04-5173

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KAREN B. COAN,
Individually and on behalf of the K.L.C. Inc. 401(k) Profit Sharing Plan,

Plaintiff – Appellant

v.

ALAN H. KAUFMAN and EDGAR W. LEE,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

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STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that ERISA requires that a claim for breach of fiduciary duty under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), alleging imprudent investment of a pension plan's assets by defendants, proceed as a shareholder's derivative action under Rule 23.1 of the Federal Rules of Civil Procedure or a class action under Rule 23.

2. Whether the district court erred in holding that the relief plaintiff seeks (an order reopening the terminated plans, requiring defendants to make those plans whole for the losses they sustained as a result of defendants' fiduciary breaches, and distributing the increased benefits to the plans' participants) is not "equitable" relief within the meaning of ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), as interpreted by Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), Great-West Life & Annuity Co. v. Knudson, 534 U.S. 204 (2002), and Strom v. Goldman, Sachs & Co., 202 F.3d 138 (2d Cir. 1999).

INTEREST OF THE SECRETARY OF LABOR

The Secretary is the federal officer charged with interpreting and enforcing Title I of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA"). As such, the Secretary has significant interests in the proper application of the safeguards Congress established through ERISA for the administration of employee benefit plans and the protection of participants

in those plans. These interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

Although the Department of Labor has primary interpretative and enforcement authority for Title I of ERISA, the Secretary does not have the resources to pursue litigation regarding every allegation of fiduciary imprudence. Accordingly, the Secretary has an interest in ensuring that private litigants are able to vindicate their rights under ERISA. The district court's holdings with respect to the procedural requirements for bringing a breach of fiduciary duty claim under ERISA section 502(a)(2), 29 U.S.C. § 1132 (a)(2), and with respect to plaintiff's standing to sue, impact the Secretary's interest.

Furthermore, the Secretary has a significant interest in the proper application of ERISA's remedial provisions. This case presents an important and recurring remedial issue that the Secretary has previously briefed on a number of occasions: whether section 502(a)(3), 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 who violate ERISA's stringent obligations and injure beneficiaries may evade liability for the losses they cause, a result that is not

warranted by ERISA or by the underlying trust law to which the Supreme Court directed courts to look in resolving this remedial issue.

The Secretary believes that the district court erred in granting summary judgment for defendants for the reasons stated in the court's opinions and, therefore, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, respectfully submits this brief as amicus curiae.

STATEMENT OF THE CASE

KLC, Inc., an equipment leasing company, sponsored a defined contribution plan with a 401(k) component, a profit-sharing component (the "Profit Sharing Fund") and a fund composed of assets from a previously-terminated defined benefit plan (the "Rollover Fund"). In 1998, Unicapital acquired KLC, and instructed it to terminate its employee benefit plan. Defendants, officers of KLC and trustees and investment fiduciaries of the plan, immediately transferred the assets in the 401(k) component of the plan to the Unicapital 401(k) plan. Although they understood that the Profit Sharing Fund and the Rollover Fund would also have to be terminated eventually, they did not do so during the pendancy of the acquisition, because, they testified, they thought Unicapital's 401(k) plan did not offer as desirable investment opportunities as the KLC plan. See Coan v. Kaufman, 333 F. Supp. 2d 14, 15-17 (D. Conn. 2004) ("Coan I").

After the funds were terminated and the participants, including Plaintiff Karen Coan, received lump-sum payments, Coan brought this ERISA action "Individually and on behalf of the K.L.C., Inc. 401(k) Profit Sharing Plan." See Complaint ¶ 2, Prayer for Relief ¶¶ 1-2. Coan alleges that that defendants not only failed to diversify the assets of the Profit Sharing Fund and the Rollover Fund, but also failed even to consider diversification. She seeks relief to the plan for the period from December 1998 to December 2001. In total, she alleges approximately $540,000 in losses and lost opportunity costs suffered by the plan. Coan I, 333 F. Supp. 2d at 17-18.

On August 30, 2005, the court granted defendants' motion for summary judgment. Id. at 16. In granting summary judgment for the defendants, the district court held that plaintiff could not proceed under ERISA section 502(a)(2) unless she proceeded with a shareholders' derivative action under Rule 23.1 of the Federal Rules of Civil Procedure. Id. at 23- 25. The district court believed that the Second Circuit and Supreme Court had both held that individuals cannot bring claims for breach of fiduciary duty, citing Lee v. Burkhart, 99 F.2d 1004, 1009 (2d Cir. 1993) and Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 141 (1985), and on that basis concluded that "Ms. Coan cannot recover individually for the alleged breaches of fiduciary duty under § 502(a)(2)." Coan I, 333 F. Supp. 2d at 23-24.

Coan argued, however, that she does not seek an individual recovery, but rather brings her suit in a representative capacity, on behalf of herself and the plan. Id. at 24; see Complaint at ¶ 2, Prayer for Relief ¶¶ 1-2. The district court rejected her argument because she "never moved for class certification, or attempted to join other former plan participants" and "has not sought to fulfill the requirements of Fed. R. Civ. P. 23.1 or otherwise taken any of the steps required for a plaintiff to proceed in a representative capacity." Coan I, 333 F. Supp. 2d at 24.

In refusing to modify its decision on plaintiff's motion for reconsideration, the district court stressed plaintiffs' perceived procedural shortcomings. Coan v. Kaufman, 349 F. Supp. 2d 271 (D. Conn. 2004) ("Coan II"). First, the district court disagreed with the plaintiff's contention that plan participants can sue in a representative capacity without meeting all the requirements of a shareholders' derivative action. The court held that Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270 (2d Cir. 1992), although overruled on numerous other issues, is still valid precedent for the proposition that an action for unpaid contributions under ERISA section 502(g)(2) must proceed pursuant to Rule 23.1, unless excused by the court. Without acknowledging the difference between a claim for unpaid contributions under section 502(g)(2) and a fiduciary breach claim under sections 409(a) and 502(a), the court held that Diduck compelled it to hold plaintiff to Rule 23.1's requirements. Coan II, 349 F. Supp. 2d at 274.

Second, the district court concluded that even if plaintiff need not proceed under Rule 23.1, "that would not necessarily mean (as Plaintiff asserts) that all she had to do to pursue her lawsuit as a derivative action was to label her lawsuit a 'representative action' and seek relief on behalf of the plan." Id. at 275. The district court cited Charles A. Wright, The Law of the Federal Courts § 73, at 525 (5th ed. 1994), which, in discussing the requirements of Rule 23.1, noted that such an action "is not the only derivative action that is possible. Trust beneficiaries may bring claims derivatively on behalf of a trust if the trustee refuses to bring them, and the same general principles will apply as in stockholders' suits, but the specific provisions of Rule 23.1 are not controlling." On this basis, the district court concluded that "even if the specific provisions of Rule 23.1 were not controlling, Plaintiff should still have made at least some effort to comply with the 'general principles' that apply in shareholder derivative actions." Coan II, 349 F. Supp. 2d at 275. The court did not explain how plaintiff might have done so, short of proceeding under Rule 23.1 itself.

Finally, the district court concluded that even courts which have acknowledged that Rule 23.1 "might not precisely apply of its own accord to ERISA derivative actions brought by plan participants" have nonetheless applied the safeguards of Rule 23 or 23.1 of the Federal Rules of Civil Procedure. Id. at 276 (citing Thornton v. Evans, 692 F.2d 1064 (7th Cir. 1983); Montgomery v.

Aetna Plywood, Inc., No. 95 C 3193, 1996 WL 189347 (N.D. Ill. July 2, 1996)). The court agreed with defendants that plaintiffs' "failure to . . . do anything to demonstrate that her action actually was intended to benefit former plan participants other than Karen Coan" doomed her claim, although the court did not specify what actions, other than compliance with Rule 23.1 or Rule 23, would have been sufficient. Coan II, 349 F. Supp. 2d at 277.

The district court also held that the relief sought by plaintiff was legal rather than equitable relief, and on that basis concluded that Coan's alternative claim for equitable relief under ERISA section 502(a)(3) must fail. Coan I, 333 F. Supp. 2d at 25-27. Plaintiff described the relief she seeks as "an injunction ordering plan reinstatement and the payment of additional benefits lost through a breach of fiduciary duty." Id. at 25 (quoting Plaintiff's Substituted Memorandum in Opposition to Motion for Summary Judgment at 46). The district court, however, found that:

> [T]he substance of the remedy Ms. Coan seeks is not equitable in nature. Instead, she seeks damages from defendants for injuries she believes she suffered as a result of their breaches of their fiduciary duties. Requesting the intermediate step of reviving long-terminated funds solely for the purpose of channeling funds from defendants' bank accounts into Ms. Coan's pockets does not transform what is effectively a money damages request into equitable relief.

Id. at 26.

Relying on Great-West, 534 U.S. at 210-14, the district court focused on whether the monetary component of the relief sought could be traced to particular funds or property in the defendants' possession, and concluded that it could not. Coan I, 333 F. Supp. 2d at 26. The court concluded that Great-West overruled this Court's decision in Strom, 202 F.3d at 143-45, which holds that monetary relief paid by a breaching fiduciary is inherently equitable. Coan I, 333 F. Supp. 2d at 25 n.10. Therefore, the court concluded that the relief sought by Coan was legal relief not available under section 502(a)(3).

SUMMARY OF THE ARGUMENT

ERISA does not require that a plaintiff bringing a breach of fiduciary duty action under section 502(a)(2) pursue a shareholders' derivative action under Rule 23.1 of the Federal Rules of Civil Procedure, pursue a class action under Rule 23 or join other participants under Rule 19. Given ERISA's "carefully crafted and detailed enforcement scheme," there is no reason to believe that Congress inadvertently omitted additional requirements to bring a claim under section 502(a)(2). E.g., Russell, 473 U.S. at 146-47; see also Mertens, 508 U.S. at 254. While the district court may have discretion under the Federal Rules of Civil Procedure to require plaintiff to take steps to protect the absent participants' interests, any such requirements arise from the Federal Rules of Civil Procedure,

not ERISA. To the extent the district court held to the contrary, its decision should be reversed.

Moreover, the district court erred in dismissing plaintiff's alternative claim for relief under section 502(a)(3) on the basis that the relief sought was not "equitable relief" within the meaning of that section. This Court correctly held in Strom that relief to compensate participants and beneficiaries harmed by fiduciaries is inherently equitable. This Court is bound to follow this ruling because the Supreme Court's subsequent decision in Great-West supports, rather than undercuts, the Court's reasoning in Strom.

ARGUMENT

I. The District Court Erred in Concluding that Section 502(a) of ERISA Requires a Participant to Bring Her Action as a Shareholders' Derivative Action or to Join All Other Participants Individually or as a Class

ERISA section 409(a) provides, inter alia:

> 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 title shall be personally liable to make good to such plan any losses to the plan resulting from such breach … and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

29 U.S.C. § 1109(a). ERISA's fiduciary duties are among the "the highest known to law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.2 (2d Cir. 1982); see Ulico

Casualty Co. v. Clover Capital Mgmt., Inc., 217 F. Supp. 2d 311, 315 (N.D.N.Y. 2002).

ERISA section 502(a)(2) provides that, "A civil action may be brought … by a participant …. for appropriate relief under § 409." 29 U.S.C. § 1132(a)(2). Thus, section 502(a)(2) authorizes a plan participant to bring an action to recover plan losses against a fiduciary who has violated section 409. Russell, 473 U.S. at 140. Such claims are "brought in a representative capacity on behalf of the plan as a whole." Id. at 141 n.9.

Here, the district court erred in confusing two issues: whether plaintiff stated a claim under ERISA and whether she was required to proceed under the federal rules applicable to shareholders' derivative actions, class actions and joinder. ERISA section 502(a)(2) allows a plan participant (or a former participant with a "colorable claim," as discussed in note 5, infra) to bring suit for appropriate relief when a plan has suffered a loss due to fiduciary breach – precisely the claims plaintiff has made here. Whatever the requirements of Rules 19, 23 and 23.1 of the Federal Rules of Civil Procedure, they apply of their own force and not by virtue of anything in ERISA. In other words, ERISA does not require that a section 502(a)(2) derivative action be brought as a class action under Rule 23, but also does not foreclose the plaintiff from bringing it as such.

The court relied on Russell and Lee v. Burkhart in concluding that a plan participant pursuing a claim under section 502(a)(2) must bring the case as a class action (or by joining the other participants and beneficiaries). The plaintiffs in those cases, however, sought benefits to which participants claimed to be entitled under the terms of their plans, rather than seeking relief for a fiduciary breach perpetrated upon a plan as a whole.

In Russell, the plaintiff was eventually paid disability benefits due under the terms of her plan, but sought damages for the delay in receipt. Russell, 473 U.S. at 136. In Lee, plaintiffs sought benefits due under their plan but unpaid as a result of the sponsor's bankruptcy. 991 F.2d at 1009. Such individualized claims for benefits, authorized under section 502(a)(1)(B), cannot be brought under section 502(a)(2). Russell, 473 U.S. at 148; Lee, 991 F.2d at 1009.

Neither case considered the procedural capacity in which a plaintiff alleging a plan-wide fiduciary breach was obligated to proceed. Nonetheless, the district court erroneously concluded that the import of these cases was that ERISA required plaintiff to pursue a shareholders' derivative action. Rule 23.1, by its terms, applies to actions "brought by one or more shareholders or members to enforce the right of a corporation or unincorporated association." Coan is not a shareholder of the plan, and the plan is not a corporation or an unincorporated association. See Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1462-63 (9th Cir.

1995) ("Plaintiffs here are not suing as 'shareholders' or 'members' to enforce the right of any 'corporation' or 'unincorporated association.' Rather, they are suing as plan beneficiaries to enforce the right of the plan against its fiduciaries."); see Montgomery v. Aetna Plywood, Inc., No. 95 C 3193, 1996 WL 189347, at *4 (N.D. Ill. April 16, 1997) ("The parties agree that Fed. R. Civ. P. 23.1 and 23.2 are inapplicable to this case since neither the Plan nor the ESOP are a corporation or unincorporated association."). Indeed, in the treatise cited by the district court, Professor Wright recognized that while the general principles of Rule 23 might apply to a derivative action that was not a shareholders' derivative action "the specific provisions of Rule 23.1 are not controlling" in such a case. Wright, supra at 525.

The authority cited by the district court as requiring ERISA fiduciary claims to proceed under Rule 23.1 is plainly distinguishable. Diduck involved a claim by a plan participant to enforce a multiemployer plan's right of action against a participating employer for delinquent contributions under ERISA section 502(g)(2). Diduck, 974 F.2d at 274-75. Section 502(g)(2), 29 U.S.C. § 1132(g)(2), permits a fiduciary to bring an action to enforce ERISA section 515, 29 U.S.C. § 1145, which requires employers to make the contracted-for contributions to multiemployer plans.

Because section 502(g)(2) only provides for delinquent contribution suits by fiduciaries, the Second Circuit and other courts have held that a participant who wishes to assert the fiduciary's statutorily-granted claim must follow the procedures of Rule 23.1, including making a demand on the trustees, before proceeding. Diduck, 974 F.2d at 278; see also Martinez v. Barasch, No. 01 CIV 2289 (MBM), 2004 WL 1555191, at *7 (S.D.N.Y. July 12, 2004); Hartline v. Sheet Metal Workers' Nat'l Pension Fund, 134 F. Supp. 2d 1, 11 (D.D.C. 2001); Dallas Cowboys Football Club v. National Football League, No. 95CIV9426 (SAS), 1996 WL 601705, at *3 (S.D.N.Y. Oct, 18, 1996).

ERISA section 502(a)(2), in contrast, expressly authorizes participants and beneficiaries, as well as fiduciaries and the Secretary, to seek redress for fiduciary breaches that have harmed their plan. 29 U.S.C. § 1132(a)(2). Diduck, and the other section 502(g)(2) cases, therefore, are simply not on point.[1]

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[1] The conclusions in Kayes and Montgomery that an ERISA-covered employee benefit plan is not an unincorporated association appears to conflict with the holding in Diduck that Rule 23.1 is applicable to an ERISA claim for contributions, although Diduck did not discuss the basis for its conclusion, and nowhere suggested that an ERISA plan is an unincorporated association within the meaning of that Rule. We think Diduck was wrong on this point, but, as discussed above, Diduck, limited to claims under ERISA section 502(g), is distinguishable. In any event, applying the demand requirement of Rule 23.1 so that a participant must demand that the plan's trustees bring suit and be refused in order to obtain standing to sue, makes some sense in the context of a delinquent contribution claim under section 502(g). But such a requirement makes no sense in the context of a fiduciary breach claim brought under section 502(a)(2), which expressly grants participants standing to sue the fiduciaries.

The court also erred in relying on the Seventh Circuit's decision in Thornton v. Evans, 692 F.2d at 1080. Although the Thornton court applied the procedural requirements of Rule 23 or Rule 23.1 to an ERISA suit against non-fiduciaries for participation in fiduciary breaches, the court expressly limited its holding to suits against non-fiduciaries. 692 F.2d at 1080 n.35. The court reasoned that ERISA expressly provides for suits by individual participants and beneficiaries against ERISA fiduciaries for their breaches, but does not expressly provide for suits by non-fiduciaries. Id. Thus, Thornton does not support the district court's ruling here.

There is no suggestion in ERISA itself that fiduciary claims under section 409(a) and 502(a) need to meet the requirements of Rules 23.1, 23 or 19, all of which were in place at the time of the passage of ERISA. In fact, the legislative history of section 502 suggests that Congress considered, but rejected, requiring fiduciary duty claims to be brought as class actions. While the Senate bills made oblique reference to suits in a representative capacity, the House bills specifically provided: "In any action by a participant or beneficiary under subsection (a)(2) or (3), such participant or beneficiary shall maintain such action as a representative of all other participants similarly situated as a class, if (A) the law of the jurisdiction provides for class actions, and, (B) the court is satisfied that the requirements for a class action are not unduly burdensome as applied in the particular circumstances."

H.R. 2, 93d Cong, 4047-48 (1974); see Staff of Conf. Comm., 93d Cong., Summary of the Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform, at 4047-48 (Comm. Print 1974) (comparing House and Senate bills) (available on Westlaw at A&P ERISA Comm. Print 1974(26)). Nonetheless, as adopted, ERISA contains no such provision. 29 U.S.C. § 1132(a). Given this history, as well as ERISA's "carefully crafted and detailed enforcement scheme" Mertens, 516 U.S. at 254 (quoting Russell, 473 U.S. at 146-47), there is no reason to believe that Congress inadvertently omitted a requirement that plaintiffs proceed under Rule 23.

Absent an express requirement in ERISA, the Federal Rules of Civil Procedure control. Rule 23 itself is permissive, not mandatory. Fed. R. Civ. P. 23 ("One or more members of a class may sue in a representative capacity") (emphasis added); see Watkins v. Simmons & Clark, Inc., 618 F.2d 398, 502 (6th Cir. 1980). The Secretary recognizes, however, that courts have the inherent power to require the parties to give notice or take other action to protect absent parties. See Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 529-31 (1984) (discussing Hawes v. Oakland, 104 U.S. 450 (1881), in which, prior to Rule 23.1, the Court imposed procedural requirements now largely codified in Rule 23.1 to prevent abusive suits by shareholders on behalf of a corporation).

Moreover, even if the district court has the authority to mandate a class action in appropriate cases, it must first perform a "rigorous analysis" of Rule 23's requirements to determine whether a class action is appropriate, something that the district court failed to do here. See Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999) (citing General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982)). It is not clear, if the district court had done so, whether it could have concluded that plaintiff met the numerosity requirement for certification of a class under Rule 23 given the relatively small number of participants in the affected funds, or that she was a proper representative of a class, given the plaintiff's work as a consultant in connection with the termination of the plan and distribution of its assets. See Coan II, 349 F. Supp. 2d at 276 n.8 (these facts "might raise an issue as to the propriety of her representation of other plan participants"). The district court, however, engaged in no such analysis.

Likewise, although the district court had the authority to require plaintiff to join other participants, it erred by not following the terms of Rule 19 of the Federal Rules of Civil Procedure. Rule 19 gives the court broad discretion in a two-step procedure to decide who should be joined, if feasible, and whether the case may proceed if he or she cannot be joined. See Fed. R. Civ. P. 19. Under Rule 19(a), the court must determine whether (1) in the person's absence, complete relief cannot be afforded to those already parties or (2) the person claims an interest

relating to the subject of the action such that disposition of the action in that person's absence would either impair his ability to protect his interest or expose a current party to the risk of inconsistent obligations. If the court determines that such a person exists, it "shall order" the person to be added as a party. Id.; see also Fed. R. Civ. P. 21 ("Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."). If a person the court orders joined under Rule 19(a) cannot be joined, the court must consider the factors in Rule 19(b) – including what prejudice might result, whether the court can lessen or avoid such prejudice through protective provisions or shaping of the relief, whether a judgment in the party's absence will be adequate, and whether plaintiff will have an adequate remedy if her action is dismissed for nonjoinder – to determine whether the party is truly indispensable.

The district court engaged in no such analysis. In the decision granting summary judgment, the district court did refer to the plaintiff's perceived need to join the absent plan participants as parties. See Coan I, 333 F. Supp. 2d at 24. Similarly, its conclusions with respect to Rules 23 and 23.1 in the order regarding plaintiff's Motion for Reconsideration also suggest that the court believed that the absent parties were indispensable parties to the litigation. See Coan II, 349 F. Supp. 2d at 276. However, at a minimum, the court was required to make all the

findings required by the Rule, and, if appropriate, order Coan to join the remaining participants before summarily terminating her case.

Thus, ERISA section 502(a)(2) required plaintiff to do no more than she did: bring her claim on behalf of the plan. Further, Rule 23.1's procedures for shareholders' derivative actions are clearly inapplicable to breach of fiduciary duty actions under ERISA sections 409 and 502(a)(2). The district court may have had other options available to it to address its concerns regarding the rights of the other participants in the affected funds, but those options arose under the Rules of Civil Procedure, not ERISA.[2] From the district court's decisions, it appears that it failed to fully consider the requirements of those Rules. For these reasons, the district court's award of summary judgment to the defendants should be reversed.

II. The District Court Erred In Concluding That the Relief Sought By Plaintiff Was Legal Relief Not Available Under ERISA Section 502(a)(3)

ERISA section 502(a)(3) provides:

> A civil action may be brought . . . 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 equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

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[2] The district court seemed primarily concerned about the fairness of a distribution of any recovery, see Coan I, 333 F. Supp. 2d at 24–26. Arguably, the court's discretion with respect to relief could ameliorate most, if not all, of the risks perceived for the absent participants, although the court rejected this suggestion. Coan II, 349 F. Supp. 2d at 275-76.

29 U.S.C. § 1132(a)(3). Section 502(a)(3) has been described as a "catch-all" remedial section designed to provide relief for violations that section 502 "does not elsewhere adequately remedy." Varity Corp. v. Howe, 516 U.S. 489, 512 1996). As the district court recognized, individualized claims for breach of fiduciary duty may be brought under section 502(a)(3), so long as they seek "equitable relief." Coan I, 333 F. Supp. 2d at 25 (quoting Chappell v. Lab. Corp. of Am., 232 F.3d 719, 727 (9th Cir. 2000)).

The term "equitable relief" is not defined in ERISA. Nevertheless, the Supreme Court has instructed that to determine whether relief is equitable, courts must determine how the relief was characterized when the bench was divided between equity courts and law courts. Great-West, 534 U.S. at 212. Moreover, the relief must have been "typically" available in equity and not simply "occasionally" available in equity. Id. at 214; Mertens, 508 U.S. at 255-56. Furthermore, courts should look to standard texts on remedies and trusts to make such determinations. Great-West, 534 U.S. at 212.

In Strom (which was decided after Mertens but before Great-West), this Court engaged in precisely this analysis to conclude that relief against a fiduciary (as Coan seeks) was exclusively available in equity, and treated as equitable by standard texts on remedies and trusts. As Strom explained, beneficiary claims against breaching fiduciaries to redress their breaches "have lain at the heart of

equitable jurisdiction from time immemorial." Strom, 202 F.2d at 144-45; see also III. A. Scott, The Law of Trusts, § 197, at 188 (4th ed. 1988) (trust relationships "are, and have been since they were first enforced, within the peculiar province of courts of equity"); 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"). Thus, in Strom, the Court properly considered, as the Supreme Court had earlier suggested in Mertens, and would later expressly require in Great-West, whether the remedy sought was an equitable remedy in the days of the divided bench, and concluded that claims against fiduciaries were inherently equitable. See also Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 592 (7th Cir. 2000) ("[W]hen sought as a remedy for breach of fiduciary duty [restitution] is properly regarded as an equitable remedy because the fiduciary concept is equitable.") (quoting Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703, 710 (7th Cir. 1999) (emphasis added)); Ream v. Frey, 107 F.3d 147 (3d Cir. 1997). Accordingly, under the law of this Circuit, the relief Coan seeks in this case is "equitable relief" within the meaning of ERISA section 502(a)(3).

A careful examination of trust law supports this conclusion. "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. A. 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). 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).

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; 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."); id. §199, at 203-04 & 206 (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary).

In Mertens and Great-West, the plaintiffs sought monetary relief against non-fiduciaries, and the Court concluded that this was not "equitable relief" within

the meaning of section 502(a)(3). Mertens, 508 U.S. at 248, 256; Great-West, 534 U.S. at 204, 219.[3] This case, however, like Strom, involves relief that was exclusively (and therefore "typically") available in equity: relief (albeit monetary) 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 could have granted it, but because only a common law court of equity could have granted it. See Restatement of Trusts, § 197; supra, Section A. (pp. 5-7).

In Strom, this Court recognized this precise distinction. The plaintiff in Strom sought 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. 202 F.3d at 141. The Court distinguished its earlier decision:

> As noted above, the district court characterized this claim as seeking money damages, a traditional legal remedy. Relying principally on our decision in Geller v. County Line Auto Sales, Inc., 86 F.3d 18 (2d Cir. 1996), it rejected plaintiff's contention that the recovery of the amount of the lost insurance benefit would be restitutionary, and therefore equitable rather than legal, on the ground that restitution is

[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.

> available only where a defendant has been enriched unjustly by the action complained of, a circumstance absent in this case. It therefore dismissed the claim against Goldman on the ground that Section 502(a)(3)(B) of ERISA, 29 U.S.C. § 1132 (a)(3)(B), in relevant part, permits recovery only of "appropriate equitable relief," not damages.
>
> The district court's reliance on Geller was misplaced. The critical fact that distinguishes Geller from this case is that this is an action against an alleged fiduciary whereas Geller involved a suit by a fiduciary against nonfiduciary wrongdoers. And that distinction is material. Geller was an appeal from the dismissal of a complaint brought by trustees of an employee benefit plan to recover from nonfiduciaries the amount of benefits paid by the trustees to an ineligible person by reason of the defendants' alleged fraud.

Id. at 143. That distinction holds here, and ought to lead to the same conclusion: monetary relief to redress a breach by a fiduciary is equitable relief under section 502(a)(3).

The Secretary recognizes that some courts, like the district court in this case, have read Mertens and Great-West as barring a monetary recovery against fiduciaries as well as non-fiduciaries, see, e.g., Callery v. U.S. Life Ins. Co., 392 F.3d 401 (10th Cir. 2004); Rego v. Westvaco Corp., 319 F.3d 140 (4th Cir. 2003); Helfrich v. PNC Bank Ky., Inc., 267 F.3d 477, 481-82 (6th Cir. 2001); Kerr v. Charles F. Vatterolt & Co., 184 F.3d 938, 943-44 (8th Cir. 1999); FMC Med. Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997). These decisions are erroneous. This more restricted reading of "equitable relief" 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. Moreover, any state law claims based on the fiduciary's misconduct would be preempted. As the Supreme Court stated in its post-Mertens opinion in Varity, "it is 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. In fact, such a result is neither consistent with ERISA's remedial purpose, nor compelled by Mertens or Great-West. Instead, we believe that Great-West, by emphasizing the need to look to the common law, fully supports the result reached by this Court in Strom. The Strom decision, therefore, is still controlling law in this Circuit.

As we argue above, because there is an available remedy here under section 502(a)(2), "equitable relief" under section 502(a)(3) may not be "appropriate" in this case. Varity, 516 U.S. at 515 ("Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate'" within the meaning of section 502(a)(3)). This does not change the

equitable nature of the relief, however, and the district court erred in refusing to follow Strom in this regard.[4]

[4] The district court assumed but did not decide the question whether Coan had standing to sue as a "participant" under ERISA. Coan I, 333 F. Supp. 2d at 22-23; see 29 U.S.C. § 1002(7) ("participant" includes a former employee who "is or may become eligible to receive a benefit of any type from an employee benefit plan.") Former employees fall within this definition if they have "a colorable claim for vested benefits." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989) (citations and quotations omitted). A former participant in a defined contribution plan who, as here, alleges that a fiduciary breach diminished the amount he received from the plan has standing to sue. See Schultz v. PLM International, Inc., 127 F.3d 1139 (9th Cir. 1997) (even if participant has received a full distribution of benefits before filing suit, he may still be able to bring an action for future benefits to be paid from fiduciary breach recovery); Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406, 1419 (9th Cir. 1988) (for purposes of standing, ill-gotten profits held in constructive trust for plan participants, beneficiaries may be construed as equitably vested benefits under ERISA plan). Such a participant is "'within the zone of interests ERISA was intended to protect.'" Mullins v. Pfizer, 23 F.3d 663, 668 (2d Cir. 1994) (quoting Vartanian v. Monsanto Co., 14 F.3d 696, 701 (1st Cir. 1994)).

CONCLUSION

For the reasons set forth above, the Secretary of Labor urges this Court to reverse the district court's grant of summary judgment to defendants.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

As required by Rule 32(a)(7)(B) of the Federal Rules of Civil Procedure, I certify that this brief is proportionally spaced, using Times New Roman 14-point font size, and contains 6213 words.

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Dated: March 25, 2005

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Susan J. Luken

CERTIFICATE OF SERVICE

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