Nos. 10-1074, 10-1131

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEBBIE MCCRAVY,

Plaintiff-Appellant/ Cross-Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Appellee/ Cross-Appellant

ON APPEAL FROM THE DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT ON PANEL REHEARING

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STATEMENT OF THE ISSUE

Whether the court has authority to order, as "appropriate equitable relief," that MetLife pay plaintiff the insurance proceeds that she would have received but for MetLife's breach of fiduciary duty, in accordance with section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), as recently construed by the Supreme Court in CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011).

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

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 has previously addressed this issue in amicus briefs filed in this case and in amicus briefs filed in numerous other courts, including the Supreme Court. Moreover, the court has granted rehearing in this case in order to determine the effect of the Supreme Court's recent decision in Amara, a case in

which the government participated as amicus curiae. Because the Secretary believes that presentation of her views may aid the Court in its resolution of the issue, the Secretary, through separate motion filed simultaneously with this brief, moves this Court to accept her brief as amicus curiae.

STATEMENT OF THE CASE

Plaintiff Debbie McCravy was employed with Bank of America, which offered a dependent life insurance and accidental death & dismemberment welfare benefit plan that was insured and administered by Defendant Metropolitan Life Insurance Company (MetLife). Plaintiff was the named beneficiary under a policy that covered her now deceased daughter, Leslie. Although plaintiff paid and MetLife accepted premiums for coverage for Leslie for a period of six years before she died in July 2007, when plaintiff asserted her claim for benefits, MetLife denied benefits because Leslie was 25 years old at the time of death. Under the terms of the policy, Leslie was ineligible for group benefits once she turned 19. Joint Appendix (JA) 41-42. Although she had a right to convert the group policy to an individual policy, the plaintiff alleges that she was unaware that conversion was necessary and that – consistent with MetLife's continued acceptance of premiums – she had believed that Leslie was fully covered. JA 9-10.

After MetLife denied her claim for life insurance benefits, plaintiff filed suit in district court alleging that MetLife breached its fiduciary duty in administering

the plan, and seeking equitable relief pursuant to ERISA section 502(a)(3).[1] She alleged that she was entitled to convert the coverage on her daughter from the group insurance which funded the ERISA plan to an individual policy, and that she would have done so if MetLife had told her it was necessary. As a fiduciary, MetLife breached its obligations and misled the plaintiff by accepting premiums as if Leslie were fully covered and failing to disclose the conversion rights or the plaintiff's ineligibility for benefits under the plan. Accordingly, she argued that she was entitled to the proceeds under either a waiver/equitable estoppel theory or under a make-whole theory of equitable relief. JA 9-10

The district court held that McCravy was not entitled to the full amount of the life insurance benefits, but that her sole available remedy was a return of the premiums she had paid for coverage on the life of her daughter. The court rejected her estoppel claim, reasoning that it would conflict with Fourth Circuit precedent holding that ERISA does not allow an oral modification to the clear written terms of a plan, as well as with Fourth Circuit cases holding that principles of waiver and estoppel are not part of the common law of ERISA. JA 154.

Similarly, the court rejected McCravy's argument that it should surcharge MetLife for the amount of the life insurance benefits. The court reasoned that the gravamen of McCravy's complaint was that MetLife wrongfully denied her life

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[1] McCravy also brought various state court claims, which the district court dismissed as preempted. McCravy does not challenge this aspect of the dismissal.

insurance benefits under the plan and that the fact that she could not bring a claim for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), did not change the fact that she sought plan benefits. JA 155-57 (citing Varity v. Howe, 516 U.S. 489 (1996); Korotynska v. Metropolitan Life Ins. Co., 474 F.3d 101, 106-07 (4th Cir. 2006)).

Moreover, citing extensively to the Fifth Circuit's decision in Amschwand v. Spherion Corp., 505 F.3d 342 (5th Cir. 2007), the court pointed out that other federal courts have rejected claims by participants and beneficiaries seeking similar relief under ERISA section 502(a)(3). JA 157-58. The court noted that, because of this, "the law in this area is now ripe for abuse by plan providers," and pointed out that the "allegations in this case present a compelling case for the availability of some sort of remedy for the breach of fiduciary duty above and beyond the mere refund of wrongfully retained premiums." Id. at 159. However, the court found itself "compelled to such a holding by the law of ERISA as interpreted by higher courts," despite the "dangerous practical implications" of its ruling. Id. at 158. Following entry of final judgment awarding McCravy the premiums that she had paid to MetLife, id. at 170-72, McCravy filed this appeal.

This Court affirmed in a decision issued on the same day that the Supreme Court issued its decision in Amara. McCravy v. Metropolitan Life Ins. Co., Nos. 10-1074, 1131, 2011 WL 1833873 (4th Cir. May 16, 2011). Relying on the

Supreme Court's decisions in Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 206, 221 (2002), and Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 365 (2006), this Court agreed with the district court that section 502(a)(3) does not allow the court to surcharge MetLife for the life insurance proceeds that McCravy would have received but for its fiduciary breaches, noting that its conclusion "conforms with that of several other circuits," that likewise have read these decisions to foreclose a surcharge remedy. 2011 WL 1833873, at *3. However, as we explain below, the Supreme Court's contemporaneously-issued decision in Amara rules out this reading of Mertens and its progeny and makes clear that, when a plan fiduciary breaches its obligations and injures a plan beneficiary, the courts have full authority to surcharge the fiduciary for its misconduct and to make the beneficiary whole.[2] Such a remedy is "appropriate equitable relief" within the meaning of ERISA section 502(a)(3).

[2] For the same reason, this Court should not follow its prior decision in LaRue v. Dewolff, Boberg & Assocs., 450 F.3d 570 4th Cir. 2006), vacated, 552 U.S. 248 (2008), ruling out a surcharge remedy, which, in any event, is not binding precedent because the decision was vacated by the Supreme Court, albeit on different grounds.

ARGUMENT

AMARA MAKES CLEAR THAT ERISA SECTION 502(a)(3) PERMITS THE COURT TO SURCHARGE METLIFE FOR MONETARY LOSSES SUFFERED BY MCCRAVY AS A RESULT OF METLIFE'S BREACHES OF ITS DUTIES AS AN ERISA FIDUCIARY

A. Surcharge is "Appropriate Equitable Relief" in this Case

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, 29 U.S.C. § 1001(b), "invoking the common law of trusts to define the general scope of" these duties. Central States, Se & Sw Areas Pension Fund v. Central Transp. Inc., 472 U.S. 559, 570 (1985) (citations omitted). As a fiduciary under an ERISA plan, MetLife was charged with the highest, trust-law based duties of loyalty and care. Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982). McCravy claims that she would have converted the ERISA group life insurance coverage on her daughter to individual coverage, as allowed under the plan, if MetLife had not breached its duties as an ERISA fiduciary by misleading her concerning her coverage by accepting premiums and failing to notify her in a timely manner that her daughter was no longer eligible for coverage under the ERISA policy.[3] See Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d

[3] Because, as all parties concede, there are no "benefits due" under the group life insurance policy governing the ERISA plan, the district court was not correct in viewing McCravy's suit as one for benefits under section 502(a)(1)(B). And for this reason, this Court's decision in Korotynska does not preclude her claim for

371, 381 (4th Cir. 2001) (holding that "an ERISA fiduciary that knows or should know that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent – especially when the misunderstanding was fostered by the fiduciary's own material representations or omissions"). As remedy for this fiduciary breach, she seeks from MetLife payment of the amount of the insurance proceeds to which she would have been entitled had she been timely informed by MetLife of her right to convert to an individual policy. Amara now makes clear that ERISA section 502(a)(3) allows for just such a remedy.

In Amara, plan participants in a defined benefit pension plan challenged the conversion of their plan to a "cash balance" plan, arguing that misleading information that CIGNA provided with regard to the conversion adversely affected their pension benefits. 131 S. Ct. at 1870. The district court found that the disclosures violated CIGNA's duties as a fiduciary under ERISA, and that the plaintiffs were "likely harmed" by these violations. Id. at 1870-71, 1872-73. Consequently, it ordered the plan reformed and benefits paid under ERISA section

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equitable relief under section 502(a)(3), since, in Korotynska, this Court held that there was no "question that Korotynska's injury is redressable elsewhere in ERISA's scheme." 474 F.3d at 106. Here, as in Amara, McCravy was not entitled to sue for benefits under section 502(a)(1)(B), which allows courts to enforce plan terms, not change them. See Amara, 131 S. Ct. at 1877-78. Instead, as Amara makes clear, she is entitled to sue for equitable relief under section 502(a)(3) to remedy the fiduciary breach that prevented her from obtaining coverage under a conversion policy.

502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and it declined to decide whether it could provide the same relief under section 502(a)(3). Id. at 1871. After the Second Circuit affirmed, the Supreme 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 1876. Thus, the dispute in the case was about "the appropriate legal standard in determining whether members of the relevant employee class were injured." Id. at 1880.

The Supreme Court resolved this dispute in Amara by concluding that the provision upon which the district court relied, "namely, the provision for recovery of plan benefits," section 502(a)(1)(B), did not provide any authority to impose this remedy, which essentially rewrote the plan. Amara, 131 S. Ct. at 1877-78. The Court instead found such authority in section 502(a)(3)'s broad reference to "appropriate equitable relief," observing that "[t]he district court strongly implied, but did not directly hold, that it would base its relief upon [502(a)(3)] were it not for (1) the fact that [§ 502(a)(1)(B)] provided sufficient authority; and (2) certain cases from this Court that narrowed the application of the term 'appropriate equitable relief[.]" Id. at 1878 (citing Mertens, 508 U.S. 248; Great-West, 534 U.S. 204). Having determined that section 502(a)(1)(B) did not provide the authority to rework the plan, the Court found that it was appropriate to turn to section 502(a)(3)'s authorization of appropriate equitable relief, and, significantly,

concluded that the district court's concern that Mertens and Great-West foreclosed such relief was "misplaced." 131 S. Ct. at 1878.

Noting the maxim that "[e]quity suffers not a right to be without a remedy," 131 S. Ct. at 1879 (quoting R. Francis, Maxims of Equity 29 (1st Am. ed. 1823)), the Court held that section 502(a)(3) provides 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 Amara 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 precisely 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 the kind of remedies that courts of equity typically granted under their exclusive jurisdiction. 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).[4]

As Amara explains, equity courts traditionally and indeed exclusively had the power to surcharge a fiduciary for losses resulting from "a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary." 131 S. Ct. at 1880, citing Restatement (Second) of Trusts § 201(1957); John Adams, Doctrine of Equity: A Commentary on the Law as Administered by the Court of Chancery 59 (7th Am. Ed. 1881); 4 John Norton Pomeroy & Spencer W. Symons, Equity Jurisdiction § 1079 (5th ed. 1941); 2 Joseph Story, Commentaries on Equity Jurisdiction §§ 1261, 1268 (12 ed. 1877). Moreover, equity courts surcharged fiduciaries for breaches very similar to the one at issue in this case. See, e.g., Marriott v. Kinnersley, Tamlyn 470, 48 Eng. Rep. 187, 188 (High Ct. Ch. 1830) (trustee charged with losses resulting from failure to pay

[4] McCravy also argues for an estoppel remedy. Because we think that surcharging MetLife as a breaching fiduciary offers the most appropriate form of relief here, we do not separately address McCravy's estoppel argument. However, her argument that she should be treated as if she had effectively elected to convert the policy when her daughter turned 19 (as she would have done but for MetLife's breach) is supported both by Amara and by this Court's decision in Griggs. The plaintiff's estoppel remedy is analogous to the reinstatement remedy recognized in Griggs, since it amounts to a constructive "instatement" into that individual policy. See Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 384-85 (4th Cir. 2001).

premium on life insurance policy); Appeal of the Harrisburg Nat'l Bank, 84 Pa. 380, 1877 WL 13273 (Pa. 1877) (court of equity may surcharge administrator of estate with life insurance policy proceeds that the administrator negligently lost). See also Brown v. Aventis Pharmaceuticals, Inc., 341 F.3d 822, 827-28 (8th Cir. 2003) (upholding an order for the employer to obtain a life insurance certificate as appropriate equitable relief under section 502(a)(3) where the terminated employee was not told of her COBRA conversion rights).[5] And in these cases and others, depending on the nature of the breach, 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) (upholding decree that required executor to pay income to life beneficiary); Kendall v. DeForest, 101 F. 167, 170 (2d Cir. 1900) (upholding decree that held trustee liable to beneficiaries for income deficiency in annuity fund); United States v. Mitchell, 463 U.S. 206, 226 (1983) (relying on trust law in holding that individual Indian beneficiaries could sue for monetary compensation for losses allegedly caused by government's mismanagement of

[5] The Harrisburg Nat'l Bank case surcharging an executor demonstrates that equity courts surcharged fiduciaries of all types, not just trustees. See, e.g., Gates v. Plainfield Trust Co., 194 A. 65 (N.J. 1937) (per curiam) (executor); Bosworth v. Allen, 61 N.E. 163, 165-66 (N.Y. 1901) (corporate directors). See also Mosser v. Darrow, 341 U.S. 267, 268, 274 (1951) (in remanding for a determination of whether "a reorganization trustee who, although making no personal profit, permitted key employees to profit from trading in securities of the debtors' subsidiaries," should be liable for surcharge, the Supreme Court noted that "trusteeship is serious business" and "[t]he most effective sanction for good administration is personal liability for the consequences of forbidden acts").

timber). All of this is in keeping with the "'distinctively equitable'" remedies developed by equity chancellors "that were 'fitted to the nature of the primary right' that they were intended to protect." Amara, 131 S. Ct. at 1879 (citations omitted).

B. The Supreme Court's Recognition of a Surcharge Remedy in Amara is a Holding of the Case that this Court is Bound to Follow

The Supreme Court in Amara granted certiorari "to decide whether the District Court applied the correct legal standard, namely a 'likely harm' standard, in determining that CIGNA's notice violations caused its employees sufficient injury to warrant legal relief." 131 S. Ct. at 1871. "To reach that question," the Court held that it was necessary to "first consider a more general matter – whether the ERISA section just mentioned (ERISA's recovery-of-benefits-due provision, § 502(a)(1)(B)) authorizes entry of the relief the District Court provided," id., a "preliminary question [that] is closely enough related to the question presented that we consider it at the outset." Id. at 1876. The Court "conclude[d] that [section 502(a)(1)(B)] does not authorize this relief," but "[n]onetheless [found] that a different equity-related ERISA provision, to which the District Court also referred, authorizes forms of relief similar to those that the court entered." Id. (citing section 502(a)(3)).

Thus, in answering the primary question on which it had granted certiorari – "the applicable legal standard in determining whether members of the relevant employee class were injured," 131 S. Ct. at 1880 – 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. The Court was "asked about the standard of prejudice" and "conclude[d] that the standard of prejudice must be borrowed from equitable principles, as modified by the obligations and injuries identified by ERISA itself." Id. at 1882. Because the Court's discussion of surcharge under section 502(a)(3) was essential to answer this question, it is not dicta that lower courts are free to ignore, as the two concurring Justices would have it. See id. at 1884 (Scalia, J., concurring in judgment). Instead, the Court's central holding, upon which it remanded "for further proceedings consistent with this opinion," id. at 1882, was precisely that section 502(a)(3) provides for equitable remedies such as surcharge and requires courts to "borrow [] from equitable principles" in fashioning such relief. This holding, which was critical to the Court's disposition of the case, was no more dicta than the Court's conclusion that section 502(a)(1)(B) did not provide for the remedy imposed by the lower courts. This Court is therefore bound to follow Amara and hold that ERISA section 502(a)(3) allows the district court to surcharge MetLife for the losses in the form of foregone proceeds under the conversion policy if these losses were caused by MetLife's fiduciary breaches.

McCravy plausibly alleges that MetLife breached its fiduciary duties by misleading her as to coverage by accepting premiums and failing to notify her in a timely manner that her daughter was no longer eligible for coverage under the ERISA policy but could convert to an individual policy. Not only are fiduciaries prohibited from misleading plan participants, Varity, 516 U.S. at 506, "an ERISA fiduciary that knows or should know that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent-especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions." Griggs, 237 F.3d at 381. Having alleged a breach, McCravy is entitled to seek "appropriate equitable relief," including the equitable remedy of surcharge, as the Court held in Amara. This Court is fully empowered to ensure that injured plan beneficiaries are made whole for violations of ERISA's important rights and duties.

C. Even if Amara's Recognition of Surcharge were Dicta, the Decision Corrects a Fundamental Misreading of Prior Supreme Court Cases on which this Court and Others have Relied in Holding that Surcharge is Unavailable; Accordingly, this Court Should Reverse Course and Hold that ERISA Section 502(a)(3) Authorizes Courts to Surcharge Breaching Fiduciaries for the Monetary Losses Caused by their Breaches

Even if the discussion of surcharge were not part of the holding in Amara, however, it would ordinarily be the duty of a lower court to follow such recent Supreme Court dicta. See 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"); Laber v. Harvey, 438 F.3d 404, 418 n.12 (4th Cir. 2006) (acknowledging that "it is arguable" that the broad statements in two Supreme Court cases is dicta, but concluding that "whether that rule was dicta or holding is close enough to require us to overrule, instead of distinguish" earlier Fourth Circuit cases). And there is an especially good reason to do so here given that the Supreme Court in Amara now gives clear guidance on the meaning and effect of its earlier decisions, starting with Mertens, which discuss the scope of section 502(a)(3), and corrects the misreading of those decisions by a number of courts, including this one. See, e.g., Todisco v. Verizon Communications, Inc., 497 F.3d 95, 99-100 (1st Cir. 2007); Coan v. Kaufman, 457 F.3d 250, 262-64 (2d Cir. 2006) (reversing prior holding recognizing surcharge in Strom v. Goldman, Sachs & Co., 202 F.3d 138, 144 (2d Cir. 1999)); Calhoon v. TWA, 400 F.3d 593, 596-98 (8th Cir. 2005); Callery v. United States Life Ins. Co., 392 F.3d 401, 404-09 (10th Cir. 2004); Helfridge v. PNC Bank, Ky., Inc., 267 F.3d 477, 481-82 (6th Cir. 2001).

As Amara explains, the Supreme Court has held that "equitable relief" means relief that was "typically available in equity." 131 S. Ct. at 1878 (quoting Sereboff, 574 U.S. at 361; Mertens, 508 U.S. at 256). Applying that principle to

claim by a plan beneficiary to recover money damages from a plan's actuary in Mertens, the Court "found that the plaintiff sought 'nothing other than compensatory damages against a nonfiduciary'" and concluded "that such a claim, traditionally speaking, was legal, not equitable, in nature.'" Amara, 131 S. Ct. at 1878 (quoting Mertens 508 U.S. at 253, 255) (emphasis added).

The Court next addressed the remedial scope of section 502(a)(3) in Great-West, which involved "a claim brought by a fiduciary against a tort-award-winning beneficiary seeking monetary reimbursement for medical outlays that the plan had previously made on the beneficiary's behalf." Amara, 131 S. Ct. at 1879. The Court there "noted that the fiduciary sought to obtain a lien attaching to (or constructive trust imposed upon) money that the beneficiary had received from the tort-case defendant," but without attaching the "particular" funds that the tortfeasor had paid. Amara, 131 S. Ct. 1878-79. Because "traditionally speaking, relief that sought a lien or constructive trust was legal relief, not equitable relief, unless the funds in question were the 'particular funds or property in the defendants' possession,'" id. at 1879 (quoting Great-West, 534 U.S. at 213), the Court disallowed the remedy under section 502(a)(3).[6]

[6] In Sereboff, the Supreme Court held that a plan could enforce a reimbursement provision in the plan under section 502(a)(3) where the beneficiary had preserved the disputed funds pending resolution of the claim. 547 U.S. at 362-68.

In Amara, CIGNA's status as an ERISA fiduciary provided the critical distinction between Amara and previous Supreme Court cases involving non-fiduciaries where equitable relief was not awarded. The error of the district court and of most federal circuits was in applying to fiduciaries a body of law that related only to non-fiduciaries. In contrast to Mertens and Great-West, because the Amara case concerned "a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust). . . . [i]t is the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity." Amara, 131 S. Ct. 1879 (citations omitted). Moreover, the Court noted that the fact that the relief sought by the plaintiffs "takes the form of a money payment does not remove it from the category of traditional equitable relief," because "insofar as an award of make-whole relief is concerned, the fact that the defendants in this case, unlike the defendant in Mertens, is analogous to a trustee makes a critical difference." Id. at 1880 (emphasis added, citations omitted). Here too, MetLife is an ERISA fiduciary, and this fact makes all the difference. See Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105, 111 (2008) (plan administrator, as a fiduciary of a life insurance plan is analogous to a common law trustee). As a fiduciary, MetLife is subject to the full range of equitable remedies available against trustees under the common law of trusts, including the equitable remedy of surcharge.

MetLife's argument to the contrary rests on the unsupportable proposition that this Court can and should apply a reading of Mertens and Great-West that the Supreme Court has just refuted because, according to MetLife, the Court itself in Amara supposedly failed to "consider several aspects of [its own] earlier holdings." Response of Appellee/Cross-Appellant to Petition for Rehearing or Rehearing En Banc (Res. Br.) at 9-11.

Contrary to MetLife's argument, Res. Br. at 9, the Amara decision gives full effect to Mertens' admonition that the remedial scope of section 502(a)(3) is limited and does not extend to the full reach of the powers of equity courts, which could impose both legal and equitable remedies. Under Amara, section 502(a)(3) continues to provide limited relief against non-fiduciaries and does not allow courts to assess legal damages against them even though courts of equity could do so. Mertens, 508 U.S. at 262 ("All that ERISA has eliminated . . . is the common law's joint and several liability for all direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did."). In this way, the Amara Court's recognition of the "critical distinction" between fiduciaries and nonfiduciaries in allowing a surcharge remedy against breaching fiduciaries that is not available against non-fiduciaries gives full effect to the placement of fiduciaries at the center of the statutory scheme, and sensibly "allocates liability for plan-related misdeeds in reasonable proportion to respective

actors' power to control and prevent the misdeeds." Mertens, 508 U.S. at 262; see also Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 251 (2000) (emphasizing that "the common law of trusts sets limits on restitution actions against defendants other than the fiduciary, the principal 'wrongdoer'"). And this "critical distinction" likewise is supported by centuries of trust law. See, e.g., Austin W. Scott, The Nature of the Rights of the Cestui Que Trust, 17 Columbia L. Rev. 269, 269, 274 (1917) (trust beneficiary may "recover a sum of money" and "his right is a personal right against the trustee, it is an equitable obligation," whereas the beneficiary had only in rem rights against parties other than the trustee); Harrisburg Nat'l Bank, 1877 WL 13273, at *4 (recognizing the distinction of an action at law against a third party to recover lost life insurance proceeds and an action in equity to surcharge the administrator of an estate with the proceeds if he negligently lost them); Second Restatement of Trusts § 280, at 38-42 (1957) (if a third party committed a tort or a breach of contract against the trust, the trustee was required to sue the third party at law; if the trustee refused to sue, the beneficiary could sue the trustee in equity for breach of trust); James P. Holcombe, Introduction to Equity Jurisprudence, 169 n.2 (1846) (same). See also Amara, 131 S. Ct. at 1880 (citing authorities recognizing surcharge). The fact that the Court did not cite appellate decisions to the contrary, see Res. Br. at 10-11, which were themselves based on a misreading of Mertens, is irrelevant.

MetLife's contention that Amara fails to recognize the difference between legal and equitable restitution. Res. Br. at 10, also misses the mark. As the Supreme Court in Amara recognized, 131 S. Ct. at 1878-79, Great-West did not involve an attempt to surcharge a plan fiduciary for the consequences of a breach but instead involved an attempt by a plan fiduciary to impose a lien or constructive trust on funds that a plan beneficiary obtained which the beneficiary was contractually obligated to pay as reimbursement to the ERISA health plan. Here, McCravy is not seeking a lien or trust on any funds in MetLife's possession and indeed is not asking for restitution, either equitable or legal, which would be measured by MetLife's gain, rather than by her loss. She seeks an entirely different equitable remedy of ancient origins by requesting that the Court surcharge MetLife, as a fiduciary to an ERISA plan, for the loss that it caused to her.

Nor is MetLife correct that surcharge is punitive and therefore unavailable under ERISA. Res. Br. at 9. At least in the days of the divided bench, surcharge was limited to make-whole relief, and neither nominal nor exemplary damages were available. See 2 Joseph Story, Commentaries on Equity Jurisdiction § 1278, at 534 (12th ed. 1877) (purpose of remedy is "to compensate the cestui qui trust"); Austin W. Scott and William F. Fratcher on Trusts § 205, at 239 (4th ed. 1987) (trustee "is not subject to surcharge for a breach of trust that results in no loss"); 2 Dan B. Dobbs, Law of Remedies, Damages § 3.11(1), at 315 (1993) (punitive

damages were traditionally not available in equitable actions, although courts have begun to award them since the merger of law and equity); accord Tull v. United States, 481 U.S. 412, 422 (1987).

In the end, it is not the Supreme Court in Amara but MetLife that has overlooked key aspects of Mertens, Great-West and Sereboff. Taken together, these decisions require that courts look to traditional trust law to determine the "'basis for the [plaintiff's] claim' and the nature of the underlying remedies sought." Great-West, 534 U.S. at 213 (citation omitted). Reference to the "standard current works" as well as a "more 'antiquarian inquiry,'" Great-West, 534 U.S. at 217 (citations omitted), clearly establish that both the basis for the plaintiff's claim – breach of trust – and the requested relief – monetary redress that was sometimes called "surcharge" – were considered equitable in the days of the divided bench, and thus this remedy constitutes "equitable relief" under the test set forth in the Supreme Court's decisions. The Amara decision recognizes just that and thereby corrects the narrow reading of section 502(a)(3) mistakenly adopted by a number of courts since Mertens and Great-West, which has led numerous courts, including the district court in this case, to decry the irrational and unjust results that have followed. JA 159; Aetna Health Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (noting the "rising judicial chorus urging" the correction of "an unjust and increasingly tangled ERISA

regime")(citation omitted); Eichorn v. AT&T Corp., No. 05-5461, 2007 WL 1574869, at *1-*2 (3d Cir. May 31, 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, 345-346 (2d Cir.2005) (Newman, 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); DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 467 (3d Cir. 2003) (Becker, J., concurring). Now participants and beneficiaries need no longer be left "betrayed without a remedy." Colleen E. Medill, Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3), 39 J. Marshall L. Rev. 827, 852 (2006); see, e.g., Amschwand, 505 F.3d at 344 (no remedy for loss of insurance coverage by widow whose dying husband was misinformed after numerous inquiries that he was fully covered under the policy). See also Amara, 131 S. Ct. at 1879 (relying on the equitable maxim that "'[e]quity suffers not a right to be without a remedy'") (citation omitted). The Amara ruling restores fiduciaries to their central role of responsibility, see Mertens, 508 U.S. at 262; 29 U.S.C. § 1002(21)(A), and again ensures that ERISA function as Congress intended, to provide "appropriate remedies" and "ready access to the Federal courts" to prevent and to redress violations of those fiduciary duties. 29 U.S.C. § 1001(b). This Court should now do the same.

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 SERVICE

I hereby certify that on September 28, 2011, I electronically filed the foregoing Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellant, with the Clerk of the Court of Appeals for the Fourth Circuit by using the Court's electronic filing system.

I further certify that on September 28, 2011 eight hard copies of the foregoing Brief were sent to the Clerk's office using Federal Express, postage paid.

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CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS AND VIRUS CHECK

I certify that the digital version and hard copies of the Secretary's Brief are identical. I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

Dated: September 28, 2011

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a) (7) (B) (i). The brief contains 5,696 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a) (7) (B) (iii). The brief was prepared by using Microsoft Office Word, 2003 edition.

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