No. 01-3801

UNITED COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JANICE OSTLER, as trustee of the
Timothy J. Ostler Living Trust dated
January 14, 2000,
Plaintiff-Appellant

v.

OCE-USA, INC.,
Defendant-Appellee

Appeal From the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 00 C 7753
The Honorable Judge Kocoras

BRIEF OF THE SECRETARY OF LABOR
AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 1

ARGUMENT 3

A. "Equitable Relief" Within the Meaning of Section 502(a)(3) of ERISA Includes the Recovery From a Fiduciary of Any Direct Monetary Loss Caused by The Fiduciary's Breach of Its Obligations 3

1. A Monetary Award Against a Fiduciary to Redress a Fiduciary Breach Was Typically Available in Equity 5

2. *Mertens* and *Great-West* Support the Conclusion That a Monetary Award to Remedy A Fiduciary's Breach Is "Equitable" Under Section 502(a)(3) 8

3. A Beneficiary May Recover the Direct Monetary Losses Resulting From a Fiduciary Breach Regardless of Whether or Not the Fiduciary Was Unjustly Enriched By Its Misconduct 14

CONCLUSION 16

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Page

Cases:

Bast v. Prudential Ins. Co. of America,
150 F.3d 1003 (9th Cir. 1998), cert. denied, 528 U.S. 870 (1999) 15

Bowen v. Massachusetts,
487 U.S. 879 (1988) 10

Bowerman v. Wal-Mart Stores, Inc.,
226 F.3d 574 (7th Cir. 2000) 6,7,14

Central States Pension Fund v. Central Transport, Inc.,
472 U.S. 559 (1985) 5

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 5,12

Great-West Life & Annuity Ins. Co. v. Knudson
122 S. Ct. 708 (2002) .... passim

Griggs v. DuPont De Nemours, & Co.
237 F.3d 371 (4th Cir. 2001) 17

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.,
530 U.S. 238 (2000) 5,12,16

Health Cost Controls of Ill., Inc. v. Washington,
187 F.3d 703 (7th Cir. 1999), cert. denied, 528 U.S. 1136 (2000) 7

Kerr v. Charles F. Vatterott & Co.,
184 F.3d 938 (8th Cir. 1999) 15

McDannold v. Star Bank, N.A.,
261 F.3d 478 (6th Cir. 2001) 16

McFadden v. R & R Engine and Machine Co.,
102 F. Supp. 2d 458 (N.D. Ohio 2000) 15,16

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) . . . . passim

Michael H. v. Gerald D.,
491 U.S. 110 (1989) 12

Ostler v. Oce-USA, Inc.,
No. 00 C 7753, 2001 WL 1191183 (N.D. Ill. Oct. 4, 2001) 1,2,3,4

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 4,13

Ream v. Frey,
107 F.3d 147 (3d Cir. 1997) 7,15

Shade v. Panhandle Motor Serv. Corp.,
91 F.3d 133, 1996 WL 386611 (4th Cir. July 11, 1996) 17

Strom v. Goldman, Sachs & Co.,
202 F.3d 138 (2d Cir. 1999) 7,15,16

Varity v. Howe,
516 U.S. 489 (1996) 3,4,13

Federal Statute:

Employee Retirement Income Security Act of 1974, as amended,
29 U.S.C. § 1001 et seq. 1

Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) 3

Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) 3

Section 409, 29 U.S.C. § 1109 13

Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) 4

Section 502(a)(2), 29 U.S.C. § 1132(a)(2) 4,13

Section 502(a)(3), 29 U.S.C. § 1132(a)(3) .... passim

Other Authorities:

Fed. R. App. P. 29 1

3 A. Scott & W. Fratcher, The Law of Trusts (4th ed. 1988)

§ 199, at 203-04 6

§ 199, at 206 6

§ 199.3, at 206 15

§ 282.1, at 30 10

George Gleason Bogert, The Law of Trusts and Trustees,
§ 861, at 3-4 (Rev. 2d ed. 1995) 5-6

Restatement (Second) of Trusts § 2 6,10

Restatement (Second) of Trusts § 74 6,10

Restatement (Second) of Trusts § 197 6,10,14

Restatement (Second) of Trusts § 197, at 433 5

Restatement (Second) of Trusts § 199, at 437 5

Restatement (Second) of Trusts § 205, at 458 5

Restatement (Second) of Trusts § 205, at 458 cmt. a 5

Restatement (Second) of Trusts § 205, at 459 cmt. c 6,14

Restatement (Second) of Trust § 205(a) 14

Restatement (Second) of Trusts § 205(b) 6,14

Restatement (Second) of Trusts § 282, at 45 cmt. e 10

STATEMENT OF INTEREST

The Secretary of Labor is charged with interpreting and enforcing the provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1001 et seq. As the Federal officer with primary enforcement authority for numerous provisions of ERISA, the Secretary has a significant interest in the proper application of ERISA's remedial provisions. This case presents an important and recurring remedial issue – whether Section 502(a)(3) of ERISA authorizes actions to recover monetary losses from fiduciaries who have breached their obligations and harmed individual beneficiaries. Under the district court's interpretation of Section 502(a)(3), fiduciaries could violate ERISA's stringent obligations, injure beneficiaries, and evade liability for the losses they caused. The Secretary disagrees with the district court's interpretation and, therefore, pursuant to Federal Rule of Appellate Procedure 29, respectfully submits this brief as amicus curiae.

STATEMENT OF THE CASE[1]

Tim Ostler worked for Oce-USA, Inc. (Oce) until December 3, 1999, when he took short-term disability leave because of non-Hodgkin's lymphoma. At the time that Mr. Ostler took disability leave, Oce offered supplemental life insurance benefits through an ERISA-covered plan. Mr. Ostler signed up for the plan and elected $491,000 in life insurance benefits to be provided by Reliastar, an insurance company. Ostler v. Oce-

[1]The Secretary takes no position on the factual matters presented by this case or the legal issue of whether or not Oce breached its fiduciary duty under ERISA. The "Statement of the Case" is taken from the district court's opinion and is not intended to express the Secretary's opinion about how the Court should rule on any particular fact. Ostler v. Oce-USA, Inc., No. 00 C 7533, 2001 WL 1191183 (N.D. Ill. Oct. 4, 2001).

USA, Inc., No. 00 C 7533, 2001 WL 1191183, at *1-2 (N.D. Ill. Oct. 4, 2001). Because the policy paid less than $500,000, Reliastar did not require a medical examination. Oce sent Mr. Ostler a benefits confirmation statement confirming his coverage under the life insurance policy as of January 1, 2000 and began deducting premiums from his paycheck. Mr. Ostler died on March 3, 2000, without ever returning to work. Id. at *2.

Mr. Ostler's widow, Janice Ostler, applied for the life insurance benefits. Reliastar denied the claim because the policy required Mr. Ostler to be "active at work" for at least one day before coverage would take effect. Mr. Ostler had been on disability leave and failed to meet the requirement. After the denial, Mrs. Ostler for the first time received a copy of the actual policy, which contained the active-at-work requirement. Previously she and her husband had only seen benefit highlights materials provided by Oce, which did not include that information. Oce told Mrs. Ostler that they had not informed her husband about the active-at-work requirement before his death because they were not aware of it. Oce refunded the premium payments to Mrs. Ostler. Id. at *2-3.

Mrs. Ostler brought an action against Oce under Section 502(a)(3) of ERISA for allegedly breaching its fiduciary obligations by failing to inform her husband of the insurance policy's active-at-work requirement. She contends that if he had been so informed, he would have returned to work for at least one day so that his policy would have been effective. Id. at *3. The district court granted summary judgment for Oce. The court opined that Oce's provision of erroneous information about whether

Mr. Ostler was covered by the policy did not give rise to a fiduciary breach. Id. at *8. The court also held that ERISA bars Mrs. Ostler's request for recovery of the alleged monetary loss. The court stated that Mrs. Ostler's claim for monetary relief under Section 502(a)(3) was an "ordinary benefits claim dressed up in fiduciary duty clothing," and that a loss remedy was unavailable. Id. at *2.

ARGUMENT

A. "Equitable Relief" Within the Meaning of Section 502(a)(3) of ERISA Includes the Recovery From a Fiduciary of Any Direct Monetary Loss Caused by The Fiduciary's Breach of Its Obligations.

ERISA fiduciaries have a duty to act prudently and with loyalty toward participants in the plan. 29 U.S.C. § 1104(a)(1)(A) & (B). When fiduciaries breach that duty, Section 502(a)(3) entitles plan participants to sue them to redress the breach. 29 U.S.C. § 1132(a)(3); Varity v. Howe, 516 U.S. 489 (1996). The Supreme Court has described Section 502(a)(3) as a "catchall" clause that provides a "safety net" to redress injuries that ERISA does not remedy under other provisions. Id. at 512.

Section 502(a)(3), however, expressly limits recovery to "appropriate equitable relief." The Supreme Court has said that this excludes "legal" relief. Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993); Great-West Life & Annuity Ins. Co. v. Knudson, 122 S. Ct. 708, 713 (2002). Thus, to succeed in a fiduciary breach claim under Section 502(a)(3), Mrs. Ostler must show that her proposed remedy is "equitable."[2]

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[2]In addition to deciding whether the monetary relief Mrs. Ostler requests is equitable, the Court must determine whether such relief is "appropriate" under Section 502(a)(3). Because Mr. Ostler never became eligible for the insurance policy, the district court was mistaken when it asserted that this "is an ordinary benefit claim dressed up

Nothing in the language of ERISA defines "equitable relief." However, in Great-West, the Supreme Court clarified that to determine if the requested relief is "equitable" under Section 502(a)(3), courts should look to standard texts on remedies and trusts as well as how such relief was characterized when the bench was divided between equity courts and law courts. 122 S. Ct. at 712, 714 & 716 (considering character of restitution "in the days of the divided bench.") The Court explained that to qualify as equitable under Section 502(a)(3), the relief must be the type "typically available in equity." Id. at 712 (quoting Mertens, 508 U.S. at 252). Thus, the plaintiff must not only show that the relief would have been granted in equity in the days of the divided bench, but that the relief was *typically*, as opposed to occasionally, available in equity. Id. at 715 (fact that damages such as those against non-fiduciaries were "occasionally awarded in equity cases" does not render them equitable relief) (emphasis omitted).

As discussed below, the relief Mrs. Ostler seeks was "typically" available in equity. In fact, under the common law of trusts, such relief from fiduciaries was exclusively available in equity. ERISA is founded on the common law of trusts, and the Supreme Court has instructed courts interpreting ERISA to turn to the common law of trusts unless that law is inconsistent with the statute's language, structure, or purpose.

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in fiduciary duty clothing." 2001 WL 1191183, at *2. Thus, Mrs. Ostler has no benefit claim under Section 502(a)(1)(B). She has no fiduciary breach claim under Section 502(a)(2) which provides relief only to the plan (see *infra* note 8), and of course, her state law claims would be preempted. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-57 (1987). She must recover under a Section 502(a)(3) fiduciary breach claim, or not at all. Therefore, if the Court finds that Oce breached its duty and that the breach caused Mrs. Ostler's losses, the requested monetary relief is "appropriate." See Varity, 516 U.S. at 515.

See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000). See also Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law."); Central States Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA.)

1. A Monetary Award Against a Fiduciary to Redress a Fiduciary Breach Was Typically Available in Equity.

Great-West instructs courts to look at standard works, including the Restatements, to determine what relief was typically available in equity. 122 S. Ct. at 716. In actions such as this where a beneficiary sues a *fiduciary* for its breach of duty, the Restatement of Trusts shows that the common law required the fiduciary to restore the beneficiary to "the position he would have been if the trustee had not committed the breach of trust." Restatement (Second) of Trusts, § 205, at 458 cmt. *a;* see also Restatement § 205, at 458. The Restatement of Trusts clearly provides that monetary relief against breaching fiduciaries is "equitable" relief. Indeed, the Restatement emphasizes that "the remedies of the beneficiary against the trustee are *exclusively equitable.*" Restatement (Second) of Trusts § 197, at 433 (emphasis added); see also id. § 199, at 437 (setting forth "equitable remedies of beneficiary"). As Professor George Gleason Bogert explains in his leading treatise:

> Equity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with *whatever remedy is necessary* to protect him and recompense him for loss, in so far as this can be done without injustice to the trustee or third parties.

George Gleason Bogert, The Law of Trusts and Trustees, § 861, at 3-4 (Rev. 2d ed. 1995) (emphasis added). See also 3 A. Scott & W. Fratcher, The Law of Trusts § 199, at 203-04 & 206 (4th ed. 1988) ("Scott & Fratcher") (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary); Restatement of Trusts § 2, p. 9 ("In a trust there is a separation of interests in the subject matter of the trust, the beneficiary having an equitable interest and the trustee having an interest which is normally a legal interest.") p. 10 (stating that trustee owes "equitable duties" to beneficiary); Id. at § 74, p. 192 (beneficiary has equitable interest in the trust). In other words, the trust relationship arises in equity and creates equitable rights and duties, which, when breached, are redressed exclusively through equitable remedies. Whether or not such a remedy consists of a money award does not change its character as an equitable remedy.[3]

The Seventh Circuit case of Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (2000), exemplifies the equitable nature of a monetary award against an ERISA fiduciary for breaching its fiduciary responsibilities. There, the employer's fiduciary

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[3]The Restatement of Trusts gives several examples of the types of monetary awards fiduciaries must pay to redress their breaches. For instance, Illustration 1 § 205, at 459 cmt. c of the Restatement explains: "A is the trustee of $10,000 in cash. As a result of his negligence, the money is stolen. A is liable for $10,000." Illustration 3 notes: "A is the trustee of a claim against B for $1,000. B is solvent and A can collect the claim in full. A negligently fails to take steps to collect the claim until B becomes insolvent with the result that he is able to collect only $400 of the money owed by B. A is liable for $600." The Restatement makes it plain that all of these remedies are equitable. See Restatement (Second) of Trusts § 197. The Restatement goes on to explain that, if a fiduciary wrongly holds trust property, a beneficiary can additionally recover unjust enrichment as a separate category of relief. See id. at § 205(b).

breach caused Ms. Bowerman to lose health insurance coverage for her pregnancy. Bowerman sued under Section 502(a)(3) seeking the amount of the pregnancy-related expenses that would have been covered but for the breach. This Court upheld Ms. Bowerman's claim for monetary relief under Section 502(a)(3) because it rested on a violation of fiduciary duty. The Court recognized that Section 502(a)(3) excludes legal relief such as damages (citing Mertens, 508 U.S. at 255), but explained, "[h]owever, when sought as a remedy for breach of fiduciary duty [, this kind of relief, which the Court viewed as restitution] is properly regarded as an equitable remedy *because the fiduciary concept is equitable.*" Id. at 592 (quoting Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703, 710 (7th Cir. 1999), cert. denied, 528 U.S. 1136 (2000)) (emphasis added). In support for its ruling, the Court cited Strom v. Goldman, Sachs & Co., 202 F.3d 138, 144 (2d Cir. 1999), which awarded monetary relief under Section 502(a)(3) for a fiduciary's negligent handling of life insurance application which resulted in participant's loss of coverage. The court in Strom explained that beneficiary claims against breaching fiduciaries to redress their breaches "have lain at the heart of equitable jurisdiction from time immemorial." See also Ream v. Frey, 107 F.3d 147 (3d Cir. 1997).[4]

Mrs. Ostler seeks only recovery of the direct economic loss she allegedly incurred as a result of a fiduciary breach. As the Restatement and this Court make clear, equity

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[4]In Ream, the trustee conveyed pension plan assets to the plan administrator who then absconded with the assets. The court ordered the trustee to pay the beneficiary the amount of his vested interest in the plan, characterizing its order as equitable restitution under Section 502(a)(3). 107 F.3d at 153.

imposes upon fiduciaries such as Oce the *equitable* duty to restore beneficiaries to their pre-breach position, and the payment of such relief by fiduciaries is exclusively equitable.

2. *Mertens* and *Great-West* Support the Conclusion That A Monetary Award to Remedy a Fiduciary's Breach Is "Equitable" Under Section 502(a)(3).

The Supreme Court addressed requests for monetary relief from non-fiduciaries under Section 502(a)(3) in Mertens, 508 U.S. 248 and Great-West, 122 S. Ct. 708. In Mertens, an employer allegedly underfunded its retirement plan and drove it out of existence. The plan participants sued under Section 502(a)(3) for the monetary losses to the plan resulting from their employer's alleged fiduciary breach. However, they did not seek the losses from the employer-fiduciary. Instead, they sought to recover from a non-fiduciary actuary whom they claimed had knowingly participated in the fiduciary's breach.

The Supreme Court refused to classify the money sought against a non-fiduciary as equitable relief under Section 502(a)(3). The Court explained that the participants did not "seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution ... [but] what petitioners in fact seek is nothing other than compensatory damages - monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief." 508 U.S. at 255.

In Great-West, a health plan sued a plan beneficiary under Section 502(a)(3) seeking a monetary award for breach of a provision in the health insurance contract

which required the beneficiary to pay to the plan the proceeds from a personal injury settlement.[5] The Court held that Great-West had asserted nothing more than an ordinary contract claim for damages. As in Mertens, the monetary relief it sought for breach of contract was not "typically available in equity" and therefore was not recoverable under Section 502(a)(3). 122 S. Ct. at 712-13.

Mertens and Great-West thus both involved Section 502(a)(3) suits against non-fiduciaries, and in each case, the plaintiffs contended that the monetary relief they sought from non-fiduciary defendants was "equitable" because courts of equity could have granted such relief under the common law of trusts. Great-West, 122 S. Ct. at 717; Mertens, 508 U.S. at 255-56. Together these decisions stand for the proposition that monetary relief in such suits cannot be considered "equitable" just because courts of equity had the power to grant such relief under the common law of trusts. As the Supreme Court explained in Mertens, courts of equity sometimes granted purely *legal* remedies, and the money damages sought from the non-fiduciary defendant in Mertens was just that -- *legal* relief that would have been available in a court of equity under the common law of trusts. Id. at 256.[6]

Courts of equity often granted legal relief under the common law of trusts. For example, when both a trustee/fiduciary and a non-fiduciary harmed the trust in the

[5]Although the plan sued the beneficiary, the disputed funds had actually been paid to an attorney and a trust; neither the trust nor the attorney had been named as defendants. 122 S. Ct. at 711.

[6]See also Great-West, 122 S. Ct. at 718 (the "special equity-court powers applicable to trusts" do not define the reach of Section 502(a)(3)).

same transaction, the beneficiary could bring an equity action to enforce equitable rights against the fiduciary and a law action to enforce legal rights against the non-fiduciary. See Scott & Fratcher § 282.1, at 30. However, the common law did not force the beneficiary to bring two separate suits – one in equity and one at law. Instead, the beneficiary could sue both parties in the equity court in order to avoid multiple suits. Id.; see also Restatement of Trusts § 282, at 45 cmt. e.

Accordingly, the Court reasoned in Mertens that it would effectively read the "equitable" limitation out of Section 502(a)(3) if it expanded the scope of available relief to include these legal remedies which were sometimes awarded by courts of equity. Mertens, 508 U.S. at 256. The present case, by contrast, involves relief that was typically available in equity (and only in equity): monetary relief against a fiduciary to restore to a beneficiary losses resulting directly from a fiduciary breach. Such relief is equitable not simply because a common law court of equity would have granted it, but because *any* relief, monetary or otherwise, in favor of a beneficiary against a *fiduciary* to remedy that fiduciary's own breach is and always has been equitable relief. See Restatement of Trusts § 197; *supra* Section A.1 (pp. 5-7).[7]

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[7]Justice Scalia's dissenting opinion in Bowen v. Massachusetts, 487 U.S. 879 (1988), on which the Court relies in Great-West, bolsters the Secretary's view. There, Justice Scalia pointed out that "the term 'damages' refers to money awarded as reparation for injury resulting from breach of *legal* duty." Id. at 913 (emphasis added). A fiduciary's duty to the beneficiary is clearly equitable and therefore remedies for its breach fall outside of this definition of "damages." The Restatement of Trusts is replete with references to the "equitable duties" of the trustee and the "equitable interests" of the beneficiaries. See e.g., § 2, pp. 9 & 10; § 74, p. 192.

Nevertheless, Oce can be expected to argue that relief is "equitable" under Great-West and Mertens only if the particular category of relief sought was available in equity without regard to the law of trusts or the existence of a fiduciary relationship. Under this reading of the Supreme Court's decisions, "equitable relief" refers to such remedies as injunctions, equitable liens and constructive trusts, but not the recovery of direct economic losses, irrespective of whether the defendant is a fiduciary or the claim arises from a breach of trust. In support of this view, Oce can point to the Supreme Court's rejection of the idea that "equitable relief" encompasses every kind of relief that a court of equity could grant under the special powers applicable to trusts. Great-West, 122 S. Ct. at 718. The courts of equity had power to award legal as well as equitable remedies against non-fiduciaries. *Supra* pp. 9-10.

As discussed above, however, the recovery of losses from breaching fiduciaries is a separate category of relief that was typically (indeed exclusively) available in equity, and is therefore available under Section 502(a)(3) of ERISA. Under the common law, Great-West's claim against a non-fiduciary defendant was purely a claim for liability for breach of contract -- a legal claim normally remedied by legal relief, irrespective of the special powers of trust-law courts. 122 S. Ct. at 712-13 & 718. By way of contrast, the common law claim most closely paralleling Mrs. Ostler's is that of a beneficiary against a trustee for breach of trust – an equitable claim typically, historically and exclusively remedied in the courts of equity. Neither Mertens nor Great-West support the proposition that Congress intended that the courts should ignore settled trust-law understandings dating from the days of the divided bench in fashioning remedies

against fiduciaries who breach their trust-law obligations. Indeed, "ERISA abounds with the language and terminology of trust law." Firestone, 489 U.S. at 110. *See also* Michael H. v. Gerald D., 491 U.S. 110, 127 n. 6 (1989) (Scalia, J.; plurality opinion) (when historical practice determines content of current legal rule, pertinent historical practice is to be identified with specificity, not generality). Here, the "most specific tradition available," id., is the unbroken historical tradition of permitting precisely the recovery from fiduciaries sought here, at equity and only at equity.

The Secretary's interpretation of Section 502(a)(3) draws additional support from ERISA's sensible allocation of responsibility between fiduciaries and non-fiduciaries as described by the Supreme Court in Mertens. As the Supreme Court explained, ERISA "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. at 251 (emphasizing that "the common law of trusts sets limits on restitution actions against defendants other than the principal wrongdoer" (referring to the fiduciary as the "principal wrongdoer")). Accordingly, the Court explained that the Act provides only limited relief against non-fiduciaries ("persons who had no real power to control what the plan did," 508 U.S. at 262), as opposed to the fiduciaries who have primary responsibility for the administration and control of benefit plans:

> 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. Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves.

Id. (emphasis in original). Since the primary responsibility for control of the plan rests with the fiduciary, so too does the attendant liability.

Contrary to the statutory scheme, therefore, the more restricted reading of "equitable relief" adopted by the district court would leave beneficiaries without any remedy for serious violations of ERISA's fiduciary provisions. A fiduciary, for example, could deliberately mislead a participant (e.g., by misrepresenting the terms or existence of health coverage), cause the participant to incur substantial medical bills in reliance on the misrepresentation, and evade responsibility for the loss. The participant would have no remedy under ERISA if the recovery for the loss were not "equitable" relief.[8] Moreover, any state-law claims based on the fiduciary's misconduct would be preempted. See Pilot Life, 481 U.S. at 51-57 (ERISA's civil enforcement scheme is exclusive and preempts alternative state remedial schemes). Such a result is neither consistent with ERISA's remedial purposes, nor compelled by Mertens or Great-West. To the contrary, as the Supreme Court stated in its post-Mertens opinion in Varity, "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." 516 U.S. at 513.

[8]Although Sections 409 and 502(a)(2) of ERISA expressly permit the recovery of losses sustained by the plan as a whole, these provisions do not apply to losses sustained by individual participants. Fiduciary misconduct resulting in individual injuries can only be redressed by the recovery of equitable relief under Section 502(a)(3) of ERISA. Varity, 516 U.S. at 510-15.

3. A Beneficiary May Recover the Direct Monetary Losses Resulting From a Fiduciary Breach Regardless of Whether or Not the Fiduciary Was Unjustly Enriched By Its Misconduct.

A fiduciary has an equitable duty to pay monetary losses caused by a fiduciary breach, regardless of whether it was unjustly enriched. As explained above, a fiduciary must remedy all harm a beneficiary suffers from its breach. Whether that remedy comes in the form of a money payment, injunction or both, the common law of trusts considers it "equitable." See Restatement of Trusts, § 197. A fiduciary's equitable obligation to redress losses caused by a breach derives directly from the fiduciary duty itself, not from unjust enrichment. See *supra* Section A.1 (pp. 5-7).

The Restatement of Trusts confirms that a money award redressing a fiduciary breach maintains its status as equitable relief even absent unjust enrichment. The Restatement enumerates several categories of equitable remedies beneficiaries may obtain from a trustee-fiduciary for breach of duty. One category rests on unjust enrichment. Restatement (Second) of Trusts § 205(b). As an entirely separate category, the Restatement sets forth relief based on harm to the trust caused by the fiduciary breach. Id. § 205(a). The Restatement gives several examples of this latter category, all of which involve monetary awards fiduciaries must pay to remedy losses caused by their breaches, and *none* of which involves an unjustly enriched fiduciary. See id. § 205, cmt. *c.* and illustrations at 459. The Restatement makes plain that these remedies are equitable. See § 197.

Several federal appellate decisions illustrate the application of the Restatement's rule in ERISA cases. In Bowerman, 226 F.3d at 592 , this Court required an employer to

pay as equitable relief within the meaning of Section 502(a)(3) health expenses which were not covered by insurance because of its fiduciary breach. However, the Court did not require that the plaintiff first show that the employer's breach resulted in unjust enrichment. Similarly, the Second Circuit in Strom, 202 F.3d at 144-45, awarded a beneficiary monetary relief under Section 502(a)(3) against a breaching fiduciary who had not been unjustly enriched. The Court explained that such a claim against a fiduciary has always stood within the exclusive province of equity and "never has required a showing of unjust enrichment." See also Ream, 107 F.3d 147; McFadden v. R & R Engine & Machine Co., 102 F. Supp. 458 (N.D. Ohio 2000). None of these courts required plaintiffs to show unjust enrichment.

These judicial decisions, along with the Restatement, confirm that the fiduciary must do whatever is necessary to redress its breach, including paying losses to the beneficiary. *Supra* Section A.1 (pp. 5-7); Scott & Fratcher, § 199.3, at 206. Regardless of how the courts label such a money payment – "monetary relief," "restitution" or even "damages" - the duty to make the payment arises in equity, not from unjust enrichment, but from the fiduciary relationship itself.[9]

By contrast, claims for monetary awards against non-fiduciaries demand a showing of unjust enrichment in order to be considered equitable under Section

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[9]Courts that have required unjust enrichment in Section 502(a)(3) actions for money losses against breaching *fiduciaries* misinterpret background trust law as well as the import of the Mertens and Great-West decisions for all the reasons set forth in the text above. See, e.g., Kerr v. Charles F. Vatterott & Co., 184 F.3d 938 (8th Cir. 1999); Bast v. Prudential Ins. Co. of America, 150 F.3d 1003 (9th Cir. 1998), cert. denied, 528 U.S. 870 (1999). In addition, none of these courts had before it the argument made by the Secretary here.

502(a)(3). Great-West, 122 S. Ct. at 714-15; Harris Trust, 530 U.S. at 251; McDannold v. Star Bank, N.A., 261 F.3d 478, 486 (6th Cir. 2001). Unjust enrichment is necessary to recover money from non-fiduciaries because the relief qualifies as "equitable" only if it constitutes "equitable restitution" (i.e., if the circumstances warrant imposition of a constructive trust or equitable lien). Unjust enrichment must lay the foundation for ordering non-fiduciaries to pay monetary relief as restitution, because unlike fiduciaries, they have no independent duty in equity to redress a breach. Indeed the constructive trust remedy (recognized as equitable by the Supreme Court in Great-West), rests on the fiction that the person who possesses the property holds it in trust for the beneficiary. Strom, 202 F. 3d at 144. There is no need for such a fiction to support equitable relief against an actual fiduciary.

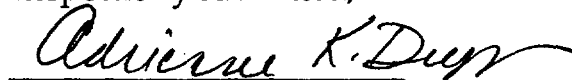
CONCLUSION

Under the district court's interpretation of Section 502(a)(3), beneficiaries could be left without a remedy against fiduciaries who have committed serious violations of ERISA's provisions and directly injured the people they were charged to protect. Even a cursory review of the cases suggests the range of injuries which could go unredressed if the district court's view became law. See, e.g., McFadden, 102 F. Supp. 2d 458 (N.D. Ohio 2000) (permitting cancer patient to recover his health expenses after he lost his health coverage because fiduciary-employer failed to submit premiums to the insurance company); Strom, 202 F.3d at 144 (authorizing recovery of life insurance proceeds which were lost because of fiduciary's negligent handling of life insurance application);

Griggs v. DuPont De Nemours Co., 237 F.3d 371, 385 (4th Cir. 2001) (remanding for determination of appropriate equitable relief where employer had informed participant that his lump sum early retirement payout would be tax deferred when it knew that it was not); Shade v. Panhandle Motor Serv. Corp., 91 F.3d 133, Unpublished Disposition, 1996 WL 386611, at *4 (4th Cir. July 11, 1996) (ordering employer whose misconduct excluded plaintiff from its health plan to pay for his $161,000 liver transplant) (copy attached). This Court should not interpret ERISA's remedial provisions to permit fiduciaries to ignore their statutory obligations, injure beneficiaries, and evade liability. The award of make-whole monetary relief to beneficiaries who have been injured by fiduciary breaches is typically, historically, and exclusively equitable.

If the Court concludes that Oce breached its fiduciary duty under ERISA, and finds that the breach caused Mrs. Ostler to lose $491,000 in life insurance proceeds, the Secretary respectfully requests that the Court hold that a monetary award in the amount of lost insurance proceeds constitutes "equitable relief" under Section 502(a)(3).

Respectfully submitted,



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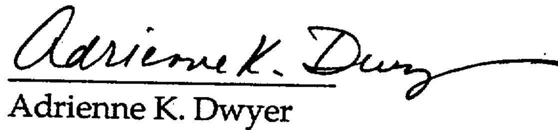
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief of the Secretary of Labor As *Amicus Curiae* In Support of Appellant contains 4,950 words.

I further certify that the enclosed document was created using Word Perfect 8, and the diskettes have been scanned for viruses and are virus free.



Adrienne K. Dwyer

Dated: February 8th, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2002, two copies of the Brief of the Secretary of Labor As *Amicus Curiae* In Support of Appellant and one diskette each were mailed, via federal express courier service, to the parties listed below:

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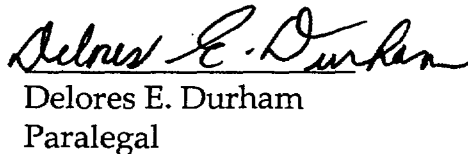

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NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.

Cassandra Lynn SHADE, Executrix and personal representative of Marvin E.
Stephens, deceased, Plaintiffs-Appellees,
v.
PANHANDLE MOTOR SERVICE CORPORATION, Defendant-Appellant,
and
Ralph Albertazzie; Mountain State Blue Cross & Blue Shield, Incorporated,
Trustees/Successors in interest of Blue Cross/Blue Shield of West Virginia;
Phoenix Mutual Life Insurance Company; West Virginia Public Employees
Insurance Agency, Defendants,
BERKELEY COUNTY WEST VIRGINIA SCHOOL BOARD, Defendant & third Party Plaintiff,
v.
Carola STEPHENS, Third Party Defendant.

No. 95-1129.

Submitted June 18, 1996.
Decided July 11, 1996.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Richard L. Williams, Senior District Judge, sitting by designation. (CA-93-5-M)

Barry P. Beck, MARTIN & SEIBERT, L.C., Martinsburg, West Virginia, for Appellant. Joseph E. Caudle, Tampa, Florida, for Appellees.

N.D.W.Va.

AFFIRMED.

Before MURNAGHAN, HAMILTON, and LUTTIG, Circuit Judges.

OPINION

PER CURIAM:

**1 Appellant Panhandle Motor Service Corporation ("Panhandle") appeals from the district court's order entering judgment in favor of Appellee Marvin E. Stephens on his claim for medical expenses and attorneys' fees in this action brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1132(e) (West Supp.1996). Finding no reversible error, we affirm.

Stephens initiated this action against Panhandle and various other defendants pursuant to the civil enforcement provisions of ERISA. 29 U.S.C.A. § 1132(e) (West Supp.1996). Following a one-day bench trial, the district court found that Panhandle breached its fiduciary duty to Stephens by failing to notify him of a change in his insurance coverage status and in failing to correct its mistake once it learned that Stephens had been inadvertently omitted from insurance coverage. [FN1]Panhandle timely appealed. [FN2]

FN1. On November 29, 1994, the district court granted Phoenix Mutual Insurance Company's ("Phoenix") motion for summary judgment on its cross- claim against Panhandle for attorneys' fees.

FN2. Stephens died unexpectedly of congestive heart failure on June 24, 1995. Cassandra Lynn Shade, Stephens' daughter, qualified as Stephens' executrix and personal representative, and has replaced Stephens in this action.

The facts of the case are ably recounted in the district court's findings of fact and conclusions of law. Panhandle operates the Panhandle 76 Truck Stop on Interstate 81 in Berkeley County, West Virginia. The company is owned by Ralph Albertazzie and Edward Stout. Panhandle currently employees about 70 employees. Between 1978 and 1994, Panhandle employed more than 1600 employees at different times. Panhandle first employed Stephens on October 19, 1978. Stephens worked for Panhandle intermittently between 1978 and January 11, 1992.

On May 1, 1980, Stephens was enrolled in his wife Carola Stephens' employee group health plan with the Berkeley County Board of Education ("BCBE"). BCBE's group health plan was provided by the West

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Virginia Public Employees Insurance Agency. In December 1989, Stephens enrolled in Panhandle's employee group health plan through Mountain State Blue Cross & Blue Shield ("Blue Cross"). In March 1990, Stephens and Carola Stephens separated.

In the fall of 1990, Stephens was diagnosed with a seriously malfunctioning liver and was certified as a candidate for a liver transplant at the University of Virginia Medical Center. Stephens was notified on December 24, 1990, that a liver was available for transplant. Later that day, Stephens went to the University of Virginia Medical Center, received the liver transplant, and began an extended period of recovery.

Panhandle's employment file for Stephens bears a December 24, 1990, entry stating "quit-disability," suggesting that Stephens quit his job on that date. Trial testimony revealed that when Stephens left for his liver transplant, employees at Panhandle did not believe that he would return to work. However, Stephens filed a written request for a medical leave of absence with Panhandle. Stephens was neither notified that he had been terminated nor given termination pay as required by W. Va.Code § 21-5-4 (1996). In fact, both Stephens and Panhandle represented to the district court that Stephens was on a medical leave of absence when he left work to have the liver transplant.

**2 On March 1, 1991, Panhandle terminated its employee group health plan with Blue Cross and implemented a self-insurance plan. Panhandle entered into an arrangement with Phoenix Mutual Insurance Company ("Phoenix"), whereby Phoenix would provide "stoploss" insurance coverage for Panhandle. Phoenix agreed to cover any medical bills of covered Panhandle employees that exceeded $5000. Stephens' coverage under Blue Cross thus terminated in March 1991.

However, due to an administrative error, Panhandle did not transfer Stephens to its new group health plan. Panhandle omitted Stephens' name from the list of Panhandle employees that it sent to Phoenix. Panhandle also excluded the name of a Mr. McIntyre, an employee suffering from cancer, from the employee census. The district court concluded that the record failed to establish that Panhandle intentionally omitted the names of Stephens and McIntyre from the list sent to Phoenix. The evidence at trial established that under Panhandle's plan with Phoenix, Stephens would have been required to pay $72.28 per month for individual health insurance coverage.

Stephens and Carola Stephens were divorced on March 14, 1991. On that date, Carola Stephens notified her BCBE group health plan that Stephens and their daughter were no longer covered dependents. Carola Stephens had previously informed Stephens that she would terminate his BCBE coverage unless he agreed to pay the insurance premiums. On March 31, 1991, BCBE sent a letter to Stephens notifying him that his coverage under its group health plan was terminated because of his divorce and that he had sixty days to elect continuation coverage. Stephens did not elect to continue his coverage under the BCBE plan because he believed that he was covered under the Blue Cross plan through Panhandle.

On April 11, 1991, Stephens returned to work at Panhandle on a part-time basis. On June 17, 1991, however, Stephens terminated his employment with Panhandle because of illness. Pursuant to the requirements of the Comprehensive Omnibus Budget and Reconciliation Act ("COBRA"), Panhandle notified Stephens that he could elect continuation coverage under Panhandle's group health plan with Phoenix. Because Panhandle had never submitted Stephens' name to Phoenix, however, Stephens' request to elect continuation coverage was denied.

Stephens again returned to work at Panhandle in August 1991. Stephens was not listed as a beneficiary under Panhandle's group health plan with Phoenix. Stephens ultimately terminated his employment with Panhandle because of illness in January 1992. Stephens became eligible for Medicare in April 1993.

The evidence at trial established that Panhandle made a profit of approximately $25,000 for tax year 1993. A statement of financial condition submitted with the tax return revealed that Panhandle's owners, Albertazzie and Stout, each earned about $80,000 in 1993. The evidence adduced at trial further revealed that Stephens' medical treatments have cost him $160.908.30. Stephens submitted documentation indicating that he incurred $31,777 in attorneys' fees in prosecuting this action.

**3 We review findings of fact by the district court for clear error. Fed.R.Civ.P. 52(a); *Hendricks v. Central Reserve Life Ins. Co.,* 39 F.3d 507, 512-13 (4th Cir.1994). The findings of fact will not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. We find that the district court did not clearly err in this case.

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A. *Stephens' Claim for Medical Expenses*

Under the COBRA amendments to ERISA, the plan sponsor of an employee group health plan over a certain size must provide continuing coverage for qualified beneficiaries who would lose coverage under the plan because of a "qualifying event." 29 U.S.C.A. § 1161(a) (West Supp.1996). A qualifying event is defined as any of the following: (1) the death of the covered employee; (2) the termination of the covered employee's employment; (3) the divorce or legal separation of the covered employee from the employee's spouse; (4) the covered employee becoming entitled to benefits under Title XVIII of the Social Security Act; (5) a dependent child ceasing to be a dependent child; or (6) a proceeding in a case involving an employer from whose employment the covered employee retired at any time. 29 U.S.C.A. § 1163 (West Supp.1996).

Both parties represented that Stephens was on medical leave of absence from Panhandle when he left work on December 24, 1990, to have a liver transplant. A medical leave of absence does not constitute a "qualifying event" under 29 U.S.C.A. § 1163. *See generally Truesdale v. Pacific Holding Co.,* 778 F.Supp. 77, 82-83 (D.D.C.1991) (employer's switch to new group health plan did not trigger COBRA notice requirement). Thus, Panhandle was not obligated to send Stephens a COBRA continuation coverage notice at the beginning of his medical leave of absence, and the district court correctly so held.

The district court also found, however, that by failing to inform Phoenix that Stephens was a covered employee under Panhandle's group health plan, Panhandle breached its fiduciary duty to Stephens. ERISA defines "fiduciary" as including any person or entity that "has any discretionary authority or discretionary responsibility in the administration of [an ERISA] plan." 29 U.S.C.A. § 1002(21)(A)(iii) (West Supp.1996). Congress intended that the term "fiduciary" be construed broadly. *See Blatt v. Marshall & Lassman,* 812 F.2d 810, 812 (2d Cir.1987) ; *Connors v. Paybra Mining Co.,* 807 F.Supp. 1242, 1245 (S.D.W.Va.1992). Panhandle was the administrator of its group health plan; consequently, the district court properly found that Panhandle acted as a "fiduciary" within the meaning of the statute, and accordingly, owed a fiduciary duty to Stephens. *See Barnes v. Lacy,* 927 F.2d 539, 544 (11th Cir.) (fiduciary duty attaches where employer "wears two hats" by acting as both employer and plan administrator), *cert. denied,* 502 U.S. 938 (1991).

**4 ERISA provides that a fiduciary breaches its duty to a plan participant by preventing or interfering with the receipt of benefits to which the participant is entitled. 29 U.S.C.A. § 1104(a)(1)(B) (West 1985 & Supp.1996); *Blatt,* 812 F.2d at 813. Moreover, an ERISA fiduciary has a duty to inform a beneficiary of any change in his coverage status. *Willett v. Blue Cross & Blue Shield,* 953 F.2d 1335, 1340 (11th Cir.1992). Thus, the district court properly found that when Panhandle terminated its group health plan with Blue Cross and implemented a self-insured plan with Phoenix providing stop-loss coverage, it had a fiduciary duty to enroll all of its employees in the new plan so that they enjoyed continued medical coverage. Panhandle's failure to inform Phoenix that Stephens was a covered employee denied Stephens coverage under the plan, and thus constituted a breach of Panhandle's fiduciary duty to Stephens.

The district court also found that Panhandle further breached its fiduciary duty in neglecting to inform Stephens of the change in his insurance coverage status, and in failing to correct its mistake once it learned that Stephens had been omitted from the employee census provided to Phoenix.

A fiduciary that breaches the fiduciary duties owed a plan participant is personally liable "to make good to such plan any losses to the plan resulting from each such breach, ... and shall be subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a) (1988). The district court found that, in this case, the appropriate remedy was to restore Stephens to the position he would have occupied but for Panhandle's breach of its fiduciary duty. *See Donovan v. Bierwirth,* 754 F.2d 1049, 1056 (2d Cir.1985). Accordingly, the court ordered Panhandle to reimburse Stephens for all medical expenses incurred between March 1991 (the date on which his Blue Cross coverage terminated) and April 1993 (the date Stephens became eligible for Medicare benefits). Stephens' documentation revealed that he incurred $124,542.89 in medical expenses between March 1991 and April 1993. The district court subtracted from that total $1,734.72 in insurance premiums that Stephens would have had to pay Panhandle's group health plan during that time. Accordingly, the district court properly ordered Panhandle to reimburse Stephens for medical expenses in the amount of $122,808.17.

B. *Stephens' Claim for Punitive Damages*

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The district court next considered Stephens' claim for punitive damages. COBRA provides that a court may assess a penalty of up to $100 per day from the date the employer failed to provide the required COBRA notice. 29 U.S.C.A. § 1132(c)(1) (West Supp.1996). The penalty provisions of the statute are intended to induce compliance by plan administrators. *Paris v. F. Korbel & Bros., Inc.,* 751 F.Supp. 834, 839-40 (N.D.Cal.1990). In this case, Panhandle employees stated that they subjectively believed that Stephens terminated his employment on December 24, 1990, when he left to receive a liver transplant. Although such termination would have constituted a "qualifying event" requiring Panhandle to provide continuation coverage notice, Panhandle failed to provide such notice. Thus, the district court found it appropriate to impose a penalty to impress upon Panhandle the importance of compliance with COBRA notice requirements. Because the record did not establish that Panhandle acted in bad faith, and because Panhandle had already amended its COBRA notification procedure, the court declined to assess the maximum penalty of $100 per day. Rather, the court found that Panhandle should pay Stephens a penalty of $5 per day from December 24, 1990, to March 11, 1993 (the date Stephens filed the instant suit). *See Phillips v. Riverside, Inc.,* 796 F.Supp. 403, 411 (E.D.Ark.1992). Thus, the total penalty assessed was $4,035. We find that amount to be reasonable.

C. *Stephens' Claim for Attorneys' Fees*

**5 In an ERISA enforcement action, a court may award reasonable attorneys' fees and the costs of action to either party. 29 U.S.C. § 1132(g)(1) (1988). In determining whether such an award is appropriate, courts generally consider: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing party would deter other persons from similar conduct; (4) whether the party requesting attorneys' fees sought to benefit all participants and beneficiaries of the ERISA plan; and (5) the relative merits of the parties' positions. *Knepper v. Automotion, Inc.,* 788 F.Supp. 999 (N.D.Ill.1992).

Analyzing those factors, the district court properly assessed attorneys' fees. First, the court found that Panhandle has sufficient resources to satisfy an attorneys' fees award. Next, the court reasoned that Panhandle must be held accountable for its negligent administra tion of its group health plan, which rendered Stephens uninsured in the face of substantial medical expenses. Third, the court found that penalizing Panhandle would deter other ERISA plan administrators from similar activities. Thus, upon reviewing Stephens' quantified fee demand, the court ordered Panhandle to reimburse Stephens for attorneys' fees in the amount of $27,712. [FN3]

FN3. The court also directed Panhandle to reimburse Phoenix for attorneys' fees in the amount of $18,151.12. That portion of the district court's order is not being challenged on appeal here.

Based upon the foregoing, we find that the district court did not clearly err in awarding judgment for Stephens in this action. The record supports the district court's findings of fact and conclusions of law. Accordingly, we grant Appellees' motion for submission on the briefs and we affirm the district court's order.

AFFIRMED.

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