No. 05-15282

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS GERARD GOERES,

Plaintiff-Appellant,

v.

CHARLES SCHWAB & CO., INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of California

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

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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 ("ERISA"), 29 U.S.C. § 1001, et seq. As the federal officer with primary enforcement authority under the statute, the Secretary has a strong interest in ensuring that courts correctly interpret ERISA's remedial provisions. This case presents a significant and recurring remedial issue: whether section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), permits beneficiaries to recover monetary losses from fiduciaries who have breached their duties and caused harm to the beneficiaries. The Secretary has consistently taken the position, in this Court and others, that "appropriate equitable relief" in section 502(a)(3) includes recovery of monetary losses from fiduciaries because historically such relief was typically and exclusively available in equity.

STATEMENT OF THE ISSUE

Whether a claim by an ERISA plan beneficiary against a fiduciary, to recover the direct monetary loss caused by the fiduciary's breach of duty in delaying payment of a retirement account to him by over a year, constitutes "appropriate equitable relief" under section 502(a)(3).

STATEMENT OF THE CASE[1]

Louis Goeres was a beneficiary of the SchwabPlan Retirement Savings and Investment Plan (the "Plan"), designated as such by a beneficiary designation form filled out and submitted to the Plan in 1992 by Stephen Ward, a Schwab employee and Plan participant.[2] Complaint ¶ 12. A Schwab Benefits Representative countersigned the beneficiary designation form on the same date that Ward filled out the form. Id. Schwab was the named fiduciary of the Plan. Id. at ¶ 5. Schwab Retirement Plan Services Inc. ("Retirement Plan Services") and the Administrative Committee of the SchwabPlan Retirement Savings and Investment Plan (the "Committee") were allegedly also fiduciaries of the Retirement Plan. Id. at ¶¶ 6-7.

In January 2000, Goeres notified Schwab's Human Resources Department that Ward had died. Complaint ¶ 16. Schwab's Human Resources Department instructed Goeres to send a copy of Ward's death certificate and told Goeres that he would be contacted by "Schwab Plan" about Ward's retirement plan account. Id. In January or February of 2000, Goeres asked Retirement Plan Services about the Retirement Plan account. A Retirement Plan Services representative told Goeres that he was not the designated beneficiary. Id. at ¶ 18. Ward's sister also contacted

[1] The Secretary takes no position on the factual matters presented in the case. The Statement of the Case is taken from the plaintiff's pleadings and is not intended to express the Secretary's opinion as to how the Court should rule on the facts.

[2] Goeres also received benefits under his partner's employee welfare benefit plans. Complaint ¶ 15.

Retirement Plan Services on behalf of Goeres; she was also told that Goeres was not Ward's beneficiary. Id. at ¶ 19.

On May 15, 2001, approximately sixteen months after Goeres notified Schwab of Ward's death, Retirement Plan Services wrote to Goeres, saying that it had "recently learned of the death of" Ward and that Goeres had been designated as Ward's beneficiary under the Retirement Plan. Complaint ¶ 22. On that same date, Retirement Plan Services sent Goeres an application for Plan benefits for the first time, and other materials. Id. at ¶ 23. Goeres alleges that these materials failed to adequately inform him of his distribution option as a non-spouse beneficiary. Id. at ¶ 24. Goeres ultimately collected the proceeds of the Retirement Plan in 2004.

Ward's Plan account was valued at approximately $1.2 million on December 31, 1999. Complaint ¶ 27. It was valued at approximately $1.6 million on June 30, 2000. Id. at ¶ 28. By May 15, 2001, when the defendants informed Goeres that he was in fact Ward's beneficiary, the account had dropped in value to approximately $700,000. Id. at ¶ 29. The Plan account had diminished to approximately $565,000 by the time the account balance was paid to Goeres in 2004. Id. at ¶ 30.

Goeres sued Schwab, Retirement Plan Services, and the Committee for breaches of fiduciary duty under ERISA in the District Court for the Northern District of California. Complaint ¶¶ 4-7, 32-37. Goeres sought as relief an order

that the defendants take all steps necessary to place him in the position he would have been in had the defendants not breached their fiduciary duties, including modifying the Plan's records to reflect Goeres's entitlement to a distribution of Ward's account, valued as of no later than June 30, 2000. Id. at Prayer for Relief ¶ C.

The district court granted defendants' motion to dismiss on September 28, 2004. The court held that the relief sought was legal rather than equitable. Goeres v. Schwab, No. C 04-01917 CRB, 2004 WL 2203474 (N.D. Cal. Sept. 28, 2004). Citing Great-West Life & Annuity Ins. Co. v. Knudsen, 534 U.S. 204 (2002), the court held that Goeres sought money damages, which are the classic form of legal relief. Goeres, 2004 WL 2203474, at *3. The court held that imposing a court order modifying the Plan records to reflect that Goeres was entitled to a distribution of benefits as of a certain date would be no different than requiring defendants to pay him the value of the account on that date. Id. at *5.

The court further held that suing a fiduciary for monetary damages is a claim for legal relief. The court did not analyze the argument that suits against breaching fiduciaries were typically available in equity; instead, it cited two pre-Great-West cases from the Ninth Circuit that dismissed claims against breaching fiduciaries as impermissibly seeking monetary, and therefore legal, relief. 2004 WL 2203474, at *4. The court distinguished a recent Ninth Circuit decision, Mathews v.

Chevron Corp., 362 F.3d 1172 (9th Cir. 2004), by noting that Mathews required the remedy of instatement into a retirement plan, whereas here there was "no plan into which plaintiff can be 'instated.'" Goeres, 2004 WL 2203474, at *5. The court rejected Goeres's argument that, as was the plaintiff in Mathews, he was seeking to be put back in the position he would have been in without the fiduciary breach. Id.

SUMMARY OF ARGUMENT

ERISA obligates fiduciaries to act prudently and with loyalty toward plan participants and beneficiaries. When fiduciaries breach these duties, participants and beneficiaries may sue under section 502(a)(3) for "appropriate equitable relief" to redress the breach under section 502(a)(3), but they may not seek legal relief. In order to determine whether the relief sought constitutes "equitable relief" within the meaning of section 502(a)(3), the Supreme Court has recently directed courts to refer to established treatises to determine the historical practice in the days when the bench was divided between equity courts and law courts. Great-West, 534 U.S. at 210, 212, 216.

As the relevant treatises make clear, historically, a beneficiary who wished to remedy a breach of trust had only one avenue of relief: the equity courts. Monetary relief to redress a breach of fiduciary duty was not only "typically" available in equity; under the common law of trusts, it was exclusively available in

equity. Moreover, unjust enrichment of the fiduciary was not required. Instead, equity courts historically had the power to put the plan beneficiary in the position he would have been in were it not for the breach.

The Supreme Court's emphasis in Great-West on an examination of equity's historical practice calls into question earlier pronouncements from this Court disallowing monetary relief under section 502(a)(3) to remedy fiduciary breaches. See McLeod v. Oregon Lithoprint Inc., 102 F.3d 376, 378 (9th Cir. 1996); Farr v. U.S. West Communications, Inc., 151 F.3d 908, 916 (9th Cir. 1998), amended by 179 F.3d 1252 (9th Cir. 1999); Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1010 (9th Cir. 1998). In none of these decisions did this Court engage in the historical analysis that is now required by Great-West. Because the reasoning of those decisions has been "directly undermined" by an intervening Supreme Court case, a panel of this Court may reconsider and overrule them. EEOC v. Luce, Forward, Hamilton, & Scripps, 303 F.3d 994, 1002 (9th Cir. 2002).

ARGUMENT

I. GREAT-WEST INSTRUCTS COURTS TO LOOK TO THE HISTORICAL PRACTICE OF THE COURTS OF EQUITY IN ORDER TO DETERMINE WHETHER A PARTICULAR REMEDY IS "EQUITABLE" UNDER SECTION 502(a)(3)

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 section 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 n.10 (1985), citing S. Rep. No. 93-127, p. 29 (1973), reprinted in 1974 U.S.C.C.A.N. 4638, 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. 4639, 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. 1982).

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), the third of ERISA's enforcement provisions, allows participants and beneficiaries to sue for "appropriate equitable relief" for breaches of fiduciary duty that cause them individual harm. See Varity v. Howe, 516 U.S. 498 (1996). Although "equitable relief" is not defined in ERISA, the Supreme Court has twice addressed the issue of what constitutes such relief.

In the first case, Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), plan participants sued under section 502(a)(3) for the monetary losses to the plan resulting from their employer's alleged fiduciary breach in significantly

underfunding the plan. Instead of seeking to recover from the employer-fiduciary, however, the plan participants sued the non-fiduciary actuary who they claimed had knowingly participated in the fiduciary's breach. 508 U.S. at 250.

The Court described the question presented in Mertens as "whether a nonfiduciary who knowingly participates in the breach of a fiduciary duty imposed by [ERISA] is liable for losses that an employee benefit plan suffers as a result of the breach." 508 U.S. at 249-50 (emphasis added). In declining to classify the money sought against a non-fiduciary as "equitable relief" under section 502(a)(3), the Court reasoned that the participants did not "seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution . . . [but rather] 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 (emphasis in original) (citation omitted). The Court accordingly rejected the notion that "'[e]quitable relief' . . . mean[s] whatever relief a court of equity is empowered to provide in the particular case at issue." Instead, the Court had held that "equitable relief" must refer to "'those categories of relief that were typically available in equity.'" 534 U.S. at

219-10. The Court, however, gave little guidance on how to make this determination.[3]

In Great-West, 534 U.S. 204, the Court further addressed this issue. Unlike Mertens, Great-West did not involve a suit for fiduciary breach at all. Instead, it involved a suit by an ERISA health plan against a plan beneficiary under section 502(a)(3), seeking a monetary award from the beneficiary for breach of a provision in the health insurance contract requiring the beneficiary to pay to the plan the proceeds from a personal injury settlement. The Court concluded that the plan there impermissibly sought to impose personal liability for a contractual obligation to pay money owed, and thus sought legal and not equitable relief. 534 U.S. at 210.

In reaching this determination, the Court found it necessary to examine the historical practice in the "days of the divided bench" to see when particular remedies were available at law and when at equity. Great-West, 534 U.S. at 210-

[3] Significantly, the Mertens Court did not decide whether, in an appropriate case, it would allow an equitable action against a fiduciary for losses caused by a fiduciary breach. The Court did acknowledge that "money damages were available in . . . courts [of equity] against the trustee." 508 U.S. at 256 (citing United States v. Mitchell, 463 U.S. 206, 226 (1983); and G. Bogert, The Law of Trusts and Trustees § 701, at 198 (rev. 2d ed. 1982)). The Court further emphasized that ERISA places most responsibility on fiduciaries, "allocat[ing] liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds," 508 U.S. at 262; and, most tellingly, it said that "[p]rofessional service providers such as actuaries become liable for damages when they cross the line from advisor to fiduciary." Id. (emphasis added).

13. The Court explained that to determine the historical practice, courts should rely on standard treatises documenting that practice:

> It is easy to disparage the law-equity dichotomy as an "ancient classification" . . . and an "obsolete distinctio[n]". . . . Like it or not, however, that classification and distinction has been specified by the statute; and there is no way to give the specification meaning . . . except by adverting to the differences between law and equity to which the statute refers. The dissents greatly exaggerate, moreover, the difficulty of that task. . . . Rarely will there be need for any more "antiquarian inquiry,". . . than consulting, as we have done, standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear.

Great-West, 534 U.S. at 216-17.

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.[4]

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. Instead, under the treatises to which Great-West directs the inquiry, it is clear that 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 (Second) of Trusts § 197 (1959); infra, Section II.[5]

Great-West thus significantly clarified the Court's earlier decision in Mertens. Like Mertens, Great-West also did not involve a suit to recover monetary damages from a fiduciary. But while Mertens was ambiguous on the availability of such relief in equity, Great-West makes it abundantly clear that examination of

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[4] 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)).

[5] 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). In contrast, 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.

the historical practice of the equity courts is required to determine whether monetary relief against a fiduciary was "typically available." 534 U.S. at 210 (emphasis omitted). As we explain below, an examination of this historical practice, as delineated in the standard treatises, reveals that the recovery of direct monetary losses sought by the beneficiary here was typically, and indeed exclusively, available in courts of equity.

II. MONETARY AWARDS AGAINST BREACHING FIDUCIARIES WERE 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; 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 [for a breach of duty] 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. 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, § 1; III. A. Scott, § 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.

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 III. A. Scott, The Law of Trusts § 199.3, at 206 ("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, § 199.3 at 206 (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary).

Under the law of trusts, the fiduciaries are liable for "any loss or depreciation in value of the trust estate resulting from the breach of trust." Restatement (Second) of Trusts § 205(a) at 458; see also III. A. Scott The Law of Trusts § 201, at 219, § 205, at 237. In many cases described by the comments, the Restatement makes clear that the breaching trustee is liable for a monetary payment as part of putting the plaintiff back in the position he should have been in without the breach. See, e.g., illus. 1 ("A is trustee of $10,000 in cash. As a result of his negligence the money is stolen. A is liable for $10,000."); illus. 2 ("A is a trustee of a claim which he can collect in full. He negligently fails to take steps to collect the claim with the result that it is barred by the Statute of Limitations. A is liable for the amount of the claim."); illus. 3 ("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 ("[t]he remedies of a beneficiary

against a trustee are exclusively equitable.");[6] see also I. A. Scott, The Law of Trusts § 1; III. A. Scott, § 197; G. Bogert, The Law of Trusts and Trustees § 861, at 3-4.

Other standard works of trust law demonstrate that monetary relief against breaching fiduciaries is equitable relief. Professor George Gleason Bogert notes:

> 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; see also III. A. The Law of Trusts § 199, at 203-04, and § 199.3 at 206 (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary). Allowing ERISA beneficiaries to seek such relief under section 502(a)(3) is not only consistent with the historical practice, it is central to ERISA's core goal of protecting plans and their participants and beneficiaries from fiduciary breach. See, e.g., Varity, 516 U.S. at 513 (noting that ERISA was designed to "establish . . . standards of conduct, responsibility, and obligations for fiduciaries

[6] 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 Restatement (Second) of Trusts § 205(b) at 458.

. . . and . . . provid[e] for appropriate remedies" for breach of those duties) (emphases added).[7]

III. A MONETARY AWARD TO REDRESS A FIDUCIARY BREACH IS TRADITIONAL EQUITABLE RELIEF, REGARDLESS OF WHETHER THE FIDUCIARY WAS UNJUSTLY ENRICHED

Defendants argued below that there can be no monetary award here because there was no unjust enrichment. Defendants' Reply in Support of Motion To Dismiss at pp. 2-3. The recovery of unjust enrichment, however, is only one of three remedies recognized by the Restatement: the other two are recovery of any loss or depreciation in value of the trust estate, and any disgorgement of profit which would have accrued to the trust estate if there had been no breach of trust. Each of these three may be available in any given case. Restatement (Second) of Trusts § 205 at 458. The Restatement specifically calls these "alternate" remedies for breach of trust, and notes that each may not always be available. Id. at cmt. a.

[7] In accordance with this history, the Seventh Circuit has awarded monetary relief against fiduciaries as "appropriate equitable relief" in ERISA cases. See Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (7th Cir. 2000). However, a number of other courts have held to the contrary. See, e.g., Callery v. U.S. Life Ins. Co., 392 F.3d 401 (10th Cir. 2004); Helfrich v. PNC Bank, Ky., Inc., 267 F.3d 477, 481-82 (6th Cir. 2001); Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 943-44 (8th Cir. 1999); cf. Pereira v. Farace, No. 03-5035(L), 2005 WL 1532318, at *7-9 (2d Cir. June 30, 2005)(in a state law breach of trust case, court holds that monetary relief from a breaching fiduciary is legal relief entitling defendants to jury trial).

In Mathews, a company acting in its fiduciary capacity represented to its employees that no severance packages were planned; several employees took early retirement, and after severance benefits were eventually announced, those employees alleged that they had been misled and should have been able to receive the severance packages. The Ninth Circuit approved a remedy which required the plan to treat the plaintiffs as if they had been involuntarily discharged as of the date of their separations, and therefore entitled to the termination enhancement benefit. 362 F.3d at 1186. Although the Secretary believes this Court was wrong in requiring the plan, rather than the breaching fiduciaries, to pay the additional benefits, the Court was correct in recognizing the traditionally equitable nature of a remedy that puts the beneficiary in the position he would have been absent the breach.[8] Such a remedy does not require a showing of unjust enrichment, as it is

[8] The Secretary thus does not support the particular remedial method that Goeres seeks here, i.e., requiring the fiduciaries to modify plan records to reflect the amount payable to Goeres on the date on which plaintiff would have submitted his application for benefits absent the breach. The breaching fiduciaries (Schwab, Retirement Plan Services, and the Committee), and not the plan, should be responsible for redressing the harm caused by their violation of their duties. The effect of an order making the Schwab plan pay for the loss, rather than the individual fiduciaries, is to require the Plan's other participants to foot the bill for the fiduciary breach. Any money taken from the Plan to pay for a judgment necessarily reduces the amount available in other participants' accounts in an individual account plan, like the Schwab plan.

the breach's effect on the beneficiary (i.e., the harm caused) rather than on the fiduciary (i.e., any profit made) that is at issue.[9]

Nor do the illustrations to the Restatement section 205 require unjust enrichment before a remedy can be awarded in a way that causes money to be paid out. Illustration 9, for example, provides: "A is trustee for B of $100,000. By the terms of the trust he is directed to invest the money in land. He purchases Blackacre for $25,000, although if he had not been negligent he could have purchased it for $15,000, its fair value. A is liable for $10,000. Although Blackacre subsequently becomes worth less than $15,000 A is not liable for more than $10,000." Restatement (Second) of Trusts § 205 at 460. The trustee in the

[9] By contract, claims for monetary awards against non-fiduciaries require a showing of unjust enrichment in order to be considered equitable under section 502(a)(3). See, e.g., Great-West, 534 U.S. at 213-14; Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 251 (2000). Unjust enrichment is necessary to recover money from non-fiduciaries because the relief qualifies as "equitable" only if the 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 relief as restitution, because unlike fiduciaries, they have no independent duty in equity to redress a breach. Indeed, the constructive trust device used to remedy unjust enrichment (recognized as equitable by the Supreme Court in Great-West), does not require a trust relationship, but instead rests on the fiction that the person who possesses the property holds it in trust for the beneficiary. See, e.g., In re JTS Corp., 305 B.R. 529, 540 (Bankr. N.D. Cal. 2003); Bogert, The Law of Trusts and Trustees, § 471 (rev. 2d ed. 1978)(constructive trust "turns the relationship into a court-created trust relationship in order to apply in the simplest way the law of express trusts . . . It is not enforced because the parties expressed an intent to have a trust . . . [It] is merely a device"). There is no need for such a fiction to support equitable relief against an actual fiduciary.

illustration is liable for the amount that the trust overpaid for its investment, even though the trustee has not been unjustly enriched.

Similarly, in Illustration 8, A, the trustee for B of Blackacre, is directed by the terms of the trust to sell Blackacre. "He sells Blackacre for $10,000, although if he had not been negligent he could have sold it for $12,000. A is liable for $2000. Although Blackacre subsequently becomes worth $15,000, A is not liable for more than $2000." Restatement (Second) of Trusts § 205, at 460. In other words, the trustee is liable for the amount of the decline in the investment when the decline was due to the trustee's breach of duty. Moreover, as recognized in the Restatement, these remedies of the beneficiary against the trustee "are exclusively equitable." Restatement (Second) of Trusts § 197, at 433-34.

Here, Goeres seeks the amount that the retirement plan account was worth on the date when he would have had received benefits if the defendants had not breached their fiduciary duties. If the fiduciaries breached their duties, they are liable to him for the difference between the amount the account would have been worth, had they not breached their duties, and the amount it actually was worth when it was paid or became available to him, as in Illustration 8. This illustration disposes of defendants' argument that nothing can be paid to Goeres because the defendants do not have any portion of the benefit owed to him: the amount they are required to pay is the amount of the "loss or depreciation in value of the trust

estate resulting from the breach of trust." Restatement (Second) of Trusts § 205(a,) at 458.

Relying on Great-West, defendants insist that plaintiff cannot recover here because there is no unjust enrichment and thus no identifiable res to which he can make an equitable claim. But Great-West (like Mertens) did not involve a breach of trust by a trustee to a beneficiary, and consequently did not invoke the traditional, "exclusively equitable" remedies of a beneficiary against a breaching trustee. As comment (a) of section 205 explains, the beneficiary has the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach, or of pursing a remedy which will give him any profit which the trustee has made by committing the breach of trust (i.e., unjust enrichment), or of pursuing a remedy which would give him any profit which would have accrued to the trust estate if there had been no breach of trust at all. Restatement (Second) of Trusts § 205, cmt. a., at 458. Recovering unjust enrichment is one, but only one, of the approaches sanctioned by the Restatement; a beneficiary need not prove unjust enrichment as a precedent for recovery, because the alternate remedies for breach of trust do not require it.

IV. IN LIGHT OF GREAT-WEST, THIS COURT SHOULD REEXAMINE ITS PRECEDENTS AND CONCLUDE THAT A MONETARY AWARD TO REMEDY A FIDUCIARY'S BREACH IS "EQUITABLE" UNDER SECTION 502(a)(3)

A closer look at Great-West and the scholarly treatises thus directly undermines the district court's reliance on earlier, pre-Great-West decisions from this Court. See Goeres, 2004 WL 2203474, at *4 (citing McLeod, 102 F.3d at 378, and Farr, 151 F.3d at 916; see also Bast, 150 F.3d at 1010 (characterizing Mertens as prohibiting money damages for breach of fiduciary duty).[10] These cases, decided before Great-West, hold that "the status of the defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute 'appropriate equitable relief' under § 502(a)(3)." McLeod, 102 F.3d at 378. However, in none of these earlier cases did this Court engage in the type of historical analysis mandated by Great-West to determine if the requested relief was typically available in equity.

As shown above, that analysis mandates the conclusion that a monetary remedy against a fiduciary is "appropriate equitable relief" because historically such a remedy was the exclusive province of the equity

[10] This Court's decision in Westaff (USA) Inc. v. Arce, 298 F.3d 1164 (9th Cir. 2002), on the other hand, has little bearing here. The claim there involved a contract action for reimbursement against a plan beneficiary, not for relief against a fiduciary for breach of duty.

courts and was typically granted by them. Indeed, adoption of the district court's ahistorical construction of "equitable" would lead to the same confusion that the Great-West majority predicted would follow adoption of the dissents' interpretation of the term. 534 U.S. at 217 ("What will introduce a high degree of confusion into congressional use (and lawyers' understanding) of the statutory term 'equity' is the rolling revision of its content contemplated by the dissents.") (emphasis in original). Likewise, generally categorizing all monetary relief as legal (and hence prohibited) is inconsistent with the methodology mandated by Great-West. Where, as here, historical practice determines the content of a current legal rule, the pertinent historical tradition must be identified with specificity rather than generality because "such general traditions provide such imprecise guidance." Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J.; plurality opinion). Consequently, because Great-West has "directly undermined" the reasoning of Bast and McLeod, the instant panel may reconsider and overrule those prior opinions. EEOC v. Luce, Forward, Hamilton, & Scripps, 303 F.3d at 1002.

Adopting the district court's restricted reading of "equitable relief" would not only depart from the most pertinent specific historical practice, it would leave beneficiaries without any remedy for serious violations of ERISA's fiduciary

provisions, in conflict with the statutory scheme. As alleged here, a fiduciary could fail to adhere to ERISA's fiduciary standards, cause a direct injury to a participant or beneficiary, and nevertheless evade responsibility for the resulting loss. The participant would have no remedy under ERISA if the recovery for the loss were not "equitable" relief, and ERISA would preempt any state-law claims based on the fiduciary's misconduct. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-57 (1987) (ERISA's civil enforcement scheme is exclusive and may well preempt alternative state remedial schemes).

Such a result is neither consistent with ERISA's remedial purposes, nor compelled by Mertens or Great-West. Whatever ambiguity Mertens left on the matter, Great-West clarifies by referring the courts to the historical practice of the equity courts at the time of the divided bench. 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. Like the courts of equity, which would not countenance such a result, Congress did not intend to do so here.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court reverse the decision of the district court.

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 05-15282

I certify that the Brief of the Secretary of Labor as Amicus Curiae in Support of the Appellant and Requesting Reversal is proportionately spaced, has a typeface of 14 points, and contains 5,896 words.

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Dated: July 11, 2005

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Case No. 05-15282

I certify that a copy of the Brief of the Secretary of Labor as Amicus Curiae in Support of the Appellant and Requesting Reversal was mailed, via federal express, to the following parties listed below:

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