeking monetary relief for a breach of fiduciary duty does not remove it from the category of traditionally equitable relief,"[95] and held that the facts supported the plaintiff's claim for breach of fiduciary duty under § 502(a)(3). The court also held that the plaintiff was entitled to equitable relief on another claim, that the retirement plan's SPD contained misinformation and therefore constituted a breach of fiduciary duty. The court repeated *Amara's* discussion of surcharge as a "remedy extend[ing] to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary."[96] Based on *Amara's* discussion of surcharge, it held that surcharge would be an appropriate equitable remedy for the plaintiff, as long as she in fact established a breach of fiduciary duty.[97]

On the other hand, another court cited *Amara* for the opposite principle: that an individual participant proceeding under § 502(a)(3) may not seek monetary damages.[98] According to the court in *McGuigan v. Local 295*, "[t]he Supreme Court recently reiterated th[e] restriction [against money damages as equitable relief] in [*Amara*], stating that 'we have interpreted the term 'appropriate equitable relief' in § 502(a)(3) as referring to those categories of relief that, traditionally speaking . . . were *typically* available in equity.'"[99] The *McGuigan* court did note the *Amara* Court's statement that equitable estoppel and surcharge are two of the remedies available under § 502(a)(3), but the court did not address whether either of these remedies were available to the plaintiff because the court found that he did not state a claim for relief.[100]

Another court remanded a case to the district court for reconsideration of the issue of whether a remedy exists under § 502(a)(3) after *Amara*.[101] The district court had found that because the plaintiff's allegations were sufficient to state a claim for benefits under § 502(a)(1)(B), the plaintiffs were precluded from asserting the same allegations through a breach of fiduciary duty claim under § 502(a)(3).[102] The court of appeals held that the plaintiffs' failed to state a claim under § 502(a)(1)(B), but remanded on the issue of whether the violations were actionable under § 502(a)(3), "[b]ecause the intervening Supreme Court decision in Amara has provided more guidance with respect to the interpretation of § 502(a)(3)."[103] While the court of appeals did not mandate that the district court agree with the Supreme Court's interpretation of § 502(a)(3), remanding on the issue in light of the *Amara* decision suggests that this court believed that the discussion in *Amara* was an important source of authority for interpreting § 502(a)(3).

iii. Reliance

Some courts have been careful to emphasize that *Amara* did not alter the need to plead reliance for certain types of claims.[104] In *Kenney*, the plaintiff claimed that after *Amara*, he need not allege actual reliance for his claims of negligent misrepresentation and material nondisclosure.[105] The court disagreed. It declared that "[t]here is nothing about [*Amara*] that suggests that a plaintiff's burden is lessened in regard to claims for negligent misrepresentation or omission. . . ."[106] Similarly, the court in *Engers v. AT&T, Inc.*, found that *Amara* did not alter the Third Circuit's rule that a participant must show "extraordinary circumstances" to recover on an equitable estoppel claim under § 502(a)(3).[107] The *Engers* court explained that *Amara* held that a showing of detrimental reliance is not necessary for all forms of equitable relief under § 502(a)(3), but it "expressly declined to address 'other prerequisites' for equitable relief. . . ."[108]

Therefore, the court held that the plaintiff was required to establish extraordinary circumstances to recover on his equitable estoppel claim.[109]

In contrast, other courts have followed *Amara's* statement that reliance is not always necessary to obtain the relief sought under § 502(a)(3).[110] In *Tomlinson v. El Paso Corporation*, the plaintiff claimed that an SPD issued by the defendants was inadequate because it did not include certain information.[111] The district court concluded that the plaintiffs were not prejudiced by the SPD because they did not rely on it as required by Tenth Circuit precedent.[112] The court of appeals disagreed, holding that the Supreme Court in *Amara* rejected this requirement.[113] It repeated *Amara's* statement that a reliance requirement arises only "'because the specific remedy being contemplated imposes such a requirement.'"[114] Moreover, the court agreed with *Amara* that even when reliance is required, plaintiffs need not have actually read the SPD.[115] Accordingly, the court found that for the injunctive relief sought by plaintiffs, it would be enough for plaintiffs to show harm caused by the defendant's breach of ERISA.[116] Similarly, the court in *Clark* declared that after *Amara*, the plaintiff must only show harm and causation to receive the equitable remedy of surcharge.[117]

c. Agency Interpretation

The Department of Labor (DOL) recently submitted an amicus brief in *Amara* on remand, in which it articulated its view that *Amara* expressly authorized a broader set of remedies under § 502(a)(3). It argued that in light of the Supreme Court's decision, the lower court may appropriately award the same relief under § 502(a)(3) that it had previously awarded under § 502(a)(1)(B).[118] According to DOL, the Supreme Court's conclusion that the lower court's remedies fall within the scope of "appropriate equitable relief" under § 502(a)(3) is a holding, not be to disregarded as dicta, "because the conclusion was a necessary part of the

Supreme Court's decision."[119] DOL reasoned as follows: the Supreme Court granted review to decide whether the district court applied the correct legal standard, the "likely harm" standard, in determining that CIGNA's notice violations caused its employees enough injury to merit legal relief. The Supreme Court answered this question by concluding that (1) § 502(a)(1)(B) did not authorize plaintiffs suit, and (2) § 502(a)(3) did provide an avenue for relief, which did not always require a showing of detrimental reliance. Therefore, its discussion of remedies was necessary to its decision.[120]

DOL counseled the lower court that the "A plus B" remedy that it awarded under § 502(a)(1)(B) was appropriate under § 502(a)(3) based on the facts of the case.[121] First, DOL argued that the lower court may appropriately reform CIGNA's plan to provide the "A plus B" relief because, as *Amara* made clear, equity courts had jurisdiction to reform written instruments based on mistake or fraud.[122] Because CIGNA engaged in fraud, DOL reasoned, the lower court should reform the plan.[123] Second, DOL argued that the lower court may also use surcharge to award class-wide "A plus B" relief.[124] DOL pointed to the Supreme Court's recognition that "surcharge is an equitable monetary remedy developed under equity's exclusive jurisdiction over trusts," which allowed the beneficiary to "surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach."[125] It then argued that surcharge was an appropriate remedy under the facts of this case because "it achieves the primary goal of surcharge by requiring CIGNA to restore the amount necessary to compensate fully for the consequences of CIGNA's breach of fiduciary duty but does not compensate for non-pecuniary harm."[126] More generally, DOL urged the lower court to "take cognizance of the sea change the Amara decision has wrought in the field of ERISA remedies," particularly in holding that detrimental reliance is not required in cases where courts ordered surcharge, and in overruling court of appeals decisions holding that § 502(a)(3) did not authorize make-whole relief.[127]

D. What Remains?

The extent to which *Amara* did or did not alter what constitutes "appropriate equitable relief" under § 502(a)(3) may not be fully known under the Supreme Court considers the issue again. But some tentative conclusions can be reached. First, claims for money damages cannot be brought under § 502(a)(3) against a *nonfiduciary*. In addition, relief that seeks a lien or a constructive trust is not "appropriate equitable relief" under § 502(a)(3), unless the funds in question are particular funds or property in the defendant's possession. These conclusions are consistent with a narrow reading of *Mertens*, *Great-West*, and *Sereboff* endorsed by *Amara*. What is less clear is the extent to which *Amara* has expanded the scope of remedies available under § 502(a)(3) to include surcharge against a breaching fiduciary, reformation of contract, and estoppel, and the extent to which it has changed the reliance requirement. While the Department of Labor strongly believes that it has, the courts are divided, often finding ways to avoid the question. Thus, it is necessary for a larger body of case law to develop to determine what exactly *Amara* accomplished.

III. Section 502(a)(3) and Congressional Intent

The *Amara* Court's conclusion that the remedies available under § 502(a)(3) include money damages is correct, but the reasoning employed to reach that result is flawed. Congressional intent reveals that a remedy should qualify as "appropriate equitable relief" under § 502(a)(3) when asserted against a fiduciary not because such remedy was "typically" available in equity, but because it would be granted pursuant to trust remedy law. A look into the law of trusts reveals that money damages were routinely ordered against breaching fiduciaries, while reforming the trust document for fraud and ordering equitable estoppel were not.

A. Congressional Intent and the Trust Law Model

The primary purpose of ERISA was to protect pension plan participants against two dangers, which Professor John Langbein has labeled “default risk” and “administration risk.”[128] “Default risk” refers to the risk that the plan sponsor might not keep its promise to pay pension benefits.[129] In response, Congress developed a set of rules in ERISA aimed at eliminating default risk, including funding rules, vesting and anti-reduction rules, and a system of plan termination insurance.[130] “Administration risk” is the danger than the people who manage and invest plan assets and pay claims may abuse their power.[131] Congress responded to this risk by subjecting these plan managers and administrators to ERISA fiduciary and remedy law, which were both derived from trust law.[132]

Both the legislative history of ERISA and the law itself reveal that Congress intended the principles of trust law to inform the fiduciary rules in ERISA. In the Conference Committee report, the Committee declared that one of the purposes of imposing strict fiduciary obligations on those with control over pension plans was “to make applicable the law of trusts.”[133] The statute effectuates this purpose by adopting the two main principles of trust fiduciary law, the rules of loyalty and prudence.[134] ERISA’s loyalty rule mandates that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of … providing benefits to participants and their beneficiaries.”[135] This rule is derived from the duty of loyalty imposed on a trustee: “The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.”[136] ERISA’s prudence rule requires a fiduciary to exercise “the care, skill, prudence, and diligence” of a "prudent man acting in a like capacity."[137] It too is patterned on the duty of prudence imposed on a trustee: "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property . . . ."[138]

Congress intended the principles of trust law to inform not only the fiduciary rules in ERISA, but also its remedial scheme. The Conference Committee report states that "[t]he labor law provisions apply rules *and remedies* similar to those under traditional trust law to govern the conduct of fiduciaries."[139] A comparison between the remedies available against breaching trustees in trust law, and those available against breaching fiduciaries in ERISA, confirms this statement. As Professor Langbein has observed, "[f]or cases in which trustees breach their fiduciary duties, the law of trusts has long exhibited a three-part remedial system."[140] A trust beneficiary may recover (1) for any loss resulting from the breach of trust, (2) for any profit that the trustee made in the breach of trust, and (3) for any gains which would have accrued in the absence of the breach of trust.[141]

ERISA remedy law replicates this trust-law system. Section 502(a)(1) authorizes a participant or beneficiary to bring an action "to recover benefits due" or to enforce or clarify his rights under the plan.[142] Section 502(a)(2) allows for actions that invoke fiduciary liability under § 409(a).[143] Section 409(a), in turn, authorizes recovery by the plan for "any losses" and "any profits," and subjects the breaching fiduciary to "such other equitable or remedial relief as the court may deem appropriate."[144] In this way, § 409(a) mirrors the first two trust-law remedies (loss resulting from breach of trust, and profits the trustee made in breach of trust) in situations in which relief flows to the plan.[145] It characterizes the third trust-law remedy, gains which would have accrued in the absence of breach of trust, as "such other equitable or remedial relief as the court may deem appropriate."[146] The use of the disjunctive – equitable *or* remedial relief – suggests a remedy that is not equitable, making the scope of relief authorized under § 409(a) apparently broader than that under § 502(a)(3), discussed below. Sections 409(a) and § 502(a)(3) are not completely consistent in another way: section 409(a) by its terms, applies only to actions against fiduciaries, while § 502(a)(3) applies to actions against anyone.

Section 502(a)(3) contains two subsections. The first authorizes injunctive relief against "any act or practice which violates any provision of [Title I, containing the fiduciary rules] or the terms of the plan."[147] The second authorizes "other appropriate equitable relief . . . to redress such violations."[148] In *Varity*, the Court nicknamed this section the "catchall" provision because it "acts as a safety net, offering appropriate equitable relief for injuries caused by violations that [section] 502 does not elsewhere adequately remedy."[149] While § 502(a)(2), by incorporating § 409(a), mirrors the trust-law remedies in situations involving loss *to the plan*, § 502(a)(3) reflects the third trust-law remedy (gains which would have accrued in the absence of breach of trust) in cases where a beneficiary seeks an *individual* recovery.

To be sure, "trust law does not tell the entire story."[150] The Court in *Varity* points out that "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection."[151] Because of this, the *Varity* Court concluded that "the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA[]."[152] It continued: "In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements."[153]

Based on the legislative history, content, and structure of ERISA's fiduciary rules and remedies, the way to decide whether § 502(a)(3) authorizes a remedy against a fiduciary is to determine the extent to which trust law provides for such relief.

B. Justice Scalia's Flawed Interpretation of "Appropriate Equitable Relief"

Justice Scalia's interpretation of "appropriate equitable relief" under § 502(a)(3) as including only that relief "typically available in equity," and excluding money damages, ignores the trust-law basis of ERISA's remedial scheme and is wrong for several other reasons. First, Justice Scalia was incorrect in asserting that in pre-fusion days, monetary relief was legal and not equitable. Justice Scalia began his discussion in *Mertens* of "appropriate equitable relief" under § 502(a)(3) by asserting that "[m]oney damages are, of course, the classic form of legal relief," and therefore not equitable.[154] Even though he acknowledged that "money damages were available in [equity] courts against the trustee," he claimed that in the pre-fusion days when equity courts awarded money damages, they were awarding legal and not equitable relief.[155] Specifically, he asserted that "there were many situations – not limited to those involving enforcement of a trust – in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.'"[156] However, this contention is erroneous because equity courts frequently awarded money damages as a remedy for breach of trust. The Restatement of Trusts lists among the "equitable remedies" of a trust beneficiary the ability to "maintain a suit . . . to compel the trustee to redress a breach of trust."[157] In addition, the Department of Labor has stated that "[u]nder the common law [of trusts], monetary relief from a breaching fiduciary was traditionally, typically, and exclusively available from the courts of equity. . . ."[158]

In addition, Justice Scalia's idea that "equitable relief" only refers to those categories of relief that were typically available in equity is unpersuasive. First, it appears nowhere in the text of ERISA or its legislative history.[159] Moreover, his classification of injunction, mandamus, and restitution as "those categories of relief that were typically available in equity"[160] is meaningless. Professor Langbein explains that "[m]andamus, Justice Scalia's first try at exemplifying the 'typically equitable' was a bench writ issued by the court of King's Bench in England and by the equivalent American courts of common law, hence never within the province of courts of equity."[161] Justice Scalia's characterization of restitution as "typically equitable" is similarly unpersuasive because in *Great-West* he would qualify that statement and find that only an action seeking to impose a constructive trust upon particular property was equitable.[162] Finally, Justice Scalia's invocation of injunction as "typically equitable" fails to give meaning to "appropriate equitable relief" in § 502(a)(3) because that section expressly authorizes the use of injunctions earlier in the sentence.[163]

Finally, Justices Ginsburg's dissent in *Great-West* demonstrates that Justice Scalia's interpretation of "appropriate equitable relief" is highly unlikely. In *Great-West*, Justice Scalia contended that Congress made a "choice to limit the relief available under § 502(a)(3) to [that typically available in courts of equity.]"[164] In her dissent, Justice Ginsburg declared that "it is plain that Congress made no such 'choice.'"[165] She observed that "[t]he rarified rules underlying this rigid and time-bound conception of the term 'equity' were hardly at the fingertips of those who enacted § 502(a)(3)."[166] Rather, "[b]y 1974, when ERISA became law, the 'days of the divided bench' were a fading memory, for that era had ended nearly 40 years earlier with the advent of the Federal Rules of Civil Procedure."[167]

C. *Amara*'s examples of "appropriate equitable relief"

As explained above, the way to decide whether § 502(a)(3) authorizes a particular remedy against a fiduciary is to determine the extent to which trust law provides for such relief. A foray into trust law reveals that one type of relief *Amara* authorizes under § 502(a)(3), money damages against a breaching fiduciary, was routinely ordered. Thus, *Amara* was correct to characterize this remedy as a form of "appropriate equitable relief." Courts did not reform trust instruments for fraud, however, or order the remedy of equitable estoppel. Therefore, these remedies should not qualify as "appropriate equitable relief" under § 502(a)(3).

a. Monetary relief

A monetary award against a breaching fiduciary should be classified as "equitable" because it is among the remedies appropriate for a breach of trust. Section 1001(b)(3) of he Uniform Trust Code of 2000, which reflects the common law, states: "The court may . . . compel the trustee to redress a breach of trust by paying money . . . ."[168] Section 1002, entitled "Damages for Breach of Trust" subjects a breaching trustee to liability "to the beneficiaries affected for . . . the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred."[169] Bogert's treatise summarizes the relevant case law: "For breach of trust the trustee may be directed by the courts to pay damages to the beneficiary."[170] In such cases, "the general rule [is] that the object of damages is to make the injured party whole . . . Both direct and consequential damages may be awarded."[171]

Because courts applying trust law routinely authorize monetary relief against a breaching fiduciary, the *Amara* Court was correct to conclude that such relief qualifies as "appropriate equitable relief" under § 502(a)(3).

b. Reformation of the trust instrument

A review of trust law reveals that courts can reform a trust instrument for mistake: "If, due to a mistake, the trust does not contain the terms that were intended by the settlor, the settlor or other interested party may maintain a suit in equity to have the instrument reformed so that it will contain the terms that were actually agreed upon or that reflect the testator's actual intent."[172] Another type of error, which may be made by the settlor or the person who physically wrote the trust, "is a drafting error that is referred to as a mistake in expression."[173]

The case law similarly demonstrates that courts can reform a trust instrument for mistake. Some cases support the ability of a court to reform a trust instrument when, due to a mistake, the trust does not contain the terms that the settlor intended. In *Flitcroft v. Commissioner of Internal Revenue*, the court reformed a trust agreement that was not expressly made irrevocable to make it irrevocable from its inception in accordance with the intent of the parties.[174] The court in *Irish v. Irish* reformed the trust to comply with the settlor's intention at the time he created the trust to provide for disposing of the principal of the trust so that it could not revert to the settlor.[175] Other cases reflect a court's power to correct scrivener's errors. In *Fleet Bank v. Fleet Bank*, the court reformed the trust to correct a drafting error that created a potential for adverse federal estate tax consequences.[176]

While courts can reform a trust instrument for *mistake*, there is no evidence that they can reform a trust instrument for *fraud*, whether committed by a settlor or a trustee. This limitation is important, because the ability of a court to reform a trust instrument for mistake would not justify authorizing reformation of an ERISA plan in all situations. In *Amara*, for example, the District Court did not reform the terms of the plan because of a mistake that the parties made; rather, they altered the terms in order to remedy the false or misleading information CIGNA provided, which seems more akin to fraud.[177] In the opinion of the *Amara* Court, the ability of courts to reform *contracts* for fraud was critical to the availability of the remedy. Because courts cannot reform *trust instruments* for fraud, however, reformation of the terms of the plan in *Amara* was inappropriate under § 502(a)(3). Reformation of a plan document only qualifies as "appropriate equitable relief" under § 502(a)(3) if its purpose is to modify the document to correct a mistake, and not to prevent fraud.

c. Equitable Estoppel

Under the law of trusts, the doctrine of equitable estoppel operates as follows: if a beneficiary has a cause of action for the enforcement of a trust or for a breach of trust, and by his words, conduct, or silence asserts to someone else that no such cause of action exists, and the other party justifiably acts upon the misrepresentation "in such a way that he cannot retreat without damage," the beneficiary may be equitably estopped from asserting his rights under the trust.[178] It is irrelevant whether the representation by the beneficiary is made by speaking, writing, by other conduct, or by remaining silent.[179] The beneficiary must make the representation to the party relying on the estoppel or to someone acting for him.[180] The other party must justifiably rely on the representation, must act on it, and the action must cause damages to him.[181]

The case law confirms this doctrine of equitable estoppel in trust law. In *Holzbaugh v. Detroit Bank & Trust Co.*, a trust was created for relatives for twenty years, with a remainder of part of the property to go to charities selected by the trustees. After accepting the benefits of the trust for eighteen years, the beneficiaries challenged the validity of the charitable portion of the trust. Because they had accepted the benefit for eighteen years, they were estopped from bringing a suit to have the charitable gift declared void.[182] In *Beaty v. Bales*, the beneficiary of a trust of a ranch property claimed that she had received no trust income and that the trustee had personally benefitted from his administration of the trust. The court held that the beneficiary was estopped from asserting her claims, because she had received copies of trust tax returns and financial statements and failed to protest mismanagement of the trust, and the trustee relied on her silence and continued with his methods of administering the trust.[183]

The Court in *Amara* discusses a different form of estoppel, one not found in trust law. According to the *Amara* Court's conception of equitable estoppel, the doctrine "operates to place the person entitled to its benefit in the same position he would have been in had the representations been true."[184] Therefore, according to the Court, holding CIGNA to what it had promised (that the new plan would not take from its employees benefits they had already accrued) resembles equitable estoppel.[185] However, this form of estoppel is a feature of *contract* law, not trust law, and therefore should not qualify as "appropriate equitable relief" under § 502(a)(3).

IV. Conclusion

What qualifies as "appropriate equitable relief"? This question has plagued the Supreme Court since its decision in *Mertens* twenty years ago. In *Mertens*, Justice Scalia decided that only relief "typically available in equity" may be ordered pursuant to § 502(a)(3).[186] Since money damages was not a remedy typically available in equity, according to Justice Scalia, such relief was not authorized pursuant to § 502(a)(3). In *Great-West* and *Sereboff*, the Court decided that because only certain forms of restitution were typically available in equity, only those forms were available under § 502(a)(3).[187] For the first time, the Court in *Varity* suggested a broader panoply of relief under § 502(a)(3).[188] In *Amara*, the Court potentially charted a new course in its § 502(a)(3) jurisprudence. While retaining the inquiry of whether the relief was "typically available in equity," the Court invited the lower court to consider applying the remedies of money damages, reformation of the plan, and estoppel.[189]

In light of these conflicting decisions, what should a lower court do when confronted with a claim for relief under § 502(a)(3)? For now, the answer is unclear. It seems safe to conclude that claims for money damages cannot be brought under § 502(a)(3) against a nonfiduciary, and relief that seeks a lien or a constructive trust similarly fails to qualify as "appropriate equitable relief" unless the funds in question are particular funds or property in the defendant's possession. The extent to which *Amara* authorizes the panoply of remedies it discusses will most likely remain unknown until the Court addresses the issue directly. If and when the Court addresses it, it should refine its analysis to reflect congressional intent. Instead of asking whether a remedy was "typically available in equity," it should inquire whether the remedy was authorized under trust law against a fiduciary. If it conducts this analysis, it will find that § 502(a)(3) should authorize money damages because they were available against a breaching trustee, while reformation of the plan for fraud and estoppel are inappropriate under § 502(a)(3) because they were not among the remedies authorized against a trustee.

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[1] Employee Retirement Income Security Act, 29 U.S.C. 1001-1461 (2000).
[2] ERISA § 502(a)(3).
[3] 508 U.S. 248, 255 (1993).
[4] 534 U.S. 204 (2002).
[5] 547 U.S. 356 (2006).
[6] 516 U.S. 489 (1996).
[7] 131 S.Ct. 1866 (2011).
[8] Mertens v. Hewitt Assocs., 508 U.S. 248, 250 (1993).
[9] *Id.*
[10] *Id.* at 250-251.
[11] *Id.* at 251.
[12] *Id.* at 255.
[13] *Id.* at 256.

[14] *Id.* (citation and quotation marks omitted).
[15] *Id.*
[16] *Id.* at 257-258.
[17] *Id.* at 256.
[18] *Id.* at 263.
[19] U.S. CONST. amend. VII.
[20] 30 AM. JUR. 2D *Executions, Etc.* § 482 (2011).
[21] *Inability to comply with judgment or order as defense to charge of contempt*, 120 A.L.R. FED. 703 (2011).
[22] Granfinanciera, S.A. v. Nordberg, 493 U.S. 33, 42 (1989).
[23] 43A C.J.S. *Injunctions* § 421 (2011).
[24] Great-West Life & Annuity Ins. Co., 534 U.S. 204, 207 (2002).
[25] *Id.*
[26] *Id.* at 207-208.
[27] *Id.* at 207.
[28] *Id.* at 209.
[29] *Id.* at 212.
[30] Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993).
[31] *Id.* at 213.
[32] *Id.* at 214.
[33] Sereboff v. Mid Atlantic Med. Servs., 547 U.S. 356, 359-360 (2006)
[34] *Id.* at 369.
[35] *Id.* at 362-363.
[36] *Id.* at 362.
[37] Great-West Life & Annuity Ins. Co., 534 U.S. 204, 210 (2002) (quotation marks and alteration omitted).
[38] Varity Co. v. Howe, 516 U.S. 489 (1996).
[39] *Id.* at 492-493.
[40] *Id.* at 493-494.
[41] *Id.* at 492.
[42] *Id.* at 515.
[43] *Id.* at 494.
[44] Howe v. Varity Co., 36 F.3d 746, 756 (8th Cir. 1994).
[45] *Id.*
[46] CIGNA Co. v. Amara, 131 S.Ct. 1866, 1870 (2011).
[32] *Id.* at 1871.
[48] *Id.* at 1871-1872.
[49] *Id.* at 1872.
[50] Amara v. CIGNA Co., 534 F. Supp. 2d 288, 296 (D. Conn. 2008).
[51] *Id.* at 337.
[52] *Id.* at 344.
[53] *Id.* at 351.
[54] Amara v. CIGNA Corp., 559 F. Supp. 2d 192, 214 (D. Conn. 2008).
[55] *Id.* at 219.
[56] *Id.* at 204.

[57] 29 U.S.C. § 1132(a)(1)(B).
[58] *Amara*, 559 F.Supp. 2d at 204.
[59] *Id.* at 205.
[60] *Id.* at 1878.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* (emphasis added).
[65] *Id.*
[66] *Id.* (quotation marks omitted).
[67] *Id.*
[68] *Id.* at 1879 (emphasis added).
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1879-1880.
[72] *Id.* at 1880.
[73] *Id.*
[74] *Id.* at 1879.
[75] *Id.*
[76] *Id.* at 1880.
[77] *Id.* at 1881.
[78] *Id.*
[79] *Id.* at 1882 (Scalia, J., concurring in the judgment).
[80] *Id.* (emphasis added).
[81] Sereboff v. Mid Atlantic Med. Servs., 547 U.S. 356, 361 (2006)
[82] *Id.* at 362 (internal quotations marks omitted).
[83] *Id.* at 362-363.
[84] CIGNA Co. v. Amara, 131 S.Ct. 1866, 1878 (2011).
[85] *Id.* at 1879.
[86] Kenney v. State St. Co., No. 09-10750-DJC, 2011 U.S. Dist. LEXIS 104202 (D. Mass. Sept. 15, 2011); Aetna Life Ins. Co. v. Kohler, No. C 11-0439 CW, 2011 U.S. LEXIS 54887 (N.D. Ca. May 23, 2011).
[87] *Kenney*, 2011 U.S. Dist. LEXIS 104202, at *24.
[88] *Id.* (citing *Great-West Life v. Knudson*, 534 U.S. 204, 214 (2002)).
[89] *Id.*
[90] *Aetna Life Ins. Co.*, 2011 U.S. LEXIS 54887, at *10 (citations and quotation marks omitted).
[91] *See* McGuigan v. Local 295, 11-CV-2044, 2011 U.S. Dist. LEXIS 86085 (E.D.N.Y. Aug. 4, 2011); Del Rosario v. King & Prince Seafood Co., No. 10-11967, 2011 U.S. App. LEXIS 13204 (11th Cir. June 28, 2011); Clark v. Feder, Semo & Bard, P.C., No. 07-0470, 2011 U.S. Dist. LEXIS 100268 (D.D.C. Sept. 7, 2011).
[92] *Clark*, 2011 U.S. Dist. LEXIS 100268, at *16, *27.
[93] *Id.* at *4.
[94] *Id.* at *14.
[95] *Id.* at *15-16.
[96] *Id.* at *27 (*quoting* CIGNA Co. v. Amara, 131 S.Ct. 1866, 1880 (2011)).

[97] *Id.*
[98] McGuigan v. Local 295, 11-CV-2044, 2011 U.S. Dist. LEXIS 86085. *13-14 (E.D.N.Y. Aug. 4, 2011).
[99] *Id.* at *14 (quoting *Amara*, 131 S.Ct. at 1878).
[100] *Id.* at *15-16, *15 n. 6.
[101] Del Rosario v. King & Prince Seafood Co., No. 10-11967, 2011 U.S. App. LEXIS 13204 (11th Cir. June 28, 2011).
[102] Del Rosario v. King & Prince Seafood Co., CV 204-036 2006, U.S. Dist. LEXIS 76777 (S.D. Ga. Mar. 7, 2006).
[103] *Del Rosario*, 2011 U.S. App. LEXIS 13204, at *7.
[104] Kenney v. State St. Co., No. 09-10750-DJC, 2011 U.S. Dist. LEXIS 104202 (D. Mass. Sept. 15, 2011); Engers v. AT&T, Inc., No. 10-2752, 2011 U.S. App. LEXIS 12675 (3d Cir. June 22, 2011).
[105] *Kenney*, 2011 U.S. Dist. LEXIS 104202, at *20-21.
[106] *Id.* at *22-23.
[107] *Engers*, 2011 U.S. App. LEXIS 12675, at *15-16, n.9.
[108] *Id.*
[109] *Id.*
[110] Tomlinson v. El Paso Co., 653 F.3d 1281 (10th Cir. 2011); Clark v. Feder, Semo & Bard, P.C., No. 07-0470, 2011 U.S. Dist. LEXIS 100268 (D.D.C. Sept. 7, 2011).
[111] *Tomlinson*, 653 F.3d at 34.
[112] *Id.*
[113] *Id.* at 35.
[114] *Id.* at 36 (quoting CIGNA Co. v. Amara, 131 S.Ct. 1866, 1881 (2011)).
[115] *Id.*
[116] *Id.*
[117] Clark v. Feder, Semo & Bard, P.C., No. 07-0470, 2011 U.S. Dist. LEXIS 100268, *29 (D.D.C. Sept. 7, 2011).
[118] Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae, Amara v. Cigna Co. (D. Conn. Sept. 7, 2011), http://www.dol.gov/sol/media/briefs/amara(A)-9-22-2011.htm.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* (citations omitted).
[126] *Id.*
[127] *Id.*
[128] John H. Langbein, *What ERISA Means by 'Equitable': The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUMBIA L. REV. 1317, 1322 (2003).
[129] *Id.*
[130] *Id.*
[131] *Id.* at 1323.
[132] *Id.* at 1323-1325.

[133] H. Conference Report No. 93-1280, at *146.
[134] Langbein, *supra* note 116, at 1325.
[135] ERISA § 404(a)(1)(A).
[136] RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959).
[137] ERISA § 404(a)(1)(B).
[138] RESTATEMENT (SECOND) OF TRUSTS § 174.
[139] H. Conference Report No. 93-1280, at *38 (emphasis added).
[140] Langbein, *supra* note 116, at 1333.
[141] RESTATEMENT (SECOND) OF TRUSTS § 205.
[142] ERISA § 502(a)(1).
[143] ERISA § 502(a)(2).
[144] ERISA § 409(a).
[145] *Id.*
[146] *Id.*
[147] ERISA § 502(a)(3)(A).
[148] ERISA § 502(a)(3)(B).
[149] Varity Corp. v. Howe, 516 U.S. 489, 512 (1996).
[150] *Id.* at 497.
[151] *Id.*
[152] *Id.*
[153] *Id.* (emphasis added).
[154] Mertens v. Hewitt Associates, 508 U.S. 248, 255 (1993).
[155] *Id.* at 256.
[156] *Id.* (quoting 1 J. POMEROY, EQUITY JURISPRUDENCE § 181, p. 257 (5th ed. 1941)).
[157] RESTATEMENT (SECOND) OF TRUSTS, *supra* note 124, at 199.
[158] Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motion to Dismiss at 51, In re Enron Corp., No. MDL 1446, 2002 WL 321169000 (S.D. Tex. Mar. 28, 2002).
[159] Langbein, *supra* note 116, at 1353.
[160] Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993).
[161] Langbein, *supra* note 116, at 1353.
[162] *Id.* at 1354.
[163] *Id.*
[164] Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 218 (2002).
[165] *Id.* at 224 (Ginsburg, J., dissenting).
[166] *Id.* (Ginsburg, J., dissenting).
[167] *Id.* at 224-225 (Ginsburg, J., dissenting) (citation omitted).
[168] Unif. Trust Code § 1001(b)(3) (amended 2001).
[169] *Id.* § 1002.
[170] GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 862 (rev. 2d ed. 1982).
[171] *Id.* § 701.
[172] BOGERT & BOGERT, *supra* note 156, § 991
[173] *Id.*
[174] Flitcroft v. C.I.R., 328 F.2d 449 (9th Cir. 1964).
[175] Irish v. Irish, 361 Pa. 410, 412, 65 A.2d 345, 345 (1949).

[176] Fleet Bank, N.A. v. Fleet Bank, N.A., 429 Mass. 1003, 706 N.E.2d 627 (1999).
[177] Amara v. CIGNA Co., 534 F. Supp. 2d 288, 351 (D. Conn. 2008).
[178] BOGERT & BOGERT, *supra* note 156, § 944.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] Holzbaugh v. Detroit Bank & Trust Co., 371 Mich. 432, 124 N.W.2d 267 (1963).
[183] Beaty v. Bales, 677 S.W.2d 750 (Tex. App. 1984).
[184] CIGNA Co. v. Amara, 131 S.Ct. 1866, 1880 (2011) (citation omitted).
[185] *Id.*
[186] Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993).
[187] Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002); Sereboff v. Mid Atlantic Medical Services, In., 547 U.S. 356 (2006).
[188] Varity Co. v. Howe, 516 U.S. 489 (1996).
[189] CIGNA Co. v. Amara, 131 S.Ct. 1866 (2011).