No. 11-1560

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEBORAH KENSETH,
Appellant,

v.

DEAN HEALTH PLANS, INC.,
Appellee.

Appeal from the United States District Court For the
Western District of Wisconsin (Crabb, B.)
Civil Action No. 08-C-1-C

Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Reversal

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STATEMENT OF THE ISSUE

Whether section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), authorizes a court to grant, as "appropriate equitable relief," a make-whole loss remedy to a plan participant who has been injured as a result of fiduciary misconduct, and to award such other equitable relief as is necessary to prevent the fiduciary and related parties from profiting as a result of the fiduciary misconduct.

STATEMENT OF INTEREST

The Secretary of Labor has primary regulatory and enforcement authority for Title I of ERISA. Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc). This case presents an important and recurring remedial issue: whether section 502(a)(3) of ERISA authorizes plan participants to recover monetary losses resulting from fiduciary breaches. The Secretary has a strong interest in the proper resolution of this issue, both with regard to private cases, and in her own litigation brought under a parallel provision of ERISA, 29 U.S.C. § 1132(a)(5), that allows the Secretary to sue for "appropriate equitable relief."

The Secretary files this brief as amicus curiae under Fed. R. App. P. 29(a).

STATEMENT OF THE CASE

This case is before the Seventh Circuit for the second time. In the first appeal, the Court vacated the district court's grant of summary judgment to the defendant on the issue of fiduciary breach and remanded for a determination of what "form of equitable relief [might be] appropriate to the facts of this case." Kenseth v. Dean Health Plan, 610 F.3d 452, 483 (7th Cir. 2010). The remedies issue is now squarely back before this Court after the district court decided that no monetary or injunctive relief could be granted under its reading of section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), which provides participants in ERISA-covered plans with the "appropriate equitable relief" cause of action to redress violations of the statute.[1]

Deborah Kenseth is the plaintiff, and Dean Health Plan Inc. ("Dean") is the defendant. Kenseth participated in an ERISA-covered health care plan sponsored by her employer, which Dean, "one of the largest [Health Maintenance

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[1] The provision states:

> A civil action may be brought – (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter 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 subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3). Section 502(a)(5), 29 U.S.C. § 1132(a)(5), provides the Secretary with a similar equitable cause of action.

Organizations] in the Midwest," insured and administered. Kenseth, 610 F.3d at 456. Although Dean pre-authorized Ms. Kenseth's surgery to correct the ill effects of a prior gastric bypass, it denied her claim for benefits after she had the surgery, citing a plan provision that excludes surgery for morbid obesity and complications resulting from such surgery. Id. at 457-61. Kenseth claims that Dean violated its duties as an ERISA fiduciary when it erroneously pre-authorized her surgery and left her liable for over $77,000 in medical bills, mostly owed to providers employed by or affiliated with Dean Health Systems, the parent company of Dean. Second Amended Complaint (R.59) at ¶¶ 35, 39-45, 47. Kenseth filed suit under ERISA section 502(a)(3) for "appropriate equitable relief" to remedy this violation. Id. at ¶ 68.

This Court held on appeal that the "facts support a finding that Dean breached its fiduciary duty to Kenseth by providing her with a summary of her insurance benefits that was less than clear as to coverage for her surgery, by inviting her to call its customer service representative with questions about coverage but failing to inform her that whatever the customer service representative told her did not bind Dean, and by failing to advise her what alternative channel she could pursue in order to obtain a definitive determination of coverage in advance of her surgery." Kenseth, 610 F.3d at 456. On remand, the district court again entered summary judgment for Dean, this time on the ground

that the court "cannot grant plaintiff the relief she seeks regardless whether a breach occurred." Kenseth v. Dean Health Plan, Inc., ___ F.Supp.2d ___, 2011 WL 901388, at *2 (W.D. Wis. 2011). Relying primarily on Mertens v. Hewitt Associates, 508 U.S. 248 (1993), the court held that the make-whole monetary recovery Kenseth seeks is legal and not "equitable relief" that a court may award under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). Kenseth, 2011 WL 901388, at *5-*9.

In addition to finding the requested make-whole relief not to be "equitable," the court also held that it would not be "appropriate" to grant such relief in the circumstances of the case. First, the court held that Kenseth was really claiming benefits under section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and thus was not bringing the type of fiduciary breach claim that could be pursued under section 502(a)(3). Kenseth, 2011 WL 901388, at *9-*10 (citing Varity v. Howe, 516 U.S. 489 (1996)). Second, the court held that the relief was "not tied to the defendant's alleged violation of law," because Kenseth presumably would have gone ahead with the surgery even if she had been given correct information beforehand that it was not covered by the Plan. Id. at *10.

For similar reasons, the court further rejected Kenseth's arguments for restitution on an unjust enrichment theory. Id. at *10-*11. The court also denied injunctive relief, as well as attorney's fees. Id. at *11-*15.

SUMMARY OF ARGUMENT

The district court's decision cannot survive review. Contrary to that decision, the Supreme Court recently made clear that ERISA fiduciaries who have breached their fiduciary duty are subject to the make-whole remedy of surcharge and other equitable monetary awards under ERISA section 502(a)(3). CIGNA Corp. v. Amara, 563 U.S. ___, 131 S.Ct. 1866 (2011). The CIGNA defendant's status as an ERISA fiduciary provided the critical distinction between CIGNA and previous Supreme Court cases involving non-fiduciaries where equitable monetary relief was not awarded. The error of the district court below and of most federal circuits was in applying to fiduciaries a body of law that related only to non-fiduciaries. With that error corrected by CIGNA, remedial law under ERISA is now congruent with the statute's purposes and with the overwhelming weight of equitable jurisprudence predating ERISA. Thus, CIGNA has dramatically changed the legal landscape, and the holding of the district court below and the law of this and most other federal circuits on this question of remedies for a fiduciary breach have been effectively overruled.

ARGUMENT

UNDER SECTION 502(a)(3), KENSETH IS ENTITLED TO "APPROPRIATE EQUITABLE RELIEF" IN THE FORM OF A MAKE-WHOLE MONETARY RECOVERY, AND DEAN IS NOT ENTITLED TO PROFIT FROM ITS FIDUCIARY BREACH

The district court's opinion, based on its reading of the Supreme Court's Mertens decision, that ERISA provides no make-whole monetary remedy for a fiduciary breach that harms a participant, is "misplaced." CIGNA, 131 S.Ct. at 1878. CIGNA, which was decided after the district court's decision, holds that the make-whole remedy of surcharge, as well as other equitable remedies such as estoppel and reformation, are available under section 502(a)(3) against fiduciaries who have breached their duties under ERISA. Accordingly, the district court's decision is incompatible with Supreme Court precedent and must be reversed.[2]

In CIGNA, plan participants sought to be made whole for harm caused to them when they received misleading and false information with regard to the

[2] Equally incompatible with CIGNA is Smith v. Medical Benefit Administrators, 639 F.3d 277 (7th Cir. 2011), which, on facts very close to this case, and like the district court here, held that make-whole relief was unavailable under ERISA section 502(a)(3). Smith was decided on March 15, 2011, after the district court's decision here but before the Supreme Court's CIGNA decision. Under Seventh Circuit law, an appellate panel may overrule circuit precedent if there is a compelling reason, such as a contrary, superseding Supreme Court decision. See Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 916 (7th Cir. 2009) ("We have overruled our prior decisions . . . when the Supreme Court issues a decision on an analogous issue that compels us to reconsider our position, Haas v. Abrahamson, 910 F.2d 384, 393 (7th Cir.1990)"); see also Russ v. Watts, 414 F.3d 783, 789 (7th Cir. 2005); Shropshear v. Corp. Counsel of City of Chicago, et. al., 275 F.3d 593, 595-597 (7th Cir. 2001).

conversion of their defined benefit plan to a "cash balance" plan. CIGNA, 131 S.Ct. at 1872-74. The district court found that the erroneous disclosures violated CIGNA's duties as a fiduciary under ERISA, and ordered the plan reformed and benefits paid under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), without deciding whether it could provide the same relief under section 502(a)(3). CIGNA, 131 S.Ct. at 1874-76. The Second Circuit affirmed.

The Supreme Court held that section 502(a)(1)(B) of ERISA, which authorizes participants to bring claims to recover plan benefits, does not give the courts authority to reform the plan and make good on promises communicated to participants in summaries of the plan (but not in the plan itself). CIGNA, 131 S.Ct. at 1876-78. However, noting the maxim that "[e]quity suffers not a right to be without a remedy," id. at 1879 (quoting R. Francis, Maxims of Equity 29 (1st Am. ed. 1823)), the Court held that section 502(a)(3) provided a broad range of equitable remedies for such fiduciary misconduct, including make-whole relief and plan reformation. In the Court's view, its previous cases denying a loss remedy under section 502(a)(3) were distinguishable because they involved non-fiduciaries, while CIGNA was a fiduciary. Id. at 1880 ("insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in Mertens, is analogous to a trustee makes a critical difference"). Significantly, because CIGNA involved "a suit by a beneficiary against a plan

fiduciary (whom ERISA typically treats as a trustee) about the terms of the trust[,] it was the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law." Id.

The Court further explained that the remedies at issue (reformation, estoppel, and surcharge) were also the kind of remedies that courts of equity typically granted under their exclusive jurisdiction. Thus, in particular, surcharge, or monetary compensation by a fiduciary for loss resulting from "a trustee's breach, or to prevent the trustee's unjust enrichment"(131 S.Ct. at 1880 (citations omitted)), was a "traditional equitable remed[y]" falling within the category of "traditionally equitable relief" (id.) that Mertens previously held to be authorized by section 502(a)(3).

> The surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary. . . . In sum, contrary to the district court's fears, the types of remedies the court entered here fall within the scope of the term "appropriate equitable relief" in § 502(a)(3).

Id. at 1880 (citations omitted). Moreover, the Court held that "although a fiduciary can be surcharged under § 502(a)(3) only upon a showing of actual harm" (id. at 1881), "it is not always necessary to meet the more rigorous standard implicit in the words 'detrimental reliance.'" Id. at 1881-82. Thus, the Court's central holding, upon which it remanded "for further proceedings consistent with this opinion," id. at 1882, was that section 502(a)(3) provides for equitable remedies such as

surcharge and requires courts to "borrow[] from equitable principles, as modified by the obligations and injuries identified by ERISA itself" in fashioning such relief. Id.[3]

CIGNA thus corrects a widely held misunderstanding of the Supreme Court's construction of section 502(a)(3) in Mertens, which held that section 502(a)(3) is limited to "equitable relief" that was typically available in equity and

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[3] Explaining that it "need not decide which remedies are appropriate on the facts of this case in order to resolve the parties' dispute as to the appropriate legal standard in determining whether members of the relevant employee class were injured," the Court remanded for the district court to "revisit its determination of an appropriate remedy for the violations of ERISA it identified" in light of the "general principles" on remedies at equity that the Court identified. CIGNA, 131 S.Ct. at 1880, 1882. This disposition, however, did not render the Court's discussion of section 502(a)(3) mere dicta that lower courts are free to ignore, as the concurring Justices contended. See id. at 1884 (Scalia, J., concurring in judgment). Rather, the Court's disposition of the remedy issue was essential to deciding what legal standard applies when there is a discrepancy between what the plan says and what the summary plan description says about the plan. See id. at 1876 (the Court granted certiorari to decide "whether a showing of 'likely harm' is sufficient to entitle plaintiffs to recover benefits based on faulty disclosures"); id. at 1880 (the dispute in the case was about "the appropriate legal standard in determining whether members of the relevant employee class were injured"). But even if the discussion of surcharge were viewed as dicta, it is "ordinarily the duty of a lower court to be guided by" "a recent dictum [of the Supreme Court] that considers all the relevant considerations and adumbrates an unmistakable conclusion." Reich v. Continental Casualty Co., 33 F.3d 754, 757 (7th Cir. 1994); see also Laber v. Harvey, 438 F.3d 404, 418 n.12 (4th Cir. 2006) ("whether that [Supreme Court] rule was dicta or holding is close enough to require us to overrule, instead of distinguish" earlier Fourth Circuit cases); United States v. Fareed, 296 F.3d 243, 247 (4th Cir. 2002) (following "the dictum endorsed by six justices" of the Supreme Court), citing Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) (federal court of appeals is "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements").

does not include "legal remedies" equity courts could enter against non-fiduciaries. Mertens, 508 U.S. at 255-57; see also Great-West Life & Annuity Ins., Co. v. Knudson, 534 U.S. 204, 210 (2002) ("the term 'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were typically available in equity'") (original emphasis; citing Mertens). Before CIGNA, lower courts almost uniformly read Mertens and Great-West as precluding any type of equitable monetary relief except in the narrowest of circumstances where a defendant (whether a fiduciary or non-fiduciary) could be made to give back unjust gains it was holding in an identifiable fund. See, e.g., Amschwand v. Spherion Corp., 505 F.3d 342 (5th Cir. 2008); Coan v. Kaufman, 457 F.3d 250, 264 (2d Cir. 2006); Knieriem v. Group Health Plan, Inc., 434 F.3d 1058, 1061-1064 (8th Cir. 2006); Callery v. U.S. Life Insurance Co., 392 F.3d 401, 409 (10th Cir. 2004); Bast v. Prudential Ins. Co. of America, 150 F.3d 1003, 1011 (9th Cir. 1998); Turner v. Fallon Community Health Plan, Inc., 127 F.3d 196, 199 (1st Cir. 1997). The Seventh Circuit adopted this view for the first time in Smith v. Medical Benefit Administrators, 639 F.3d 277 (7th Cir. 2011). See n.2 supra.

This mistaken view of the Supreme Court precedents construing section 502(a)(3) likewise permeated the district court's opinion in this case. See Kenseth, 2011 WL 901388, at *5 ("'the "equitable relief" authorized by section 1132(a)(3) will normally not include monetary relief,' especially compensatory damages")

(citation omitted). But CIGNA thoroughly refuted this reading of "equitable relief." Instead, CIGNA makes clear that the appropriate inquiry is whether the 502(a)(3) action for fiduciary breach is "the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law," CIGNA, 131 S.Ct. at 1879, and, if so, whether the relief sought resembles "traditional equitable remedies," including surcharge. Id. at 1880 (citations omitted). That inquiry is the polar opposite of the one the district court engaged in here. E.g., Kenseth, 2011 WL 901388, at *5 (rejecting the Secretary's view that "a court must determine whether requested relief is 'equitable' under § 1132(a)(3), not simply by looking at the type of relief at issue, but by asking whether an equity court would have had authority to award the relief requested in an analogous lawsuit against the same type of defendant").

As CIGNA recognized, surcharge is an equitable monetary remedy developed under equity's exclusive jurisdiction over trusts. Equity courts traditionally had responsibility for regulating fiduciary conduct in their role as "universal trustee," with ultimate supervisory authority over trusts and trustees. See, e.g., Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 676 (1819) (charitable trusts "subject to the general superintending power of the court of chancery . . . possessing a general jurisdiction, in all cases of an abuse of trust, to redress grievances and suppress frauds"); Frye v. Community Chest of

Birmingham and Jefferson County, 4 So.2d 140, 148 (Ala. 1941) ("The court of equity has inherent power under the law of trusts to make such orders touching properties within its jurisdiction as will protect all interests."); Cutter v. American Trust Co., 197 S.E. 542, 549 (N.C. 1938) ("'The regulation and enforcement of trusts is one of the original and inherent powers of a court of equity.'") (quoting 21 C.J. 116); T.J. Moss Tie Co. v. Wabash Ry. Co., 11 F. Supp. 277, 284 (S.D.N.Y. 1935) ("trusts are creatures of courts of equity" which exercise "general administrative power in connection with its trust creations"). In this role, equity courts provided a variety of remedies, including monetary relief, which served the goals of equity to restore the status quo ante, i.e., the position the beneficiary was or would have been in if the breach had not occurred, and do justice, e.g., by depriving the breaching trustee of ill-gotten profits. Restatement (Second) of Trusts § 197, at 433 (1959) (Second Restatement); id. § 198, at 434; 1 John N. Pomeroy, A Treatise on Equity Jurisprudence § 151, at 184 (5th ed. 1941); 2 Joseph Story, Commentaries on Equity Jurisprudence § 975, at 175 (12th ed. 1877); Duvall v. Craig, 15 U.S. (2 Wheat.) 45, 56 (1817); Manhattan Bank v. Walker, 130 U.S. 267, 271 (1889); Dartmouth College, 17 U.S. at 676.

Typically, therefore, equity surcharged the breaching fiduciary by requiring him to pay "the amount necessary to compensate fully for the consequences of the breach," by, for example, "restor[ing] the values of the trust estate and trust

distributions to what they would have been if the trust had been properly administered."[4] Restatement (Third) of Trusts § 205 & cmt. a, at 223 (1992); see Oliver v. Piatt, 44 U.S. (3 How.) 333, 401 (1845) (giving the cestui que trust an election to hold a breaching trustee "personally liable for the breach of trust" or to trace the trust property into the hands of a third person (other than a bona fide purchaser for value)); see also United States v. Mason, 412 U.S. 391, 398 (1973); Mosser v. Darrow, 341 U.S. 267, 270-273 (1951); Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 458, 463-464 (1939); Townsend v. Vanderwerker, 160 U.S. 171, 178-79, 182-83 (1895); Lewis v. United States, 92 U.S. 618, 622-23 (1875); Seymour v. Freer, 75 U.S. (8 Wall.) 202, 215 (1868); Falk v. Hoffman, 233 N.Y. 199, 201, 135 N.E. 243, 244 (1922) (Cardozo, J.); see generally George G.

[4] Liability for a breach of trust could be imposed "either in a suit brought for that purpose or on an accounting where the trustee [was] surcharged beyond the amount of his admitted liability," George G. Bogert & George T. Bogert, The Law of Trusts and Trustees (Bogert) § 862, at 36 (rev. 2d ed. 1995), and the monetary recovery could be paid to the beneficiary rather than to the trust itself. See, e.g., Gates v. Plainfield Trust Co., 194 A. 65 (N.J. 1937) (per curiam); Kendall v. DeForest, 101 F. 167, 170 (2d Cir. 1900). An award of monetary relief equal to the benefits lost because of a breach of fiduciary duty is one type of surcharge equity courts typically issued. See, e.g., Heady v. State, 60 Ind. 316 (1878) (where executors failed to follow will's instructions that interest on estate assets should be used to pay beneficiaries' educational expenses, beneficiary who paid for his education with his own funds was entitled to sue executors for reimbursement); Appeal of the Harrisburg Nat'l Bank, 84 Pa. 380, 383 (1877) (court of equity may surcharge administrator of estate with life insurance policy proceeds that the administrator negligently lost); Marriott v. Kinnersley, 48 Eng. Rep. 187, 188 (High Ct. Ch. 1830) (trustee charged with losses resulting from failure to pay premium on life insurance policy).

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Bogert & George T. Bogert, The Law of Trusts and Trustees § 862, at 36 (rev. 2d ed. 1995); 4 Austin W. Scott, William F. Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 24.9, at 1685-87 (5th ed. 2007). Accordingly, the district court in this case was flatly wrong to disregard – as inapposite to the section 502(a)(3) analysis – pre-merger cases clearly demonstrating that equitable remedies against fiduciaries included make-whole monetary relief. See Kenseth, 2011 WL 901388, at *7 ("Mertens has no bearing on Oliver or any other case outside the ERISA context").

To assure that "[e]quity suffers not a right to be without a remedy," CIGNA, 131 S.Ct. at 1879, equity courts have wide discretion to structure equitable remedies in the manner best calculated to vindicate the purposes of the trust relationship. Perhaps the most distinctive characteristic of equitable remedies is their "unlimited variety of form. It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases." 1 John N. Pomeroy, A Treatise on Equity Jurisprudence § 170, at 227 (5th ed. 1941) (footnote omitted); see Sharon v. Tucker, 144 U.S. 533, 544-45 (1892) (quoting Pomeroy); see also Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944) ("The 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.").[5] The guiding principle is that the court should seek to make the wronged participant or beneficiary whole, by restoring, for example, the values of "trust distributions to what they would have been if the trust had been properly administered." Restatement (Third) of Trusts § 205 & cmt. a, at 223.

In this case, this Court has already determined that the "facts support a finding that Dean breached its fiduciary duty to Kenseth," which it characterized as "providing her with a summary of her insurance benefits that was less than clear as to coverage for her surgery, . . . inviting her to call its customer service representative with questions about coverage but failing to inform her that whatever the customer service representative told her did not bind Dean, and . . .

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[5] As summarized by George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 861, at 3-5 (rev. 2nd ed. 1995)(footnotes omitted):

> 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. The court is not confined to a limited list of remedies but rather will mold the relief to protect the rights of the beneficiary according to the situation involved. If equity cannot give the beneficiary the exact benefit to which the trust would entitle him, it will provide him the best possible substitute. Generally, the decree will seek to compensate the beneficiary for a loss suffered or to recover profits made by the trustee. In some cases the object in assessing damages is to deter trustees from the commission of breaches of trust even though the trust itself has suffered no loss.

failing to advise her what alternative channel she could pursue in order to obtain a definitive determination of coverage in advance of her surgery." Kenseth, 610 F.3d at 456. And this Court further stated, based on the factual record as it stood in the first appeal, that "[e]ven if Kenseth were unable to show that a postponement of the surgery would have enabled her to obtain alternative insurance coverage that would have reimbursed her for the procedure, she might be able to show that she could have undergone the same surgery elsewhere for less money, postponed the surgery until she and her husband had saved the money to pay for the procedure, or pursued other treatments." Id. at 481. In the remand proceeding, there was no further factual development of the record that would contradict this finding or support the district court's conclusion (Kenseth, 2011 WL 901388, at *10) that Kenseth would have undergone the surgery regardless of what she was told beforehand.[6] Assuming Dean's pre-surgery representation of coverage constituted

[6] Both district court decisions were decided on summary judgment. In her brief to this Court, Kenseth vigorously disputes the district court's assumption, contending instead that the "undisputed evidence was Kenseth could have elected to forego the surgery and other alternatives were available to her." Brief of Plaintiff-Appellant at 22 (citing her proposed finding of fact No. 40, to which Dean responded "[n]o dispute"). If the Court believes, however, that there are disputed or unresolved issues of material fact on whether Kenseth would have undergone the same surgery and incurred the same liabilities even if she had been told up front that coverage would be denied, and further believes that the appropriate equitable remedy hinges on the answer to that question, it should remand for trial. In any event, it was improper for the district court simply to "assume" Kenseth's inability to mitigate losses (i.e., to forego the surgery) due to an alleged "absence of evidence" to the contrary and to find that no remedy would be "appropriate" as a result.

a fiduciary breach, therefore, Kenseth is, under the established equitable principles described above, plainly entitled to a surcharge remedy that affords "the amount necessary to compensate fully for the consequences of the breach." Restatement (Third) of Trusts § 205 & cmt. a, at 223. That amount is the $77,000 or more in medical bills for which she is liable as a consequence of having had her surgery authorized, but her claim subsequently denied, by Dean.

Consequently, not only should the district court's refusal to fashion any type of monetary equitable remedy be countermanded, but its alternative holding that such relief would not be "appropriate" should also be rejected. The first ground for this holding – that Kenseth's claim is really one for benefits under section 502(a)(1(B) that cannot also be pursued under section 502(a)(3) – does not survive CIGNA. There, the Court considered the availability of equitable relief under section 502(a)(3) precisely because it determined that the claim for make-whole relief was not actually a claim for benefits that could be brought under section 502(a)(1)(B). The same scenario is present here. The second ground – that the request for medical expenses is "not tied to the defendant's alleged violation of the

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Notwithstanding the district court's view that it is plaintiff's burden to show that [Kenseth] is entitled to relief, "2011 WL 901388, at *10, once plaintiff made a prima facie showing causation (see R. 34, ¶ 40), the burden shifts to the fiduciary to disprove causation. Martin v. Feilen, 965 F. 2d 660, 671 (8th Cir. 1992) (citing Leigh v. Engle, 727 F.2d 113, 138-39 (7th Cir. 1984)); see also Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985) ("once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer").

law" – is more case-specific but should also be rejected, or at least remanded, for the reasons stated in the previous paragraph.

Finally, while surcharge does not require a showing of unjust enrichment against the breaching fiduciary, Taylor v. Benham, 46 U.S. (5 How.) 233, 275 (1847); see 4 Scott and Ascher on Trusts § 24.9, at 1685-86, CIGNA recognizes that restitution "to prevent the trustee's unjust enrichment" in an action against a fiduciary is a form of surcharge remedy constituting "appropriate equitable relief" under section 502(a)(3). CIGNA, 131 S.Ct. at 1880. Indeed, a "cardinal principle" of trust law on which ERISA is based, is "that the wrong-doer shall derive no benefit from his wrong. The entire profits belong to the cestui que trust, and equity will so mould and apply the remedy as to give them to him." May v. LeClaire, 78 U.S. 217, 236 (1870); see Restatement (Second) of Trusts § 203 (1959).

Under equity's election of remedies rule, Kenseth may elect that Dean disgorge profits to the extent that Dean's affiliates have been unjustly enriched by the medical bills Kenseth now owes, if the amount of those profits is greater than the make whole remedy would be. Oliver v. Piatt, 44 U.S. (3 How.) at 401. In this regard, it does not matter that the medical providers are separate entities from Dean because fiduciaries may not direct profits to favored or related third parties any

more than they can pocket the profits themselves.[7] Mosser, 341 U.S. at 271-72 (1951) ("the transactions were as forbidden by others as they would have been on behalf of the trustee himself" and the trust law's "strict prohibition would serve little purpose if the trustee were free to authorize others to do what he is forbidden"). Accord 1 George E. Palmer, The Law of Restitution, § 2.11 at 142 (1978) (Mosser "held the trustee accountable for profits he never received"); 3 Scott and Ascher on Trusts, § 17.2.2 at 1107 (citing Mosser); George G. Bogert on Trusts, § 543(V) at 449 (rev. 2nd ed. 1993) (citing Mosser). See Jackson v. Smith, 254 U.S. 586, 588-89 (1921); Magruder v. Drury, 235 U.S. 106 (1914); Michoud v. Girod, 45 U.S. (4 How.) 503, 555-57 (1845).

But however this Court chooses to fashion an appropriate equitable remedy suitable to the circumstances of this case, it is vital to recognize how CIGNA has changed the legal landscape with regard to ERISA remedies for a fiduciary breach causing harm to plan participants or beneficiaries. Under the prevailing pre-CIGNA construction of Mertens and Great-West, numerous courts left plan

[7] Dean has argued below that its providers, which are not parties to the litigation, are separate companies from its fiduciary health insurance subsidiary and that those separate companies have not yet collected any money from Kenseth. Def's Br. Opp'n Pl's Mot. Summ. J. (R.84) 12-14. However, the Court should prevent the unjust enrichment by making Dean responsible, as fiduciary, for making restitution. When a responsible fiduciary is before the court, equity does not relegate beneficiaries to finding other responsible fiduciaries, or to look for non-fiduciaries to sue. If the fiduciary is proved responsible for the problem, it is up to the fiduciary to solve it, not the beneficiary.

participants and beneficiaries with no remedy of any kind, even when they were grievously harmed and when fiduciaries profited from their breaches.[8] The Secretary's long-held and consistent view, which the district court in this case rejected, was that those courts were misconstruing ERISA and the relevant Supreme Court precedent.

Although courts in general felt bound by what they considered to be Mertens' categorical limitation on monetary remedies, some judges and legal scholars were highly critical of the prevailing narrow view of section 502(a)(3) and Mertens. See Aetna Health Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (joining "the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime") (internal quotation marks and citation omitted); Amschwand, 505 F.3d at

[8] See, e.g., Knieriem, 434 F.3d at 1061-64 (court dismissed case because, even assuming a breach of fiduciary duty and financial gain where participant died after denial of coverage for stem cell transplant treatment for lymphoma, restitution and surcharge are not available remedies under ERISA); Bast, 150 F.3d at 1011 (insurer delayed granting costly cancer treatment claim until patient became too ill to be treated, and court construed Mertens to bar disgorgement of the financial windfall the insurer realized from its own breach and the participant's consequent decline and death); Cannon v. Group Health Serv., Inc., 77 F.3d 1270, 1271-72, 1276-77 (10th Cir. 1996) (no remedy even though insurer allegedly "benefit[ed] from [its] unreasonable conduct" due to the consequent death of participant); cf. Turner, 127 F.3d at 199 (court refuses to consider monetary remedy for benefits withheld from deceased patient notwithstanding argument that this "provides a cruel incentive for plan administrators to withhold treatment or delay it as long as possible, since the claim for benefits may be mooted by the beneficiary's death").

348-49 (5th Cir. 2008) (Benavides, J., concurring specially) ("The facts . . . scream out for a remedy beyond the simple return of premiums. Regrettably, under existing law it is not available."); Eichorn v. AT&T Corp., 489 F.3d 590, 592-93 (3d Cir. 2007) (Ambro, J., concurring in denial of petition for rehearing en banc); Lind v. Aetna Health, Inc., 466 F.3d 1195, 1200 (10th Cir. 2006); Pereira v. Farace, 413 F.3d 330, 345-46 (2d Cir. 2005) (Newman, J., concurring); DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 467 (3d Cir. 2003) (Becker, J., concurring); Cicio v. Does 1-8, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part), vacated, 542 U.S. 933 (2004).[9] Such criticisms, however, made scant headway in the courts prior to CIGNA.

Now, after CIGNA, there can be no doubt that monetary remedies such as surcharge are available against breaching fiduciaries. CIGNA thus restores ERISA to its original promise as a statute protecting the participants and beneficiaries of employee benefit plans by affording them a remedy for harms suffered as the result of a fiduciary breach.

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[9] See also Colleen E. Medill, Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3), 39 J. Marshall L. Rev. 827, 852 (2006); John H. Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in Russell, Mertens, and Great-West, 103 Colum. L. Rev. 1317, 1353-1362 (2003); Randall J. Gingiss, The ERISA Foxtrot: Current Jurisprudence Takes One Step Forward and One Step Back in Protecting Participants' Rights, 18 Va. Tax Rev. 417 (1998); Jayne Elizabeth Zanglein, Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA, 72 Wash. U.L.Q. 671 (1994).

CONCLUSION

For the reasons stated above, the district court's decision should be reversed and appropriate equitable remedies, including a make-whole or restitutionary surcharge remedy, should be awarded.

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I hereby certify that on 13th day of June, 2011, I electronically filed the Brief for Amicus Curiae, Hilda L. Solis, Secretary of Labor, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered counsel of record.

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