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ERISA & DISABILITY BENEFITS NEWSLETTER

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VOLUME 14, ISSUE 1, JANUARY 2022

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AMARA AFTER TEN YEARS: EXPLORING THE "HOST" OF EQUITABLE REMEDIES AVAILABLE UNDER ERISA FOR PLAN PARTICIPANTS AND BENEFICIARIES IN THE SIXTH CIRCUIT—PART 1 BY ERIC L. BUCHANAN[i]

Last year marked the tenth anniversary of *CIGNA Corp. v. Amara,* 563 U.S. 421, 440–41 (2011) the case clarifying that a wide variety of causes of action and remedies are available to plan participants when fiduciaries breach their duties under ERISA.[ii] This is the first in a series of articles updating the law addressing plan participants' rights against breaching fiduciaries.

ERISA protects employees' pension and other employee benefits, like disability or health insurance offered through work. ERISA provides two causes of action frequently used to obtain promised plan benefits. If an ERISA fiduciary, like an employer or insurance company, denies benefits under the terms of a plan, the participants and beneficiaries can sue to get the benefits due under the terms of a plan under ERISA § 502(a)(1)(B). When benefits that are not due under the terms of the plan, but the fiduciary provides misleading or false information that certain benefits are due, or otherwise misleads a participant or beneficiary in a way that prevents obtaining benefits due under plan terms, the participants and beneficiaries can sue employers and insurance companies for a breach of their duties as fiduciaries under ERISA § 502(a)(3).

This article addresses the second action, explaining how ERISA law provides many ways for an employee, as an ERISA plan participant or beneficiary, to recover when an employer or insurance company breaches their fiduciary duties under ERISA.[iii] This article covers the history of this cause of action in the Supreme Court. Follow-on articles will cover more detail about various rules of equity that apply in these claims as well as how these claims have been addressed in the Sixth Circuit.

As ERISA law evolved, the Supreme Court explained that individual plan participants have the right to enforce a wide range of "appropriate equitable remedies" against employers and insurance companies acting as fiduciaries.

ERISA is based on trust law.

ERISA adopts much of its structure from trust law, with employers and insurance companies acting as fiduciaries and employees filling the role of trust beneficiaries. When an employer offers pension benefits or other benefits such as life, health, and disability benefits ("ERISA welfare benefits"), the employer offering those benefits becomes a "plan sponsor," and in most cases is also the "plan administrator" of those plans. ERISA treats a benefit plan essentially as a trust, and the "plan administrator" is basically a trustee of the benefit plan, with fiduciary duties toward the employees who are beneficiaries under the plan. When an employer offers a benefit, like group insurance, an insurance company has similar fiduciary duties as an ERISA administrator; likewise, when an employer uses a third party to oversee the benefits offered, that third-party administrator is also a fiduciary.

Plan participants and beneficiaries can sue for a breach of fiduciary duties under ERISA.

Just as in traditional trust law, in which beneficiaries have claims when trustees and other fiduciaries breach their fiduciary duties, under ERISA employees and their dependents, who are plan participants and beneficiaries, can sue when an ERISA fiduciary breaches its duties. As set out in n. 2, *supra*, ERISA § 502(a)(3) allows a participant or beneficiary to seek "appropriate equitable relief" for violations of ERISA, including violations of ERISA § 409 for fiduciaries violations of "responsibilities, obligations, or duties imposed upon fiduciaries" under ERISA.

The remedy for a breach of fiduciary duties under ERISA is limited to a remedy that would have been "typically available" in equity.

The Supreme Court first significantly addressed claims for breaches of fiduciary duties by holding that the term "equitable" limited the relief available to those remedies "typically" available in a court of equity at the time of the divided bench *Mertens v. Hewett Associates*, 508 U.S. 248, 257-61 (1993). The Federal Rules of Civil Procedure gave courts jurisdiction over claims both in law and in equity starting in 1938. Prior to "combining the benches" of law and equity, claims could only be brought in one court or the other, but not both. Claims under law, such as breach of contract and enforcing legal title were brought in law courts. Claims dealing with issues such as interpreting trusts and enforcing fiduciary duties, in which trust beneficiaries had equitable rights but not legal rights, were brought in chancery court.

The Court in *Mertens* revived the distinction between these two types of courts and the cases they could hear, finding the word "equitable" in the ERISA statute was a limitation on the word relief so that a claim under ERISA § 502(a)(3) could only result in relief similar to that an equity court could have provided back in the days when equity and law courts were separated. *Id.*, 508 U.S. at 257-61.

In *Mertens*, the plan participants sued the company that gave their plan fiduciaries bad investment advice, but the company giving advice was not itself a fiduciary. The Court ruled that "equitable relief" excluded compensatory and punitive damages against a non-fiduciary as relief that was not typically available in equity courts. *Id,* 508 U.S. at 257-61.

Plan participants and beneficiaries can sue for a breach of fiduciary duties under ERISA as individuals to recover for their own benefit.

Mertens left open the question of whether a beneficiary could sue for his or her own individual relief, rather than sue on behalf of the plan as a trust. In *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996), the Supreme Court confirmed that an individual could bring a § 502(a)(3) to seek equitable relief for him or herself, rather than for the plan. *Id.* (holding that claimants could seek individual relief to remedy fiduciary's misrepresentation of benefits). But the Court did not deeply examine what remedy an individual participant or beneficiary could seek.

The remedies for fiduciaries suing beneficiaries are limited under equity and ERISA.

The Supreme Court next examined the limits on remedies under ERISA § 502(a)(3) in a couple of leading cases that involved claims by fiduciaries *against* plan participants or beneficiaries when sued by an ERISA fiduciary.

In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Court held that a claim by an ERISA plan or plan fiduciary under ERISA § 502 (a)(3) to recover a reimbursement claim from a plan participant was not one for which a remedy was provided under ERISA. After settling an automobile injury, Knudson had the money placed into a special needs trust. Later her health insurance company claimed they were entitled to a large portion of her recovery under the terms of her ERISA plan.

Because this was a plan fiduciary suing a plan participant, the fiduciary could only sue under ERISA § 502(a)(3); following *Mertens*, *supra*, the Court found the word "equitable" before the word "relief" to be a limit on the types of relief available to those types of relief available 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 recover money based on enforcing the plan terms was not available under § 502(a)(3), 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 220-21.

The Court then further explained that, even if a cause of action were available to enforce the terms of the plan, the fiduciary could not recover from Knudson's special needs trust under the choices of remedies typically available in equity. The Court analyzed a few 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 defendant's general assets because that relief was not available from the shortlist of equitable remedies the Court listed as available for this type of claim. 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 available here where the funds were in a separate trust.

Later, the Supreme Court clarified the understanding of what remedies were available under ERISA § 502(a)(3) for an ERISA fiduciary seeking to recover from a plan participant. In *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), the Court first clarified that it was not crucial that a claim brought had to be an equitable "claim" but could be one for breach of contract because ERISA itself created the claim to obtain an equitable remedy *to enforce plan terms*." *Id*. at 363. Otherwise, ERISA § 502(a)(3)(B)(ii) would be meaningless. *Id*. Even though framed as enforcing plan terms, which is similar to breach of contract, the Court also stated that the fiduciary seeking to recover "must still establish the basis for the claim is equitable," and whether it is legal or equitable depends on the basis of the claim and the underlying remedy sought. *Id*.

The Court relied on a 90-year-old case, *Barnes v. Alexander,* 232 U.S. 117 (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." *Barnes,* 232 U.S. at 121. The Court then explained, 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:

> *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, 547 U.S. at 365. 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, so long as the ERISA fiduciary can 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. 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?

ERISA case law provides for more complete equitable remedies when a beneficiary or participant has a claim against a fiduciary.

The Supreme Court returned to the question of remedies available to plan participants or beneficiaries to recover from plan fiduciaries under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) in *Cigna Corporation v. Amara*, 563 U.S. 421, (2011). The Court has clarified that the remedies available to plan participants are much broader than those available to fiduciaries suing plan participants. *Id.*, 563 U.S. at 439.

Cigna changed its company pension plan from one that guaranteed certain defined benefits to one that would be based on individual accounts for each employee. *Id.,* 563 U.S. at 426. This change required Cigna to place an equivalent cash value on older employees' accumulated defined benefits that would be the measure of the amount of money to be placed in the new plan accounts. It turned out that Cigna misled its employees about the calculation, including not telling the employees that the initial deposit was not enough to provide the same benefit an employee would have received under the old plan, failed to tell the employees the initial deposit was reduced due to an actuarial calculation that not all employees would live to retirement which reduced their contribution by 10% and failed to disclose other ways the new plan did not provide the same value. *Id.*, 563 U.S. at 429-430. The district court found Cigna's descriptions were "incomplete and inaccurate" and that Cigna "intentionally misled its employees." *Id.*, 563 U.S. at 431. Cigna employees sued for an ERISA breach of fiduciary duties after these misrepresentations were discovered.

The Supreme Court clarified that unlike *Mertens*, [*supra*] which was a case against a non-fiduciary, or *Great-West*, [*supra*], which was a case "brought by a fiduciary against a … beneficiary," Amara concerned "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,* 563 U.S. at 439.

The *Amara* Court explained that "chancellors [judges in equity courts] 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*., 563 U.S. at 440 (citing various sources on the law of equity: 1 S. Symons, Pomeroy's Equity Jurisprudence § 108, pp. 139–140 (5th ed.1941), 1 J. Story, Commentaries on Equity Jurisprudence § 692 (12th ed. 1877), and R. Francis, Maxims of Equity 29 (1st Am. ed. 1823).)

Equity provides various causes of action and remedies for beneficiaries suing trustees and those same remedies are available to ERISA participants suing ERISA fiduciaries.

The *Amara* Court examined the remedy provided by the district court below, which was to reform the terms of the plan to ensure Cigna employees were provided the benefits they were promised.[iv] The Court held that plan participants could rely on any of several equitable causes of action to achieve the equitable remedy of reformation.

Conclusion:

In follow-on newsletters, we will explore further the various causes of action and remedies available in equity that can provide a cause of action under ERISA for plan participants and beneficiaries who are harmed by ERISA fiduciaries breaching their duties.

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Eric Buchanan regularly chairs conferences and speaks to both national and local audiences on disability insurance, ERISA, insurance law, and social security disability. Eric has represented hundreds of people in social security and ERISA disputes in federal court. Eric is the past-chair (2007-2008) of the AAJ Social Security Disability Section, past chair (2006-2007) of the AAJ ERISA Health Care Finance and Disability Litigation Group, past President of the Chattanooga Trial Lawyers, and past-chair (2005-2006) of the Tennessee Bar Association Disability Law Section.

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[ii]ERISA is the "Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et.seq.

[iii] ERISA describes what actions may be brought by whom in § 502 (29 U.S.C. § 1132):
(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;
(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
(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; …
(4)
ERISA § 409 (29 U.S.C. § 1109) also provides for liability for a breach of fiduciary duty:

> **(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 subchapter 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. . .

[iv] The district court originally granted the remedy of reforming the plan to provide the promised benefits under ERISA § 502(a)(1)(B), the cause of action for enforcing the terms of the plan. The Supreme Court found that section of ERISA could not provide authority to reform the terms of the plan as written. *Amara*, 563 U.S. at 438. As explained in the rest of the paper, the Supreme Court went on to find authority for that remedy under ERISA § 502(a)(3).

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