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

BRIEF FOR THE SECRETARY OF LABOR
AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUE

Whether the relief that plaintiff seeks – surcharging MetLife for the financial consequences of its alleged fiduciary breaches – constitutes equitable relief within the meaning of section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3).

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 files this brief as amicus curiae under FRAP 29(a).

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 until the time of Leslie's death in July 2007, in fact Leslie was not eligible to participate in the plan because she was over the age of 19 at the time of her death, although she was younger than 19 when plaintiff first elected coverage. JA 141-42.

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 argued that under a provision of the policy, 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 she had been told she needed to do so. Because it was a breach for MetLife to have failed to do so, especially considering it accepted premium payments from her for years and allegedly led her to believe that this coverage was in place, she argued both 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

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

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 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 (2006)).

Moreover, citing extensively to the Fifth Circuit's decision in Amschwand v. Spherion Corp., 505 F.3d 342 (5th Cir. 2007), cert. denied, 128 S. Ct. 2995 (2008), 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.

ARGUMENT

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, Southeast & Southwest Areas Pension Fund v. Central Transp. Inc., 472 U.S. 559, 570 (1985) (citations omitted). At the core of ERlSA's fiduciary obligations are the familiar trust-law duties of loyalty and prudence, which are among the "highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

ERISA provides enforcement of its stringent fiduciary duties and other requirements through a number of "carefully integrated" remedial provisions. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985). This case concerns one of those provisions, ERISA section 502(a)(3), which allows a participant, beneficiary, or fiduciary to sue "to enjoin any act or practice which violates" ERISA or "to obtain other appropriate equitable relief . . . to redress such

violations." That provision is designed as a "catchall" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Varity Corp. v. Howe, 516 U.S. 489, 512 (1996).

ERISA SECTION 502(a)(3) PERMITS THE COURT TO SURCHARGE METLIFE FOR THE INSURANCE PROCEEDS THAT MCCRAVY WOULD HAVE RECEIVED BUT FOR THE ALLEGED BREACHES OF FIDUCIARY DUTY

The Supreme Court first addressed the scope of "equitable relief" available against a non-fiduciary under section 502(a)(3) in Mertens v. Hewitt Assocs., 508 U.S. 248 (1993). There, the Court held that "equitable relief" means relief that was "typically available in equity," and held that equity would not have permitted a suit to recover money damages from a plan's non-fiduciary actuary. Id. at 256.

The Court next addressed the remedial scope of section 502(a)(3) in Great-West Life Ins. Co. v. Knudson, 534 U.S. 204, 206, 221 (2002), where the Court held that section 502(a)(3) did not authorize an ERISA plan to recover reimbursement of medical expenses from non-fiduciary plan beneficiaries. The Court reasoned that because the plan sought recovery from the general assets of the beneficiaries rather than from specific funds to which the plan claimed a right, the relief sought constituted legal and not equitable restitution. Id. at 212-18. The Court explained that whether relief is "legal" or "equitable" under section 502(a)(3) "depends on 'the basis for the [plaintiff's] claim' and the nature of the underlying

remedies sought." Id. at 213 (citation omitted). Cf. Harris Trust & Savs. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 250 (2000) (relying on the historical availability of an action in equity against a person who acquired property from a breaching fiduciary).

Most recently, in Sereboff v. Mid-Atlantic Medial Services, Inc., 547 U.S. 356 (2006), the Court held that a plan could enforce a reimbursement provision under section 502(a)(3) where the beneficiary had preserved the disputed funds pending resolution of the claim. Id. at 362-68. The Court concluded that the plan sought "equitable relief" within the meaning of section 502(a)(3) because "both the basis for the plan's claim and the relief it sought [an equitable lien by agreement] would have been considered equitable in the days of the divided bench." Id. Because the beneficiaries were not fiduciaries in any of these cases, the Court did not have occasion to decide the scope of equitable relief available against fiduciaries.

A. The relief sought is equitable because both the basis for the claim and the remedy sought were equitable in the days of the divided bench

In contrast to the limited relief available in equity against non-fiduciaries, both reference to the "standard current works" and a "more 'antiquarian inquiry,'" Great-West, 534 U.S. at 217 (citations omitted), reveals that equity has consistently provided a variety of remedies, including various measures of monetary relief, against fiduciaries for breach of trust. See, e.g., Restatement (Second) of Trusts §

199, at 437. 1 John N. Pomeroy, A Treatise on Equity Jurisprudence § 151, at 184 (4th ed. 1918); 2 Joseph Story, Commentaries on Equity Jurisprudence § 975, at 175 (12th ed. 1877). One equitable remedy was "to compel the trustee to redress [the] breach," including by "the payment of money." Second Restatement § 199; 3 Austin W. Scott & William F. Fratcher, The Law of Trusts § 199.3, at 206 (4th ed. 1987); see 2 Story §§ 1266-1278, at 519-534. Thus, depending on the circumstances and among other remedies, the beneficiary could "charge the trustee with any loss that resulted from the breach of trust, or with any profit made through the breach of trust." 3 Scott § 205, at 237; see Second Restatement § 205, at 458.

McCravy's suit is directly analogous to a traditional action by the cestui qui trust to compel the trustee to redress a breach of trust, claims that "have lain at the heart of equitable jurisdiction from time immemorial." Strom v. Goldman, Sachs & Co., 202 F.3d 138, 144 (2d Cir. 1999), rev'd Coan v. Kaufman, 457 F.3d 250, 262-64 (2d Cir. 2006). Both the basis for the claim – breach of trust – and the requested relief – monetary redress that was sometimes called "surcharge" – was considered equitable in the days of the divided bench, and thus constitutes "equitable relief" under the test set forth in Mertens, Great-West and Sereboff. [2]

[2] 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

Surcharge was not a legal remedy that could be awarded in a court of law but was sometimes awarded in a court of equity. Instead, "[a]s trusts are creatures of courts of equity and depend on them for the maintenance of their purposes," T.J. Moss Tie Co. v. Wabash Ry. Co., 11 F. Supp. 277, 284 (S.D.N.Y. 1935), the equity courts exercised exclusive jurisdiction over claims by a beneficiary against a trustee for breach of trust, subject to limited exceptions that do not apply here, and could provide a variety of remedies, including monetary relief. Restatement (Second) of Trusts § 197, at 433 (1959) (Second Restatement); id. § 198, at 434; 1 Pomeroy § 151, at 184; 2 Story § 975, at 175; Duvall v. Craig, 15 U.S. (2 Wheat.) 45, 56 (1817); Manhattan Bank v. Walker, 130 U.S. 267, 271 (1889); Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 676 (1819). These monetary remedies were developed in equity and available only there to remedy breaches of equitable duties by trustees and other fiduciaries.

Indeed, monetary relief tailored to specific harm predates the separation of law and equity, developing sometime around 1198, while the Chancellor was among a number of royal officers responsible for judicial functions. Donald W.

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 v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 381 (4th Cir. 2001).

Sutherland, The Assize of Novel Disseisen 52-54 (1973); 2 F. Pollock & F. Maitland, The History of English Law Before the Time of Edward I 44-48 (2d ed. 1899); George E. Woodbine, The Origins of the Action of Trespass, 33 Yale L.J. 799, 807-08 (1923); 1 William S. Holdsworth, A History of English Law 32, 35, 37-38 (1903)("1 Holdsworth"). Litigants could petition the King for relief from strict application of legal principles, and the Chancellor usually handled these petitions. 1 Holdsworth, at 37-38, 395-404. In this early period, monetary relief, whether awarded in Chancery or elsewhere, was based on principles of conscience associated with equity. 5 William S. Holdsworth, A History of English Law 43-54, 215 (2d ed. 1937)("5 Holdsworth").

Chancery continued awarding monetary relief after its separation from the law courts in the fourteenth or early fifteenth century, see 1 Holdsworth at 198-199, and as the common law became more fixed and rigid, many litigants found that the equity courts offered better and more flexible remedies, including monetary remedies. 5 Holdsworth, at 215-217. Ultimately, the law courts were forced to provide monetary relief for more kinds of claims to attract litigants, and this often meant that it was the law courts that derived their in personam monetary remedies from Chancery, not the other way around. See, e.g., May v. LeClaire, 78 U.S. 217, 236 (1870) (discussing the legal remedies of trover, which requires tracing of property and assumpsit, which holds the wrongdoer liable for

appropriate damages, and noting that "[t]here are kindred principles in equity jurisprudence, whence, indeed, these rules of the common law seem to have been derived"). These monetary remedies, enforced through the in personam power of equity courts over trustees and other fiduciaries, are thus of ancient origin.

One of these remedies – "surcharge" – required the breaching fiduciary 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." Restatement (Third) of Trusts § 205 & cmt. a, at 223 (1992); see 3 Scott § 205, at 238-239; Black's Law Dictionary 1482 (8th ed. 2004); 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); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 862, at 36 (rev. 2d ed. 1995). 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 timber).

Moreover, the remedy of surcharge differed in important ways from legal damages, which may remedy a wide array of consequences, including physical harm and intangible injuries such as pain, mental injury and harm to family relations, personal liberty or reputation. 1 T. Sedwick, A. Sedwick & J. Beale, A Treatise on the Measure of Damages §§ 37, 39 (9th ed. 1912). Surcharge provided a narrower scope of consequential relief centering on trust administration and how the breach affected the beneficial purposes of the trust. See Bogert, § 862 at 48-50 & n.33 (courts must seek to remedy those consequences related directly to the trust's purpose). Thus, surcharge appears to have provided compensation only for economic injury, not non-pecuniary harm. See 3 Scott § 205, at 237-50 (making no mention of non-economic injury); Third Restatement § 205, at 223 (same). Moreover, 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 Story § 1278, at 534 (purpose of remedy is "to compensate the cestui qui trust"); Scott § 205, at 239 (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).

But within these confines surcharge was an available and widely used equitable remedy for fiduciary breach. See 3 Scott § 205, at 238-239; Morrissey v. Curran, 650 F.2d 1267, 1282 (2d Cir. 1981) ("At common law, an accounting surcharging a trustee for breach of his fiduciary duty was a readily available remedy."); 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 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"). 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). And significantly, 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 premium on life insurance policy); 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).

B. No precedent of the Supreme Court or of this court precludes suits against fiduciaries for this type of monetary redress

1. In reaching its decision, the district court noted that other courts of appeals have construed the Supreme Court's decisions to foreclose suits under section 502(a)(3) for monetary redress of losses caused by a breach of fiduciary duty, and relied heavily on the Fifth Circuit's decision to that effect in a closely analogous case. JA 157-58 (citing Amschwand, supra). See also Goeres v. Charles Schwab & Co., 220 Fed. Appx. 663 (9th Cir. 2007), cert. denied, 128 S. Ct. 2994 (2008); Todisco v. Verizon Communications, Inc., 497 F.3d 95, 99-100 (1st Cir. 2007); Coan, 457 F.3d at 262-64 (reversing prior holding in Strom); 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). Contrary to the conclusion of these courts, suits under section 502(a)(3) against fiduciaries for monetary redress of fiduciary breaches are fully consistent with the Supreme Court's decisions in Mertens and Great-West. See McDonald v. Household Int'l, Inc., 425 F.3d 424, 430 (7th Cir. 2005); Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 592 (7th Cir. 2000).

Unlike McCravy, the plaintiffs in Mertens did not seek to surcharge fiduciaries with the loss they suffered, but instead sought damages from a non-fiduciary third party. 508 U.S. at 253-254, 262; cf. Appeal of the Harrisburg Nat'l Bank, 84 Pa. at 383-384 (court of equity has no jurisdiction to order third party who is holding life insurance proceeds that administrator negligently failed to collect to pay those proceeds to estate). The monetary relief that courts of equity awarded against such third parties was under concurrent jurisdiction which allowed such courts to impose legal relief. 508 U.S. at 256 (citing 1 Pomeroy § 181, at 257). But as Mertens recognized, ERISA sensibly "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." 508 U.S. at 262; see also Harris Trust, 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'"). Thus, ERISA provides only limited relief against non-fiduciaries ("persons who had no real power to control what the plan did," Mertens, 508 U.S. at 262), as opposed to the fiduciaries who have primary responsibility for the administration and control of benefit plans. Id. ("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.") (emphasis in original). Since the primary responsibility for control

of the plan rests with the fiduciary, so too does the attendant liability. See id. at 262-63.[3]

The trust law too recognizes this critical distinction between fiduciaries and non-fiduciaries. Most fundamentally, the jurisdiction that the court of equity exercised over trustees and other fiduciaries was exclusive, not concurrent, and was always in personam. "It is true, therefore, that the cestui qui trust has not merely rights in personam against his trustee, but also rights in rem, rights that may be asserted against" parties other than the trustee. Austin W. Scott, The Nature of the Rights of the Cestui Que Trust, 17 Colum. L. Rev. 269, 274 (1917); id. at 269 (cestui qui trust may "recover a sum of money" and his "right is a personal right against the trustee, it is an equitable obligation"). Not surprisingly, pre-merger equity courts recognized the distinction between 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. See Appeal of the Harrisburg National Bank, 2 Pears. 251, 84 Pa. 380, 1877 WL

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[3] There is also less need for ERISA to provide monetary relief against third party service providers because state law remedies, for malpractice and the like, are available against them and generally are not preempted. Gerosa v. Savasta & Co., 329 F.3d 317, 324 (2d Cir. 2003) (citing cases); LeBlanc v. Cahill, 153 F.3d 134, 147 (4th Cir. 1998) (claims against third party service providers are generally not preempted unless they "'provid[e] alternate enforcement mechanisms' for employees to obtain ERISA plan benefits"). In contrast, state law remedies against fiduciaries who have breached their fiduciary duties generally are preempted. See p. 20-21, infra.

13273, at *5 (Pa. 1877). More generally, 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. Second Restatement § 280, at 38-42; James P. Holcombe, Introduction to Equity Jurisprudence, 169 n.2 (1846). If the trustee refused to sue, the beneficiary could sue the trustee in equity for breach of trust. Second Restatement § 282 & cmt. e, 44-45. In that suit, equity would permit the beneficiary to join the third party as a defendant as a matter of concurrent jurisdiction, in order to avoid the need for multiple suits – one at equity against the trustee and the other at law against the third party. See id.; 4 Scott § 282.1, at 30.

For these same reasons, Great-West is distinguishable. Like Mertens, Great-West was not a suit by a participant against a fiduciary for breach of fiduciary duty. Instead, the plan itself sued a non-fiduciary beneficiary seeking the legal remedy of money damages for breach of a contractual obligation. 534 U.S. at 210, 221.

2. No precedent of this Court precludes a surcharge remedy here. This Court has addressed the scope of section 502(a)(3), outside of the subrogation context, in three principal cases. In Griggs, this Court reversed a district court order holding that a plaintiff who took early retirement benefits had no available remedy for the $58,000 in taxes that he would not have had to pay if he had been correctly apprised of the tax consequences of taking his benefits in the form of a

lump sum. The Court addressed "whether the remedy Griggs seeks – reinstatement to the status quo – is a kind typically available in equity," and held that "it is." Id. at 384. In ruling that Griggs was entitled to seek a status-quo-ante remedy under section 502(a)(3), the Court relied on the Eighth Circuit's decision in Howe v. Varity Corp., 36 F.3d 746, 756 (1994), which the Supreme Court affirmed on other grounds, holding that the plaintiffs in that case were entitled to an injunction reinstating their benefit plan as it existed at the time they retired in reliance on misleading statements by plan fiduciaries. Griggs, 237 F.3d at 384. Moreover, the Court relied on the fact that reinstatement was clearly an available remedy under Title VII, which has "nearly identical language." Id. at 384-85. The Court then remanded for a determination of whether such an equitable remedy would be "appropriate" under the circumstances. On remand, the district court allowed Griggs to rescind the election of the lump-sum benefit, and this Court upheld the remedy of rescission. 385 F.3d 440, 445-50 (4th Cir. 2004). While McCravy is not, of course, seeking rescission, she seeks, among other things "that the parties be put back in the position they would have occupied but for the breach of fiduciary duty." JA 10. The Griggs decision certainly provides support for the notion that section 502(a)(3) allows courts to return the parties to the status quo ante that existed prior to the breach of fiduciary duty. 237 F.3d at 384 ("reinstatement to the status quo – is a kind [of remedy] typically available in equity"). See also Brown

__________________________, 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). Because this Court recognized this kind of remedy as equitable in Griggs, it should do so in this context as well.[4]

The Court next addressed 502(a)(3) remedies in Rego v. Westvaco Corp., 319 F.3d 140 (4th Cir. 2003). As an initial matter, this Court rejected the plaintiff's argument that any "remedy, when sought for a breach of fiduciary duty, is always an equitable remedy," noting that the Supreme Court had rejected that argument (in a case against a non-fiduciary). Id. at 145 (citing Mertens, 508 U.S. at 257). The Court likewise rejected Rego's argument that he was entitled to equitable restitution or a constructive trust, reasoning that Rego had failed to identify particular funds in the defendant's possession that belonged to him. Id. at 145 (citing Great-West, 534 U.S. at 213-14). Finally, the Court rejected Rego's argument that his request for relief could be justified as a make-whole remedy which "has traditionally been available under trust law as an equitable form of relief for a trustee's breach of fiduciary duty." Id. at 146. With regard to this

[4] One of the arguments that McCravy makes is that she should be construed to have elected coverage under the conversion policy when her daughter turned 19, as she alleged she would have done but for the fiduciary breaches. This seems particularly analogous to the reinstatement remedy that this Court recognized in Griggs, since it amounts to a constructive "instatement" into that individual policy.

argument, the Court reasoned that "it is obvious on the face of his complaint that Rego is not actually trying to make himself whole," but was instead seeking "far more" than the difference between the valuation that he claims was applicable and the amount for which he sold his shares. Id. Because Rego's claim was "in no sense a request to be restored to the position [he] would have occupied if the misrepresentation . . . had never occurred," this Court "decline[d] to consider it 'appropriate equitable relief'" under section 502(a)(3). Id. (citations omitted). Here, however, McCravy seeks the precise amount of the life insurance benefits, and thus seeks to be restored to the precise position she would have occupied but for the fiduciary breaches. Cf. Ream v. Fray, 107 F.3d 147, 152-53 (3d Cir. 1997) (holding that a beneficiary was entitled to sue under section 502(a)(3) for "direct, clearly defined personal loss" stemming from plan trustee's wrongful diversion of plan assets to an administrator). These facts distinguish this case from Rego.

Finally, in LaRue v. Dewolff, Boberg & Assocs., 450 F.3d 570, 576-77 (4th Cir. 2006), vacated on other grounds, 552 U.S. 248 (2008), this Court rejected the availability of this kind of make-whole remedy for breach of fiduciary duty, reasoning that the fact "[t]hat plaintiff can analogize this suit to a common law breach of trust action therefore proves of no avail in characterizing the relief he

seeks as equitable." Id. at 577.[5] However, this Court's decision in LaRue is no longer controlling precedent because the Supreme Court vacated the decision, and remanded for further proceedings, albeit without addressing the section 502(a)(3) issue. Although vacated decisions may be given some weight, see EEOC v. City of Norfolk Police Dep't, 45 F.3d 80, 83 & n.3 (4th Cir. 1995), we think this Court should not do so in this case for all the reasons stated in this brief.[6]

C. Such suits are necessary to achieve ERISA's protective goals

ERISA contains an expansive preemption provision, which generally displaces all state laws that "relate to any [ERISA covered] plan." 29 U.S.C.

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[5] Here, we have shown that surcharge was available outside the context of trust law and were generally applicable to fiduciaries. See, e.g., Appeal of the Harrisburg Nat'l Bank, 84 Pa. at 383 (surcharging executor); Bosworth v. Allen, 61 N.E. 163, 165-66 (N.Y. 1901) (surcharging corporate directors). Thus, this Court's concern in Larue that the plaintiff there had not shown that "'make whole' relief was available in courts of equity outside the context of trusts," 450 F.3d at 577 (quoting Rego, 319 F.3d at 145), is misplaced.

[6] This Court's precedent in a related area of the law supports the conclusion that the kind of monetary relief sought by McCravy is equitable relief within the meaning of section 502(a)(3). In Phelps v. C.T. Enters., Inc., 394 F.3d 213 (4th Cir. 2005), participants in an ERISA-covered health care plan sued a number of fiduciaries based on their failure to sufficiently fund the plan so that it could pay all medical claims, despite withholding contributions from employee paychecks. This Court reversed the order dismissing the case, noting that "[a]ny potential relief available to the Employees going forward must therefore be grounded in the 'other equitable relief' language" of section 502(a)(3), but that because it provides "for only equitable remedies, this section of ERISA . . . entails no right to a jury trial." Id. at 222. It is true that the Court did not decide what remedies were available to plaintiffs under this subsection on remand, but it clearly left open the possibility of monetary relief grounded in equity, citing this Court's decisions in Griggs. Id. n.5.

1144(a). That preemption provision overrides state law remedies against plan fiduciaries arising from a breach of an ERISA fiduciary duty. See, e.g., Peralta v. Hispanic Bus., Inc., 419 F. 3d 1064, 1069 (9th Cir. 2005); Eckelkamp v. Beste, 315 F.3d 863, 870 (8th Cir. 2002); Dudley Supermkt., Inc. v. Transamerica Life Ins. & Annuity Co., 302 F.3d 1, 4 (1st Cir. 2002); Kramer v. Smith Barney, 80 F.3d 1080, 1083 (5th Cir. 1996); see also Aetna Health Inc. v. Davila, 542 U.S. 200, 208-209 (2004). Accordingly, the district court in this case correctly held that McCravy's state-law claims were preempted. JA 152.

Moreover, it is clear that McCravy may not seek a remedy under section 502(a)(2) for her individual loss outside of the plan. See Russell, 437 U.S. at 144. And, contrary to the district court's conclusion, JA 156, McCravy's suit is not one for benefits under section 502(a)(1)(B) because, as all parties concede, there are no "benefits due" under the group life insurance policy governing the ERISA plan. See Griggs, 237 F.3d at 385 n.7 ("Griggs cannot recover 'benefits due' under section 502(a)(1), see 29 U.S.C. § 1132(a)(1), because when he received his lump sum payment, he received all that he was entitled to receive from DuPont – there are no outstanding benefits.").[7] Because McCravy thus does not seek benefits

[7] This Court's decision in Korotynska is not to the contrary. Because the plaintiff in that case claimed "that MetLife's allegedly improper claims procedures injured her by leading to the denial of benefits to which she was rightly entitled," this Court held that there was "no question that Korotynska's injury is redressable

under the plan as provided in section 502(a)(1)(B), but seeks instead a remedy from the plan fiduciaries for fiduciary misconduct, if she has no effective remedy under section 502(a)(3), she has no effective remedy at all.

For this reason, the narrow reading of Section 502(a)(3) mistakenly adopted by a number of courts since Mertens and Great-West, 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, 413 F.3d at 345-46 (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).

Legal scholars have echoed the judicial concern that participants and beneficiaries cannot be left "betrayed without a remedy." Colleen E. Medill, Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section

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elsewhere in ERISA's scheme." 474 F.3d at 106. The same is not true here, as the district court acknowledged.

502(a)(3), 39 J. Marshall L. Rev. 827, 852 (2006); see, e.g., 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).

This narrow reading of the scope of section 502(a)(3) cannot be reconciled with the central role assigned to fiduciaries and fiduciary duties in the ERISA regime, nor with the statute's protective purposes. Fiduciaries have primary responsibility for administration and control of ERISA covered plans. See Mertens, 508 U.S. at 262; 29 U.S.C. § 1002(21)(A). Congress therefore viewed the fiduciary duties imposed by ERISA as affording critical protection for plan participants and beneficiaries. And, as Congress spelled out in the statute's opening section, ERISA was 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).

It is thus "hard to imagine" that Congress would have left participants and beneficiaries without an effective remedy against fiduciaries who have committed serious violations of ERISA's provisions and directly injured the people they were charged to protect. Varity, 516 U.S. at 513. But that is what would occur in this

and many other situations if this Court were to agree with the district court that section 502(a)(3) does not authorize suits against fiduciaries to recover losses and to account for profits resulting from fiduciary breaches. Even a cursory review of the cases suggests the range of injuries that could go unredressed if the panel's decision remains standing. See, e.g., McFadden v. R&R Engine & Mach. Co., 102 F. Supp. 2d 458 (N.D. Ohio 2000) (expenses incurred by cancer patient after he lost coverage because fiduciary failed to submit premiums to insurer); Strom, 202 F.3d at 144 (loss of life insurance proceeds because of fiduciary's negligent handling of life insurance application); Shade v. Panhandle Motor Serv. Corp., No. 95-1129, 1996 WL 386611, at *4 (4th Cir. July 11, 1996) (unpublished) (ordering employer whose misconduct excluded plaintiff from his health plan to pay for his $161,000 liver transplant). These awards of monetary relief to plan participants and beneficiaries who have been injured by fiduciary breaches are typically, historically, and exclusively equitable. If upheld, the district court's narrow and, we believe erroneous, interpretation of equitable relief would permit fiduciaries to ignore their statutory obligations, injure beneficiaries, and evade liability. Instead of sanctioning such a result, this Court should recognize – as it did in finding a remedy in Griggs for a fiduciary's provision of inaccurate information about the tax consequences of distribution options that caused a participant to suffer substantial and otherwise avoidable tax liability – that section 502(a)(3) permits courts to

compel breaching fiduciaries to remedy their breaches by surcharging them for the losses suffered by plan participants and beneficiaries as a result of their fiduciary breaches.

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 April 28, 2010, 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 April 28, 2010 eight hard copies of the foregoing Brief were sent to the Clerk's office using Federal Express, postage paid.

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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: April 28, 2010

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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 5,645 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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