

ERISA Remedies: Key Enforcement Provisions and Scope of Equitable Relief for Benefit Claims

Statutory and Plan Provision Violations, Section 502(a)(1)(B), Relief Under 502(a)(3), Limiting Equitable Remedies

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ERISA REMEDIES:

*KEY ENFORCEMENT PROVISIONS AND SCOPE OF
EQUITABLE RELIEF FOR BENEFIT CLAIMS*

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OUTLINE

- Overview of types of claims
- Overview of key defenses to equitable claims
- Recent case developments on scope of equitable relief
- Key plan provisions to limit equitable relief
- Best practices for managing claims

OVERVIEW OF COMMON ERISA CLAIMS

BENEFITS CLAIM

29 U.S.C. § 1132(a)(1)(B)

(a) Persons empowered to bring a civil action. A civil action may be brought--

(1) by a participant or beneficiary ...

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

BENEFITS CLAIM

- Claim must be brought by a participant or beneficiary
- Claim must seek what is permitted under the “terms of the plan[.]”
 - A court can look outside the plan's written language in deciding what the plan language means. *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011)
 - Generally rules of contract interpretation apply.
- Court cannot change terms of plan. *Amara*
 - “[W]e have found nothing suggesting that [(a)(1)(B)] authorizes a court to alter those terms, ... where that change, akin to the reformation of a contract, seems less like the simple enforcement of a contract as written and more like an equitable remedy. *Id.*”

BREACH OF FIDUCIARY DUTY CLAIM

29 U.S.C. § 1109(a)

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 have been made through 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.

29 U.S.C. § 1132(a)

A civil action may be brought-- ...

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [29 U.S.C. § 1109]

WHO IS A FIDUCIARY?

- Often primary dispute is whether a person or entity is a fiduciary
 - Named fiduciary – named in plan documents
 - E.g., Plan administrator
 - Named fiduciary can also wear “non-fiduciary hats” – plan sponsor
 - Functional fiduciary – result of role played
 - 29 U.S.C. § 1002(21 (A): a person is a fiduciary **to the extent** he/she
 - exercises discretionary authority over management,
 - exercises any control over management or disposition of plan assets
 - renders investment advice or has authority to do so
 - has any discretionary authority or discretionary responsibility in plan administration
- A person is only a fiduciary *to the extent* he is engaging in fiduciary acts

WHO IS A FIDUCIARY?

- *Dawson-Murdock v. Natl. Consulting Group, Inc.*, 931 F.3d 269 (4th Cir. 2019)
 - If defendant is a named fiduciary, no need to also allege functional fiduciary status
 - Otherwise, must allege facts to plausibly support functional fiduciary status
 - A Plan Administrator acts as a fiduciary when it conveys or fails to convey accurate information about eligibility for benefits

BREACH OF FIDUCIARY DUTY

- Claim can be brought by participants, beneficiaries, fiduciaries or Secretary of Labor
- Claim can only be brought against a fiduciary
- Scope of relief is limited by 1109
 - Damages to the plan (“make good to such plan any losses”)
 - Restitution for the plan (“restore to such plan any profits”)
 - Other equitable or remedial relief, including removal
- Relief is for injury to the plan
 - Includes individual plan accounts. *LaRue v. DeWolff, Boberg & Assocs. Inc.*, 552 U.S. 248 (2008)

EQUITABLE CLAIM

29 U.S.C. § 1132(a)(3)

(a) A civil action may be brought-- ...

(3) 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[.]

EQUITABLE CLAIM

- Claim can be brought by participants, beneficiaries and fiduciaries
- Does not authorize *all* equitable relief, but only *appropriate* equitable relief. *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)
 - Refers to those categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were typically available in equity. *Mertens*; *Amara*
 - *Allows relief such as injunction, mandamus, and restitution, but not compensatory damages. Mertens*

EQUITABLE CLAIM

- Generally participant or beneficiary cannot use an **equitable claim** to obtain relief that should be obtained, if at all, through a **benefits claim**
 - “[W]here Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be ‘appropriate.’” *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996)
- Types of relief available can vary depending on whether defendant is a fiduciary

CIGNA CORP. V. AMARA, 563 U.S. 421 (2011)

- What the lawsuit was about:
 - Class action lawsuit by participants over the conversion of a traditional defined benefit pension plan to a cash-balance plan
 - The plan guaranteed participants the greater of their accrued benefit under the old DB plan OR the amounts in their individual accounts under the new CB plan
 - The SPD and other communications allegedly misled participants into believing they would receive their old benefit PLUS their account balances under the new plan, and were allegedly misleading in other ways
 - Participants sued under 29 U.S.C. § 1132(a)(1)(B) to enforce the terms of the SPD
 - But 1132(a)(1)(B) did not give the court the power to reform the plan

CIGNA CORP. V. AMARA

- What the Supreme Court held:
 - **First:** A participant who sues to recover benefits due under the terms of the plan must base the suit on the plan document, not the SPD, because information in an SPD about the plan is not itself part of the plan
 - **Upshot:** When there is a conflict between the plan and the SPD, participants no longer automatically are entitled to proceed under the most favorable document

CIGNA CORP. V. AMARA

- What the Supreme Court said:
 - **Second:** In strong *dicta*, the Court stated that participants who claim they were harmed by a misleading SPD or other fiduciary communication might be able to recover an award of monetary relief as “other appropriate equitable relief” for a claim brought under ERISA §1132(a)(3). Monetary relief can be obtained under theories of traditional “equitable relief” such as:

CIGNA CORP. V. AMARA

- “Reformation” — Revise the plan document so it matches the terms of the SPD. Requires a showing of fraud or mistake
- “Estoppel” — The plan administrator is legally precluded from denying that the benefits described in the SPD are owed. Requires a showing of detrimental reliance
- “Surcharge” — Order the fiduciary to pay money damages for the consequences of his breach of fiduciary duty or to prevent the fiduciary’s unjust enrichment. Surcharge recovery appears to be available only against the breaching fiduciary, not against the plan itself. Requires a showing of breach of fiduciary duty and actual harm to the participant caused by the breach

RESTITUTION / EQUITABLE LIENS & KEY DEFENSES TO EQUITABLE CLAIMS

EQUITABLE RESTITUTION/LIEN

- Arises when plan fiduciary seeks to recover benefits paid to a participant
- Common scenarios
 - Plan provides for repayment of benefits out of third-party tort recovery
 - Plan provides for reduction of benefits due to receipt of other benefits (such as SSDI benefits)
 - Plan overpays benefits due to error

SCOPE OF CLAIM

- 1132(a)(3) **does not** permit a claim to impose personal liability on a participant for a contractual obligation to pay money to the plan. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002)
- 1132(a)(3) **does** permit a claim to impose a constructive trust or equitable lien on particular funds in the participant's possession. *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006)
- Primary distinction is whether fiduciary can identify a specific fund (or proceeds) in participant's possession
 - *Knudson* – funds were paid to Special Needs Trust, and therefore were never in participant's possession
 - *Sereboff* – funds were set aside in participant's account

GENERAL RULE

Plan can only recover property that:

- (1) is specifically identifiable,
- (2) belongs in good conscience to the plan, and
- (3) is within the possession and control of the defendant.

“Strict tracing” not required

Not necessary to identify specific property or funds that went from the plan to the participant

DEFENSES FOR PARTICIPANTS (WHERE THE PLAN SUES FOR RECOUPMENT)

- State Common Law Defenses
 - Make Whole, Common Fund, Unjust Enrichment, Unclean Hands, Laches (see *US Airways v. McCutchen*, 133 S. Ct. 1537 (2013))
- Dissipation, funds no longer in defendant's possession
 - *Montanile v. Bd. Of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S.Ct. 651 (2016)

MONTANILE V. BD. OF TRUSTEES OF NAT. ELEVATOR INDUS. HEALTH BENEFIT PLAN

- Question presented: “Whether, under [ERISA], a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seeks ‘equitable relief’ within the meaning of ERISA § 1132(a)(3) [if the fiduciary has not identified a particular fund that is in the participant's possession and control at the time the fiduciary asserts its claim.]”

MONTANILE

- **Held:** When a participant receives a settlement from a third party for an injury and spends the settlement on non-traceable items such as food and services, an ERISA plan fiduciary **cannot** bring a § 1132(a)(3) claim for reimbursement from the participant's general assets
- SCT holds that a reimbursement action by a fiduciary must seek money held in a segregated fund
- If the segregated fund has been dissipated, then tracing is required for any relief to be available

US AIRWAYS, INC. v. MCCUTCHEN, 569 U.S. 88 (2013)

- Enforcing equitable lien by agreement “means holding the parties to their mutual promises.” If an equitable defense is “at odds with the parties’ expressed commitments[,]” then it is not available in an 1132(a)(3) claim
 - When plan is silent on an issue (like allocation of attorneys’ fees), equitable doctrine can supply

MCCUTCHEN

- Plan language: “[y]ou will be required to reimburse [US Airways] for amounts paid for claims **out of any monies recovered** from [a] third party[.]”
- Precludes “double recovery” rule
 - Rule would limit recovery to the amount paid by third party for specific damages/expenses paid by the plan
 - Plan gives US Airways first claim on “any monies recovered”
- Does not preclude “common fund” doctrine
 - Doctrine allows attorneys’ fees to a litigant who recovers a common fund for benefit of others
 - Plan is silent on attorneys’ fees; equitable doctrine fills in gap
 - “Any monies recovered” interpreted as net of attorneys’ fees

PARTICIPANT CLAIMS FOR RESTITUTION

- Accounting for profits and disgorgement of profits are forms of restitution
- In *Teets v. Great-West Life & Ann. Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019), the Tenth Circuit held that tracing requirement for equitable restitution applies to accounting and disgorgement of profits but the requirement could be modified
 - Where plaintiff is entitled to a constructive trust on particular property in defendant's possession, he can recover profits generated by the defendant's use of the property, even if the plaintiff cannot identify a particular res containing the profits
- Similar principles in *The Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643 (9th Cir. 2019), for (a)(3) claims by employers against insurers

DEFENSES FOR THE PLAN AND ITS FIDUCIARIES TO AN ACTION BY A PARTICIPANT

- Statute of limitations (ERISA § 413, 29 U.S.C. § 1113)
 - Actual knowledge limitations period – *Intel Corp. Investment Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020)
- Lack of fiduciary status therefore not liable for breach of fiduciary duty
- Standing – *Thole v. US Bank*, 140 S. Ct. 1615 (2020)
 - Application beyond defined benefit plans?

RECENT DEVELOPMENTS ON SCOPE OF EQUITABLE RELIEF

DOES A VIABLE 1132(A)(3) CLAIM EXIST WHERE THERE IS AN ACTIONABLE 1132(A)(1)(B) CLAIM?

- § 1132(a)(3) claim for “other appropriate equitable relief”
- Can such a claim proceed when the plaintiff seeks relief (or could have sought relief) under 1132(a)(1)(B) for relief under the terms of the plan?
- Courts have typically rejected 1132(a)(3) claims where they seek the same relief as a 1132(a)(1)(B) claim for the sole injury that the plaintiff’s benefit claim was denied

STRANG V. FORD MOTOR CO. GEN'L RETIREMENT PLAN, 693 FED. APPX. 400 (6TH CIR. 2017)

- Widow sued regarding a lump sum pension distribution that was not provided; her husband died before election window and before completing the necessary forms
- Ford argued that (a)(3) claim must be based on an injury that is separate and distinct from the denial of benefits
 - Surcharge claim based on Ford's withholding of election forms constituted the same injury as the denial of benefits because the remedy sought was the same – the \$463K difference between what Strang received and what she would have received had her husband obtained a lump sum distribution
- District court dismissed the 1132(a)(3) breach of fiduciary duty claim and later granted summary judgment on the 1132(a)(1)(B) claim
- Sixth Circuit affirmed - the injury from the alleged breach of fiduciary duty and the denial of benefits is one and the same
- Reinforced by *Davis v. Hartford Life & Accident Ins. Co.*, 980 F.3d 541 (6th Cir. 2020) (fiduciary breach and disgorgement (a)(3) claims did not arise from a distinct injury from termination of benefits)

JONES V. AETNA LIFE INS. CO., 856 F.3D 541 (8TH CIR. 2017)

- Claim challenged denial of LTD benefits and asserted benefits claim ((a)(1)(B))
- Plaintiff asserted equitable claim ((a)(3)) for breach of fiduciary duty for failing to obtain medical records, failing to tell her where to send evidence of disability, and using examiners with conflicts of interest
- District court dismissed equitable claim as not seeking appropriate equitable relief
 - Subsequently granted judgment for Aetna on benefits claim
- 8th Circuit upheld decision on benefits claim
- **But** held that equitable claim shouldn't have been dismissed
 - Plaintiff's equitable theory differed from her benefits theory
 - Even though seek to recover the same damages, equitable claim should not have been dismissed
- Case remanded for further proceedings on equitable claim, district court held on remand, no breach of fiduciary duty. Affirmed by 8th Circuit.

MANUEL V. TURNER INDUS. GROUP, 905 F.3D 859 (5TH CIR. 2018)

- Participant brought claims under (a)(3) for
 - Breach of fiduciary duty for failing to distribute the SPD within 90 days of his participation in the plan and maintaining a deficient SPD that was missing certain plan provisions
 - Violating claims administration requirements by asserting new grounds for denial on last level of appeal and failing to identify medical reviewer
- Under *Cigna*, an employee injured by a deficient SPD could seek equitable relief under (a)(3)
- District court prematurely concluded that SPD claims could not be maintained under (a)(3). Reversed the dismissal of the SPD claims and remanded those claim for further consideration of the parties' contentions
- However, affirmed district court's decision to dismiss the claims on claims administration because those could be raised under (a)(1)(B)

CLASS ACTIONS AND ARBITRATION

- Putative class action by 401(k) participant dismissed and individual arbitration was compelled. *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019) & unpublished opinion at 2019 WL 3926990
 - In 1984, 9th Circuit held that ERISA claims were not arbitrable. *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984)
 - *Dorman* held that *Amaro*'s reasoning "is clearly irreconcilable with the reasoning or theory of intervening higher authority[.]"
- Arbitration provisions can prohibit employee class actions. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018)
- Interestingly – see *Smith v. Bd. Of Dirs. Of Triad Mfg.*, 13 F.4th 613 (7th Cir. 2021) (plan arbitration provision not enforced because it prohibited plan-wide relief which is expressly permitted under ERISA)

COORDINATION OF BENEFITS

- Dispute between ERISA plan and non-ERISA insurer over who has primary responsibility for medical expenses
 - Non-ERISA procedure is to compare the coordination clauses in the different policies
 - If they are equivalent, they cancel each other out and the insurers share the cost pro rata
- ERISA rule
 - After payment made, there is no “appropriate equitable relief” that plan can seek from a non-ERISA insurer
 - *Central States, SE and SW Areas Health & Welfare Fund v. Health Special Risk, Inc.*, 756 F.3d 356 (5th Cir. 2014)
 - *v. First Agency, Inc.*, 756 F.3d 954 (6th Cir. 2014)
 - *v. Gerber Life Ins. Co.*, 771 F.3d 150 (2d Cir 2014)
 - *v. Bollinger, Inc.*, 573 F. App'x 197 (3d Cir. 2014)
 - *v. Student Assurance Servs.*, 797 F.3d 512 (8th Cir. 2015)
 - Rejected claims for declaratory judgment (for past or future benefits), equitable lien, restitution
- Possible equitable claim if ERISA governs competing plans

REFORMATION

- Reformation of plan to remedy fraud or mistake
- Remedies false and misleading information
- Often pled alongside equitable estoppel
- *Pearce v. Chrysler Grp. LLC Pension Plan*, 893 F.3d 339 (6th Cir. 2018) (remanded for determination of whether omission of early retirement exclusion from SPD meets reformation requirements of constructive fraud or inequitable conduct, unless defendant corrected plaintiff's misunderstanding)
 - But where P fails to allege any mistaken belief caused by fraud or inequitable conduct by the other party, no reformation. *Briggs v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 774 F. App'x 942 (6th Cir. 2019)
- *Osberg v. Footlocker*, 862 F.3d 198 (2d Cir. 2017) (affirmed remedy of reformation to conform plan to participants' reasonably mistaken expectations; no detrimental reliance required)

EQUITABLE ESTOPPEL

- Elements: misleading statement or failure to make statement, reasonable and detrimental reliance, fiduciary act, additional elements (ambiguous plan provision, extraordinary circumstances)
- Operates to place the person in the same position he would have been in had the representations been true
- *Spizman v. BCBSM, Inc.*, 855 F.3d 924 (8th Cir. 2017) (dismissed equitable estoppel claim because plaintiff could not use an estoppel theory to enlarge benefits under a written plan)

SURCHARGE

- Monetary “compensation” for a loss resulting from a trustee’s breach of duty, or to prevent the trustee’s unjust enrichment
- A fiduciary can be surcharged under 1132(a)(3) only upon a showing of actual harm
- Such harm may consist of detrimental reliance. It might also come from the loss of an ERISA-protected right
- *Retirement Comm. Of DAK Americas LLC v. Brewer*, 867 F.3d 471 (4th Cir. 2017) (purported harm occurring after plan sponsor corrected mistake and before alleged losses occurred was speculative and lacked causal nexus to fiduciary breach to warrant surcharge)

PLAN PROVISIONS FOR LIMITING EQUITABLE RELIEF

ANTI-ASSIGNMENT

- Anti-assignment language in plans has been upheld
 - *Am. Orthopedic & Sports Med. v. Indep. Blue Cross Blue Shield*, 890 F.3d 445 (3d Cir. 2018) (collecting appellate decisions)
 - Plan language - “The right of a Member to receive benefit payments under this Program is personal to the Member and is not assignable in whole or in part to any person, Hospital, or other entity nor may benefits of this Program be transferred, either before or after Covered Services are rendered.”

ANTI-ASSIGNMENT

- Anti-assignment not enforced where there is a perceived failure to enforce the anti-assignment provision
- *Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.*, 770 F.3d 1282, 1296-97 (9th Cir. 2014) implied that the right to assert an anti-assignment clause may be waived under certain circumstances
- *Beverly Oaks Physicians Surgical Ctr., LLC v. Blue Cross Blue Shield of Illinois*, 983 F.3d 435 (9th Cir. 2020) (adequate allegations supporting waiver where claim form indicated provider was acting as assignee and claims administrator did not raise the anti-assignment provision as a basis for denying benefits)

DISCLAIMER OF COMMON LAW DEFENSES

- Post-*McCutchen*, plans have been amended to disclaim applicability of common law equitable defenses in order to preserve right of recovery
- Language such as: The plan's right of recovery shall not be reduced by any fees or costs you may incur in connection with your pursuit of any of tort recoveries or by any state law doctrines that would reduce the amount the Plan may be entitled to recover

PRACTICE POINTERS

PROS AND CONS OF MTD (A)(3) CLAIM

- MTD on (a)(3) might be advantageous to streamline case and potentially limit discovery
- Courts, however, have allowed simultaneous claims at the pleading stage unless they seek the same relief or are brought under the same theory
- Even if successful in the district court, on appeal, the appellate court might choose to remand for consideration of the merits of an (a)(3) claim and whether equitable relief is appropriate

INJUNCTION IN SUBROGATION CASES

- *Montanile* provides that dissipation of the fund by participant destroys the equitable lien
 - RBG dissent: “*Montanile* received a \$500,000 settlement out of which he had pledged to reimburse his health benefit plan[.] ... He can escape that reimbursement obligation, the Court decides, by spending the settlement funds rapidly on nontraceable items. ... What brings the Court to that bizarre conclusion?”
- Once fund is identified, best practice is to take steps to prevent dissipation

INJUNCTION OR AGREEMENT

- *Temporary Restraining Order*
 - *Benefits Admin. v. Wenc1*, 2016 U.S. Dist. LEXIS 190735 (D. Minn. Aug. 22, 2016) (“providing prior notice could trigger efforts to dissipate the Overpaid Benefits, which might negate or eliminate Plaintiff’s ability to enforce the equitable lien-by-agreement. Although the Court presently has no basis to conclude that Wenc1 would intentionally engage in such conduct, the Court is persuaded that ... ex parte relief is warranted.”)
- *Preliminary Injunction*
 - *Ret. Comm. v. Brewer*, 867 F.3d 471 (4th Cir. 2017) (noting preliminary order “which enjoined the Defendants from spending, transferring, or otherwise diminishing the disputed funds.”)
 - *Diamond Crystal Brands, Inc. v. Wallace*, 563 F. Supp. 2d 1349 (N.D. Ga. 2008) (“If a preliminary injunction does not issue ... Plaintiff may not be able to obtain relief under Section 1132(a)(3) because the funds ... may no longer be traceable and under the control of Defendants.”)
 - *Brown v. Assocs. Health & Welfare Plan*, 2007 U.S. Dist. LEXIS 59062 (W.D. Ark. Aug. 13, 2007) (“Pursuant to *Great-West*, this Court finds Defendants will suffer irreparable harm if the disputed funds are dissipated.”)
- *Agreement*
 - *Sereboff* (noting that parties stipulated to freeze funds to resolve motion for preliminary injunction)

SOCIAL SECURITY ANTI-ALIENATION

- Most disability plans provide that LTD benefits are reduced by SSDI benefits
 - SSDI benefits often awarded retroactively, leading to overpayment that fiduciary seeks to recover
- Cannot seek equitable lien against SSDI benefits
 - 42 U.S.C. § 407(a): “The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process[.]”

ANTI-ALIENATION (CONT'D)

- Fiduciary can enforce lien against the overpaid LTD benefits
 - *Cusson v. Liberty Life Assur. Co.*, 592 F.3d 215 (1st Cir. 2010)
 - *Dillard's Inc. v. Liberty Life Assur. Co.*, 456 F.3d 894 (8th Cir. 2006)
- Contrary view
 - *Bilyeu v. Morgan Stanley LTD Plan*, 683 F.3d 1083 (9th Cir. 2012)
- What happens when participant has dissipated previously received LTD benefits?
 - *Montanile*