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Supreme Court's Evolution in Defining Equitable Remedies Under ERISA

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Overview

The Employee Retirement Income Security Act of 1974, as amended, ("ERISA") regulates deferred compensation in the form of retirement, medical, disability and other employee benefits. It was a response to the prior legal environment that provided little recourse to employees whose employers, union and other benefit plan officials had misappropriated pension funds or otherwise reneged on promises to pay pensions and other employee benefits. Modeled after the common law of trusts, ERISA imposes fiduciary standards on plan officials responsible for paying employee benefits, and protects employees' rights to benefits promised by according them the rights of trust beneficiaries.[1]

Despite a detailed statute designed to protect the security of employees' benefits, case law is replete with holdings that curtail or deny remedies to individuals for fiduciary breaches and other violations of ERISA. Whether an aggrieved party can obtain redress under ERISA has been an area in which U.S. Supreme Court cases have produced historically inconsistent results.

One issue relates to whether monetary restitution is a remedy under ERISA. Critics have argued that "make-whole" monetary relief was historically an equitable remedy common under trust law and should also be available under ERISA.[2] The federal courts have been reluctant to find equitable relief under ERISA, based on the holdings of Supreme Court cases *Massachusetts Mutual Life Insurance. Co. v. Russell*,[3] *Mertens v. Hewitt Assocs.*,[4] and *Great-West v. Knudson*.[5] The result has been that the case law under ERISA has, for much of its history, provided inadequate relief for fiduciary breaches, breach of subrogation clauses, and other ERISA violations.

Individual Relief. The discussion of *Russell*, *Mertens*, *Varity Corp. v. Howe*, [6] *LaRue v. DeWolff, Boberg & Assocs., Inc.*, [7] and *CIGNA Corp. v. Amara* [8] explores an inconsistent and contentious case history regarding whether an individual plan participant or beneficiary may obtain relief under ERISA for a fiduciary breach or other violation. In particular, it explores reasoning dating back to *Russell*, which permeates the line of ERISA cases denying individuals remedies.

Relief for Breach of Subrogation Clauses. The discussion below of *Great-West v. Knudson*, [9] *U.S. Airways, Inc. v. McCutchen*, [10] *Sereboff v. Mid Atlantic Medical Services, Inc.* [11] and *Montanile v. Board of Trustees of Nat'l Elevator Indus. Health Benefit Plan* [12] explores the case history relating to the Court's views on particular equitable remedies, such as equitable liens and constructive trusts, to enforce subrogation clauses under ERISA plans.

A close inspection of the Supreme Court cases defining ERISA remedies reveals a number of 5-4 decisions, and other decisions evidencing a substantial difference in the approach between majority and dissenting or concurring opinions. The precedential value of heavily contested cases is diminished, particularly if they are not well reasoned, the legal rule is unworkable, or there are intervening circumstances.[13] The early Supreme Court cases denying monetary equitable remedies for ERISA fiduciary violations may put the precedential value of those cases on uncertain ground.

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[1] H.R. Rep. No. 93-1280, 93d Cong. 2nd Sess. 295 (1973) ("Legislative History"). An earlier Senate report likewise noted that ERISA codifies certain principles under trust law. S. Rep. No. 93-127, 93d Cong. 1st Sess. 1 (1973), reproduced in U.S. Senate, Committee on Labor & Public Welfare, Committee Print, Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 587 (1976).

[2] Langbein, John H., *What ERISA Means by 'Equitable': The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 Colum. L. Rev. 1317 (2003) (hereinafter "Langbein").

[3] 473 U.S. 134, 6 EBC 1733 (1985).

[4] 508 U.S. 248, 16 EBC 2169 (1993).

[5] 534 U.S. 204, 27 EBC 1065 (2002).

[6] 516 U.S. 489, 19 EBC 2761 (1996).

[7] 552 U.S. 248, 42 EBC 2857 (2008).

[8] 563 U.S. 427, 50 EBC 2569 (2011).

[9] 534 U.S. 204, 27 EBC 1065 (2002).

[10] 133 S. Ct. 1537, 55 EBC 1845 (2013).

[11] 547 U.S. 356, 37 EBC 1929 (2008).

[12] 136 S. Ct. 651, 61 EBC 1165 (2016).

[13] See, for example, discussion of stare decisis in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

Presumptions Permeating Early Cases. The following three presumptions have permeated the case law denying individual participants or beneficiaries relief under ERISA:

- Congress intended to limit ERISA remedies available to individuals (*Russell*);
- Congress intended "equitable" relief under ERISA to refer exclusively to the historical equitable remedies available, which the Court itself identifies as "typical" (*Mertens* and *Great-West*); and
- Unless ERISA specifically provides a particular remedy, the Court should not read it into the statute (*Russell*).

These presumptions, which permeate the early case law on ERISA remedies, are founded in the Court's early statutory interpretation, the correctness of which has later been called into question.

In recent years, the Supreme Court has modified and distinguished some of its early ERISA holdings that had denied monetary relief for an ERISA violation. For example, *LaRue* limited the scope of *Russell* by restoring lost profits to a participant's plan account for a breach of fiduciary duty that affected only him. In *CIGNA Corp. v. Amara* the Court signaled a rejection of earlier cases which had defined ERISA equitable remedies under § 502(a)(3) so narrowly that ERISA violations went without remedy.

In moving away from some of its past presumptions, the Court has opened a new path for enforcing ERISA. This general trend underscores the importance of plan fiduciaries' more careful compliance with their legal duties, but does not wholly protect against certain ERISA violations for which the Court still finds no remedy.

The following discusses the history of case law of equitable remedies available to participants and beneficiaries for various ERISA violations, most notably, breaches of fiduciary duty. The discussion of the cases at.20 is arranged chronologically by case. Subrogation cases are dealt with separately at.30, and are also arranged chronologically, with some overlap with the cases dealing with participants and beneficiaries' relief. The trend in the cases at.20 is to expand equitable remedies available to individuals, while subrogation cases discussed at.30 have limited relief to identifiable funds traced to the defendant's possession.

Individual Recovery Under ERISA

Massachusetts Mutual Life Insurance Co. v. Russell: Relief Available to the Plan Under § 502(a)(2)

In a case involving the payment of disability benefits improperly delayed under an ERISA plan, the Supreme Court held that ERISA § 409 and § 502(a)(2),[14] read together, do not provide a plan participant or beneficiary a private right of recovery for a fiduciary breach.[15]

In *Russell*, the insurer had stopped paying Russell her disability benefits based on a report of her surgeon. After a lapse of almost five months, her disability benefits resumed. During the period of nonpayment, however, the plaintiff's husband was forced to cash out his retirement savings to support the family. The plaintiff received all the disability benefits to which she was contractually entitled, but sought additional compensatory and punitive damages for herself as a result of the insurer's long delay in deciding her claim.

The Ninth Circuit Court of Appeals held that ERISA § 502(a)(2) (which cross-references § 409) allowed Russell to recover compensatory and punitive damages for the fiduciary's failure to act in good faith and in a fair and diligent manner. The Ninth Circuit read the second part of the compound sentence of § 409 with independent application, allowing the court wide discretion to award the participant compensatory and punitive damages.[16]

In a split opinion, the Supreme Court reversed the Ninth Circuit decision, holding that, while the participant could sue for a breach of the fiduciary duty under § 502(a)(2), she could only obtain a recovery to the "plan as a whole" and not individually. The Court held that § 502(a)(2) and § 409 limit recovery only to the plan, in all instances. The *Russell* Court read into the second part of the compound sentence of § 409 the requirement that relief must be "to the plan," even though that restriction appears only in the first part of the compound sentence.[17] This statutory construction can be said to exhibit the logical fallacy of composition, in which one assumes that the whole has a property that only a part exhibits. Without the fallacy of composition, a literal reading of § 409 would not limit a remedy to the plan, but (as the Ninth Circuit did) would allow an individual a remedy that is "such other equitable or remedial relief as the court may deem appropriate."

Based only on its reading of § 409, which references the removal of a trustee as an example of relief, the Court further generalized that the ERISA "draftsmen were primarily concerned with the possible misuse of plan assets and with remedies that would protect the entire plan rather than the rights of an individual beneficiary."[18] This conclusion also exhibits the logical error of fallacy of composition because the Court presumed that

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[14] ERISA § 502(a)(2) states, "A civil action may be brought by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409." ERISA § 409 states, "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title *shall be* personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which may have been made through the use of assets of the plan by the fiduciary, *and shall be* subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." (emphasis added)

[15] 473 U.S. 134, 140.

[16] *Id.* at 138. The second part of the compound sentence of § 409 states, "[the breaching fiduciary]... shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

[17] See ERISA § 409, *supra* note 13.

[18] *Russell*, 473 U.S. 134, 142.

a sample remedy referenced in § 409 (removing the fiduciary) speaks to all remedies for fiduciary breach under the entire statute. That reading allows for an extremely narrow view of ERISA remedies as protecting plans by policing fiduciaries, rather than preserving the rights of participants.

The Court's presumption that ERISA de-emphasizes individual protections fostered its further generalization that unless a comprehensive statute, like ERISA, provides a particular remedy, such as an individual's recovery of "extra-contractual damages," the Court is reluctant to read other remedies into it.[19]

The concurring opinion by four Justices in *Russell* was, except for its one point of agreement, effectively a dissent. The one point of agreement between the majority and the concurring Justices was that § 409 remedies for a breach of fiduciary duty are to the "entire plan," rather than to individuals. However, the four "concurring" Justices disagreed, at length, with the sweeping generalizations of the majority's view that individuals are without a remedy under ERISA for fiduciary breaches, or that ERISA fiduciaries do not owe strict fiduciary duties to participants and beneficiaries in processing benefits claims.[20] The concurring Justices rejected the majority's views as incompatible with the "structure, legislative history, and purposes of ERISA,"[21] and posited instead that participants should be able to obtain "appropriate equitable relief" for fiduciary breaches under § 502(a)(3).[22] As evidence for their rejection of a narrow scope of remedies under ERISA, the concurring Justices noted that ERISA includes a catchall remedy at § 502(a)(3).[23]

Russell did not bar all individual equitable relief for the breach of fiduciary duty under ERISA, but rather, prevented an individual's recovery for breach of fiduciary duty brought only under § 502(a)(2). Russell left unanswered the question of whether a private remedy is available under the catchall of § 502(a)(3).[24] However, until *Mertens* was decided, the circuits read *Russell* as precluding consequential damages under § 502(a)(3) as well.[25]

The presumption of limited individual recovery under ERISA permeated other Supreme Court cases that restricted or denied relief to participants bringing fiduciary claims. (See, *e.g.* the discussion of *Mertens* and *Great-West*, below.) Only in more recent cases has the Court moved away from these generalizations.

Eleven years after *Russell*, the Supreme Court held in *Varity Corp. v. Howe* that the catchall, ERISA § 502(a)(3), is broad enough to allow participants to recover individual benefits for breaches of fiduciary duty.[26] Twenty-three years after *Russell* in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, the Supreme Court retracted its prior holding in *Russell* that an individual could not get relief under ERISA § 502(a)(2), and allowed a participant in a defined contribution plan to recover a loss to his own 401(k) account for a fiduciary breach. *LaRue* let stand, however, the reading of § 409 in *Russell* that all recoveries must be to the plan.

Mertens v. Hewitt Assocs.: ERISA and the Catchall Equitable Remedy of § 502(a)(3)

Whether there is any relief under ERISA to plan participants for the violations of a non-fiduciary who knowingly participated in a breach of duty by the fiduciary was the issue in *Mertens v. Hewitt Assocs.* [27] The plaintiffs in that case attempted to hold a non-fiduciary actuary liable for aiding the ERISA fiduciary in its failure to adequately fund a pension plan. The actuary had employed assumptions that underestimated true plan costs so that its client, the employer sponsoring a pension plan, could cut its own expenses. As a result, the plan became underfunded and eventually terminated, leaving participants with much smaller pensions than promised. The plan participants sued under ERISA § 502(a)(3) [28] for compensatory damages, accusing the actuary of knowingly participating in the fiduciary's breach of its duty of care in managing the plan, and facilitating the employer's default in paying pensions.

The issue before the Court was whether ERISA authorizes suits for monetary relief against a non-fiduciary (the actuary) who knowingly participated in a breach of duty by the plan sponsor fiduciary. Whether there had been an ERISA violation was not an issue before the Court.[29]

In a 5-4 decision, the Supreme Court held that ERISA does not authorize recovery by plaintiffs for compensatory monetary relief under § 502(a)(3) because that relief was not *typically* available as equitable relief in the days of a divided bench and therefore did not constitute "*appropriate equitable relief* " under ERISA § 502(a)(3).[30] The majority took the position that equitable relief could not refer to a monetary remedy because money damages were available only as a legal remedy.

The dissent rejected both the Court's curtailment of employee protections under ERISA, and the majority's premise that equitable remedies did not traditionally include compensatory monetary damages. It read "ap-

[19] *Id.* at 147.
[20] *Id.* at 152-53
[21] *Id.* at 150-51.
[22] *Id.* at 154.
[23] *Id.* at 155.
[24] Id. at 155 (Brennan, J. concurring).
[25] See Langbein, *supra* note 2, at 1342.

[26] *See Varity Corp. v. Howe,infra.*
[27] 508 U.S. 248, 16 EBC 2169 (1993).
[28] ERISA § 502(a)(3) states, "A civil action may be brought by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."
[29] *Mertens* at 254-55. But see fn. 1 of the dissent at 265 in which the dissent, unlike the majority, questioned the validity "of petitioners' cause of action against non-fiduciaries for knowing participation in a fiduciary's breach of duty."
[30] *Id.* at 256.

propriate equitable relief" under § 502(a)(3) to include a monetary make-whole award to restore aggrieved parties to the same situation they would have been in had no breach of trust occurred.[31] The dissent, while accepting that "extracompensatory," punitive damages were unavailable at equity, rejected the majority's leap that compensatory monetary awards are unavailable under § 502(a)(3), noting that the latter had always been considered "appropriate equitable relief" for breach of trust at common law.[32] The dissent implicitly rejected the Court's earlier presumption in *Russell* that ERISA was not designed to provide remedies to private parties. Instead, the dissent described the majority's narrow reading of § 502(a)(3) as a "perverse" deprivation of remedies that trust beneficiaries had traditionally enjoyed under the common law.[33]

Eighteen years after *Mertens*, the Court in *CIGNA Corp. v. Amara* proposed, but did not hold, that equitable relief under § 502(a)(3) includes monetary compensation for losses to beneficiaries resulting from a trustee's breach of duty or to protect unjust enrichment.[34]

Varity Corp. v. Howe: Non-Monetary Remedy Under ERISA § 502(a)(3)

In *Varity Corp. v. Howe* [35] the Court, in a 6-3 decision, recognized a private right of action for a fiduciary breach and awarded health plan participants a non-monetary remedy under ERISA § 502(a)(3) in the form of participation in another health plan. The majority holding in *Varity*, like the dissent in *Mertens*, rejected the Court's earlier presumption in *Russell* that ERISA does not provide remedies to private parties. However, it left untouched the question of whether monetary compensatory relief is available to individuals for ERISA violations.

Varity Corp. reorganized by transferring the unprofitable business lines, debts and self-funded health plan of its subsidiary, Massey-Ferguson, Inc., to a newly formed subsidiary, Massey Combines. The corporate reorganization was designed to segregate money-losing operations into the new subsidiary and shield the profitable parts of the business from any liability for the debts and losses of the new subsidiary. Even though the new subsidiary was insolvent from the day of its creation, Varity Corp. and Massey-Ferguson, Inc. falsely represented to employees that the new subsidiary had a promising future and that all the benefits of participants transferring to the new subsidiary would be secure. Based on these misrepresentations, 1,500 Varity employees voluntarily transferred to the new subsidiary which went out of business two years later. Employees and retirees of the insolvent subsidiary lost their health benefits, and sued Varity for breach of fiduciary duty under the ERISA catchall § 502(a)(3).

[31] *Id.* at 266.
[32] *Id. at 269-79.*
[33] *Id.* at 274.
[34] See the discussion of *CIGNA Corp. v. Amara, infra.*
[35] 516 U.S. 489 19 EBC 2761 (1996).

The *Varity* plaintiffs lacked standing to sue for benefits under § 502(a)(1)(B) because they were no longer plan participants. They did not seek compensatory or punitive damages, but instead participation in a health plan as an equitable remedy under the catchall of ERISA § 502(a)(3).[36] The Supreme Court took the case to resolve the conflict among the circuits on whether participants could obtain individual relief under § 502(a)(3) for a fiduciary breach.[37] ERISA § 502(a)(3) states in pertinent part, "A civil action may be brought. . . by a participant. . .to obtain other appropriate equitable relief . . .(ii) to enforce any provisions of this title or the terms of the plan." Under that section the district court and Court of Appeals for the Eighth Circuit awarded the plaintiffs reinstatement into the Massey-Ferguson, Inc. health plan. That remedy gave plaintiffs the health benefits they would have received had they not relied on Varity's false statements and transferred to the insolvent affiliate.

It found, as plan administrator, Varity Corp. was a fiduciary that breached its duty of loyalty when it made misleading statements to employees about their benefits[38] and violated ERISA § 404(a)(1).[39] The Court found participation in a health plan as an appropriate remedy under the catchall, ERISA § 502(a)(3), "consistent with the literal language of the statute and the purposes of ERISA and pre-existing trust law."[40]

The *Varity* majority distinguished *Russell*, a claim brought her claim under ERISA § 502(a)(2) which allowed recovery for a fiduciary breach only to the plan and not the individual.[41]

It rejected the position in *Russell* that § 502(a)(2) is the only remedy available to an individual for a fiduciary breach but did not address whether plaintiffs could bring their claim under more than one provision of § 502.[42] There is nothing in *Varity* that prevents a participant from bringing a fiduciary claim under § 502(a)(2) for relief to the plan, and another claim under § 502(a)(3) for individual relief, but *Varity* identified that issue as one which the Court had not specifically decided.[43]

[36] *Id.* at 509-510, 515.
[37] *Id.* at 495.
[38] *Id.* at 502-505.
[39] *Id.* at 505-506. ERISA § 404(a)(1) states in pertinent part, "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of participants and beneficiaries. . . ."
[40] *Id.* at 509-515.
[41] *Id.* at 509-510.
[42] *Id.* at 515. The Court noted that if adequate relief is provided already, "there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'"
[43] Whether the same claim can be brought under more than one section of ERISA was also addressed in the concurring opinion of *LaRue* regarding another area of ERISA. In that opinion, Chief Justice Roberts and Justice Kennedy stated that it was not clear whether LaRue could bring a claim under § 502(a)(2) when § 502(a)(1)(B) might have afforded him a remedy, stating, "I simply highlight the fact that the Court's determination that the present claim may be brought under § 502(a)(2) is reached without considering whether the possible availability of relief under

Applying its previous assumptions about the limited scope of ERISA remedies for individual participants, the *Varity* dissent disagreed that ERISA § 502(a)(3) allows an individual relief for fiduciary breach.[44] Ignoring the literal language of § 502(a)(3),[45] which specifically allows participants and beneficiaries to bring equitable claims to redress "any" ERISA violation, the *Varity* dissent drew on the presumption first stated in *Russell* that ERISA was not designed to protect the rights of plan participants and beneficiaries. It reasoned that because *Russell* denied recovery to an individual under § 502(a)(2) for a fiduciary breach, that no part of ERISA allows individual relief for fiduciary breaches. In particular, the dissent believed because § 502(a)(2) addressed fiduciary breaches and precluded individual relief, that § 503(a)(3) must also preclude individual relief for individuals, despite the broad statutory language of § 502(a)(3) to the contrary.[46]

Subsequent Supreme Court cases rejected the *Varity* dissenters' assumptions and conclusions. However, in *Great-West & Annuity Ins. Co. v. Knudson*, Justice Scalia resurrected the effect of his dissent in *Varity* by observing in footnote five of *Great-West* that *Varity* did not authorize all relief under the catchall, § 502(a)(3), but only "appropriate" equitable relief, a viewpoint that he then used in *Great-West* to foreclose any recovery under § 502(a)(3) for lack of "appropriateness."[47]

LaRue v. DeWolff, Boberg & Assocs., Inc.: Participant's Right to Monetary Recovery for Fiduciary Breach under ERISA § 502(a)(2)

The Supreme Court revisited an issue first raised 25 years earlier in *Russell* when it examined in *LaRue v. DeWolff, Boberg & Assocs., Inc.* [48] whether a participant can bring a claim for a fiduciary breach under ERISA § 501(a)(2) to recover losses suffered only by his own individual retirement plan account and not to the plan as a whole. This time, the *LaRue* Court unanimously held that ERISA § 502(a)(2) authorizes a participant to bring a private right of action for a fiduciary breach to recover monetary relief for the his own plan account. This holding implicitly rejected the notion from *Russell* that a participant's recovery for a fiduciary breach under § 409 must be for the plan "as a whole."[49]

Like many 401(k) plan participants, James LaRue had the right to direct the investments of his plan account. LaRue asserted that he lost $150,000 when the 401(k) plan fiduciaries failed twice to follow his instructions to change the investment of his account. He filed suit against the plan fiduciaries under ERISA § 502(a)(2) and § 502(a)(3) to recover the loss to his plan account, alleging a breach of fiduciary duty under ERISA.

Following *Russell*, the Court of Appeals for the Fourth Circuit found that LaRue could not sue under § 502(a)(2) to recover losses of his personal plan account because any recovery would not be for the entire plan. The Court of Appeals also rejected LaRue's argument for "make-whole" equitable relief under § 502(a)(3), taking the position that the relief LaRue sought was for legal damages, not available under ERISA.[50]

The question before the Supreme Court was whether a participant in a defined contribution plan can sue for the breach of fiduciary duty under ERISA § 502(a)(2) to recover amounts only for his own plan account. The Supreme Court answered unanimously in the affirmative, and vacated the decision of the appeals court that had concluded otherwise.

The *LaRue* decision unanimously reined in the Court's prior 5-4 ruling in *Russell* by holding that ERISA § 502(a)(2) permits a participant in a defined contribution plan to sue for fiduciary breaches and recover losses to the participant's own account in the plan. In an opinion authored by Justice Stevens (who had also authored *Russell*), the Court now rejected the notion that recovery must be made to the entire plan, noting instead that "the 'entire plan' language from *Russell*, *which appears nowhere in § 409 or § 502(a)(2)*, does not apply to defined contribution plans" (emphasis added).[51]

The *LaRue* Court attributed its decision in *Russell* to the "former landscape of employee benefit plans" populated by defined benefit plans.[52] That attribution may have had more to do with the Court needing a reason for departing from its presumption in *Russell* that ERISA protects plans, not individuals harmed by fiduciary breaches. Instead, *LaRue* noted, "Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409."[53]

The Court also distinguished *Russell* by noting that the plan participant had sued for consequential damages for herself, under the second part § 409, unlike LaRue who sought lost profits for his plan account under the first part of § 409, caused by the fiduciary breach.[54] Because LaRue was not asking for relief payable to himself individually, but to his plan account, the Court had no reason to deflect from its prior assumption in *Russell*,

§ 502(a)(1)(B) alters that conclusion." *LaRue*, 128 S. Ct. 1020, 1027.

[44] *Varity*, 516 U.S at 522-23.

[45] See language of the statute quoted in fn. 28.

[46] *Varity*, 516 U.S. at 522-25. The *Varity* dissent, in its statutory construction, makes a logical leap that exemplifies a fallacy of composition. See detailed discussion of *Russell*, *supra.*

[47] See discussion of *Great-West*, *infra*.

[48] 552 U.S. 248 ,42 EBC 2857 (2008).

[49] *Id.* at 1026.

[50] *Id.* at 1023.

[51] *Id.* at 1025.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 1024. The relief LaRue sought was consequential damages, in the form of lost profits, payable to his plan account that would eventually be distributed to him as part of his benefit. Russell sought remedial relief in the form of punitive and consequential damages payable to herself under a broad reading of § 409, quoted *supra* at footnote 13.

that the remedy under the second part of § 409, is payable only "to the plan," not the individual.

Instead, the Supreme Court repudiated *Russell's* bar on an individual's suit for breach of fiduciary duty under ERISA § 502(a)(2) and its presumption that relief under § 502(a)(2) must benefit the plan "as a whole." While the majority attributed its change in direction to the changed "landscape" from traditional defined benefit to defined contribution plans, its decision actually corrected its own false presumption in *Russell* that there is no individual remedy to a participant or plan beneficiary for fiduciary breaches under § 502(a)(2) and § 409. This point was emphasized in the concurring opinion of Justices Thomas and Scalia who now abandoned the notion that ERISA "never intended" to authorize individual plan participants relief under either § 502(a)(2) or § 502(a)(3). Rather, they observed, that ERISA § 409 and § 502(a)(2) are "unambiguous" in permitting a plan participant to sue for a fiduciary breach to recover losses to the plan, without regard to the type of plan involved.[55] Since loss to a participant's account is a loss to the plan, recovery to the participant's plan account is a remedy to the plan contemplated by § 502(a)(2) and § 409.

While a traditional defined benefit plan does not establish individual participant accounts, its recovery under § 502(a)(2) for a fiduciary breach affecting some but not all participants would likewise inure to the benefit of the aggrieved participant when the plan pays that participant the correct, unreduced benefit. Thus, although the majority did not say it, the logic of *LaRue* applies equally to defined benefit, welfare, and defined contribution plans, and is not as a result of a changed landscape. *LaRue* dropped language from *Russell* that recovery for a fiduciary breach must inure to the plan "as a whole," but retained the idea that the plan must receive monetary recovery for a fiduciary breach, even though that recovery is ultimately paid to a specific participant.

By acknowledging the statutory right afforded participants to sue for fiduciary breaches, *LaRue*, with *Varity*, clarified and corrected *Russell*, and repositioned the direction of remedial relief of future ERISA case law to align better with the language of the statute. In awarding LaRue's account a monetary remedy, the Court also admitted *sub silentio* to the appropriateness of monetary equitable restitution for fiduciary breaches under ERISA.

CIGNA Corp. v. Amara: Broadening Equitable Remedies Under ERISA

In *CIGNA Corp. v. Amara*,[56] the Supreme Court signaled a new direction for judicially defined ERISA remedies by stating that certain equitable theories of estoppel, reformation, and surcharge might be appropriate to provide ERISA relief. This dicta apparently sought to expand the types of equitable remedies allowed under *Mertens* and *Great-West* without actually so holding. Whether the suggested equitable theories will actually translate to recoveries for aggrieved plaintiffs is by no means clear.

The fiduciaries in *Amara* intentionally misrepresented to employees that their pensions would not be reduced when the pension plan was terminated and replaced with an individual account, cash balance plan. Instead CIGNA promised that the beginning balance of each participant's new plan account would equal the participant's accrued benefit in the old plan.[57]

In fact, CIGNA did not carry over participants' full benefits under the old plan but, rather, reduced those benefits by various factors. For example, the opening balance ignored employees' early retirement subsidies earned under the pension plan and used different actuarial mortality and interest assumptions to diminish the opening balance. The effect was to cut back participants' benefits in violation of ERISA § 204(g), so that participants had to work several additional years after the conversion before their retirement benefits would be greater than what they had already earned under the pension plan.[58] Rather than inviting the unrest that would have ensued had CIGNA told employees the truth, CIGNA fraudulently assured employees, in written plan descriptions, that their benefits under the terminated pension plan would be preserved and the new plan benefits would be added to all the pension benefits.[59]

The district court concluded that CIGNA's misrepresentation violated the cutback notice requirements of ERISA § 204(h), and also ERISA § 102(a) and § 104(b), which require a plan administrator to provide participants with accurate summary plan descriptions "written in a manner calculated to be understood by the average plan participant."[60]

The plan participants sought to use the § 204(h) notice violation to invalidate the plan amendments that reduced their benefits.[61] However, the district court recognized that if it nullified the cash balance amendment cutting back benefits, employees would be left in a worse position because benefit accruals under the prior pension plan had been frozen.

Because Supreme Court cases, up to then, had severely curtailed the kinds of relief available under § 502(a)(3), the district court deliberately avoided granting relief under ERISA § 502(a)(3).[62] Instead, its remedy under ERISA § 502(a)(1)(B) [63] (the benefit recovery provision)

[55] *Id.* at 1028.

[56] 131 S. Ct. 1866, 50 EBC 2569 (2011).

[57] *Id.* at 1872-73.

[58] *Id.* at 1873-4. *See also*, *Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288, 301-302, 43 EBC 1011 (D. Conn. 2008).

[59] *Id.* at 1874.

[60] *Id.*

[61] *Amara v. CIGNA Corp.*, 559 F. Supp. 2d 192, 206-210 (D. Conn. 2008).

[62] *Amara v. Cigna Corp.*, 559 F. Supp. 2d 192, 205. See discussion of *Great-West, supra*.

[63] That section states, "A civil action may be brought by a participant or beneficiary. . . to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to

was to reform the terms of the plan by giving employees the higher benefit described in the plan summary, even though that description did not reflect the actual plan.

The Second Circuit affirmed the holding of the district court granting participants the higher benefits promised in the summary. CIGNA challenged the decision, arguing that ERISA § 502(a)(1)(B) does not allow reformation as a remedy, but requires recoveries *under the terms of the plan*.

In a unanimous decision, the Supreme Court held that § 502(a)(1)(B) does not allow the recovery of benefits based on a plan summary that is inconsistent with the plan.[64] But apparently dissatisfied with its lack of a remedy, the Court went on to examine whether § 502(a)(3) might authorize other relief to the CIGNA plan participants.[65]

The Supreme Court observed that the district court's application of remedy resembles estoppel because it sought to hold CIGNA to its promise and operates to put a person in the same place had the misrepresentation been true.[66]

It also noted that equity courts had the power to award monetary compensation for losses resulting from a trustee's fiduciary breach through the exclusively equitable remedy of surcharge.[67] These observations countered the 5-4 opinions in *Great-West* and *Mertens* that had rejected monetary compensation as a wholly legal, not equitable remedy, and outside the purview of § 502(a)(3). The Court further delineated a number of equitable remedies that could be encompassed by ERISA § 502(a)(3). Specifically named were estoppel (based on a finding of detrimental reliance); reformation (based on a finding of fraud by one party and mistake of the other); injunction and surcharge (a make-whole monetary remedy based on a finding of actual harm and either detrimental reliance or loss of a right).[68] The Court also observed that equity courts possessed the power to order monetary compensation for losses resulting from a trustee's breach of duty or to protect unjust enrichment.

Through its elaborate and detailed dicta on equitable remedies, the Supreme Court thus assured the district court (without so holding) that surcharge, injunction, estoppel, monetary restitution, and reformation are all appropriate equitable remedies under § 502(a)(3).[69]

The Supreme Court then vacated the judgment below and remanded the case for further proceedings to explore whether an equitable remedy is properly applicable to the case under ERISA § 502(a)(3).

In their concurring opinion, Justices Scalia (who authored both opinions in *Mertens* and *Great-West*) and Thomas agreed that § 502(a)(1)(B) does not authorize relief based on a summary plan description because a summary is not the plan. However, they strenuously rejected the "blatant dictum" of the majority that the delineated equitable remedies are both traditional and available under § 502(a)(3), and observed instead that "it is far from clear [whether contract reformation, estoppel, or surcharge] are remedies [to Amara] in this case."[70]

On remand, the district court refused to let defrauded plan participants go without remedy. [71] Instead it applied the roadmap laid out by the majority's dicta and addressed CIGNA's fraud by reforming the plan to reflect the terms of the summary. The district court also allowed surcharge against CIGNA for breach of its fiduciary duty to provide beneficiaries with make-whole monetary relief once they showed actual harm caused by the breach. In fashioning its remedy, the district court rejected the view of *Great-West* and *Mertens*, that ERISA allows only an extremely narrow subset of all equitable remedies. The Second Circuit affirmed the district court opinion.[72]

Breached Subrogation Clauses: ERISA § 502(a)(3)

Great-West Life & Annuity Insurance Co. v. Knudson

The Supreme Court decided several subrogation cases that also grappled with the idea of what an appropriate equitable remedy is under ERISA. In a 5-4 opinion, *Great-West Life & Annuity Insurance Co. v. Knudson* [73] decided the question of whether the subrogation clause of an employer's group medical plan could be enforced under ERISA § 502(a)(3). Relying on the presumptions underpinning the majority opinion in *Russell* and the dissent in *Varity*, the *Great-West* Court concluded that the subrogration clause could not be enforced because equitable relief under § 502(a)(3) limits remedies only to those "typically" and exclusively available in the days of a divided bench. The Court rejected specific performance of a contract to pay money as not "typically" available in equity. It also rejected monetary restitution as an available remedy unless the particular funds or property in question are in the defendant's possession.

Janette Knudson was covered under the medical plan of her husband's employer when she was in a serious car accident. Great-West Life & Annuity Insurance Co. paid Knudson over $400,000 to reimburse her medical costs. She also received damages of $650,000 from the car

clarify his rights to future benefits under the terms of the plan."

[64] 131 S. Ct. 1866, 1877-78.

[65] *Id.* at 1878.

[66] *Id.* at 1879-80. The Court specifically quoted Justice Story's ancient Commentaries on Equity Jurisprudence that equitable estoppel "forms a very essential element in . . . fair dealing, and rebuke of all fraudulent misrepresentation which it is the boast of courts of equity constantly to promote."

[67] *Id.* at 1880.

[68] *Id.* at 1881.

[69] *Id.*

[70] *Id.* at 1884.

[71] *Amara v. CIGNA Corp.*, 925 F. Supp. 2d 242, 265 (D. Conn. 2012).

[72] *Amara v. CIGNA Corp.*, 775 F.3d 510 60 EBC 2472 (2d Cir. 2014).

[73] 534 U.S. 204, 27 EBC 1065 (2002).

manufacturer in a settlement of her tort action. However, only $13,829 of the total settlement was attributable to past medical expenses.

The plan's subrogation clause placed a first lien upon any recovery from the third party for medical expenses already paid by the plan. If the beneficiary recovered from a third party and failed to reimburse the Plan, the Plan terms held the beneficiary personally liable up to the amount of the first lien.[74]

Great-West sought injunctive and declaratory relief under § 502(a)(3) to enforce the subrogation clause against Knudson for the full $400,000 it had paid for her medical costs. The district court held that Great-West was limited to past medical costs of $13,820. The Ninth Circuit affirmed, holding that reimbursement of the $400,000 was not an available equitable remedy under § 502(a)(3).[75]

As in *Mertens* and *Russell*, the Supreme Court drew on the presumption that because ERISA is a detailed statute, Congress must not have intended it to encompass remedies not expressly stated.[76]

The majority rejected Great-West's attempt to obtain injunctive relief because that remedy was not *typically* available at equity.[77] The subrogation clause could not be enforced under ERISA § 502(a)(3) because imposing personal liability for money damages on Knudson for her violation of the contract was an action at law, not equity.

The Court also rejected Great-West's characterization of its proposed remedy as equitable restitution and characterized it instead as legal restitution for the breach of contract. In the Court's view, equitable restitution is limited to a constructive trust or equitable lien on funds in the defendant's possession. [78] Although *Mertens* had previously characterized restitution as a "typical" equitable remedy along with injunction and mandamus, the Court in *Great-West* now distinguished between restitution at law and restitution at equity, limiting the latter to an application of a constructive trust or an equitable lien on specific funds.[79]

Because Knudson had already dissipated the money that Great-West sought to recover, no constructive trust or equitable lien could apply to particular funds.[80]

The result of *Great-West* was to abort the enforcement of unambiguous plan terms, effectively reading those terms out of the plan. In denying recovery, the decision read ERISA § 502(a)(3) narrowly, finding injunction and specific performance of past due monetary obligations were unavailable because those remedies were not "typical" in the days of a divided bench.[81]

The Court inserted its own filter into the definition of "appropriate" equitable relief under § 502(a)(3) by assuming that: (A) Congress intended to limit ERISA remedies to individuals (*Russell*),[82] (B) Congress intended "equitable" relief to refer to the historical remedies available solely in equity courts in the days of the divided bench (*Great-West*), (C) the Court itself identifies what equitable remedies are "typical" (*Mertens*), and (D) unless ERISA specifically provides a particular remedy, the Court should not read it into the statute (*Russell*). These assumptions drove the Court's finding in *Great-West* that no remedy is available for enforcing plan terms where the subrogation funds have been dissipated. The decision specifically disallowed make-whole monetary relief for consequential injury of the sort characteristic of trust law.[83]

The dissenting opinion, authored by Justice Ginsburg, with whom Justices Stevens, Souter and Breyer joined, rejected the notion that Congress intended to revive the long obsolete distinction between law and equity when it framed remedies under ERISA.[84] The dissent found it anomalous that, rather than turning on the wrongfulness of misappropriating subrogated funds, the majority's determination of whether restitution is "equitable" turned instead on whether the defendant possessed the very same funds in dispute. The dissent noted that whether Great-West had sued the trust actually in possession of the funds or Knudson, the relief it sought was the same. Finally the dissent noted that monetary restitution was historically a typical equitable remedy and, therefore, appropriate under ERISA, noting that *Mertens* did not require a "typical" equitable remedy to be "exclusive" to the equity courts.[85]

The dissent refused to exclude equitable restitution of generic funds as an ERISA remedy, as the majority had done, on the theory that it is also a remedy at law.[86]

Because of the majority's conclusion that only some equitable, and no legal remedies are available under ERISA § 502(a)(3), *Great-West* made federal courts reluctant to apply any equitable remedies under ERISA § 502(a)(3) (other than injunctions and equitable restitution of particular funds).[87]

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[74] *Id.* at 207.

[75] ERISA § 502(a)(3) authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of. . . the terms of the plan."

[76] *Great-West,* at 209-10.

[77] *Id.* at 210-11.

[78] *Id.* at 212-14.

[79] *Id.* at 214-15.

[80] *Id.* at 210-12.

[81] *Id.* at 211.

[82] See discussion of *Mertens* and logical fallacy of composition, *supra*.

[83] See Langbein, *supra* note 2, at 1360-61.

[84] In pointed terms, Justice Ginsburg's dissent stated, "It is thus fanciful to attribute to members of the 93d Congress familiarity with those 'needless and obsolete distinctions' [between legal and equitable remedies]. . . . much less a deliberate 'choice' to resurrect and import them wholesale into the modern regulatory scheme laid out in ERISA. '[T]here is nothing to suggest that ERISA's drafters wanted to embed their work in a time warp.' " Op. Cit. at 225.

[85] *Great-West*, 534 U.S. at 231.

[86] *Id.* at 228.

[87] See, e.g., *Mank v. Green*, 323 F. Supp. 2d 115, 33 EBC 1055 (D. Me. 2004) citing *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough*, 354 F.3d 348, 358,

Sereboff v. Mid Atlantic Medical Services, Inc.

In 2006, the Supreme Court heard another subrogation claim in *Sereboff v. Mid Atlantic Medical Services, Inc.* [88] The issue was whether, under an ERISA claim for "appropriate equitable relief," an insurer, seeking to enforce a subrogation provision under an ERISA plan, could receive a reimbursement of medical expenses from the settlement proceeds held in a segregated account. Applying the reasoning of *Mertens* and*Great-West* that an equitable remedy under ERISA must be typical of the days of a divided bench, the Court unanimously held that specifically identified funds in the beneficiary's possession could be paid to the insurer as equitable restitution. The Court did not require any strict tracing of the specific assets payable to the insurer, noting that it was enforcing an equitable lien by agreement, not imposing a judicial equitable lien that requires strict tracing.

However, a split developed among the circuits in which the First, Second, Third, Sixth, Seventh and Eleventh Circuits interpreted *Sereboff* as allowing an equitable lien even if the funds cannot be strictly traced, while the Eighth and Ninth Circuits held that the fiduciary must be able to trace the funds strictly to the beneficiary's possession before it may seek recovery. In 2015, the Supreme Court agreed to hear *Montanile v. Board of Trustees of Nat'l Elevator Indus. Health Benefit Plan,* [89] on the issue of whether ERISA § 502(a)(3) permits recovery of assets that are not specifically identifiable.

U.S. Airways Inc. v. McCutchen

In a 5-4 decision,[90] the Supreme Court formally departed from the approach it had used in *Great-West*, which had prevented the enforcement of a plan's subrogation clause under ERISA § 502(a)(3) for lack of an equitable remedy "typical" among ancient equitable remedies in the days of a divided bench. This time, the Court looked to the intent of the plan language.

McCutchen suffered a disabling injury as a result of a traffic accident and incurred $66,866 in medical expenses, which were paid by the self-insured medical plan of his employer, U.S. Airways. McCutchen sued the driver who caused the accident, and received a $10,000 settlement plus $100,000 in motorist coverage. The attorneys representing McCutchen on contingency took a 40 percent fee and, after expenses, McCutchen netted about $66,000.

The U.S. Airways plan brought an action for equitable reimbursement under ERISA § 502(a)(3) and demanded the full amount of McCutchen's medical costs that the plan had advanced, even though that demand was more than McCutchen's net recovery (less attorney fees). U.S. Airways argued that the full reimbursement was appropriate within the meaning of the plan and the U.S. District Court for the Western District of Pennsylvania agreed. [91]

Closely following the reasoning of *Great-West*, the Third Circuit applied the Supreme Court's view that equitable relief available under § 502(a)(3) is limited.[92] Noting that in the days of a divided bench, equity courts did not hold contractual language sacrosanct, the Third Circuit concluded that the integrity of plan terms is also limited under ERISA.[93] It vacated the district court's decision to grant summary judgment to U.S. Airways and remanded the case for further proceedings, holding that the principle of unjust enrichment overrides the language of the reimbursement clause if and when the two come into conflict.[94] Since the plan language would leave McCutchen with less than full payment for his medical bills, and give U.S. Airways a windfall, the Third Circuit refused to read the language of the plan as requiring McCutchen to bear the full cost of the attorneys' fees.

The Supreme Court rejected the Third Circuit's application of *Great-West* to override the terms of an ERISA plan and instead applied § 502(a)(3) to enforce an "equitable lien by agreement." The Court noted that equitable principles do not override the plan terms, but inform them by filling in details not otherwise in the terms.[95] The result of the Supreme Court's decision was

31 EBC 2505 (5th Cir. 2003), reh'g en banc den., 89 Fed. Appx. 905 (5th Cir. Jan. 13, 2004); *Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Varco*, 338 F.3d 680, 687-88, 30 EBC 2409 (7th Cir. 2003).

The First, Fifth, and Seventh Circuits construed *Great-West* to permit actions for equitable restitution through an equitable constructive trust under ERISA § 502(a)(3) (as opposed to legal restitution) for defendants possessing identifiable funds that rightfully belong to the plan. In contrast, the U.S. District Court of the District of Connecticut avoided proposing an equitable remedy under ERISA § 502(a)(3) at all because it was unsure what equitable remedies were available after the decision in *Great-West* (*Amara v. CIGNA Corp.*, 559 F. Supp. 2d 192, 205, 45 EBC 1062 (D. Conn. 2008), cited in *CIGNA Corp. v. Amara*, 131 S.Ct. 1866, 50 EBC 2569 (2011) (referring to the district court's avoidance of equitable remedy under ERISA § 502(a)(3)). Instead, the district court looked to ERISA § 502(a)(1)(B) (the benefit recovery provision) to fashion an equitable remedy for the plaintiffs, awarding benefits based on a reformation of the plan terms, estoppel to prevent the decrease of early retirement benefits that participants already accrued, and injunction requiring the plan to pay participants money owed them under the reformed plan.

[88] 547 U.S. 356, 37 EBC 1929 (2008).

[89] 593 Fed. Appx. 903, 59 EBC 2559, (11th Cir. 2014), *cert. granted*, No. 140723 (Mar. 30, 2015).

[90] *U.S. Airways Inc. v. McCutchen*, 133 S. Ct. 1537, 55 EBC 1845 (2013).

[91] No. 2:08cv1593, 2010 BL 200127 (Aug. 30, 2010).

[92] 663 F.3d 671, 678, 52 EBC 2143 (3rd Cir. 2010) (citing *Great-West*, 534 U.S. at 209).

[93] *Id.* at 678-79.

[94] *Id.* at 677.

[95] 133 S. Ct. 1537, 1548-51. In contrast to *Great-West*, the Court held: "Neither general principles of unjust enrichment nor specific doctrines reflecting those principles—such as the double-recovery or common-fund rules—can override the applicable contract. We therefore reject the Third Circuit's decision. But second, the [equitable] common-fund rule informs the interpretation of U.S. Airways' reimbursement provision. Because that term does not advert to the costs of recovery, it is properly read to retain the common-fund doctrine. We therefore also disagree with the Dis-

to have the court below fill in the missing terms of the plan using the equitable common fund doctrine and allocate the costs of third-party recoveries between the insurer and beneficiary.

In contrast to *Great-West*, the *McCutchen* decision holds that the language of plan documents govern the rights and obligations of the parties, and that those terms cannot be overridden by equitable defenses.[96] However, ERISA § 502(a)(3) can be used to enforce plan terms, applying an equitable theory, here, the common-fund doctrine to allocate costs to the parties, to fill in the details that plan terms do not address.

The dissent agreed that equity cannot override the plain terms of the contract, but disagreed with the Court's application of the equitable "common-fund" doctrine to fill in the contractual gap of how to allocate costs spent on recovering the funds.

Montanile v. Board of Trustees of Nat'l Elevator Indus. Health Plan

In *Montanile v. Board of Trustees of Nat'l Elevator Indus. Health Benefit Plan* [97] the Court held that a fiduciary could not enforce an equitable lien by agreement against a participant's general assets in its subrogation claim. Montanile had received medical benefits from an ERISA plan for his injuries. He also collected a separate settlement from a third party for his injuries, and dissipated the funds in a way that could not be traced. The opinion by Justice Thomas, with which only Justice Ginsburg dissented, held that a fiduciary cannot attach the participant's general assets under § 502(a)(3) in a subrogation claim because an equitable lien against generic funds is not an available remedy.[98] Dissipating the funds to non-traceable goods and services, as Montanile had done, defeats an equitable lien and any equitable lien by agreement. The Court rejected that "equitable relief" includes ancillary legal remedies that equity courts sometimes employed, such as pecuniary remedies.

In the sole dissent, Justice Ginsburg found the majority's conclusion an error stemming from its misreading of ERISA in Great-West that ERISA limits relief to a subset of historic equitable remedies. Justice Ginsburg found the Court's holding wrong that a participant could escape his reimbursement obligation by spending down settlement funds on non-traceable items.

Conclusion

Through many years of case history, the Supreme Court effectively eviscerated ERISA by concluding that the statute does not necessarily offer participants and beneficiaries remedies for fiduciary breaches and other ERISA violations, nor does it necessarily correct violations of subrogation clauses if the subrogated funds have been dissipated.

To buttress its early presumption in *Russell* that ERISA did not intend to protect the rights of individuals, the Supreme Court, in *Mertens* and *Great-West*, devised its own invention of what an equitable remedy is under ERISA. The early version of that theory of remedies limited relief to the plan as a whole under a subset of equitable remedies that the Supreme Court has identified as "typical" of the equity courts. This limited definition effectively denied relief for many ERISA violations.

However, a cross-current of views in recent Supreme Court ERISA cases are increasingly finding that:

- ERISA does provide remedies to plaintiffs for fiduciary breaches (as opposed to the plan as a whole) (*Varity, LaRue,* and *Amara*);
- Monetary restitution and an array of other equitable remedies are appropriate relief under ERISA (*Varity, LaRue,* and *Amara*) ; and
- Unambiguous plan terms must be enforced unless equitable principles apply to permit the reformation of that language (*Amara* and *McCutchen*).

As these principles find broader application in the case law, the contested holdings of *Russell*, *Mertens*, and *Great-West*, and the presumptions supporting those holdings should eventually be curtailed or abandoned and a path should be cleared to expand ERISA remedies to address fiduciary breaches, and the misappropriation of subrogated funds. *LaRue* and *Amara* implicitly rejected presumptions of the earlier cases finding instead that: (A) make-whole monetary relief can be awarded under ERISA for a fiduciary breach; (B) relief for fiduciary violations under § 502(a)(2) and § 409 need not be to the plan as a whole but can be directed to one individual's own plan account; and (C) the Court is not limited to a subset of equitable remedies but may award surcharge or compensatory monetary relief. By avoiding the fallacy of composition that underlies prior holdings depriving individuals of relief for fiduciary breaches, the Court may eventually read the second part of the compound sentence of § 409 as a catchall allowing individuals direct remedies for fiduciary breaches. As it is, the Court in *LaRue* has already allowed monetary restitution for a fiduciary breach paid to the individual's plan account; the balance of which will eventually be paid only to that individual.

McCutchen, while a split decision, rejected the presumption of *Great-West* that ERISA subrogation terms cannot necessarily be enforced and fashioned an equitable remedy to avoid unjust enrichment based on the plan language.

However, the Court has yet to reject the notion that recovery in a subrogation claim is available only if assets are specifically traceable. By refusing a remedy in *Montanile*, the Court effectively invalidates subroga-

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trict Court's decision. In light of these rulings, we vacate the judgment below and remand the case for further proceedings consistent with this opinion." *Id.* at 1551.

[96] *Id.* at 1549.

[97] 136 S. Ct. 651, 61 EBC 1165 (2016).

[98] *Id.* at 655.

tion clauses where the participant wrongfully dissipates the windfall.[99]

While the subrogation cases have left aggrieved plaintiffs without a remedy unless funds are traceable and in the defendant's possession, the Court has been expanding relief in the case of fiduciary breaches. In doing so, the Court may be on a trajectory for eventually abandoning the presumptions and holdings that deny relief for fiduciary breaches and subrogation violations under ERISA. For example, the Court may come to view the person handling subrogated funds as a fiduciary to the person owed reimbursement, apply an equitable "make-whole" monetary remedy that does not rely on the strict tracing of particular money, and restore misappropriated, subrogated funds through a different equitable remedy. Otherwise, the law would permit, as it did in *Montanile*, unjust enrichment of persons mishandling the plan benefits, in direct contravention to the plan terms.

Planning Points

A change in the Court's direction signaling greater judicial enforcement of ERISA would have a significant impact on the management of employee benefits, particularly during a period of an aging American demographic. The evolution of judicial remedies under ERISA could portend greater protections of the public at least for fiduciary breaches under ERISA. This trend is not dependent on whether the fiduciary regulations of the Department of Labor survive.

The changing case law puts greater pressure on ERISA fiduciaries to consider their legal duties more carefully, and adopt more rigorous procedures that insure compliance. Particular aspects of concern include:

- Selection of fiduciaries and co-fiduciaries,
- Fiduciary actions,
- Roles of advisors and fiduciaries in complying with ERISA,
- Costs of plan investments,
- Management and operation of self-directed plan investments, including accurate execution of investment instructions,
- Accuracy and compliance of disclosures to employees,
- Enforcement of ERISA plan terms, and
- Timing of benefit payments.

[Updated March 2017]

[99] While *Montanile* allowed unjust enrichment for lack of an appropriate remedy under ERISA, the Roberts Court has enforced ERISA protections in other ways. For example, the unanimous ruling in *Tibble v. Edison International*, 135 S. Ct. 1823, 59 EBC 2461 (2015), allowed participants to challenge the high cost of investment options held in a retirement plan for more than six years by applying the statute of limitations to an ongoing fiduciary duty to monitor plan investments, rather than to the prudence of the initial choice of investments. Similarly, the Supreme Court overturned the presumption of prudence that circuit courts had accorded ESOP fiduciaries. In *Fifth Third Bancorp v. Dudenhoeffer* 134 S. Ct. 2459, 58 EBC 1405 (2014), the Supreme Court affirmed unanimously that employee stock ownership plan fiduciaries, except for the duty to diversify investments, are subject to the same duty of prudence that applies to other ERISA fiduciaries.