Nos. 03-5035, -5055

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRACE INTERNATIONAL HOLDINGS,
Debtor,

JOHN S. PEREIRA, As Trustee of Trace International Holdings, Inc,& Trace Foam Sub, Inc.
Plaintiff-Appellee,

v.

ANDREA FARACE , FREDERICK MARCUS, PHILLIP SMITH & KARL WINTERS
Defendants-Appellants,

MARSHALL S. COGAN, ROBERT NELSON, SAUL SHERMAN & TAMBRA KING,
Defendants,
(caption continued on inside cover)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE
SUPPORTING APPELLANT'S PETITION FOR PANEL AND
EN BANC REHEARING

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TAMBRA KING,
Defendant,

ANDREA FARACE , FREDERICK MARCUS
Defendants-Third Party-Plaintiffs-Appellants,

MARSHALL S. COGAN, ROBERT NELSON, SAUL SHERMAN & TAMBRA KING,
Defendants,

SAUL S. SHERMAN,
Defendant-Third-Party-Plaintiff,

DOW CHEMICAL CO.,
Third-Party-Defendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases: Page

Federal Cases--continued: Page

Federal Cases--continued: Page

Federal Cases--continued: Page

State Case:

Statutes and regulations:

Statutes and regulations--continued: Page

Miscellaneous:

Miscellaneous--continued: Page

INTRODUCTION AND INTEREST OF THE SECRETARY

The Secretary of Labor (the "Secretary") has primary authority to interpret and enforce the provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1132, 1135. The Secretary's interests include promoting the uniform application of ERISA, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). This case presents an important and recurring remedial issue: whether actions to recover monetary losses from fiduciaries who have breached their obligations and harmed individual beneficiaries seek "equitable" relief. Although the issue arose here in the context of a jury trial request by defendant fiduciaries in a state corporate law action for fiduciary breach, the panel's decision is based on cases construing ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), which provides, among other things, for "appropriate equitable relief" to redress fiduciary breaches. See also ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5) (allowing the Secretary to sue for "appropriate equitable relief").

The panel concluded that an earlier decision by the Second Circuit in Strom v. Goldman, Sachs & Co., 202 F.3d 138 (2d Cir. 1999), holding that make-whole monetary relief from a breaching fiduciary to the plan participant or beneficiary is equitable within the meaning of section 502(a)(3), has been directly undermined by

the Supreme Court's decision in Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002). Pereira v. Farace, Nos. 03-5035(L), 03-5055(CON), 2005 WL 1532318, at *8, *9 (June 30, 2005). The panel reasoned that under Great-West, a claim for restitution (as the district court had characterized the Trustee's claim), even from a breaching fiduciary, is only equitable if the plaintiff seeks to recover particular funds or other property that the defendant possesses. Because the plaintiff did not seek to recover particular funds from the defendants, the panel concluded that the plaintiff's claim was actually for damages, a legal and not equitable remedy, and the defendants consequently were entitled to a jury trial under the Seventh Amendment. Id. at *9, *15.

The decision in this case effectively overrules Strom, and thus appears to preclude the recovery by ERISA plan participants and beneficiaries of monetary relief for the losses caused by fiduciaries who have violated ERISA's stringent obligations. The Secretary disagrees with the panel that this result is mandated by, or even consistent with, the Supreme Court's decision in Great-West, and therefore submits this brief in support of plaintiff-appellee's petition for panel rehearing and suggestion for rehearing en banc.

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). "Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA. Central States, Southeast & Southwest Areas Pension Fund v. Central Transp. Inc., 472 U.S. 559, 570 (1985), citing S. Rep. No. 93-127, at 29 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4865 ("'The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts.'"); H.R. Rep. No. 93-533, at 11 (1973), reprinted in 1974 U.S.C.C.A.N. 4649 (identical language). At the core of ERISA's fiduciary obligations are the duties of loyalty and prudence, which are based on trust law principles and are among the "highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

Section 502(a)(3) of ERISA allows participants and beneficiaries to sue for "equitable relief" for breaches of fiduciary duty that cause them individual harm. Varity v. Howe, 516 U.S. 489 (1996). Although "equitable relief" is not defined in ERISA, the Supreme Court in Great-West held that, to determine whether relief is equitable, courts should look to standard texts on remedies and trusts to determine how the relief was characterized when the bench was divided between equity courts and law courts. 534 U.S. at 212. In order to qualify as equitable under section 502(a)(3), the relief must have been "typically" available in equity and not simply "occasionally" available in equity. Id. at 215. Thus, section 502(a)(3) does

not authorize damages against non-fiduciaries, which were "occasionally awarded in equity cases," but were classically legal in nature and typically awarded in a court of law. Id. (emphasis omitted). As discussed below, however, where, as here, monetary relief is sought from breaching fiduciaries, it is equitable because it was exclusively available in equity in the days before the merger of law and equity, as this court held in Strom. Far from undermining this holding, Great-West – by directing courts to the standard texts on trust and remedies to determine how equity characterized such relief in the days of the divided bench – fully supports the reasoning and result in Strom.

Panel rehearing is appropriate to correct the panel's misreading of Great-West and the law of trusts and remedies to which it refers, and to allow the panel to reconcile its holding with other decisions from the Second Circuit that the panel's decision does not discuss, which hold that parties are not entitled to a jury trial under ERISA. See Fed. R. App. P. 40(a)(2). En banc rehearing is appropriate because this decision is in conflict with the Second Circuit's decision in Strom, as well as with the Second Circuit's prior ERISA rulings disallowing jury trials. See Fed. R. App. P. 35(a)(1), (b)(1)(A). The panel's decision is also of exceptional importance because of its likely impact on plan participants and beneficiaries and, in the words of Judge Newman in his concurring opinion, because it is "at odds with centuries of equitable proceedings involving claims against trustees, estate

executors, and other fiduciaries," and more specifically "at odds with numerous traditional equity actions that have historically been brought and currently are being brought in probate courts throughout the country without juries." Pereira, 2005 WL 1532318, at *12, *15.

1. As Strom explained, beneficiary claims against breaching fiduciaries to redress their breaches "have lain at the heart of equitable jurisdiction from time immemorial." 202 F.3d at 144; see also 3 Austin W. Scott & William F. Fratcher, The Law of Trusts § 197, at 188 (4th ed. 1988) (trust relationships "are, and have been since they were first enforced, within the peculiar province of courts of equity"); George G. Bogert & George T. Bogert, The Law of Trusts & Trustees § 870, at 123 (rev. 2d ed. 1995) ("The court of equity first recognized the trust as a legal institution and has fostered and developed it."). Thus, in Strom, the Court properly considered, as the Supreme Court had earlier suggested in Mertens v. Hewitt Associates, 508 U.S. 248 (1993), and would later expressly require in Great-West, whether the remedy sought was an equitable remedy in the days of the divided bench, and concluded that claims against fiduciaries were inherently equitable. See also Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 592 (7th Cir. 2000) ("[W]hen sought as a remedy for breach of fiduciary duty, restitution is properly regarded as an equitable remedy because the fiduciary concept is equitable.") (quoting Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d

703, 710 (7th Cir. 1999) (emphasis added)); Ream v. Frey, 107 F.3d 147 (3d Cir. 1997). Such a claim is analogous to "the conventional action by a cestui que trust against a trustee for breach of trust." Strom, 202 F.3d at 144.

A careful examination of trust law supports this conclusion. "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." Restatement (Second) of Trusts § 2, at 9 (1959); id. § 74, at 192 (beneficiary has equitable interest in the trust). "The duties of the trustee with respect to trust property are equitable duties. By this [it] is meant that they are enforceable in a court of chancery or a court having and exercising the powers of a court of chancery." 1 Austin W. Scott & William F. Fratcher, The Law of Trusts § 2.7, at 48-49 (4th ed. 1987).

As the Restatement of Trusts emphasizes, "the remedies of the beneficiary against the trustee are exclusively equitable." Restatement, supra, § 197, at 433 (emphasis added). During the days of the divided bench, beneficiaries could not obtain relief in a court of law because they did not hold legal title to the property of the trust. 1 Scott & Fratcher, supra, § 1, at 4; 3 Scott & Fratcher, supra, § 197, at 188. They could only seek relief in a court of equity to enforce their equitable interests. 1 Scott & Fratcher, supra, § 1; 3 Scott & Fratcher, supra, § 197. The equity court, unlike the law court, could compel the trustee to act in accordance

with its fiduciary duties and compensate the beneficiary for losses when the trustee's action caused the beneficiary to suffer harm. 3 Scott & Fratcher, supra, §§ 197, 199; Bogert & Bogert, supra, § 861, at 3-4 ("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.") (emphasis added). Moreover, courts of equity had the power to fashion whatever remedy was necessary under the circumstances to best protect the beneficiary, without regard to the rigid, technical constraints that governed the ability of courts of law to fashion legal relief before the fusion of law and equity. See Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944); Bogert & Bogert, supra, § 861, at 3-5; 1 John N. Pomeroy, A Treatise on Equity Jurisprudence § 109, at 140 (5th ed. 1941).

The trust relationship, therefore, arises in equity and creates equitable rights and duties, which, when breached, are redressed exclusively through equitable remedies. Whether or not such a remedy against a fiduciary consists of a money award does not change its character as an equitable remedy. In actions such as this where a beneficiary sues a fiduciary for its breach of duty, the fiduciary could be required to restore the beneficiary to the "position in which he would have been if the trustee had not committed the breach of trust." Restatement, supra, § 205 cmt. a at 458; see also id. § 205, at 458; 3 Scott & Fratcher, supra, § 199.3, at 206 ("If

the trustee has committed a breach of trust the beneficiaries can maintain a suit in equity to compel him to redress the breach of trust, either by making specific reparation or by the payment of money or otherwise."); id. §199, at 203-04 & 206 (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary). In many cases described by the comments, the Restatement makes clear that the breaching trustee is liable for monetary payment as part of putting the plaintiff back in the position he would have been in without the breach. See, e.g., Restatement, supra, § 205 illus. 1, at 459 ("A is trustee of $10,000 in cash. As a result of his negligence the money is stolen. A is liable for $10,000."). Indeed, there is every reason to think, as one leading commentator has put it, that ERISA's "drafters presupposed the long familiar practice, which has recently been codified in the Uniform Trust Code, that 'the court may . . . compel the trustee to redress a breach of trust by paying money.'" John H. Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens and Great-West, 103 Colum. L. Rev. 1317, 1338 (2003) (citing Uniform Trust Code § 1001(b)(3) (amended 2001), 7C U.L.A. 221 (Supp. 2003)).

2. Nothing in Great-West undermines this conclusion. In both Mertens and Great-West, the plaintiffs sought monetary relief against non-fiduciaries, and the Court concluded that this was not "equitable relief" within the meaning of section

502(a)(3). Mertens, 508 U.S. at 256; Great-West, 534 U.S. at 219.[1] This case, however, like Strom, involves relief that was exclusively (and therefore "typically") available in equity: relief (albeit monetary) 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 could have granted it, but because only a common law court of equity could have granted it. See Restatement, supra, § 197. Justices Ginsburg and Breyer have acknowledged this very point in a recent preemption decision, noting, as the government had argued, that the availability of monetary remedies against breaching fiduciaries could, in appropriate cases, ameliorate the harsh effects of the preemption of otherwise applicable state tort law. Aetna Health Inc. v. Davila, 124 S. Ct. 2488, 2503 (2004) (Ginsburg & Breyer, JJ., concurring) ("'Congress . . . intended ERISA to replicate the core principles of trust remedy law, including the make-whole standard of relief.' Langbein [at] 1319. I anticipate that Congress, or this Court, will one day so confirm."). Moreover, the majority in Aetna noted that the

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[1] Courts of equity could grant legal relief against non-fiduciaries under the common law of trusts. For example, when both a trustee/fiduciary and a non-fiduciary harmed the trust in the 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 4 Austin W. Scott & William F. Fratcher, The Law of Trusts § 282.1, at 30 (4th ed. 1989). 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, supra, § 282 cmt. e at 45.

government's amicus brief, relying in part on the Strom decision, had suggested that monetary relief was available under section 502(a)(3). Although the Court concluded that the issue was not before them and need not be addressed, it certainly treated this as an open issue. Id. at 2502 n.7.

In Strom, this Court recognized this precise distinction between monetary damages from a non-fiduciary, which is not equitable relief, and make-whole monetary relief from a fiduciary to redress a breach, which is quintessentially equitable. The plaintiff in Strom sought monetary relief under section 502(a)(3) for a fiduciary's negligent handling of a life insurance application which resulted in the participant's loss of coverage. 202 F.3d at 141. The Court distinguished its earlier decision in Geller v. County Line Auto Sales, Inc., 86 F.3d 18 (2d Cir. 1996):

> The district court's reliance on Geller was misplaced. The critical fact that distinguishes Geller from this case is that this is an action against an alleged fiduciary whereas Geller involved a suit by a fiduciary against nonfiduciary wrongdoers. And that distinction is material. Geller was an appeal from the dismissal of a complaint brought by trustees of an employee benefit plan to recover from nonfiduciaries the amount of benefits paid by the trustees to an ineligible person by reason of the defendants' alleged fraud.

Id. at 143 (emphasis added). That distinction holds here, and ought to lead to the same conclusion: monetary relief to redress a breach by a fiduciary is equitable relief under section 502(a)(3).[2]

3. At the heart of the panel's error is its assumption that because Great-West "reconfigured the legal landscape of restitution," Pereira, 2005 WL 1532318, at *8, restoration of losses to a trust beneficiary (in ERISA terms, "participant" or "beneficiary"), can no longer be considered an equitable remedy. Again, the fact that the Supreme Court in Aetna treated this as very much an open issue, see, supra pp. 9-10, strongly suggests that the panel overread Great-West and erred in overruling Strom on this basis. A close reading of Great-West, and its treatment of restitution, confirms the panel's mistake.

Great-West concludes that, historically, "restitution" is equitable only when it seeks to recover, through a constructive trust, particular funds or property in the defendant's possession that belong in good conscience to the plaintiff. Because the plaintiff in this case is seeking losses to the corporate creditors that resulted from the defendants' breach of trust, the panel concludes that he is seeking legal relief.

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[2] One other Circuit reached the same conclusion in a pre-Great-West decision. See Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (7th Cir. 2000). However, a number of courts have held to the contrary. See, e.g., Callery v. U.S. Life Ins. Co., 392 F.3d 401 (10th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3632 (U.S. Apr. 11, 2005) (No. 04-1366); Helfrich v. PNC Bank, Ky., Inc., 267 F.3d 477, 481-82 (6th Cir. 2001); Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 943-44 (8th Cir. 1999).

In other words, the court assumed that equitable restitution through a constructive trust is the only available monetary remedy after Great-West, and that if the monetary relief sought is not equitable restitution, it is therefore legal damages.

This analysis misreads both Great-West and the law of trusts and remedies. First, the loss remedy sought here could not possibly be restitution, of either the legal or equitable variety. Restitution always measures losses based on a defendants' gain, and not on losses suffered by a plaintiff, as sought here. See 1 Dan B. Dobbs, Law of Remedies § 4.1(1), at 555 (2d ed. 1993) ("Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss."). It does not follow, however, that the plaintiff is simply seeking legal damages, since, as discussed above, a trust beneficiary could not sue a trustee in a court of law in the pre-merger days.

In fact, the recovery of losses from a breaching fiduciary was really a third category of equitable relief, known at common law as surcharge, that sought to put the trust beneficiary back in the position he would have been if not for the breach. Restatement, supra, § 205(a); Williams Elecs. Games, Inc. v. Garrity, 366 F.3d 569, 577 (7th Cir. 2004); see also id. (pointing out that fiduciary breach claims were "traditionally actionable in suits at equity [because] fiduciary obligations

were an invention of the English chancery court"); 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."); see also Mosser v. Darrow, 341 U.S. 267, 268, 274 (1951) (in remanding for a determination of whether "a reorganization trustee who, although making no personal profit, permitted key employees to profit from trading in securities of the debtors' subsidiaries," should be liable for surcharge, the 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"). Although surcharge is akin to the legal remedy of damages in that it can include monetary relief for losses suffered by the plaintiff (rather than restitution of improper gains by the defendant), it was clearly equitable: it was typically, and indeed, exclusively, granted in courts of equity. Cf. Langbein, supra, at 1353 ("it may once have been technically correct to say that damages were exclusively a common law remedy, but only because damages in equity were called surcharge").[3]

[3] Nor is there any merit to the distinction alluded to by Judge Newman in his concurring opinion between claims that sought to restore funds from a breaching fiduciary to a trust and those that sought to restore benefits to a beneficiary. Pereira, 2005 WL 1532318, at *14. "Cases awarding money damages for consequential injury, either to the trust or the beneficiary, exist in profusion in trust remedy law." Langbein, supra, at 1337 & n.12 (citing Bogert & Bogert, supra, § 701, at 198).

4. Recognizing the inherently equitable nature of ERISA claims for breach of fiduciary duty, most courts have long denied requests for jury trials. See, e.g., Borst v. Chevron Corp., 36 F.3d 1308, 1323-24 (5th Cir. 1994); Broadnax Mills, Inc. v. Blue Cross & Blue Shield, 876 F. Supp. 809, 816 (E.D. Va. 1995) (collecting cases); cf. In re Evangalist, 760 F.2d 27, 29 (1st Cir. 1985) (Breyer, J.) (denying a request for jury trial in a corporate fiduciary breach case because "[a]ctions for breach of fiduciary duty, historically speaking, are almost uniformly actions 'in equity' – carrying with them no right to trial by jury"); but see Bona v. Barasch, No. 01 Civ. 2289, 2003 WL 1395932, at *35 (S.D.N.Y. Mar. 20, 2003) (under Great-West, relief that plaintiffs sought under section 502(a)(2), the loss to the plan, was legal relief that entitled them to a jury trial). Indeed, it has long been the rule in this Circuit that a party is not entitled to a jury trial in an ERISA case, see Katsaros v. Cody, 744 F.2d 270, 278 (2d Cir. 1984), as confirmed, post-Great-West in Muller v. First Unum Life Insurance Co., 341 F.3d 119, 124 (2d Cir. 2003). See also Sullivan v. LTV Aerospace & Def. Co., 82 F.3d 1251, 1258 (2d Cir. 1996) (finding no right to a jury trial in case brought under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), for benefits due and under section 502(a)(3) for fiduciary breach). In fact, until this decision, it appears that it was so well-established a principle in this Circuit, that the Muller court simply noted, without further discussion, that "there is no right to a jury trial under ERISA." 341

F.3d at 124.[4] These decisions, which the panel's decision does not discuss, would appear to directly conflict with the decision in this case and provide a strong basis for either en banc or panel rehearing.

5. Finally, this case is appropriate for en banc rehearing because the issue it presents – the equitable nature of monetary relief to remedy fiduciary breaches – is of extraordinary importance, both in the Seventh Amendment context in which it was decided, and in its impact on the ability of ERISA participants and beneficiaries who have been harmed by fiduciary breaches to bring claims for make-whole monetary relief. As the concurring opinion suggests, Pereira, 2005 WL 1532318, at *12, *15, the panel's decision calls into question the equitable nature of numerous actions against trustees, estate executors and other fiduciaries that seek monetary relief but have never been brought before juries. See, e.g., Bank of Am. v. Superior Court, 226 Cal. Reptr. 685, 693, 181 Cal. App. 3d 705,

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[4] Muller, like most of the cases that present the jury trial issue under ERISA, involved a claim for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The case for a jury trial in that context would seem somewhat stronger, since the basis for the claim, unlike a fiduciary breach claim under section 502(a)(3), appears at least somewhat analogous to a legal claim for breach of contract. Yet even in this context, all eight circuits to have to have addressed the issue have concluded that there is no right to a jury trial for such claims. See, e.g., Cox v. Keystone Carbon Co., 894 F.2d 647, 649-50 (3d Cir. 1990); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006-07 (4th Cir. 1985); Borst v. Chevron Corp., 36 F.3d 1308, 1323-24 (5th Cir. 1994); Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir. 1988); In re Vorpahl, 695 F.2d 318 (8th Cir. 1982); Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1984); Howard v. Parisian, Inc., 807 F.2d 1560, 1566-67 (11th Cir. 1987).

719 (Ct. App. 1986) (action against guardian of estate for wrongdoing must proceed in probate court and plaintiff was not entitled to a jury trial or punitive damages; "appropriate remedy for losses caused the guardianship estate by the wrongdoing of a guardian is to order the guardian to reimburse the estate for its losses"); see also Boone v. Lightner, 319 U.S. 561 (1943) (surcharge action against trustee of his daughter's trust fund for losses caused by illegal mismanagement); Dwyer v. Tracy, 118 F. Supp. 289 (N.D. Ill. 1954) (corporate director liable for salary payments to children of deceased officer).

Moreover, if the panel is correct, plan participants and 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 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) (permitting cancer patient to recover his health expenses after he lost coverage because fiduciary-employer failed to submit premiums to 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. E.I. DuPont De Nemours & Co., 237 F.3d 371, 385 (4th Cir. 2001) (remanding for a determination of appropriate equitable relief where employer had informed

participant that his lump sum early retirement payout would be tax deferred when it was not); 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 make-whole monetary relief to plan participants and beneficiaries who have been injured by fiduciary breaches are typically, historically, and exclusively equitable. The panel's narrow and, we believe erroneous, interpretation of equitable relief would permit fiduciaries to ignore their statutory obligations, injure beneficiaries, and evade liability.

CONCLUSION

For the foregoing reasons, the panel or the en banc court should grant rehearing and reverse.

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Attorney for Secretary of Labor, Elaine L. Chao, as amicus curiae

Dated: July 25, 2005