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Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

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ERISA REMEDIES POST AMARA BY: ERIC L. BUCHANAN

The Supreme Court has weighed back in on the question of what remedies are available to plan participants to recover from plan fiduciaries under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) in Cigna Corporation v. Amara, 131 S.Ct. 186 (2011). The Court has clarified that the remedies available to plan participants are much broader than some had thought. The Court effectively held that plan participants may seek remedies under ERISA § 502(a)(3) from among the "host" of equitable remedies available to chancellors in equity courts from the days of the divided bench. This understanding of ERISA's remedies opens many doors for plan participants that many had thought were closed.

As part of its holding, the Supreme Court also held that summary plan descriptions ("SPD's") "provide communication with beneficiaries about the plan, but that their statements do not themselves constitute the terms of the plan for purposes of [ERISA] § 502(a)(1)(B)." Id., 131 S.Ct. at 1878.

ERISA is a federal law that regulates most claims for employee benefits or other claims that affect employee benefits plans, and preempts most state laws regarding claims under those plans. ERISA § 514(a), 29 U.S.C. § 1144 (a). The Supreme Court has previously explained that any state law that would allow a remedy beyond that provided in ERISA is preempted. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 107 S.Ct. 1549 (1987) (Congress, in passing ERISA, "set forth a comprehensive civil enforcement scheme" that included Congress's choice to allow certain remedies related to employee benefits plans and to prohibit others.)

So what does the ERISA statute allow for causes of actions and remedies? ERISA § 502, 29 U.S.C. § 1132 states who may bring a cause of action under ERISA and what causes of action may be brought:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought--
>
> **(1)** by a participant or beneficiary--
>
> **(A)** for the relief provided for in subsection (c) of this section, or
>
> **(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;
>
> . . .
>
> **(3)** by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter 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 subchapter or the terms of the plan;
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> [Subsections 4-9 all give a cause of action only to the Secretary of Labor, not individuals]

Thus, under the language of the enforcement provisions of ERISA, under ERISA § 502(a)(1) a plan participant or beneficiary (but not an ERISA fiduciary) has two causes of action.

First, under ERISA § 502(a)(1)(A), a plan participant may sue to enforce the provisions of ERISA § 502(c) (which allow for penalties of up to $110 per day if certain documents are not provided within 30 days on written request). Second, under ERISA § 502(a)(1)(B) a plan participant or beneficiary (but, again, not a fiduciary) may sue to recover the benefits due under a plan, enforce rights under the terms of a plan, or to clarify the rights to future benefits under a plan.

Under the next relevant part[1] of the enforcement statute, ERISA § 502(a)(3) appears to provide broad remedies for plan participants and beneficiaries, as well as fiduciaries, to enjoin acts which violate ERISA or the plan and to obtain appropriate equitable relief to redress such violations and to enforce the terms of ERISA or of the plan.

However, the Supreme Court has issued several decisions over the years that interpret these provisions of ERISA, making it clear that ERISA does not allow for causes of action or remedies beyond those listed. See, e.g. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985). (The Supreme Court noted that it has been "reluctant to tamper with [the] enforcement scheme" embodied in the statute by extending remedies not specifically authorized by its text.); Pilot Life, supra, and Mertens v. Hewitt Associates, 508 U.S. 248, 254 (1993)) (In which the Supreme Court noted that ERISA's "carefully crafted and detailed enforcement scheme provides `strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'")

The Supreme Court has also addressed the question of who can bring a claim under ERISA § 502(a)(3) and against whom such claims can be brought. In Mertens v. Hewitt Associates, 508 U.S. 248, 113 S.Ct. 2063, (1993) the Supreme Court held that ERISA § 502(a)(3) did not allow a plan participant to recover money damages from a non-fiduciary defendant. In Mertens, the plan participants sought to recover from a private firm that only provided actuarial services to a fiduciary. The Court found that the plaintiff sought "nothing other than compensatory damages" against a nonfiduciary. Id., at 253, 255 (emphasis deleted). And we held that such a claim, traditionally speaking, was legal, not equitable, in nature, and was not available. Id., at 255.

On the other hand, it was also argued in the past that a plan participant or beneficiary did not have an individual claim under ERISA § 502(a)(3), but could only bring a claim on behalf of a plan. This argument was rejected in Varity Corp. v. Howe, 516 U.S. 489, 515, 116 S.Ct. 1065, (1996) (allowing a plan participant or beneficiary to bring an individual claim against a plan fiduciary).

Additionally, the Supreme Court has further limited those remedies available under the language of the statute. In Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708, 151 L Ed 2d 635 (2002), the Court held that a claim by an ERISA plan (ERISA fiduciary) under ERISA § 502(a)(3) to recover a subrogation claim from a plan participant was not one for which a remedy was provided under ERISA because the Court interpreted the word "equitable" before the word "relief" to be a limit on the types of relief available. Specifically, the Court held that "equitable relief" was limited to those types of relief available for causes of action that could only be heard in equity courts during the days of the divided bench. The Court held that a cause of action simply to enforce the terms of the plan, and to recovery money based on that type of claim would not be available, because such a claim was not "equitable", but, rather, was a cause of action "at law" to enforce the terms of a contract. *Knudson*, 534 U.S. at 220-221. Further, the Court provided only a few specific examples of the types of relief or remedies available in equity, and effectively held that relief under ERISA § 502(a)(3) was not available to recover "money damages" out of the general assets of the defendant because that relief was not available from the short list of equitable remedies the Court listed as available. The Court explained that perhaps an equitable or constructive trust could provide a mechanism to obtain an equitable remedy over specifically identifiable funds if such could be identified, but that was not the case.

Later, the Supreme Court broadened the reading of what remedies were available under ERISA § 502(a)(3) in another case where an ERISA fiduciary sought to recover from a plan participant. In *Sereboff v. Mid Atlantic Medical Services, Inc.*, __ U.S. __, 126 S.Ct. 1869, (2006). The Court relied on a 90 year old case, *Barnes v. Alexander,* 232 U.S. 117, 34 S.Ct. 276, 58 L.Ed. 530 (1914), for the proposition that equity provides for a rule "that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." *Id.,* at 121, 34 S.Ct. 276. The Court then explained that, the Court's previous analysis in *Knudson* that equity only provided for certain remedies where the specific assets could be traced to specific funds did not provide a complete list of all available equitable remedies. The Court explained that:

> *Knudson* simply described in general terms the conditions under which a fiduciary might recover when it was seeking equitable restitution under a provision like that at issue in this case. There was no need in *Knudson* to catalog all the circumstances in which equitable liens were available in equity; Great-West claimed a right to recover in restitution, and the Court concluded only that equitable restitution was unavailable because the funds sought were not in Knudson's possession.

Sereboff at 1876. Thus, while the Court did not explicitly overrule *Knudson*, *Sereboff* effectively overruled most of *Knudson*, in that a Plan administrator or ERISA fiduciary can recover money from a beneficiary to enforce the terms of the plan even without specifically being able to trace identifiable funds into the beneficiaries' possession, so long as the ERISA fiduciary can make a claim that it is recovering specific funds to which an equitable lien immediately attached upon receipt by the participant due to an earlier promise to pay over, not from the general assets of the plan participant. In other words, so long as the ERISA fiduciary could point to a specific equitable remedy that it could obtain, the Court allowed the recovery.

This line of cases left courts, attorneys, and parties wondering just what causes of actions and remedies remain for plan participants and beneficiaries when they are harmed by

ERISA administrators/fiduciaries who breach their fiduciary duties to the plan participants and beneficiaries. Does ERISA § 502(a)(3) provide only those remedies mentioned by the Supreme Court in Knudson or Sereboff, as some have thought, or are the remedies broader? The picture has become much more clear following the Supreme Court's recent ruling in Cigna Corporation v. Amara, supra, which says that the remedies available under ERISA § 502(a)(3) are much broader, and include the "host" of equitable remedies available to chancellors in equity courts.

In the Amara case, the Cigna Corporation decided to change its retirement plan from a defined benefit plan (a plan in which retired employees are paid a benefit based on years of service and rate of pay) to a defined contribution plan (a plan in which no retirement benefit is guaranteed, but is based on the investment growth of contributions to the plan over time, similar to the concept of a typical 401(k) plan). The lower courts and the Supreme Court found a problem, not because CIGNA changed the plan, but because CIGNA did not fully inform its employees about the effects of the change in the plan, and, in some ways, misled the employees about how credit under the old plan would be converted to a contribution under the new plan.

Specifically, the district court found that CIGNA's summary plan documents and other documents explaining the change in plans did not fully explain how CIGNA would give credit to employees with vested defined benefits pensions. For example, CIGNA stated that it would assign a present value to the amount of a person's benefits accrued under the old plan, and would deposit that as a contribution to the new plan, but CIGNA did not fully explain some of the actuarial assumptions it assigned to those contributions. Arguably, this made the contributions worth much less than the guaranteed defined benefits that were promised under the old plan, even though CIGNA promised there would be no loss in benefits.

The district court agreed with the Plaintiffs in Amara that CIGNA has misled its employees about how the transition from the old plan was being done, and ordered a remedy that included changing the benefits under the plan to match what the district court believed would be more in line with what CIGNA promised in documents describing the new plan.

The problem with the district court's remedy, according to the Supreme Court, is that the district court relied on ERISA § 502(a)(1)(B) to reform the plan to provide the benefits that CIGNA's documents seemed to promise, but the actual plan did not. The district court thought that it had to rely on ERISA § 502(a)(1)(B) to provide a remedy, because the District Court reviewed the Supreme Court's prior cases of Sereboff, Knudson, and Mertens and determined that those opinions "have severely curtailed the kinds of relief that are available under § 502(a)(3)." Amara v. CIGNA Corp., 559 F.Supp.2d 192, 205 (D.Conn.,2008).

The Supreme Court found that the district court could not rely on ERISA § 502(a)(1)(B) to reform the plan, because that section of ERISA only allows for a court to order a remedy "enforce[ing]. . .the terms of the plan." Amara, supra, at 1878.

The Solicitor General, as amicus curiae, argued that the district court's remedy under ERISA § 502(a)(1)(B) was appropriate, because the district court was enforcing the terms of the plan as found in summary plan descriptions issued by CIGNA. The Supreme Court rejected this argument on the grounds that "while . . . the summary documents, important as they are, provide communication with beneficiaries about the plan," the text of the SPD's do not themselves constitute the terms of the plan for purposes of § 502(a)(1)(B). Id.

The Supreme Court then addressed the question, that if § 502(a)(1)(B) did not provide a remedy, "what about . . . § 503(a)?" Id, at 1878. The Supreme Court found that the district court's concerns that the remedies under ERISA § 502(a)(3) were too limited to provide relief in this case were "misplaced." Id.

The Court explained that its prior cases should not be read as limiting the remedy available in this case. For example, in Mertens, the Plaintiff beneficiary brought a claim against a non-fiduciary, which is a case that would have been brought at law, not in equity. Id. Similarly, Knudson should not be read as limiting remedies for a case like this, because Knudson concerned a claim by a fiduciary seeking a lien over the recovery by a beneficiary from a third-party tort-feasor for medical expenses previously paid by the fiduciary. Because the fiduciary sought a lien or constructive trust, the fiduciary's remedy in Knudson was not available because the money the fiduciary had paid and wanted to recover was not the "particular" money the tort-feasor had paid, and, therefore, the recovery was not an available equitable remedy on those facts. Id, 1878-1879.

Contrary to those cases, the Supreme Court explained, "[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). Id, at 1879. Therefore, the Supreme Court explained, the district court's concerns over the limitations of remedies was misplaced, "because equity chancellors developed a host of other 'distinctively equitable' remedies—remedies that were 'fitted to the nature of the primary right' they were intended to protect. . . . Indeed, a maxim of equity states that '[e]quity suffers not a right to be without a remedy.' Id., at 1879.

The Court then went on to offer several examples of equitable causes of actions and remedies that would allow the district court to do what it wanted to do, namely to provide the CIGNA employees the pension benefits they were promised in CIGNA's documents explaining the plan.

The Supreme Court suggested that reformation of the plan might fall within an equity court's power to reform contracts to remedy false or misleading information. Id, at 1879. The Court explained that, "[t]he power to reform contracts (as contrasted with the power to enforce contracts as written) is a traditional power of an equity court, not a court of law, and was used to prevent fraud." Id, internal citation omitted.

The Court suggested that holding CIGNA to its promises to its employees (namely that the new plan would not take away any benefits already accrued) could also fall under the tradi-

tional equitable remedy of estopple. *Id.* The Court explained that "[e]quitable estoppel 'operates to place the person entitled to its benefit in the same position he would have been in had the representations been true.'" Equitable estoppel was not only a remedy available to equity courts, but "as Justice Story long ago pointed out, 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.'"

Also, the Supreme Court addressed the question of whether the district court's order that CIGNA pay retired beneficiaries the money owed under CIGNA's promises was an impermissible award of money damages. Previously, some courts had understood a payment of money damages to be beyond the remedies allowed in equity, but the Supreme Court made it clear that such an award had long been available in equity, especially for a breach of trust by a fiduciary:

> the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief. Equity 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. Restatement (Third) of Trusts § 95 . . . Indeed, prior to the merger of law and equity this kind of monetary remedy against a trustee, sometimes called a "surcharge," was "exclusively equitable." . . .
>
> The surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary. See Second Restatement § 201;. . .. Thus, insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in *Mertens,* is analogous to a trustee makes a critical difference. See 508 U.S., at 262–263, 113 S.Ct. 2063. In sum, contrary to the District Court's fears, the types of remedies the court entered here fall within the scope of the term "appropriate equitable relief" in § 502(a)(3).

Id, at 1880 (internal citations omitted).

The Supreme Court ultimately concluded that it was up to the lower court, not the Supreme Court, to determine which of the "host" of equitable cause of actions and remedies available should be applied under ERISA § 502(a)(3), and remanded the case for the court to determine which equitable remedy would apply.

The lessons learned from this case are that in order to recovery an "equitable" remedy under ERISA § 502(a)(3) a Plaintiff must plead a cause of action that would have been available in equity and to seek the "equitable" remedy for that cause of action. Causes of action that lay at law would only be available under ERISA § 502(a)(1)(B). However, even though the causes of action and remedies available under ERISA § 502(a)(3) are still limited to those remedies available to chancellors in equity courts from the days of the divided bench, the good news is that those remedies are not further limited to some short list offered as examples. Rather, the causes of action and remedies are all of those available to equity courts. When a fiduciary misleads plan participants and beneficiaries of ERISA plans, the courts will hold such fiduciaries to the same standards, and under the same rules, that an equity court would hold a trustee who violated his fiduciary duties to the beneficiaries of a trust.

However, the Court seems to apply the rules of equity strictly (which had strict and cantankerous pleadings requirements), so that it will be important for practitioners to carefully plead any cause of action in terms one that was actually allowed by an equity court, and plead in such a way to survive equity's strict rules.

This case also strongly implies that, in hearing a claim under ERISA § 502(a)(3), because a court must determine if a cause of action in equity exited that would provide a remedy in equity that is sought, and the Supreme Court is applying those rules strictly, then a court should also consider those defenses in equity that were part and parcel to those causes of action. But, because that was not squarely addressed in this case, whether equitable defenses can be ignored in equitable causes of action will likely be litigated in the future.

Another important lesson learned from this case is that summary plan descriptions, or "SPD's," are not ERISA documents that contain the terms of an ERISA plan. Rather, they are documents created by the Plan Administrator to explain the plan, but cannot change the plan, nor can they be relied upon to be a basis to "enforce . . . the terms of a plan" under ERISA § 502(a)(1)(B). Thus, for example, if a plan document does not grant discretion to a plan administrator, this case seems to hold that a grant of discretion found only in an SPD is not a plan term, and would not be a valid grant of discretion.

[1] ERISA § 502(a)(2) provides for the Secretary, participants, beneficiaries, and fiduciaries to obtain relief under § 409 to recover on behalf of a plan for breaches of fiduciary duty, but does not allow an individual cause of action on behalf of a participant or beneficiary.

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