No 02-3614

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

QUALCHOICE, INC.

Plaintiff-Appellant,

v.

ROBIN ROWLAND

Defendant-Appellee.

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF QUALCHOICE'S PETITION FOR EN BANC REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Federal Statutes and Regulations.

Miscellaneous:

INTEREST OF THE SECRETARY

The Secretary of Labor (the "Secretary") has primary authority to interpret and enforce the provisions of Title I of ERISA. 29 U.S.C. §§ 1132, 1135. See Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). The Secretary's interests further include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). The plans' ability to seek reimbursement of benefits from plan participants who have recovered funds from third parties is important to plans' continued financial stability, and so long as it is accomplished through the imposition of constructive trusts over specifically identifiable funds it constitutes "appropriate equitable relief" under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). If allowed to stand, the panel's holding that a plan fiduciary's action to enforce a plan reimbursement provision is a legal action, regardless of whether the plan participant or beneficiary recovered from another entity and possesses that recovery in an identifiable fund, will undermine the Secretary's interest in ensuring the financial stability of plan assets.

ARGUMENT

QualChoice seeks to enforce the reimbursement provision, or in statutory terms, "to enforce . . . the terms of the plan," 29 U.S.C. § 1132(a)(3)(ii), through a constructive trust or equitable lien. The panel ruled that this remedy is not available to QualChoice because an action to enforce a plan reimbursement provision is a legal action. QualChoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004). En banc rehearing is warranted in part because the panel's ruling is in tension with the Supreme Court's decision in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), which, both implicitly and explicitly, recognized that ERISA section 502(a)(3) allows courts to impose a constructive trust over identifiable funds that, because of a reimbursement or subrogation provision, belong in good conscience to a plan. Moreover, the decision exacerbates a split in the circuits on the issue. Fed. R. App. P. 35(b)(1)(A) (a conflict with the decision of other circuits is of exceptional importance and justifies en banc rehearing). Finally, the panel decision is of exceptional importance because it not only disallows the recovery by Plans of millions of dollars of third-party recoveries, it also effectively reads out of ERISA section 502(a)(3) the right to "enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3).

I. THE PANEL'S CONCLUSION THAT A FIDUCIARY'S ACTION TO ENFORCE A PLAN REIMBURSEMENT PROVISION IS A LEGAL ACTION, REGARDLESS OF WHETHER THE PLAN PARTICIPANT OR BENEFICIARY RECOVERED FROM ANOTHER ENTITY AND POSSESSES THAT RECOVERY IN AN IDENTIFIABLE FUND, IS INCONSISTENT WITH THE SUPREME COURT'S ANALYSIS IN GREAT-WEST

Section 502(a)(3) of ERISA authorizes a civil action "by a . . . fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). In Great-West, the Supreme Court held that "appropriate equitable relief" under section 502(a)(3) of ERISA refers to "those categories of relief that were typically available in equity." 534 U.S. at 210 (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)). The Court went on to say that "for restitution to lie in equity, the action . . . must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." Id. at 214 (emphasis added).

Great-West had sought restitution in that case of $411,157 in medical expenses it had paid on behalf of beneficiary Janette Knudson after Knudson secured a $650,000 settlement from the third parties responsible for her

injuries. The settlement allocated $256,745.30 to a Special Needs Trust to provide for Knudson's long-term medical care, $373,426 to attorney's fees and costs, $5000 to reimburse the California Medicaid Program, and $13,828.70 to reimburse Great-West. The state court approved the settlement and ordered the third parties to pay the amount allocated to the Special Needs Trust directly to the trust. Knudson's attorney sent Great-West a check for $13,828.70, but Great-West refused to cash it. Instead, Great-West sued Knudson in federal district court seeking full reimbursement of the $411,157 it paid on her behalf.

The Supreme Court held that Great-West's suit was not authorized by ERISA section 502(a)(3). 534 U.S. at 218. The Court observed that the money from the settlement was not in Knudson's possession; it had been dispersed to the Special Needs Trust and her attorney. Id. at 214. Great-West had not brought suit against the Special Needs Trust or Knudson's attorney. The Court found that Great-West, therefore, was not trying to recover particular funds that belonged to Great-West that happened to be in Knudson's possession, but rather was trying to impose personal liability upon Knudson for any funds equal to the benefits it had advanced to her. Id. The Court concluded that Great-West sought legal restitution not authorized

by ERISA. Id. at 218. Far from foreclosing the ability of plans to seek equitable restitution, however, the Court reasoned:

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

Id. at 213 (citations omitted).

The panel's decision is in tension with these statements in Great-West. QualChoice here seeks precisely the remedies (constructive trust and equitable lien) identified by the Supreme Court as typifying equitable restitution, and bases its claim on the very theory countenanced by the Court (that Rowland possesses identifiable funds belonging in good conscience to QualChoice). Although the Supreme Court expressly left open the question whether Great-West could have obtained equitable relief against Knudson's attorney or the trustee of the Special Needs Trust, 534 U.S. at 213, and the Court's discussion of constructive trust in Great-West was dicta, it was, nevertheless, central to the Court's reasoning. Indeed, if the Court had thought, as the panel held, that a constructive trust remedy was unavailable because any claim to enforce the terms of the plan could be recharacterized as a breach of contract claim, which could only be remedied in a court of

law, then most of the discussion in the Great-West decision, and in particular its focus on the fact that Knudson did not hold the settlement proceeds, would have been unnecessary.

The panel fundamentally misconstrued Great-West and the operation of the common law in concluding that the constructive trust and equitable lien remedies sought by QualChoice are unavailable. As an initial matter, the panel's finding that QualChoice merely had a contractual interest, not a property interest, in the proceeds of the settlement is questionable. QualChoice's interest here is more accurately seen as grounded in the ERISA statute itself (which generally allows sponsoring employers to set the parameters of a participant's welfare benefits and permits fiduciaries to "enforce . . . the terms of the plan"), and not in the common law of contracts. Although it is true that courts sometimes draw on contract principles in construing the terms of an ERISA plan, see Deegan v. Continental Cas. Co., 167 F.3d 502, 507 (9th Cir. 1999), it is equally true that courts look to trust law principles in construing the scope and content of the statute. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-111 (1989) (ERISA "abounds with the language and terminology of trust law" and should be construed against this trust law background).

Even assuming, however, that that the court was correct in its factual premise that QualChoice has a contractual and not a property interest in the settlement proceeds, the panel was incorrect in concluding that the ancient writ of assumpsit was the only available restitutionary remedy. What equity contributed to restitution was the use of in personam jurisdiction (enforceable in contempt), which allowed the court to ignore formalities of title, and take a flexible approach that considered the equities and good conscience. 1 Dan Dobbs, Law of Remedies, 591, 587 (2d ed. 1993). Indeed, Dobbs points out that the remedies of constructive trust and equitable lien were created at equity precisely to remedy situations in which the defendant held the legal title to an identifiable res (including a bank account), but the plaintiff had a superior moral claim.[1] Id. at 591, 595; accord Great-West, 534 U.S. at 213; Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250-51 (2000) (noting that "[w]henever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the

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

property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have any legal estate therein'") (citations omitted). Assumpsit was not available where the remedy sought was the return of particular property because courts of law could not change title, but equity could. Thus, courts of equity employed a constructive trust or equitable lien to compel the defendant "to follow good conscience rather than good title." Dobbs at 587.

That constructive trusts and equitable liens were available in many situations where some form of legal restitution might also be available does not detract from their equitable character.[2] Through these devices, equity stepped in with a remedy – legal title to particular property – that courts of law could not provide. Thus, actions for nonpayment of a debt for specific property, breach of a promise to repay a loan, and failure to pay on a promissory note for which property was transferred, all could suffice to warrant imposition of a constructive trust on the property transferred or improved with the plaintiff's property. Dobbs at 598 & n.52 (citing Middlebrooks v. Lonas, 246 Ga. 720, 272 S.E.2d 687 (1980); Leyden v.

[2] In fact, Dobbs points out that assumpsit was not only used by law courts to remedy breach of contract, but was also used to prevent unjust enrichment through the legal construct of quasi-contract. Thus, constructive trust, which is likewise used to prevent unjust enrichment, stands as "an equitable parallel to the law courts' quasi-contract." Dobbs at 590.

Citicorp Indus. Bank, 782 P.2d 6 (Colo. 1989)). "Where the constructive trust will produce the right measure and conditions of restitution, however, it is appropriate in any kind of unjust enrichment case." Dobbs at 597 (emphasis added). So long as identifiable funds held by the defendant that belong in good conscience to the plaintiff are sought, constructive trusts or equitable liens are available equitable remedies.[3]

II. THE PANEL'S HOLDING EXACERBATES THE CONFLICT IN THE CIRCUITS ON THIS ISSUE

The Fifth Circuit has correctly held that reimbursement is an appropriate equitable remedy under section 502(a)(3) where the plan fiduciary seeks "to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the" participant or beneficiary. Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot, & Wansborough, P.C., 354 F.3d 348, 356 (5th Cir. 2003), cert. denied, 2004 WL 237908 (U.S. July 1, 2004) (No. 03-1135). The Seventh Circuit has

[3] It is by no means certain that QualChoice would be entitled to recover under this test since, according to the affidavit from Rowland's attorney, Rowland currently holds no identifiable funds, and QualChoice allegedly agreed, previously, to waive any interest it had in the proposed settlement agreement. See, 367 F.3d at 641. If these allegations are borne out, presumably QualChoice would not meet the test for imposition of a constructive trust. We file a brief here only to urge the adoption of the correct standard by this Court, and not to suggest that QualChoice ultimately will be found entitled to recover under this standard.

reached the same conclusion, reasoning that "[u]nlike the legal action addressed in Great-West Life, the funds at issue here are identifiable, have not been dissipated, and are still in control of a Plan participant." Admin. Comm. of the Wal-Mart Stores v. Varco, 338 F.3d 680, 687-88 (7th Cir. 2003), petition for cert. filed, 72 U.S.L.W. 3452 (U.S. Dec. 23, 2003) (No. 03-959); accord Bombardier, 354 F.3d at 358 ("[h]aving closely examined the substance of the relief sought in the case before us, we are convinced that . . . the Plan does not seek to impose personal liability" on the participant).

The Fourth Circuit has adopted the same approach in at least two unpublished decisions issued after Great-West. See Primax Recoveries, Inc. v. Young, 83 Fed. Appx. 523, 525 (4th Cir. 2003); In re Carpenter, 36 Fed. Appx. 80 (4th Cir. 2002). See also Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 986-87 (4th Cir. 1990) (holding a plan's subrogation claim for unjust enrichment to recover previously provided benefits from participants who subsequently received a tort award was a valid claim under ERISA); Rego v. Westvaco Corp., 319 F.3d 140, 145 (4th Cir. 2003) (stating in dicta that "a claim for equitable restitution must seek 'not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.' The plaintiff, in other words, must argue that 'money or property identified as belonging in good

conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.'"). Two other circuits have also acknowledged in dicta that a claim for equitable restitution would lie where a defendant holds funds that in good conscience belong to the plaintiff. See Gerosa v. Savasta & Co., Inc., 329 F.3d 317, 321 (2d Cir.), cert. denied, 124 S. Ct. 435 (2003); Sackman v. Teaneck Nursing Ctr., 86 Fed. Appx. 483, 485 (2003) (unpublished).

The Ninth Circuit, on the other hand, has held that a plan fiduciary's action to enforce a reimbursement provision seeks legal relief unavailable under section 502(a)(3), regardless of whether the plan participant recovered from a third-party and possesses that recovery in an identifiable fund. The Ninth Circuit has thus denied recovery even in cases where the funds sought by the ERISA plan could clearly be traced to particular funds or property in the defendant's possession. Great-West Life & Annuity Ins. Co. v. Berlin, 45 Fed. Appx. 750 (9th Cir. 2002) ("The fact the funds sought by Great-West have been placed in a trust account and are specifically identifiable does not transform its action into one for equitable relief.") (unpublished); Westaff (USA) Inc. v. Arce, 298 F.3d 1164, 1167 (9th Cir. 2002) ("This case differs from our prior cases . . . in that the money at issue, a legitimate personal injury settlement to which the beneficiary is entitled, has been

placed in an escrow account and remains specifically identifiable. The action remains one for money damages."), cert. denied, 537 U.S. 1111 (2003). Although there is inconsistent dicta in a more recent Ninth Circuit decision, see Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Local Union No. 675 v. Foster, 332 F.3d 1234, 1237 (9th Cir. 2003), there is no question that the panel's decision here exacerbates the disagreement in the circuits on this issue. The Secretary believes the three-prong test applied by the Fourth, Fifth and Seventh Circuits, is the correct application of the Great-West standard and should be adopted by the en banc Court here.

III THE PANEL'S DECISION IS OF EXCEPTIONAL IMPORTANCE BECAUSE OF ITS LIKELY IMPACT ON PLANS

In addition to being in conflict with the decisions of other circuits and in significant tension with Supreme Court precedent, the panel's decision is of exceptional importance for other reasons: by reading section 502(a)(3) to disallow enforcement of subrogation provisions because they are grounded in contract, the decision is likely not only to add significantly to the costs borne by ERISA health care plans, but could also prevent participants and fiduciaries from bringing suit under section 502(a)(3) to enforce the terms of the plan.

As of 2002, an estimated 137 million people participated in private sector employer-sponsored health care plans covered by ERISA. Many of these plans contain reimbursement/subrogation provisions. Indeed, in 2000, the largest provider of subrogation services in the United States reported subrogation recoveries that averaged $4.8 million for every one million persons covered by its client. See Healthcare Recoveries, Inc., SEC Form 10K (Mar. 27, 2001). By flatly prohibiting such recoveries, the panel's decision is likely to have a large economic impact on health care plans in this Circuit, and may lead some employers to respond by dropping or decreasing coverage.

Furthermore, under the logic of the panel's reasoning that section 502(a)(3) does not allow enforcement of a plan subrogation provision because it is grounded in contract, no attempt to enforce a plan term would be permissible. This reads out of section 502(a)(3) the right to "enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). Such a construction may have unforeseen consequences on the enforcement of ERISA beyond the subrogation context, and should be avoided under ordinary rules of statutory construction. See TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or

word shall be superfluous, void, or insignificant.'") (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)) (internal quotation marks omitted)).

CONCLUSION

For the reasons discussed above, the Secretary, as amicus curiae, requests that this Court rehear this matter en banc and reverse the decision of the panel.

Respectfully submitted this 17th day of June, 2004.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7), I hereby certify that the foregoing Brief of the Secretary of Labor as Amicus Curiae in Support of Qualchoice's Petition for En Banc Rehearing is proportionally spaced, using Times New Roman 14-point font size.

Dated: June 17, 2004

ELIZABETH HOPKINS

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of the Secretary of Labor as Amicus Curiae in Support of Qualchoice's Petition for En Banc Rehearing were mailed, by U.S. mail, postage prepaid, the 17th day of June 2004 to the following:

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