No. 03-4097

UNITED COURT OF APPEALS
FOR THE TENTH CIRCUIT

SANDY CALLERY,
Plaintiff-Appellant
v.
THE UNITED STATES LIFE INSURANCE COMPANY
IN THE CITY OF NEW YORK, J.B'S RESTAURANTS, INC.,
J.B.'S FAMILY RESTAURANTS, INC., and STAR BUFFET, INC.,
Defendants-Appellees

Appeal from the United States District Court
for the District of Utah, Central Division
The Honorable Judge Tena Campbell

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT AND REVERSAL OF THE DISTRICT COURT

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STATEMENT OF INTEREST

The Secretary of Labor is charged with interpreting and enforcing the provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001, et seq. As the Federal officer with primary enforcement authority for numerous provisions of ERISA, the Secretary has a significant interest in the proper application of ERISA's remedial provisions. This case presents an important and recurring remedial issue: whether Section 502(a)(3) of ERISA, 29 U.S.C.§ 1132(a)(3), authorizes actions to recover monetary losses from fiduciaries who have breached their obligations and harmed individual beneficiaries. Under the district court's interpretation of Section 502(a)(3), fiduciaries could violate ERISA's stringent obligations, injure beneficiaries, and evade liability for the losses they caused. The Secretary disagrees with the district court's interpretation and, therefore, pursuant to Federal Rule of Appellate Procedure 29, respectfully submits this brief as amicus curiae.

STATEMENT OF THE CASE[1]

Sandy Callery was employed by J.B.'s Restaurants, Inc., J.B's Family Restaurants, Inc. and Star Buffet, Inc. ("Star Buffet"). Complaint ¶ 1. Star Buffet offered life insurance coverage to its employees through a policy issued by United States Life Insurance Company ("U. S. Life"). Complaint ¶ 8. In 1994, Sandy Callery elected to obtain life insurance coverage worth $100,000 on her husband, John Callery, through the U.S. Life policy. Id. Although she and her husband divorced in 1997, she continued to pay life insurance premiums for Mr. Callery's life insurance until the date of his death on February 28, 2000. Complaint ¶ 10.

Callery applied for the life insurance benefits from U.S. Life upon Mr. Callery's death. Complaint ¶ 11. On May 19, 2000, U.S. Life denied the claim, stating that the policy had terminated on August 29, 1997, the date of the Callery's divorce. Complaint ¶ 12. According to U.S. Life, termination of a spouse's eligibility for life insurance upon divorce was outlined in an exclusion in the insurance policy. Id. Callery was never provided with a summary plan description that outlined the life insurance policy's scope of coverage and exclusions, nor had

[1] The Secretary takes no position on the factual matters presented by this case. The Statement of the Case is taken from the plaintiff's complaint and affidavit and is not intended to express the Secretary's opinion about how the Court should rule on any particular fact.

the insurance policy itself been distributed to Callery or other Star Buffet employees. Complaint ¶¶ 14-15. Accordingly, Callery was unaware of the exclusion until U.S. Life denied her claim. Complaint ¶15.

Callery brought an action against Star Buffet under Section 502(a)(3) of ERISA for allegedly breaching its fiduciary obligations by failing to inform her of the insurance policy's exclusion. She contends that if she had been informed of the exclusion, she would have made other arrangements to obtain coverage to protect her ability to provide financially for the Callery's children. Affidavit of Sandy Callery ¶¶ 3-5. Callery seeks equitable relief in the form of $100,000, the face amount of the policy, prejudgment interest, and attorney fees and costs. Complaint ¶ 24.

Star Buffet moved for judgment on the pleadings, arguing that Callery was seeking money damages, not equitable relief, and that, because money damages are not available under ERISA Section 502(a)(3), her complaint should be dismissed. At a January 7, 2003 hearing, the district court held in favor of Star Buffet. Callery timely appealed.

ARGUMENT

"Equitable Relief" Within the Meaning of Section 502(a)(3) of ERISA Includes the Recovery from a Fiduciary of Any Direct Monetary Losses Caused by the Fiduciary's Breach of its Duties

ERISA was designed to protect the interests of participants and beneficiaries of employee benefit plans by establishing standards of conduct, responsibility, and obligations for fiduciaries. ERISA § 2(b), 29 U.S.C. § 1001(b). "Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA. Central States, Southeast & Southwest Areas Pension Fund v. Central Transp. Inc., 472 U.S. 559, 570 (1985), citing S. Rep. No. 93-127, p. 29 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4865 ("'The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts.'"); H.R. Rep. No. 93-533, p. 11 (1973), reprinted in 1974 U.S.C.C.A.N. 4649 (identical language). At the core of ERISA's fiduciary obligations are the duties of loyalty and prudence, which are based on trust law principles and are among the "highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir.), cert. denied, 459 U.S. 1069 (1982).

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), allows participants and beneficiaries to sue for "equitable relief" for breaches of fiduciary duty that cause

them individual harm. Varity v. Howe, 516 U.S. 489 (1996). Although "equitable relief" is not defined in ERISA, the Supreme Court has held that, to determine whether relief is equitable, courts should look to standard texts on remedies and trusts in order to determine how the relief was characterized when the bench was divided between equity courts and law courts. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U. S. 204, 212 (2002). To qualify as equitable under Section 502(a)(3), the relief must have been "typically" available in equity and not simply "occasionally" available in equity. Id. at 214. Thus, Section 502(a)(3) does not authorize damages against non-fiduciaries, which were "occasionally awarded in equity cases," but were classically legal in nature and typically awarded in a court of law. Id. at 215. However, as discussed below, because the relief that Sandy Callery seeks is against a fiduciary, it was exclusively available in equity and treated as equitable by standard texts on remedies and trusts. Accordingly, the relief she seeks is "equitable relief" within the meaning of ERISA Section 502(a)(3).

A. A monetary award against a fiduciary to redress a fiduciary breach is an equitable remedy because it was typically available in equity

Trust relationships "are, and have been since they were first enforced, within the peculiar province of courts of equity." III. A. Scott, The Law of Trusts, § 197,

at 188 (4th ed. 1988). See G. Bogert, The Law of Trusts and Trustees, § 870, at 123 (rev. 2d ed. 1995) ("The court of equity first recognized the trust as a legal institution and has fostered and developed it"). "In a trust there is a separation of interests in the subject matter of the trust, the beneficiary having an equitable interest and the trustee having an interest which is normally a legal interest." Restatement (Second) of Trusts, § 2, at 9 (1959); id. § 74, at 192 (beneficiary has equitable interest in the trust). "The duties of the trustee with respect to trust property are equitable duties. By this [it] is meant that they are enforceable in a court of chancery or a court having and exercising the powers of a court of chancery." I. A. Scott, The Law of Trusts, § 2.7, at 48-49.

As the Restatement of Trusts emphasizes, "the remedies of the beneficiary against the trustee are exclusively equitable." Restatement (Second) of Trusts, § 197, at 433 (emphasis added). During the days of the divided bench, beneficiaries could not obtain relief in a court of law because they did not hold legal title to the property of the trust. I. A. Scott, The Law of Trusts, § 1, at 4; III. Scott, The Law of Trusts, § 197, at 188. They could only seek relief in a court of equity to enforce their equitable interests. I. A. Scott, supra, § 1; III. A. Scott, supra, § 197. The equity court, unlike the law court, could compel the trustee to act in accordance with its fiduciary duties and compensate the beneficiary for losses when the

trustee's action caused the beneficiary to suffer harm. III. A. Scott, The Law of Trusts, §§ 197; 199.

As the Supreme Court has explained, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). As Professor George Gleason Bogert explains in his leading treatise:

> Equity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with whatever remedy is necessary to protect him and recompense him for loss, in so far as this can be done without injustice to the trustee or third parties.

G. Bogert, The Law of Trusts and Trustees, § 861, at 3-4 (emphasis added). This is in contrast to the legal courts where plaintiffs were entitled to relief as a matter of right, see Curtis v. Loether, 415 U.S. 189, 196-97 (1974), and where "[t]he distinguishing characteristic of legal remedies [was] their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern[ed] their use." 1 Pomeroy, A Treatise on Equity Jurisprudence, § 109, at 140 (5th ed. 1941).

The trust relationship, therefore, arises in equity and creates equitable rights and duties, which, when breached, are redressed exclusively through equitable

remedies. Whether or not such a remedy against a fiduciary consists of a money award does not change its character as an equitable remedy. In actions such as this where a beneficiary sues a fiduciary for its breach of duty, the fiduciary could be required to restore the beneficiary to the "position in which he would have been if the trustee had not committed the breach of trust." Restatement (Second) of Trusts, § 205, at 458, cmt. *a;* see also id. § 205, at 458. See also III. A. Scott, The Law of Trusts, § 199.3, at 206-07 ("If the trustee has committed a breach of trust the beneficiaries can maintain a suit in equity to compel him to redress the breach of trust, either by making specific reparation or by the payment of money or otherwise."). See III. A. Scott, The Law of Trusts, §199, at 203-04 & 206 (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary).[2]

[2] The Restatement of Trusts gives several examples of the types of monetary awards fiduciaries must pay to redress their breaches. For instance, Illustration 1 § 205, at 459, cmt. c of the Restatement explains: "A is [the] trustee of $10,000 in cash. As a result of his negligence, the money is stolen. A is liable for $10,000." Illustration 3 notes: "A is [the] trustee of a claim against B for $1,000. B is solvent and A can collect the claim in full. A negligently fails to take steps to collect the claim until B becomes insolvent with the result that he is able to collect only $400 of the money owed by B. A is liable for $600." The Restatement makes it plain that all of these remedies are equitable. See Restatement (Second) of Trusts, § 197, at 433-34. The Restatement goes on to explain that, if a fiduciary wrongly holds trust property, a beneficiary can additionally recover unjust enrichment as a separate category of relief. See id. § 205(b).

At least two circuit courts have held that monetary relief is equitable relief within the meaning of ERISA Section 502(a)(3) when the relief is sought against a fiduciary. In Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (7th Cir. 2000), the employer's fiduciary breach caused Ms. Bowerman to lose health insurance coverage for her pregnancy. Bowerman sued under Section 502(a)(3) seeking the amount of the pregnancy-related expenses that would have been covered but for the breach. The Seventh Circuit upheld Ms. Bowerman's claim for monetary relief under Section 502(a)(3) because it was based on a violation of fiduciary duty. The court recognized that Section 502(a)(3) excludes legal relief such as damages (citing Mertens v. Hewitt Assoc., 508 U.S. 248, 255 (1993), but explained that "when sought as a remedy for breach of fiduciary duty [, this kind of relief, which the Court viewed as restitution] is properly regarded as an equitable remedy because the fiduciary concept is equitable." Bowerman, 226 F.3d at 592 (quoting Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703, 710 (7th Cir. 1999), cert. denied, 528 U.S. 1136 (2000)) (emphasis added). In support for its ruling, the court cited Strom v. Goldman, Sachs & Co., 202 F.3d 138, 144 (2d Cir. 1999), which awarded monetary relief under Section 502(a)(3) for a fiduciary's negligent handling of life insurance application which resulted in the participant's loss of coverage. The court in Strom explained that beneficiary claims against breaching

fiduciaries to redress their breaches "have lain at the heart of equitable jurisdiction from time immemorial." See also Ream v. Frey, 107 F.3d 147 (3d Cir. 1997).[3]

Star Buffet argued below that this Court has already held in Moffett v. Haliburton Energy Servs., Inc., 291 F.3d 1227, 1234 (10th Cir. 2002), that monetary relief against a fiduciary is not equitable. In Moffett, a participant in a disability plan sued under state law and ERISA after he was redetermined eligible for benefits. Although the plaintiff sought statutory penalties and attorney fees, as well as any other "remedial or equitable remedies available under ERISA," id. at 1230, the court noted that "he did not identify in his complaint the specific equitable relief that he desires." Id. at 1234. Relying on Mertens and Great-West, this Court stated that "to the extent [that] we read his complaint as seeking non-statutory remedies and/or damages, in the form of monetary compensation for economic [and] other harm suffered because of the delay in [the] receipt of his benefits," that relief was not available under ERISA. Id. This Court had already concluded, however, that Moffett's "conclusory allegations fail to establish the basis for an alleged breach of fiduciary duties." Id. at 1233. Moreover, the court was speaking

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[3] In Ream, the trustee conveyed pension plan assets to the plan administrator who then absconded with the assets. The court ordered the trustee to pay the beneficiary the amount of his vested interest in the plan, characterizing its order as equitable restitution under Section 502(a)(3). 107 F.3d at 153.

generally about the availability of damages under the plaintiff's numerous theories and was not specifically addressing remedies in terms of fiduciary breach. Id. at 1234 ("Moffett seeks a variety of remedies for all of the alleged ERISA violations"). Thus, fairly read, Moffett says nothing about whether monetary relief is available to remedy a fiduciary breach, and given that the court found no fiduciary breach, the court certainly did not hold such relief to be unavailable if there is a breach of fiduciary duty.

B. Mertens and Great-West support the conclusion that a monetary award to remedy a fiduciary's breach is equitable under Section 502(a)(3)

The Supreme Court addressed requests for monetary relief under Section 502(a)(3) in Mertens, 508 U.S. 248 and Great-West, 534 U.S. 204. Both of these cases involved suits against non-fiduciaries and, consequently, do not answer the precise question presented here. While some courts have read Mertens and Great-West as barring a monetary recovery against fiduciaries as well as non-fiduciaries, see, e.g., Rego v. Westvaco Corp., 319 F.3d 140 (4th Cir. 2003), the rationale of the Mertens and Great-West decisions do not support that conclusion.[4]

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[4] In Rego, the Fourth Circuit erroneously reasoned that the Supreme Court in Mertens had rejected the availability of monetary relief against a breaching fiduciary, absent the ability to trace particular funds to the fiduciary. 319 F.3d at 145. As we discuss, this decision and the others like it that either reject monetary awards outright against plan fiduciaries or require equitable tracing, see, infra, note 9 and cases cited therein, misapprehend both Mertens and Great-West and the

In Mertens, an employer allegedly underfunded its retirement plan and drove it out of existence. The plan participants sued under Section 502(a)(3) for the monetary losses to the plan resulting from their employer's alleged fiduciary breach. They did not seek the losses from the employer-fiduciary but, instead, sought to recover from a non-fiduciary actuary whom they claimed had knowingly participated in the fiduciary's breach. The Supreme Court refused to classify the money sought against a non-fiduciary as equitable relief under Section 502(a)(3). The Court explained that the participants did not "seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution . . . [but] what petitioners in fact seek is nothing other than compensatory damages -- monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief." 508 U.S. at 255.

In Great-West, a health plan sued a plan beneficiary under Section 502(a)(3) seeking a monetary award for breach of a provision in the health insurance contract that required the beneficiary to pay to the plan the proceeds from a personal injury

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common law of trust to which these cases refer. Moreover, the Rego decision is in conflict with the well-reasoned decisions of the Seventh and Second Circuits in Bowerman and Strom which recognize that monetary relief against a breaching fiduciary is inherently equitable. See, supra, pp. 6-7.

settlement.[5] The Court held that Great-West had asserted nothing more than an ordinary contract claim for damages. As in Mertens, the monetary relief it sought for breach of contract was not "typically available in equity" and therefore was not recoverable under Section 502(a)(3). 534 U.S. at 210.

Mertens and Great-West thus both involved Section 502(a)(3) suits against non-fiduciaries, and in each case, the plaintiffs contended that the monetary relief they sought from non-fiduciary defendants was "equitable" because courts of equity could have granted such relief under the common law of trusts. Great-West, 534 U.S. at 219; Mertens, 508 U.S. at 255-56. Together these decisions stand for the proposition that monetary relief in such suits cannot be considered "equitable" just because courts of equity had the power to grant such relief under the common law of trusts. As the Supreme Court explained in Mertens, courts of equity sometimes granted purely legal remedies, and the money damages sought from the non-fiduciary defendant in Mertens was just that -- legal relief that would have been available in a court of equity under the common law of trusts. Id. at 256.[6]

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[5] Although the plan sued the beneficiary, the disputed funds had actually been paid to an attorney and a trust; neither the trust nor the attorney had been named as defendants. Great West, 534 U.S. at 208.

[6] See also Great-West, 534 U.S. at 219 (the "special equity-court powers applicable to trusts" do not define the reach of Section 502(a)(3)).

Courts of equity often granted legal relief against non-fiduciaries under the common law of trusts. For example, when both a trustee/fiduciary and a non-fiduciary harmed the trust in the same transaction, the beneficiary could bring an equity action to enforce equitable rights against the fiduciary and a law action to enforce legal rights against the non-fiduciary. See IV. A. Scott, The Law of Trusts, § 282.1, at 30. However, the common law did not force the beneficiary to bring two separate suits -- one in equity and one at law. Instead, the beneficiary could sue both parties in the equity court in order to avoid multiple suits. Id.; see also Restatement of Trusts § 282, at 45, cmt. e.

Accordingly, the Court reasoned in Mertens that it would effectively read the "equitable" limitation out of Section 502(a)(3) if it expanded the scope of available relief to include these legal remedies that were sometimes awarded by courts of equity. 508 U.S. at 256. The present case, by contrast, involves relief that was typically available in equity (and only in equity): monetary relief against a fiduciary to restore to a beneficiary losses resulting directly from a fiduciary breach. Such relief is equitable not simply because a common law court of equity would have granted it, but because any relief, monetary or otherwise, in favor of a beneficiary against a fiduciary to remedy that fiduciary's own breach is and always

has been equitable relief. See Restatement of Trusts, § 197; supra, Section A. (pp. 5-7).[7]

Nevertheless, Star Buffet argued below that relief is "equitable" under Great-West and Mertens only if the particular category of relief sought was available in equity without regard to the law of trusts or the existence of a fiduciary relationship. Under this reading of the Supreme Court's decisions, "equitable relief" refers to such remedies as injunctions, equitable liens and constructive trusts, but not the recovery of direct economic losses, irrespective of whether the defendant is a fiduciary or the claim arises from a breach of trust. In support of this view, Star Buffet pointed to the Supreme Court's rejection of the idea that "equitable relief" encompasses every kind of relief that a court of equity could grant under the special powers applicable to trusts. Great-West, 534 U.S. at 219-20. The courts of equity had power to award legal as well as equitable remedies against non-fiduciaries.

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[7] Justice Scalia's dissenting opinion in Bowen v. Massachusetts, 487 U.S. 879 (1988), on which the Court relies in Great-West, bolsters the Secretary's view. There, Justice Scalia pointed out that "the term 'damages' refers to money awarded as reparation for injury resulting from breach of legal duty." Id. at 913 (emphasis added). A fiduciary's duty to the beneficiary is clearly equitable and therefore remedies for its breach fall outside of this definition of "damages." The Restatement of Trusts is replete with references to the "equitable duties" of the trustee and the "equitable interests" of the beneficiaries. See, e.g., § 2, at 9-10; § 74, at 192.

As discussed above, however, the recovery of losses from breaching fiduciaries is a separate category of relief that was typically (indeed exclusively) available in equity, and is therefore available under Section 502(a)(3) of ERISA. Under the common law, Great-West's claim against a non-fiduciary defendant was purely a claim for liability for breach of contract -- a legal claim normally remedied by legal relief, irrespective of the special powers of trust-law courts. 534 U.S. at 209-11 & 219-20. By way of contrast, the common law claim most closely paralleling Callery's is that of a beneficiary against a trustee for breach of trust -- an equitable claim typically, historically and exclusively remedied in the courts of equity. Neither Mertens nor Great-West support the proposition that Congress intended that the courts should ignore settled trust-law understandings dating from the days of the divided bench in fashioning remedies against fiduciaries who breach their trust-law obligations. Indeed, "ERISA abounds with the language and terminology of trust law." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989). See also Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion) (when historical practice determines content of current legal rule, pertinent historical practice is to be identified with specificity, not generality). Here, the "most specific tradition available," id., is the unbroken

historical tradition of permitting precisely the recovery from fiduciaries sought here, at equity and only at equity.

The Secretary's interpretation of Section 502(a)(3) draws additional support from ERISA's sensible allocation of responsibility between fiduciaries and non-fiduciaries as described by the Supreme Court in Mertens. As the Supreme Court explained, ERISA "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." 508 U.S. at 262; see also Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 251 (2000) (emphasizing that "the common law of trusts sets limits on restitution actions against defendants other than the principal 'wrongdoer,'" which the Court referred to as the fiduciary).

Accordingly, the Court explained that the Act provides only limited relief against non-fiduciaries ("persons who had no real power to control what the plan did," Mertens, 508 U.S. at 262), as opposed to the fiduciaries who have primary responsibility for the administration and control of benefit plans:

> All that ERISA has eliminated . . . is the common law's joint and several liability for all direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did. Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves.

Id. (emphasis in original). Since the primary responsibility for control of the plan rests with the fiduciary, so too does the attendant liability.

Contrary to the statutory scheme, therefore, the more restricted reading of "equitable relief" adopted by the district court would leave beneficiaries without any remedy for serious violations of ERISA's fiduciary provisions. A fiduciary, for example, could deliberately mislead a participant (e.g., by misrepresenting the terms or existence of health coverage), cause the participant to incur substantial medical bills in reliance on the misrepresentation, and evade responsibility for the loss. The participant would have no remedy under ERISA if the recovery for the loss were not "equitable" relief.[8] Moreover, any state-law claims based on the fiduciary's misconduct would be preempted. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-57 (1987) (ERISA's civil enforcement scheme is exclusive and preempts alternative state remedial schemes). Such a result is neither consistent with ERISA's remedial purposes, nor compelled by Mertens or Great-West. To the contrary, as the Supreme Court stated in its post-Mertens opinion in Varity, "it is

[8] Although Sections 409, 29 U.S.C. § 1109, and 502(a)(2), 29 U.S.C. § 1132(a)(2), of ERISA expressly permit the recovery of losses sustained by the plan as a whole, these provisions do not apply to losses sustained by individual participants. Fiduciary misconduct resulting in individual injuries can only be redressed by the recovery of equitable relief under Section 502(a)(3), 29 U.S.C. § 1132(a)(3), of ERISA. Varity, 516 U.S. at 510-15.

hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." 516 U.S. at 513.

C. A beneficiary may recover the direct monetary losses resulting from a fiduciary breach regardless of whether or not the fiduciary was unjustly enriched by its misconduct

A fiduciary has an equitable duty to pay monetary losses caused by a fiduciary breach, regardless of whether it was unjustly enriched. As explained above, a fiduciary must remedy all harm a beneficiary suffers from its breach. Whether that remedy comes in the form of a money payment, injunction or both, the common law of trusts considers it "equitable." See Restatement of Trusts, § 197. A fiduciary's equitable obligation to redress losses caused by a breach derives directly from the fiduciary duty itself, not from unjust enrichment. See, supra, Section A. (pp. 5-7).

The Restatement of Trusts confirms that a money award redressing a fiduciary breach maintains its status as equitable relief even absent unjust enrichment. The Restatement enumerates several categories of equitable remedies beneficiaries may obtain from a trustee-fiduciary for breach of duty. One category rests on unjust enrichment. Restatement (Second) of Trusts § 205(b). As an entirely separate category, the Restatement sets forth relief based on harm to the

trust caused by the fiduciary breach. Id. § 205(a). The Restatement gives several examples of this latter category, all of which involve monetary awards fiduciaries must pay to remedy losses caused by their breaches, and none of which involves an unjustly enriched fiduciary. See id. § 205, cmt. *c.* and illustrations at 459. The Restatement makes plain that these remedies are equitable. See id. § 197

Several federal appellate decisions illustrate the application of the Restatement's rule in ERISA cases. In Bowerman, 226 F.3d at 592, the Seventh Circuit required an employer to pay as equitable relief within the meaning of Section 502(a)(3) health expenses that were not covered by insurance because of its fiduciary breach. However, the Court did not require that the plaintiff first show that the employer's breach resulted in unjust enrichment. Similarly, the Second Circuit in Strom, 202 F.3d at 144-45, awarded a beneficiary monetary relief under Section 502(a)(3) against a breaching fiduciary who had not been unjustly enriched. The Court explained that such a claim against a fiduciary has always stood within the exclusive province of equity and "never has required a showing of unjust enrichment." See also Ream, 107 F.3d 147; McFadden v. R & R Engine & Mach. Co., 102 F. Supp. 2d 458 (N.D. Ohio 2000). None of these courts required plaintiffs to show unjust enrichment.

These judicial decisions, along with the Restatement, confirm that the fiduciary must do whatever is necessary to redress its breach, including paying losses to the beneficiary. Supra, Section A. (pp. 5-7); III. Scott The Law of Trusts, § 199.3, at 206. Regardless of how the courts label such a money payment -- "monetary relief," "restitution" or even "damages" -- the duty to make the payment arises in equity, not from unjust enrichment, but from the fiduciary relationship itself.[9]

By contrast, claims for monetary awards against non-fiduciaries demand a showing of unjust enrichment in order to be considered equitable under Section 502(a)(3). Great-West, 534 U.S. at 213-14; Harris Trust, 530 U.S. at 251; McDannold v. Star Bank, N.A., 261 F.3d 478, 486 (6th Cir. 2001). Unjust enrichment is necessary to recover money from non-fiduciaries because the relief qualifies as "equitable" only if it constitutes "equitable restitution" (i.e., if the circumstances warrant imposition of a constructive trust or equitable lien). Unjust enrichment must lay the foundation for ordering non-fiduciaries to pay monetary

[9] Courts that have required unjust enrichment in Section 502(a)(3) actions for money losses against breaching fiduciaries misinterpret background trust law as well as the import of the Mertens and Great-West decisions for all the reasons set forth in the text above. See, e.g., Kerr v. Charles F. Vatterott & Co., 184 F.3d 938 (8th Cir. 1999); Bast v. Prudential Ins. Co. of America, 150 F.3d 1003 (9th Cir. 1998), cert. denied, 528 U.S. 870 (1999). In addition, none of these courts had before it the argument made by the Secretary here.

relief as restitution, because unlike fiduciaries, they have no independent duty in equity to redress a breach. Indeed the constructive trust remedy (recognized as equitable by the Supreme Court in Great-West), rests on the fiction that the person who possesses the property holds it in trust for the beneficiary. Strom, 202 F.3d at 144. There is no need for such a fiction to support equitable relief against an actual fiduciary.

CONCLUSION

Under the district court's interpretation of Section 502(a)(3), beneficiaries could be left without a remedy against fiduciaries who have committed serious violations of ERISA's provisions and directly injured the people they were charged to protect. Even a cursory review of the cases suggests the range of injuries that could go unredressed if the district court's view became law. See, e.g., McFadden, 102 F. Supp. 2d 458 (permitting cancer patient to recover his health expenses after he lost his health coverage because fiduciary-employer failed to submit premiums to the insurance company); Strom, 202 F.3d at 144 (authorizing recovery of life insurance proceeds which were lost because of fiduciary's negligent handling of life insurance application); Griggs v. E.I. DuPont De Nemours & Co., 237 F.3d 371, 385 (4th Cir. 2001) (remanding for determination of appropriate equitable relief where employer had informed participant that his lump sum early retirement payout

would be tax deferred when it knew that it was not); Shade v. Panhandle Motor Serv. Corp., 91 F.3d 133, Unpublished Disposition, No. 95-1129, 1996 WL 386611, at *4 (4th Cir. July 11, 1996) (ordering employer whose misconduct excluded plaintiff from its health plan to pay for his $161,000 liver transplant). This Court should not interpret ERISA's remedial provisions to permit fiduciaries to ignore their statutory obligations, injure beneficiaries, and evade liability. The award of make-whole monetary relief to beneficiaries who have been injured by fiduciary breaches is typically, historically, and exclusively equitable. This Court should therefore reverse and remand to the district court for further proceedings.

Respectfully submitted,

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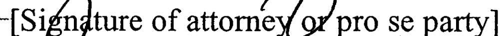

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I hereby certify that a true and correct copy of the foregoing Brief of the Secretary of Labor as Amicus Curiae in Support of the Appellant and Reversal of the District Court has been mailed, via federal express courier service, this 20th day of August 2003, to the following:

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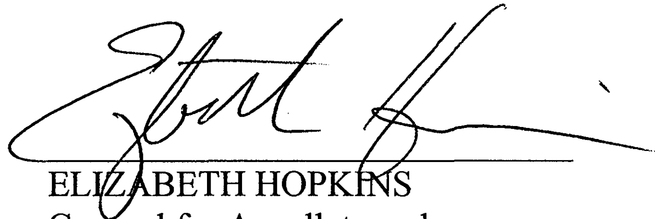

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