

No. 05-13344-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BLUECROSS BLUESHIELD OF SOUTH CAROLINA,

Plaintiff-Appellant,

v.

VINCENTE CARILLO and JOSUE CARILLO,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF AMICUS CURIAE ELAINE L. CHAO,
SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR
IN SUPPORT OF APPELLANT REQUESTING REVERSAL

For the Secretary of Labor:

HOWARD M. RADZELY
Solicitor of Labor

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

TIMOTHY D. HAUSER
Associate Solicitor

WAYNE R. BERRY
Senior Trial Attorney

United States Department of Labor
Office of the Solicitor
Plan Benefits Security Division, P.O. Box 1914
Washington, D.C. 20013
(202) 693-5600

APPEAL NO. 05-13344-JJ

BlueCross BlueShield of South Carolina v. Vincente Carillo, et al.

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 11th Cir. R. 26.1, the Secretary of the United States Department of Labor (the "Secretary"), through her undersigned counsel, certifies that the Secretary is aware of the following persons who have an interest in the outcome of this appeal.

Ansel Franklin Beacham, III

Blue Cross Blue Shield of South Carolina

Josue Carillo

Vincente Carillo

Charles Madden Cork, III

Polly M. Haley

Thomas H. Lawrence

The Secretary of the United States Department of Labor

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**INTEREST OF THE SECRETARY OF LABOR
AND AUTHORITY TO FILE AMICUS CURIAE BRIEF**

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA. See Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). The Secretary's interests further include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). The ability of plans to seek reimbursement of benefits from plan participants who have recovered funds from third parties is important to the continued financial stability of plans, and so long as it is accomplished through the imposition of constructive trusts over specifically identifiable funds it constitutes "appropriate equitable relief" under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). If allowed to stand, the district court's holding that a plan fiduciary's action to enforce a plan reimbursement provision is a legal action, regardless of whether the plan participant or beneficiary recovered from another entity and possesses that recovery in an identifiable fund, will undermine the Secretary's interest in ensuring the financial stability of plan assets.

Rule 29(a) of the Federal Rules of Appellate Procedure authorizes the filing of the Secretary's amicus curiae brief. Pursuant to the Court's August 30, 2005 Order, the Secretary's brief is to be filed on September 14, 2005.

SECRETARY'S STATEMENT OF THE ISSUE

Whether the imposition of a constructive trust or equitable lien over specifically identifiable funds in plan participants' bank accounts constitutes appropriate equitable relief under section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA").

STATEMENT OF THE CASE

Appellees Vincente and Josue Carillo (the "Carillos") sustained injuries in an automobile accident on June 17, 2002. As a result of their injuries, the Mohawk Carpet Corporation Health and Welfare Benefits Plan (the "Plan") paid medical benefits totaling \$126,364.73 on behalf of the Carillos; \$122,393.64 on behalf of Josue Carillo and \$3,971.09 on behalf of Vincente Carillo. Blue Cross Blue Shield v. Carillo, 372 F. Supp. 2d 628, 631-32 (N.D. Ga. 2005). The Carillos subsequently settled their tort claim against the third party responsible for the accident for \$200,000. Id. at 632. Appellant Blue Cross Blue Shield of South Carolina ("BCBS") requested that the Carillos reimburse the Plan for the \$126,364.73 in medical benefits it had advanced, but the Carillos refused. Id.

On February 23, 2005, BCBS brought suit in the Northern District of

Georgia, claiming a right to be reimbursed from the settlement proceeds for the cost of the medical benefits paid to the Carillos under the Plan.¹ Pursuant to section 502(a)(3) of ERISA, BCBS sought the imposition of a constructive trust over the settlement funds held in the Carillos' bank accounts. BCBS requested a temporary restraining order and preliminary injunction. Following a hearing on February 25, 2005, the district court approved an ex parte temporary restraining

¹ The Plan's subrogation/right-of-reimbursement clause provides, in relevant part:

In the event benefits are provided to or on behalf of a Covered Person under the terms of this Plan, the Covered Person agrees, as a condition of receiving benefits under the Plan, to transfer to the Plan all rights to recover damages in full for such benefits when the injury or illness occurs through the act or omission of another person, firm, corporation, or organization.

If, however, the Covered Person receives a settlement, judgment, or other payment relating to the accidental injury or illness from another person, firm, corporation, organization, or business entity paid by, or on behalf of, the person or entity who allegedly caused the injury or illness, the Covered Person agrees to reimburse the Plan in full, and in first priority, for any medical expenses paid by the Plan relating to the injury or illness. The Plan's right of recovery applies regardless of whether such payments are designated as payment for, but not limited to, pain and suffering, medical benefits, lost wages, other specified damages, or whether the Covered Person has been made whole or fully compensated for his/her injuries.

. . . .

. . . Failure to cooperate with the Plan will entitle the Plan to withhold benefits due the Covered Person under the Plan Document. Failure to reimburse the Plan as required will entitle the Plan to deny future benefit payments for all Covered Persons under this policy until the subrogation/reimbursement amount has been paid in full.

372 F. Supp. 2d at 632.

order. On March 14, 2005, the district court held a hearing on BCBS's motion for preliminary injunction. On that same day, the district court deferred ruling on the motion for preliminary injunction and "extended the Temporary Restraining Order as to the following: (1) \$61,120.17 of settlement proceeds deposited in [] Josue Carillo's [bank] account . . . (2) \$32,000 of settlement proceeds remaining in [] Vincente Carillo's [bank] account . . . and (3) a 2000 F-150 Ford truck purchased by [] Vincente Carillo with a portion of the settlement proceeds." 372 F. Supp. 2d at 631. On March 21, 2005, the Carillos filed a motion to dismiss and on April 4, 2005, BCBS filed a motion for summary judgment. On May 25, 2005, the district court granted the Carillos' motion to dismiss, finding that BCBS failed "to state a claim for relief under § 1132(a)(3)." Id. at 638. The district court also denied BCBS's motions for preliminary injunction and summary judgment. This appeal followed.

SUMMARY OF ARGUMENT

Building on its prior decision in Mertens v. Hewitt Assocs., 508 U.S. 248, 256, 113 S. Ct. 2063, 2068-69 (1993), the Supreme Court held in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214, 122 S. Ct. 708, 714-15 (2002), that for an action for restitution to lie in equity within the meaning of ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), it must seek to restore to the plaintiff specifically identifiable funds or property in the defendant's possession that belong

in good conscience to the plaintiff.

BCBS's claim against the Carillos for reimbursement under the terms of the Plan of the amount of medical benefits it paid on account of the Carillos' injuries from funds recovered by the Carillos in a tort action fits comfortably within this common law construct. Because, under the Plan language, the Carillos agreed when they accepted benefits to reimburse the Plan out of any third-party recoveries, the disputed amount "belong[s] in good conscience" to BCBS. Great-West, 534 U.S. at 213. Moreover, because the funds were held in the Carillos' bank accounts and at one point subject to a temporary restraining order prohibiting their dissipation, the amount sought by BCBS under the Plan's reimbursement provision can "clearly be traced to particular funds or property in the defendant's possession." Id. No more is required for equitable restitution to lie under Great-West, as the majority of courts including the Fourth, Fifth, Seventh and Tenth Circuits have recognized. The Sixth and Ninth Circuit decisional law to the contrary is based on a misreading of Great-West and Mertens.

ARGUMENT

The Imposition of a Constructive Trust or Equitable Lien Over Specifically Identifiable Funds in Plan Participants' Bank Accounts Constitutes Appropriate Equitable Relief Under ERISA Section 502(a)(3)

A. The Supreme Court's Decision in Great-West Specifically Authorizes the Relief Requested by BCBS

The district court erred in granting the Carillos' motion to dismiss. The district court held that BCBS's claim, "regardless of whether it is styled as a claim for a constructive trust, for equitable restitution, or for an equitable lien, simply seeks to enforce a provision of a plan document that would require [the Carillos] to pay money." Blue Cross, 372 F. Supp. 2d at 637-38 (citing Providence Health Plan v. McDowell, 385 F.3d 1168, 1174 (9th Cir. 2004), cert. denied, ___ U.S. ___, 125 S. Ct. 1726 (2005)). As a result, the court concluded that BCBS's "claim is not equitable in nature, and is not 'appropriate equitable relief' for purposes of § 1132(a)(3)." Blue Cross, 372 F. Supp. 2d at 638. The district court's holding that the relief sought by BCBS is not "appropriate equitable relief" under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), is inconsistent with Supreme Court precedent and should be reversed.

Section 502(a)(3) of ERISA authorizes a civil action "by a . . . fiduciary (A) to enjoin any act or practice which violates . . . 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 . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). In

Great-West, the Supreme Court held that appropriate "equitable relief" under section 502(a)(3) of ERISA refers to "those categories of relief that were typically available in equity." 534 U.S. at 210 (emphasis in original) (quoting Mertens, 508 U.S. at 256). "[F]or restitution to lie in equity," the Court explained, "the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." Great-West, 534 U.S. at 214.

In Great-West, Great-West sought restitution of \$411,157 in medical expenses it had paid on behalf of beneficiary Janette Knudson after Knudson secured a \$650,000 settlement from the third parties responsible for her injuries. The settlement allocated \$256,745.30 to a Special Needs Trust to provide for Knudson's long-term medical care, \$373,426 to attorney's fees and costs, \$5,000 to reimburse the California Medicaid Program, and \$13,828.70 to reimburse Great-West. The state court approved the settlement and ordered the third parties to pay the amount allocated to the Special Needs Trust directly to the trust. Knudson's attorney sent Great-West a check for \$13,828.70, but Great-West refused to cash it. Instead, Great-West sued Knudson in federal district court seeking full reimbursement of the \$411,157 it had paid on her behalf. The Supreme Court held that Great-West's suit was not authorized by ERISA section 502(a)(3). Great-West, 534 U.S. at 218. The Court observed that the money from the settlement

was not in Knudson's possession; it had been dispersed to the Special Needs Trust and her attorney. Id. at 214. The Court found that Great-West, therefore, was not trying to recover particular funds that belonged to Great-West that happened to be in Knudson's possession, but rather was trying to impose personal liability upon Knudson for any funds equal to the benefits it had advanced to her. Id. The Court thus concluded that Great-West sought legal restitution not authorized by ERISA. Id. at 218.

Contrary to the district court's reasoning, Great-West did not foreclose plans' ability to seek equitable restitution. Rather, the Court in Great-West specified:

[A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. . . . A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner.

Id. at 213 (emphasis in original)(citations omitted). Moreover, the Supreme Court expressly left open the question whether Great-West could have obtained equitable relief against Knudson's attorney or the trustee of the Special Needs Trust. Id. at 220.

Thus, as Great-West recognizes, constructive trusts and equitable liens are available under section 502(a)(3) because they have always been equitable remedies. Indeed, as one of the leading authorities on remedies points out, the

remedies of constructive trust and equitable lien were created at equity precisely to remedy situations in which the defendant held the legal title to an identifiable res (including a bank account), but the plaintiff had a superior moral claim. 1 Dan Dobbs, Law of Remedies § 4.3(2) at 590, 591, 595 (2d ed. 1993); accord Great-West, 534 U.S. at 213; Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250-51, 120 S. Ct. 2180, 2189 (2000) (noting that "[w]henver the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein'" (citations omitted)).² Through these devices, courts of equity compelled the defendant "to follow good conscience rather than good title." Dobbs, § 4.3(1) at 587. Thus, actions for nonpayment of a debt for specific property, breach of a promise to repay a loan, and failure to pay on a promissory note for which property was transferred, all could suffice to warrant imposition of a constructive trust on the property transferred or improved with the plaintiff's property. Dobbs, § 4.3(2) at

² A constructive trust is an equitable device whereby the "defendant is . . . made to transfer title to the plaintiff who is, in the eyes of equity, the true 'owner.'" Dobbs, § 4.3(1) at 587. The equitable lien "uses similar ideas to give the plaintiff a security interest in the property or to give the plaintiff only part of the property rather than all of it." Id. at 588.

598 & n.52 (citing Middlebrooks v. Lonas, 246 Ga. 720, 272 S.E.2d 687 (1980); Leyden v. Citicorp Indus. Bank, 782 P.2d 6 (Colo. 1989)).

B. BCBS Seeks Appropriate Equitable Relief Under Great-West

BCBS here seeks to enforce the subrogation provision, or in statutory terms, "to enforce . . . the terms of the [P]lan." 29 U.S.C. § 1132(a)(3)(ii). The district court's refusal to impose a constructive trust in the present case is at odds with the scope of equitable relief recognized by the Supreme Court in Great-West. The \$126,364.73 in dispute "belong[s] in good conscience" to BCBS because the Carillos agreed to reimburse the Plan out of any third-party recoveries when they accepted benefits under the Plan. Blue Cross, 372 F. Supp. 2d at 635.³ Unlike the money in Great-West, the money in this case can "clearly be traced to particular funds or property in the defendant's possession" because the funds were held in the Carillos' bank accounts pending resolution of BCBS's claim. Id.

³ The Supreme Court described the remedy of constructive trust in similar terms in Harris Trust, 530 U.S. at 250-51, noting that "[w]herever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein.'" Id. (quoting Moore v. Crawford, 130 U.S. 122, 128, 9 S. Ct. 447 (1889), and 4 J. Pomeroy, Equity Jurisprudence § 1053 at 119-120 (5th ed. 1941)). The Carillos, who are the legal owners of the settlement funds being held in their bank accounts, received benefits from the BCBS pursuant to language that specified that they would reimburse the Plan from any related tort recoveries. The disputed amount is thus owed in good conscience to BCBS.

C. The Majority of Courts to Address This Issue After Great-West, Including the Fourth, Fifth, Seventh and Tenth Circuits, Have Authorized the Enforcement of Reimbursement/Subrogation Provisions Against Specifically Identifiable Funds

A majority of courts presented with ERISA subrogation/reimbursement claims after the Great-West decision have concluded that Great-West permits the imposition of a constructive trust over specifically identifiable funds in the defendant's possession.⁴ Most recently, the Fourth Circuit affirmed the district court's grant of summary judgment to a plan fiduciary seeking reimbursement of medical benefits advanced on behalf of a plan participant. Mid Atlantic Med. Servs., LLC v. Sereboff, 407 F.3d 212 (4th Cir. 2005). Mid Atlantic sought reimbursement of \$74,869.37 from the settlement funds obtained by the Sereboffs in their state court action against the person responsible for an automobile accident that resulted in the plan's paying medical benefits on their behalf. Agreeing with the district court, the Fourth Circuit noted that, unlike the legal action addressed in

⁴ Many courts have also allowed plans to place liens on third-party recoveries, the other form of equitable relief permitted under Great-West. See In re Carpenter, 36 Fed. Appx. 80 (4th Cir. 2002) (affirming bankruptcy court's finding that Wal-Mart Plan had an enforceable equitable lien on debtor's personal injury settlements proceeds); Primax Recoveries Inc. v. Duffy, 204 F. Supp. 2d 1111 (N.D. Ill. 2002) (allowing lien on specific funds not yet received from underinsurance coverage); Yerby v. United Healthcare Ins. Co., 846 So. 2d 179 (Miss. 2002) (permitting plan to intervene in state tort action and to place lien on settlement between beneficiary and tortfeasor); Uber v. TIG Specialty Ins. Co., No. 232687, 2003 WL 231321 (Mich. Ct. App. Jan. 31, 2003), appeal denied, 469 Mich. 862, 666 N.W. 2d 675 (Mich. 2003); Brodzik v. Szpakowicz, No. CV000500564S, 2002 WL 31502353 (Conn. Super. Ct. Oct. 22, 2002).

Great-West, Mid Atlantic "seeks equitable restitution, as that term is used in [Great-West], because [Mid Atlantic] seeks to recover funds that are specifically identifiable, belong in good conscience to [Mid Atlantic], and are within the possession and control of the Sereboffs." 407 F.3d at 218; see also Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard, 393 F.3d 1119, 1121-25 (10th Cir. 2004); Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrought, 354 F.3d 348, 355-58 (5th Cir. 2003), cert. denied, 541 U.S. 1072, 124 S. Ct. 2412 (2004). The Second Circuit has also acknowledged in dicta that a claim for equitable restitution would lie where a defendant holds funds that in good conscience belong to the plaintiff. See Gerosa v. Savasta & Co., Inc., 329 F.3d 317, 321 (2d Cir.), cert. denied, 540 U.S. 967, 124 S. Ct. 435 (2003).

In other cases, courts have achieved the same result by imposing a constructive trust over the proceeds of funds "belonging in good conscience" to the plan. See Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Fund v. Varco, 338 F.3d 680, 687 (7th Cir. 2003), cert. denied, ___ U.S. ___, 124 S. Ct. 2904 (2004); Forsling v. J.J. Keller & Assocs., Inc., 241 F. Supp. 2d 915, 917 (E.D. Wis. 2003); Allison v. Wellmark, Inc., No. C00-3015-MWB, 2002 WL 31818946, at *9 (N.D. Iowa Oct. 15, 2002); IBEW-NECA Southwestern Health & Benefit Fund v. Douthitt, 211 F. Supp. 2d 812, 815 (N.D. Tex. 2002), aff'd, 98 Fed.

Appx. 306 (5th Cir. 2004); Bauer v. Gylten, Nos. A3-00-161, A3-02-27, 2002 WL 664034, at *3 (D.N.D. Apr. 22, 2002) (permitting plaintiffs to amend their original complaint to include a request for the imposition of a constructive trust, pursuant to the Supreme Court's decision in Great-West). Lower courts in this circuit have done the same. See Space Gateway Support v. Prieth, 371 F. Supp. 2d 1364 (M.D. Fla. 2005) (concluding that plaintiff, a plan fiduciary who sought proceeds of a tort recovery from the plan participant, had stated a claim for relief under 502(a)(3)); B.P. Amoco Corp. v. Connell, et al., 320 F. Supp. 2d 1368 (M.D. Ga. 2004)(allowing recovery from trustee of a special needs trust under 502(a)(3)).

Similarly, other courts, although not imposing a constructive trust, have held that ERISA plan fiduciaries state a valid claim for equitable reimbursement when the disputed monies can clearly be traced to particular funds or property in the defendant's possession. The District Court for the District of Columbia held that a recovery agent's claim for restitution constitutes a claim for equitable relief when a portion of the settlement funds are being held in trust by the beneficiary's former attorney "for the precise purpose of reimbursing the Plan." Primax Recoveries, Inc. v. Lee, 260 F. Supp. 2d 43, 48 (D.D.C. 2003). Likewise, the District Court for the Southern District of Iowa held that an insurer properly states a claim for equitable restitution where the settlement funds are being held in an attorney's trust account. Wellmark, Inc. v. Deguara, 257 F. Supp. 2d 1209, 1216 (S.D. Iowa 2003)

("This Court finds the possession theory is the correct read of Great-West. That is, attempts by an ERISA plan or insurer to recover settlement proceeds to which it is entitled under a subrogation or reimbursement provision are only prohibited under § 502(a)(3) if the insured is not in the possession of clearly identifiable proceeds.").

Still other courts have supported ERISA plans' rights to reimbursement by permitting a plan to add the trustee of a beneficiary's revocable living trust as a defendant so that the plan can state a valid claim for equitable restitution, Corporate Benefit Servs. of Am., Inc. v. Sempf, No. 03-C-0048-C, 2003 WL 21704145, at *4-*5 (W.D. Wis. May 9, 2003), and by issuing a preliminary injunction to enjoin a beneficiary from disposing of settlement funds against which an ERISA plan has asserted a right of recovery, Great-West Life & Annuity Ins. Co. v. Perkins, No. C:02-5294-FDB, 2002 WL 1816438 (W.D. Wash. July 9, 2002).

Almost all of the cases in which an ERISA plan's claim for reimbursement were denied involved monies which could not clearly be traced to particular funds in the defendant's possession, and can thus be distinguished from the present case. In some cases, the funds were no longer clearly identifiable because they had been disbursed and dissipated. See Asbestos Workers Local No. 42 Welfare Fund v. Brewster, 227 F. Supp. 2d 226 (D. Del. 2002). In other cases, the funds were not in the defendant's possession because the beneficiary had not yet settled or won the

suit against the third party tortfeasor. See Primax Recoveries Inc. v. Goss ex rel. Goss, 240 F. Supp. 2d 800 (N.D. Ill. 2002); Extendicare v. Crow, No. Civ.A. 1:02-CV-109-C, 2002 WL 32079263 (N.D. Tex. Oct. 23, 2002); Primax Recoveries Inc. v. Carey, 247 F. Supp. 2d 337, 342 n.5 (S.D.N.Y. 2002) ("[A] constructive trust [is] an inappropriate remedy . . . when the 'settlement proceeds' are in nobody's possession, because they are the entirely hypothetical fruit of a potential future settlement that does not yet exist and may never come into being at all."). But see Primax Recoveries Inc. v. Duffy, 204 F. Supp. 2d 1111, 1113 (N.D. Ill. 2002) (allowing a lien on specific funds not yet received from underinsurance coverage). In Bauhaus USA, Inc. v. Copeland, 292 F.3d 439 (5th Cir. 2002), the disputed funds were not in the defendant participant's possession because the settlement proceeds had been placed into the Registry of the Mississippi Chancery Court. While we do not agree with those courts, such as the Fifth Circuit in Bauhaus, that have held that an equitable remedy is unavailable where the funds are in a court registry or have not yet been awarded, these cases are all distinguishable from the present case where the funds are in the actual possession of the defendants.

D. The Decisions of the Sixth and Ninth Circuits Denying Relief Under Section 502(a)(3) Cannot be Reconciled With Great-West, ERISA's Text or ERISA's Purposes

Here, the district court followed the reasoning of the Sixth and Ninth Circuits, the only Circuit Courts that have held that any attempt by an ERISA plan

to seek reimbursement/subrogation under the terms of the plan constitutes a legal claim that is not authorized by section 502(a)(3) of ERISA. See QualChoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004), cert. denied, ___ U.S. ___, 125 S. Ct. 1639 (2005); McDowell, 385 F.3d 1168.⁵ The district court "conclude[d] that Plaintiff's claim, regardless of whether it is styled as a claim for a constructive trust, for equitable restitution, or for an equitable lien, simply seeks to enforce a provision of a plan document that would require Defendants to pay money. Such a claim is not equitable in nature, and is not 'appropriate equitable relief' for purposes of § 1132(a)(3)." Blue Cross, 372 F. Supp. 2d at 637-38 (citations omitted). The district court's reliance on the Sixth and Ninth Circuits is misplaced.

The decisions of the Sixth and Ninth Circuits cannot be reconciled with the statements in Great-West where the Supreme Court specifically identifies the remedies of constructive trust and equitable lien as typifying equitable restitution. Great-West, 534 U.S. at 213. Although arguably dicta,

⁵ Several decisions have cited Great-West to preclude plans from seeking reimbursement, without fully analyzing whether the monies sought by the plans could "clearly be traced to particular funds or property in the defendant's possession." See Cmty. Ins. Co. v. Morgan, 54 Fed. Appx. 828, 829-30 (6th Cir. 2002); Unicare Life & Health Ins. Co. v. Saiter, 37 Fed. Appx. 171, 173 (6th Cir. 2002); Great-West Life & Annuity Ins. Co. v. Unger, No. CIV. 02-082-TUC-WDB, 2002 WL 2012528, at *1-*2 (D. Ariz. July 24, 2002); Hotel & Restaurant & Bar Employees Fringe Benefit Funds v. Trvong, No. CIV. 01-873(MJD/RLE), 2002 WL 171725, at *3-*4 (D. Minn. Jan. 31, 2002). To the extent that these cases stand for the proposition that Great-West precludes plans from seeking constructive trusts as an equitable remedy under ERISA, the Secretary believes that they were wrongly decided.

the Supreme Court's discussion of constructive trust in Great-West was, nevertheless, central to the Court's reasoning. Indeed, if the Court had thought, as the Sixth and Ninth Circuits held, that a constructive trust remedy was unavailable because any claim to enforce the terms of the plan could be recharacterized as a breach of contract claim, which could only be remedied in a court of law, then most of the discussion in the Great-West decision, and in particular its focus on the fact that Knudson did not hold the settlement proceeds, would have been unnecessary. In the words of the district court in Wellmark, "[t]he [district court here] follows the ultimate reasoning of Great-West without noting the essential factual distinction Justice Scalia specifically discussed when the 'money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.' . . . That factual distinction has importance that cannot be disregarded." Wellmark, 257 F. Supp. 2d at 1215-16.

In the Sixth and Ninth Circuits' view, the subrogation/reimbursement right arose in contract and, therefore, the restitution remedy was a legal remedy. Even assuming, however, that the Sixth Circuit was correct in assuming that the plan had a contractual and not a property interest in the settlement proceeds, it was incorrect in concluding that a legal remedy

(based on the ancient writ of assumpsit) was the only available restitutionary remedy. What equity contributed to restitution was the use of in personam jurisdiction (enforceable in contempt), which allowed the court to ignore formalities of title, and take a flexible approach that considered the equities of the case. Dobbs, §4.3(1) at 587. Indeed, Dobbs points out that the remedies of constructive trust and equitable lien were created at equity precisely to remedy situations in which the defendant held the legal title to an identifiable res (including a bank account), but the plaintiff had a superior moral claim. Dobbs, § 4.3(2) at 591, 595; accord Great-West, 534 U.S. at 213; Harris Trust, 530 U.S. at 250-51.

That constructive trusts and equitable liens were available in many situations where some form of legal restitution might also be available does not detract from their equitable character. Through these devices, equity stepped in with a remedy - legal title to particular property - that courts of law could not provide. Thus, actions for nonpayment of a debt for specific property, breach of a promise to repay a loan, and failure to pay on a promissory note for which property was transferred, all could suffice to warrant imposition of a constructive trust on the property transferred or improved with the plaintiff's property. Dobbs, § 4.3(2) at 598 & n.52 citing Middlebrooks v. Lonas, 246 Ga. 720, 272 S.E.2d 687; Leyden v. Citicorp

Indus. Bank, 782 P.2d 6. "Where the constructive trust will produce the right measure and conditions of restitution, however, it is appropriate in any kind of unjust enrichment case." Dobbs, § 4.3(2) at 597. So long as identifiable funds held by the defendant that belong in good conscience to the plaintiff are sought, constructive trusts or equitable liens are available equitable remedies.

In addition to being in conflict with the decisions of other Circuits and inconsistent with Supreme Court's decision in Great-West, the decisions of the Sixth and Ninth Circuits, by reading section 502(a)(3) to disallow enforcement of subrogation/reimbursement provisions because they are grounded in contract, not only add significantly to the costs borne by ERISA health care plans, but also prevent participants and fiduciaries from bringing suit under section 502(a)(3) to enforce the terms of the plan.

As of 2002, an estimated 137 million people participated in private sector employer-sponsored health care plans covered by ERISA. Many of these plans contain reimbursement/subrogation provisions. By following the Sixth and Ninth Circuits and flatly prohibiting such recoveries, the district court's decision is likely to have a large economic impact on health care plans in this Circuit, and may lead some employers to respond by dropping or decreasing coverage.

Furthermore, under the logic of the district court's reasoning that section 502(a)(3) does not allow enforcement of a plan subrogation/reimbursement provision because it is grounded in contract, no attempt to enforce a plan term would be permissible. This reads out of section 502(a)(3) the right to "enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). Such a construction may have unforeseen consequences on the enforcement of ERISA beyond the subrogation/reimbursement context, and should be avoided under ordinary rules of statutory construction. See TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S. Ct. 441 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting Duncan v. Walker, 533 U.S. 167, 174, 121 S. Ct. 2120 (2001)) (internal quotation marks omitted)).

Unlike the money in Great-West, the money in this case can "clearly be traced to particular funds or property in the defendant's possession." Blue Cross, 372 F. Supp. 2d at 635. So long as identifiable funds held by the defendant that belong in good conscience to the plaintiff are sought, constructive trusts or equitable liens are available equitable remedies under Section 502(a)(3) of ERISA. Here, the Carillos received approximately \$200,000 in settlement of their tort

action. Some portion of that money was deposited into their respective bank accounts. Under the Supreme Court's analysis in Great-West, section 502(a)(3) allows BCBS to recover the amounts remaining in the Carillos' respective bank accounts through the imposition of a constructive trust.⁶ Only if BCBS were

⁶ Relying on Popowski v. Parrott, Civil Action File No. 1:04-CV-0889-JOF (N.D. Ga. Dec. 22, 2004), slip op. (unpublished), which is currently pending on appeal before this Court and has been consolidated for oral argument with this case, the district court also noted that "[p]laintiff does not seek recovery of specified, identifiable funds, but instead seeks recovery of funds that have been commingled into various checking accounts and spent, in part, to purchase a truck. Under those circumstances, relief under § 1132(a)(3) is unavailable." Blue Cross, 372 F. Supp. 2d at 638 (citing Popowski at 10-11). However, the mere commingling of the settlement funds with the Carillos' other monies does not mean that they are not recoverable. Mid Atlantic, 407 F.3d at 218 (holding that action lies, even though the funds were "placed in accounts with the [defendants'] other monies"). A defendant who holds assets that rightfully belong to another cannot defeat a just result by the simple expedient of placing the assets in a general account or commingling them with other assets. Because the funds "can 'clearly be traced to particular funds' recovered in the" Carillos' tort action, they are recoverable. Id.

Although the tracing rules are complex and the Department does not take a position here on the appropriate test that should be used, courts have developed a variety of tracing rules specifically to deal with situations where assets are commingled; commingling alone doesn't end the analysis. As one court has noted, "[t]racing of commingled funds as a general accounting principle is not foreign to the courts." In re R & T Roofing Structures & Commercial Framing, Inc., 887 F.2d 981, 987 (9th Cir. 1989). In Begier v. IRS, 496 U.S. 53, 67, 110 S. Ct. 2258 (1990), the Supreme Court announced: "The courts are directed to apply 'reasonable assumptions' to govern the tracing of funds." One method used by the courts, "a doctrine known as the 'lowest intermediate balance' rule has evolved from equitable principles of trusts. . . ." Id. This "is a trust-fund tracing rule that has long been applied as a matter of federal common-law in bankruptcy proceedings when a debtor or trustee has commingled funds, which are subject to a common-law trust, with other funds in a bank account." Matter of Wellington Foods, Inc., 165 B.R. 719, 726 n.7 (Bankr. S.D. Ga. 1994), citing Schuyler v.

seeking reimbursement of the money already dissipated by the Carillos (and which cannot be traced), or an amount greater than the amount remaining in their accounts, would BCBS be seeking "to impose personal liability on the [Carillos]", a legal remedy not permitted under section 502(a)(3). See Great-West, 534 U.S. at 213-14.

Here, however, the Court should not ignore the fact that "'money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.'" Wellmark, 257 F. Supp. 2d at 1216 (quoting Great-West, 534 U.S. at 213). The Secretary urges this Court to follow the majority of courts that have held that the imposition of a constructive trust over specifically identifiable funds in the defendant's possession in such circumstances is an appropriate equitable remedy under ERISA.

Littlefield, 232 U.S. 707, 34 S. Ct. 466 (1914); Cunningham v. Brown, 265 U.S. 1, 44 S. Ct. 424 (1924); In re Columbia Gas Sys., Inc., 997 F.2d 1039 (3d Cir. 1993); Matter of Kennedy & Cohen, Inc., 612 F.2d 963, 965-66 (5th Cir. 1980).

CONCLUSION

The imposition of a constructive trust over the specifically identifiable funds in the Carillos' possession is an appropriate equitable remedy under ERISA and, therefore, the decision of the district court should be reversed.

Dated: September 14, 2005

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

/s/ WAYNE R. BERRY

WAYNE R. BERRY
Senior Trial Attorney

United States Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Avenue, N.W.
Room N-4611
Washington, D.C. 20210
(202) 693-5600

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

APPEAL NO. 05-13344-JJ

BlueCross BlueShield of South Carolina v. Vincente Carillo, et al.

I certify that the foregoing Brief of Amicus Curiae Elaine L. Chao, Secretary of the United States Department of Labor in Support of Appellant Requesting Reversal complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,823 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that the foregoing Brief of Amicus Curiae Elaine L. Chao, Secretary of the United States Department of Labor in Support of Appellant Requesting Reversal complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in 14 point, Times New Roman.

/s/ WAYNE R. BERRY

WAYNE R. BERRY
Senior Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Brief of Amicus Curiae Elaine L. Chao, Secretary of the United States Department of Labor in Support of Appellant Requesting Reversal was mailed, by overnight delivery, postage prepaid, this 14th day of September 2005 to the following:

Thomas H. Lawrence
Polly M. Haley
LAWRENCE & RUSSELL, LLP
5050 Poplar Avenue
Suite 1717
Memphis, Tennessee 38157

Charles M. Cork, III
GAMBRELL & STOLZ, L.L.P.
923 Washington Avenue
P.O. Box 5047
Macon, Georgia 310208-5407

Ansel Franklin Beacham, III
BRINSON ASKEW BERRY
SIEGLER RICHARDSON & DAVIS
Omberg House
615 West First Street
P.O. Box 5513
Rome, Georgia 30162-5513

/s/ WAYNE R. BERRY
WAYNE R. BERRY
Senior Trial Attorney