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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. Eric Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization. For more information, visit our website at www.buchanandisability.com.

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ERISA § 502(a)(1)(B) AND § 502(a)(3) IN THE SAME CASE - BY JEREMY L. BORDELON

ERISA Section 502 is the "civil enforcement" section of the ERISA law. It is the section which describes all of the causes of action which may be brought by plans or participants to enforce any part of the ERISA law.

ERISA § 502. CIVIL ENFORCEMENT
(a) Persons Empowered to Bring Civil Action – A civil action may be brought –

(1) by a participant or beneficiary –
A) for the relief provided for in subsec tion (c)[1] of this section, or
(B) to recover benefits due to him un der the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits un der the terms of the plan;
(2) …
(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 equita ble relief
(i) to redress such violations or
(ii) to enforce any provisions of this title or the terms of the plan.

ERISA § 502, 29 U.S.C. § 1132. That section, of course, contains several sub-sections which describe the different actions which may be taken in response to different harms. Because the most common harm is a wrongful denial of benefits, the most common action is one to recover those benefits, under Section 502(a)(1)(B).

Many courts, including the Sixth Circuit, originally held that if a specific claim could be brought under § 502(a)(1)(B), a claimant was not allowed to also bring a claim under the "catchall" provisions of § 502(a)(3).[2] Later cases allowed that it was possible to bring the two claims simultaneously in the same case, under the right circumstances.[3] Nevertheless, ERISA defendants routinely argue that when the relief sought is the same (i.e., benefits paid), the plaintiff may only proceed under § 502(a)(1)(B).

However, looking only at the relief sought is misleading. It is often difficult to distinguish between claims under § 502(a)(1)(B) and § 502(a)(3) on the basis of the relief sought. While the legal basis for granting the relief is different, in the end, the relief sought is often

the same. The important distinction between the two types of claims, as recognized by the Supreme Court, is not the relief sought, but the violation alleged.[4] *Varity* stands for the proposition that "while the remedy for a breach of fiduciary duty related to the interpretation of plan documents and the payment of claims is encompassed in a § 1132(a)(1)(B) claim for benefits, the remedy for 'other breaches of other sorts of fiduciary obligation' may be sought under § 1132(a)(3)." [5]

So we must look to the violation alleged, not the relief sought, to determine the proper cause of action. As in any other field of law, if there are multiple violations alleged, there may be multiple causes of action under different statutes or subsections thereof. What violations, then, are remediable under the various sections?

Clearly, when the only violation alleged is an improper denial of benefits under the terms of the plan, the cause of action and remedy are found in § 502(a)(1)(B). For example, for a disability claimant, if benefits are denied because the administrator determines that the person is not disabled as defined in the policy – e.g., the administrator says the claimant is not as disabled as he and his doctors claim he is, and that he really could work – then that's properly a § 502(a)(1)(B) case, and only a § 502(a)(1)(B) case. Although such a claim could be contemplated under § 502(a)(3) "to enjoin any act…which violates…the terms of the plan," such a claim would be duplicative of the § 502(a)(1)(B) action, and therefore not allowed.

However, consider the example of *Gore v. El Paso Energy Corporation Long Term Disability Plan*.[6] Mr. Gore was originally told that his LTD benefit plan provided two years of benefits if he became unable to perform his own occupation, but before he became disabled the plan was amended to provide only one year of benefits for the same disability. Mr. Gore claimed he was never informed of that change. When he became disabled, he was paid one year of benefits, because the administrator found he was unable to perform his own occupation, but denied at the end of that year, because the administrator found he was able to perform other jobs.

After exhausting the necessary appeals, Mr. Gore sued under both § 502(a)(1)(B) and under § 502(a)(3). For the former, he claimed that he was indeed unable to perform not just his own job, but any job, and should continue receiving benefits under the terms of the plan. For his § 502(a)(3) claim, Mr. Gore simultaneously claimed that the administrator breached its fiduciary duties by misleading him about the terms of the plan – he was originally told he would get two years if disabled from his own occupation, and in fact he only got one. So, under § 502(a)(3), for that fiduciary breach Mr. Gore sought, at a minimum, one extra year of benefits to conform to what he was promised.

Initially, the District Court dismissed Mr. Gore's § 502 (a)(3) claim, holding that because the alleged breach of fiduciary duties could be adequately remedied under § 502(a)(1)(B), the § 502(a)(3) claim could not co-exist with it.[7] The Sixth Circuit reversed, however, because the *harms* alleged under the two causes of action were distinct:

> Had Gore alleged that Liberty breached its fiduciary duty, pursuant to [§ 502(a)(3)] for wrongful denial of benefits…the claim would be duplicative of his [§ 502(a)(1)(B)] claim.…**The injury of which Gore complains is different**.… Instead, Gore complains that El Paso breached its fiduciary duty by leading Gore to believe that he had two years of "own occupation" benefits. …Gore's only remedy against El Paso would be under § [502(a)(3).] The two claims are distinct and unrelated to each other.…
>
> If Gore received LTD benefits under the "any occupation" coverage, Gore would no longer suffer any injury from El Paso's misrepresentation of the "own occupation" benefit. Gore would receive payment for the second year regardless of whether El Paso should have told him that the "own occupation" benefits only lasted a year. However, the opposite result is not true. When Gore did not receive the "any occupation" wages, his misrepresentation claim was not moot because his injury from the misrepresentation was not eliminated.
>
> That Gore's "own occupation" injury would be rendered moot if remedied by the "any occupation" determination does not mean that the Plaintiff's alleged injury is "a repackaged denial of benefits claim." The fact that Plaintiff's claim for an equitable remedy "could have been"

> resolved if his § [502(a)(1)(B)] claim was resolved in his favor, does not mean that his claim is the same as the one barred in *Wilkins*.
>
> As in *Varity*, an award of benefits to Gore under the "any occupation" examination would not have changed the alleged fact that El Paso misrepresented the policy's coverage to Gore. The award of benefits would have merely made the need for relief in the form of injunction or damages moot, but it would not have addressed the question of whether Gore was entitled to another year of "own occupation" benefits.

Gore, 477 F.3d at 841. By this logic, as long as the harms or violations alleged are distinct, one can maintain separate causes of action under both § 502(a)(1)(B) and § 502(a)(3) in the same case. Of course, if the potential remedies overlap, as they could have in *Gore*, then the plaintiff may not have a "double recovery." In other words, if Mr. Gore had succeeded on his § 502(a)(1)(B) claim, it would have rendered his § 502(a)(3) claim moot. Unless and until that occurred, though, his two claims could co-exist.

One other reason that ERISA § 502(a)(3) claims have been difficult to pursue in the past has been the general thought in the courts that such claims may not yield money damages, only "appropriate equitable relief." Therefore, a claim brought under § 502(a)(3) for anything that looked like money damages was wont to be dismissed for failure to state a claim on which relief could be granted. Indeed, the statute does use the phrase "appropriate equitable relief," and until recently that was quite narrowly construed, the door has opened a crack in recent years with *CIGNA Corporation v. Amara*, 131 S. Ct. 1866 (2011), and its progeny. Those remedies will be discussed in a future article, but it will suffice for now to say that it seems more worthwhile than before to seek out and pursue claims under ERISA § 502(a)(3).

Endnotes

[1] A cause of action under this section, 502(a)(1)(A), is appropriate when seeking remedies for failure to provide plan documents upon request, as described in the referenced section 502(c).

[2] *Wilkins v. Baptist Healthcare Sys.*, 150 F.3d 609 (6th Cir. 1998) (distinguishing *Varity Corp. v. Howe*, 516 U.S. 489 (1996)).

[3] *Hill v. Blue Cross and Blue Shield of Michigan*, 409 F.3d 710 (6th Cir. 2005); *Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833 (6th Cir. 2007).

[4] *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996) (ERISA's "structure suggests that these 'catchall' provisions [such as § 502(a)(3)] act as a safety net, offering **appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy**.") (emphasis added).

[5] *Gore v. El Paso Energy Corp. Long Term Disability Plan*, 2005 U.S. Dist. LEXIS 26591, 12-13 (M.D. Tenn. 2005), *rev'd on other grounds*, 477 F.3d 833 (6th Cir. 2007).

[6] 477 F.3d 833 (6th Cir. 2007).

[7] *Id.* at 840.