No. 03-10195

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOMBARDIER AEROSPACE EMPLOYEE WELFARE PLAN,

Plaintiff-Appellee,

v.

FERRER, POIROT & WANSBROUGH, PC, et al.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF OF AMICUS CURIAE ELAINE L. CHAO, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR IN SUPPORT OF APPELLEE REQUESTING AFFIRMANCE

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STATEMENT OF THE ISSUES

1. Whether, pursuant to a subrogation/reimbursement provision in the Bombardier Employee Welfare Benefit Plan (the Plan), the district court properly imposed a constructive trust over funds obtained in the settlement of a third-party tort claim, which currently are held in the trust account of the plan participant's attorney.

2. Whether the district court properly enforced Plan terms that make Plan participants liable for all attorney fees incurred in pursuing third-party recoveries, and thus disallowed a setoff for these fees from the amount recoverable by the Plan.

INTEREST OF THE SECRETARY OF LABOR

The Secretary of the United States Department of Labor (the "Secretary") has primary authority to interpret and enforce the provisions of Title I of ERISA and therefore has a strong interest in ensuring that the fiduciary duties of loyalty and prudence in the administration of plan assets are strictly applied. 29 U.S.C. §§ 1132, 1135. See Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). The Secretary's interests further include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). The ability of welfare plans to seek reimbursement of benefits

from injured plan participants who have recovered funds to compensate them for injuries from third parties is important to the continued financial stability of these plans, and so long as this is accomplished through the imposition of constructive trusts over specifically identifiable funds, the Secretary believes that it constitutes "appropriate equitable relief" under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).

STATEMENT OF THE CASE

Appellant Stephen Mestemacher was an employee of Bombardier Aerospace, and as such was a participant in the Bombardier Aerospace Employee Welfare Plan ("Bombardier" or the "Plan"), a self-funded employee welfare plan designed to provide managed care and medical services for Bombardier Aerospace employees and their dependents. Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, PC, No. Civ. A. 3:02-CV-1982, 2003 WL 282443, at *1 (N.D. Tex. Feb. 4, 2003). After Mestemacher was injured in an automobile accident in January 2002, Bombardier paid his medical bills totaling $13,643.63. Id. In March 2002, Mestemacher settled his tort claim against the third party responsible for the accident for $65,000. Id. at *2. Appellant Ferrer, Poirot, & Wansbrough, PC ("Ferrer") acted as Mestemacher's attorneys in the tort action. Id. Through an agreed order, Ferrer consented to hold

$18,500 of the settlement monies in a trust account deposited in a Bank of America account, pending resolution of Bombardier's claim. Id. Bombardier then filed suit in federal court in the Northern District of Texas against Mestemacher, Ferrer and Bank of America, seeking the imposition of a constructive trust over the settlement funds held in Ferrer's trust account. Id. at *3.

Bombardier claims a right to be reimbursed for the $13,643.63 in benefits it had advanced to Mestemacher under the Plan, and seeks injunctive and declaratory relief to enforce that right, asserting that Mestemacher as the principal, and Ferrer as his agent, possess and control the funds. 2003 WL 282443, at *3. At the time of the accident, the Plan provided not only for a right to be reimbursed 100% of the plan's expenditures out of a plan participant or beneficiary's recovery in a third-party tort action, but also provided that plan participants are required to cooperate in seeking such tort recoveries and that any associated attorney fees are the sole responsibility of the participant.[1]

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[1] Specifically, the Plan's reimbursement and subrogation clause provides the following:

> Refund to Us for Overpayment of benefits
> If You or Your dependent recover money for medical, Hospital, dental or vision expenses incurred due to an Illness or Injury for which a Benefit has been paid under this Plan, We will have the right to a refund from You or Your dependent. The amount refunded to Us will be the lesser of:
> 1. the amount You or Your dependent recover;

On February 4, 2003, the District Court granted Bombardier's motion for summary judgment and ordered Ferrer to transfer $13,643.63 from the trust

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2. the amount of Benefits We have paid.
You or Your dependent (or a parent or legal guardian, if required) will help Us do whatever else may be reasonably needed to obtain this refund.

Right to Reduction, Reimbursement and Subrogation
The Plan has a right to 1) reduce or deny Benefits otherwise payable by the Plan and 2) recover or subrogate 100% of the Benefits paid or to be paid by the Plan for Covered Persons to the extent of any and all of the following payments:
• Any judgment, settlement or payment made or to be made, because of an accident, including but not limited to other insurance.
• Any auto or recreational vehicle insurance coverage or benefits including, but not limited to, uninsurer/underinsured motorist coverage.
• Business and homeowners medical and/or liability insurance coverage or payments.
• Attorney fees.

Cooperation Required
The Plan requires Covered Persons or their representatives to cooperate in order to guarantee reimbursement to the Plan from third party benefits. Failure to comply with this request will entitle the Plan to withhold Benefits due to Covered Persons under the Plan Document. Covered Persons or their representatives may not do anything to hinder reimbursement of overpayment to the Plan after You have accepted benefits.

Attorney fees and court costs are the responsibility of the participant, not the Plan.

Bombardier, 2003 WL 282443, at **1-2.

account to Bombardier, without any setoff for attorneys' fees or expenses. The court reasoned that the Plan's "clear and unambiguous reimbursement provisions . . . combined with the fact that the Plan is not seeking personal liability from Mestemacher and that the settlement funds are not . . . in the registry of the court, entitle the Plan to the imposition of a constructive trust." 2003 WL 282443, at *4. Additionally, the court relied on the Plan's express provision making attorney fees the responsibility of Mestemacher and not the Plan. Id. The judgment has been executed and the disputed funds have been turned over to Bombardier.

SUMMARY OF ARGUMENT

Building on its prior decision in Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993), the Supreme Court held in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 (2002), that for an action for restitution to lie in equity within the meaning of ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3), it must seek to restore to the plaintiff specifically identifiable funds or property in the defendant's possession that belong in good conscience to the plaintiff.

Bombardier's claim against Mestemacher and Ferrer for reimbursement under the terms of the Plan of the amount of medical benefits it paid on account of Mestemacher's injuries from funds recovered by Mestemacher in a tort action fits comfortably within this common law construct. Because, under the Plan language,

Mestemacher agreed when he accepted benefits under the Plan to reimburse the Plan out of any third-party recoveries, the disputed amount "belong[s] in good conscience" to Bombardier. Moreover, because the funds were specially held in Mestemacher's attorney's trust account pending resolution of Bombardier's claim, the amount sought by Bombardier under the Plan's reimbursement provision can "clearly be traced to particular funds or property in the defendant's possession." Great-West, 534 U.S. at 213. No more is required for equitable restitution to lie under Great-West, and the Ninth Circuit decisional law to the contrary is based on a misreading of Great-West and Mertens.

Nor is Mestemacher entitled under the "common fund" doctrine to a setoff for the amount he spent on attorney fees in obtaining the third-party recovery, given the clear Plan language making him solely responsible for the payment of those fees. Indeed, this Court has held that the common fund doctrine is inapplicable even in the absence of such a clear Plan provision. Great-West, which did not involve any attorney fee provision, is not to the contrary. Thus, as most courts have held, at least where the language of the plan is clear, courts have no occasion to apply a setoff for attorney fees under a common fund doctrine.

ARGUMENT

I. The Imposition of a Constructive Trust Over Specifically Identifiable Funds in an Attorney's Trust Account Constitutes Appropriate Equitable Relief Under ERISA Section 502(a)(3)

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

In Great-West, Great-West sought restitution of $411,157 in medical expenses it had paid on behalf of beneficiary Janette Knudson after Knudson secured a $650,000 settlement from the third parties responsible for her injuries. The settlement allocated $256,745.30 to a Special Needs Trust to provide for Knudson's long-term medical care, $373,426 to attorney fees and costs, $5000 to reimburse the California Medicaid Program, and $13,828.70 to reimburse Great-

West. The state court approved the settlement and ordered the third parties to pay the amount allocated to the Special Needs Trust directly to the trust. Knudson's attorney sent Great-West a check for $13,828.70, but Great-West refused to cash it. Instead, Great-West sued Knudson in federal district court seeking full reimbursement of the $411,157 it had paid on her behalf. The Supreme Court held that Great-West's suit was not authorized by ERISA Section 502(a)(3). Great-West, 534 U.S. at 218. The Court observed that the money from the settlement was not in Knudson's possession; it had been dispersed to the Special Needs Trust and her attorney to pay for attorney fees. Id. at 214. The Court found that Great-West, therefore, was not trying to recover particular funds that belonged to Great-West that happened to be in Knudson's possession, but rather was trying to impose personal liability upon Knudson for any funds equal to the benefits it had advanced to her. Id. The Court concluded that Great-West sought legal restitution not authorized by ERISA. Id. at 218.

Great-West, however, does not foreclose the ability of plans to seek equitable restitution. Rather, the Court in Great-West specified:

> [A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's

> possession. . . . A court of equity could then order a defendant to transfer title (in the case of a constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner.

Id. at 213 (internal citations omitted). Moreover, the Court expressly left open the question whether Great-West could have obtained equitable relief against Knudson's attorney or the trustee of the Special Needs Trust. Id. at 220.

The Plan here seeks to enforce the subrogation provision, or in statutory terms, "to enforce . . . the terms of the plan." 29 U.S.C. 1132(a)(3)(ii).[2] The District Court's imposition of a constructive trust to accomplish this result fits within the bounds of equitable relief recognized by the Supreme Court in Great-West. The $13,643.63 in dispute "belong[s] in good conscience," 534 U.S. at 213, to Bombardier because Mestemacher agreed to reimburse the Plan out of any third-party recoveries when he accepted benefits under the Plan.[3] Unlike the money in

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[2] The cases cited by Mestemacher and Ferrer, Brief of Appellants, 8-9, for the proposition that Ferrer owes no fiduciary duty to the Plan do not establish, as they suggest, that Ferrer is not a proper defendant. Indeed, as the Supreme Court pointed out in Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000), "§ 502(a)(3) admits of no limit . . . on the universe of possible defendants," but instead authorizes "'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA or an ERISA plan." Id. at 246 (citations omitted). Thus, to the extent that Bombardier seeks a constructive trust against Ferrer to enforce the Plan's subrogation provision, Ferrer would appear to be a proper defendant under Section 502(a)(3).

[3] The Supreme Court described the remedy of constructive trust in similar terms in Harris Trust, 530 U.S. at 250-51, noting that "[w]henever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity

Great-West, the money in this case can "clearly be traced to particular funds or property in the defendant's possession" because the funds were specially held in Mestemacher's attorney's trust account pending resolution of Bombardier's claim. Either defendant Ferrer had possession of the funds as the trustee of the account, or Mestemacher had possession of the funds as the principal who could authorize Ferrer to release the funds to Bombardier. Thus, the District Court properly imposed a constructive trust over the $13,643.63 and transferred title to

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impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have any legal estate therein.'" Quoting Moore v. Crawford, 130 U.S. 122, 128 (1889), and 4 J. Pomeroy, Equity Jurisprudence § 1053, at 119-120 (5th ed. 1941). Mestemacher, who is the legal owner of the settlement funds being held by Ferrer in a trust account, received benefits from Bombardier pursuant to language that specified that he would reimburse the Plan for any related tort recoveries. The disputed amount is thus owed in good conscience to Bombardier.

Defendants mistakenly rely on Texas law, see Brief of Appellants, 14-15, which apparently limits constructive trust to cases of fraud, but which presumably is preempted in its application to ERISA plans. See Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts, 954 F.2d 299, 301, 303 (5th Cir. 1992) (federal common law, and not state law, is applicable to ERISA plans). Contrary to this state law rule, the "standard current works" to which Great-West generally directs courts to look, 534 U.S. at 217, agree with what is implicit in Great-West, id. at 213, that fraud or other wrongdoing is not required for the imposition of a constructive trust, but that such trusts are property used to prevent or remedy unjust enrichment. See, e.g., Scott on Trusts § 462, at 303, § 462.2, at 313-14 (4th ed. 2001); 1 Dobbs Law of Remedies § 4.3(2), at 597 (2d ed. 1993) (constructive trust may be "appropriate in any kind of unjust enrichment case and is in no way limited to cases of wrongdoing").

Bombardier as an equitable remedy under ERISA Section 502(a)(3).

A majority of courts presented with ERISA subrogation/reimbursement claims after the Great-West decision have concluded that Great-West permits the imposition of a constructive trust over specifically identifiable funds in the defendant's possession.[4] Most recently, the Seventh Circuit affirmed the district court's imposition of a constructive trust over settlement funds placed in a separate "reserve account" in anticipation of litigation over the Plan's reimbursement rights. Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680, 687 (7th Cir. 2003). The Seventh Circuit noted that "[u]nlike the legal action addressed in Great-West Life, the funds at issue here are identifiable, have not been dissipated, and are still in the control of a Plan participant due to the fact that [the participant's attorney] placed them in a reserve account in [the participant's] name when they were disbursed." Id. Constructive trusts have also been imposed in Forsling v. J.J.

[4] Many courts have also allowed plans to place liens on third-party recoveries, the other form of equitable relief permitted under Great-West. See In re Carpenter, 36 Fed. Appx. 80, 2002 WL 1162277 (4th Cir. 2002) (affirming Bankruptcy Court's finding that Wal-Mart Plan had an enforceable equitable lien on debtor's personal injury settlements proceeds); Primax Recoveries, Inc. v. Duffy, 204 F. Supp. 2d 1111 (N.D. Ill. 2002) (allowing lien on specific funds not yet received from underinsurance coverage); Yerby v. United Healthcare Ins. Co., 846 So. 2d 179 (Miss. Ct. App. 2002) (permitting plan to intervene in state tort action and to place lien on settlement between beneficiary and tortfeasor); Uber v. TIG Specialty Ins. Co., No. 232687, 2003 WL 231321 (Mich. Ct. App. Jan. 31, 2003); Brodzik v. Szpakowicz, No. CV000500564S, 2002 WL 31502353 (Conn. Super. Ct. Oct. 22, 2002).

Keller & Assocs., Inc., 241 F. Supp. 2d 915 (E.D. Wis. 2003); Allison v. Wellmark, Inc., No. C00-3015-MWB, 2002 WL 31818946 (N.D. Iowa Oct. 15, 2002); IBEW-NECA Southwestern Health & Benefit Fund v. Douthitt, 211 F. Supp. 2d 812 (N.D. Tex. 2002); and Bauer v. Glyten, Nos. A3-00-161, A3-02-27, 2002 WL 664034 (D.N.D. Apr. 22, 2002) (permitting plaintiffs to amend their original complaint to include a request for the imposition of a constructive trust, pursuant to the Supreme Court's recent decision in Great-West).

Other courts, although not imposing a constructive trust, have also held that ERISA plan fiduciaries state a valid claim for equitable reimbursement when the disputed monies can clearly be traced to particular funds or property in the defendant's possession. The D.C. District Court held that a recovery agent's claim for restitution constitutes a claim for equitable relief when a portion of the settlement funds are being held in trust by the beneficiary's former attorney "for the precise purpose of reimbursing the Plan." Primax Recoveries, Inc. v. Lee, 260 F. Supp. 2d 43, 48 (D.D.C. 2003). Likewise, the District Court for the Southern District of Iowa held that an insurer properly states a claim for equitable restitution where the settlement funds are being held in an attorney's trust account. Wellmark, Inc. v. Deguara, 257 F. Supp. 2d 1209, 1216 (S.D. Iowa 2003) ("This Court finds the possession theory is the correct read of Great-West. That is, attempts by an

ERISA plan or insurer to recover settlement proceeds to which it is entitled under a subrogation or reimbursement provision are only prohibited under § 502(a)(3) if the insured is not in the possession of clearly identifiable proceeds."). Other courts have supported ERISA plans' rights to reimbursement by permitting a plan to add the trustee of a beneficiary's revocable living trust as a defendant so that the plan can state a valid claim for equitable restitution under Great-West, Corporate Benefit Servs. of Am., Inc. v. Sempf, No. 03-C-0048-C, 2003 WL 21704145 (W.D. Wis. May 9, 2003); and by issuing a preliminary injunction to enjoin a beneficiary from disposing of settlement funds against which an ERISA plan has asserted a right of recovery, Great-West Life & Annuity Ins. Co. v. Perkins, No. C:02-5294-FDB, 2002 WL 1816438 (W.D. Wash. July 9, 2002).

Nearly all of the cases in which an ERISA plan's claim for reimbursement were denied involved monies which could not clearly be traced to particular funds in the defendant's possession, and can thus be distinguished from the present case. In some cases, the funds were no longer clearly identifiable because they had been disbursed and dissipated. See Mank v. Green, No. 03-42-P-C, 2003 WL 21250676 (D. Me. May 30, 2003); Asbestos Workers Local No. 42 Welfare Fund v. Brewster, 227 F. Supp. 2d 226 (D. Del. 2002). In other cases, the funds were not yet in the defendant's possession because the beneficiary had not yet settled or won

the suit against the third party tortfeasor. See Primax Recoveries, Inc. v. Goss, 240 F. Supp. 2d 800 (N.D. Ill. 2002); Extendicare v. Crow, No. Civ.A. 1:02-CV-109-C, 2002 WL 32079263 (N.D. Tex. Oct. 23, 2002); Primax Recoveries, Inc. v. Carey, 247 F. Supp. 2d 337 (S.D.N.Y. 2002) ("[A] constructive trust [is] an inappropriate remedy . . . when the 'settlement proceeds' are in nobody's possession, because they are the entirely hypothetical fruit of a potential future settlement that does not yet exist and may never come into being at all.").[5]

This Court's decision in Bauhaus USA, Inc. v. Copeland, 292 F.3d 439 (5th Cir. 2002) stands in the same camp. In Bauhaus, this Court held that the recovery there sought was not equitable because the disputed funds were not in the defendant participant's possession or control because the settlement proceeds had

[5] Several decisions have cited Great-West to preclude plans from seeking reimbursement, without fully analyzing whether the monies sought by the plans could "clearly be traced to particular funds or property in the defendant's possession." See Unicare Life & Health Ins. Co. v. Saiter, 37 Fed. Appx. 171, 2002WL 1301574 (6th Cir. 2002); Great-West Life & Annuity Ins. Co. v. Unger, No. CIV. 02-082-TUC-WBD, 2002 WL 2012528 (D. Ariz. July 24, 2002); Hotel & Restaurant & Bar Employees Fringe Benefit Funds v. Truong, No. CIV.01-873(MJD/RLE), 2002 WL 171725 (D. Minn. Jan. 31, 2002); cf. Community Ins. Co. v. Morgan, 54 Fed. Appx. 828, 2002 WL 31870325 (6th Cir. 2002) (plan administrator's claim against tortfeasor's insurer, which was not based on equitable tracing principles, but instead sought a declaration that the plan was entitled to proceeds of a settlement that had not yet been paid, was an impermissible suit for legal relief) (unpublished). To the extent that these cases stand for the proposition that Great-West precludes plans from seeking constructive trusts as an equitable remedy under ERISA, we believe that they were wrongly decided.

been placed into the registry of the Mississippi Chancery Court. Id. at 445. Like Great-West, the decision in Bauhaus implies that where, as here, the defendants do have possession and/or control over funds that in good conscience are owed to the Plan, a cause of action for equitable restitution lies. See Bombardier, 2003 WL 282443, at *4 (reading Bauhaus to allow a claim for equitable restitution where the defendant has possession of the disputed funds); IBEW-NECA Southwestern Health & Benefit Fund, 211 F. Supp. 2d at 816 (same).

Only the Ninth Circuit has held that any attempt by an ERISA plan to seek reimbursement/subrogation under the terms of the plan constitutes a legal claim that is not authorized by ERISA Section 502(a)(3). See Wellmark v. Deguara, 257 F. Supp. 2d at 1215 (criticizing the Ninth Circuit's approach). The Ninth Circuit has denied recovery even in cases where the funds sought by the ERISA plan could clearly be traced to particular funds or property in the defendant's possession. Great-West Life & Annuity Ins. Co. v. Berlin, 45 Fed. Appx. 750, 2002WL 2017076 (9th Cir. 2002) ("The fact the funds sought by Great-West have been placed in a trust account and are specifically identifiable does not transform its action into one of equitable relief."); Westaff (USA) Inc. v. Arce, 298 F.3d 1164, 1167 (9th Cir. 2002) ("The escrow account was set up through an agreement with the beneficiary to make it easier for Westaff to obtain the funds in the event it is

determined to be entitled to them. The beneficiary's cooperation should not now be used as a weapon by the insurance company to force the beneficiary into a lawsuit in federal court that Congress, in enacting ERISA, intended to bar.").[6]

These Ninth Circuit decisions are inconsistent with the rule established in Great-West that "appropriate equitable relief" under ERISA refers to "'those categories of relief that were typically available in equity,'" 534 U.S. at 210 (emphasis in original). Even more obviously, they are inconsistent with the Court's recognition in Great-West that "a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession," id. at 213 (emphasis in original). In the words of the district court in Wellmark v. Deguara, "[t]he Ninth Circuit follows the ultimate reasoning of Great-West without noting the essential factual distinction Justice Scalia specifically discussed when the 'money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.' That factual distinction has importance that cannot be disregarded." 257 F. Supp.

[6] The Ninth Circuit also affirmed the award of attorney fees against Westaff (USA) to Arce, because "when an ERISA plan administrator brings a suit seeking non-equitable relief, dismissal is properly on the merits for failure to state a claim," and the district court therefore has jurisdiction to enter a fee award. Id.

2d at 1215-16. We therefore urge this Court to heed the factual distinction drawn by Justice Scalia in Great-West, and to follow the majority of courts that have held that the imposition of a constructive trust over specifically identifiable funds in the defendant's possession is an appropriate equitable remedy under ERISA.

II. Plan Terms that Provide that Attorney Fees are the Sole Responsibility of the Participant Override the "Common Fund" Doctrine

The "common fund" doctrine operates at common law to spread the costs of litigation among all those who benefit from a lawsuit. See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991). In the subrogation context, it accomplishes this cost-spreading by allowing a plan participant or beneficiary to offset the amount he spent on attorney fees in obtaining a third-party recovery from the amount the plan is entitled to recover. See Palmerton v. Associates' Health & Welfare Plan, 659 N.W.2d 183, 188 (Wis. Ct. App. 2003) ("Normally, where an ERISA plan's only participation in a personal injury suit was to assert its subrogation claim . . . the plan has a common law obligation to pay its fair share of attorney fees and costs.") (citation omitted). Whatever the applicability of this doctrine as a default rule of federal common law where a plan does not expressly address the issue, ERISA plan terms that expressly provide that participants are solely responsible for the attorney fees and costs they incur in pursuit of a third-

party recovery override the common fund doctrine.

This Court has held that ERISA plans can recover the full amount of benefits paid on behalf of a beneficiary, without a setoff for the beneficiary's attorney fees, if the plan calls for reimbursement from "any and all" third party recoveries. Walker v. Wal-Mart Stores, Inc., 159 F.3d 938, 940 (5th Cir. 1998). In Walker, the Fifth Circuit ordered the beneficiary to reimburse the plan in full, even though the text of the plan did not specifically mention attorney fees or expenses. Id. Under this controlling precedent, there is no occasion for this Court to fashion and apply a federal common law rule allowing for a setoff of attorney fees. In this case, however, the argument for full reimbursement is substantially stronger than in Walker, because the Bombardier Plan calls for reimbursement of "100% of the Benefits paid" and expressly provides that "Attorney fees and court costs are the responsibility of the participant, not the Plan."[7] Indeed, ERISA expressly provides that plans must be administered "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D).

Appellants Ferrer and Mestemacher suggest that Great-West now requires

[7] The Secretary does not take any position on whether the Fifth Circuit is correct that, in the absence of express plan language, the application of a common fund doctrine is inappropriate. Instead, the Secretary takes the position that, at least where plan terms are clear, there is no occasion to fashion and apply such a federal common law rule.

lower courts to conduct a "balancing of the equities," and to reduce plans' recovery by a fair share of the attorney fees and costs incurred by a beneficiary in the pursuit of a third party recovery. Brief of Appellants, 28. Great-West, however, did not address the issue of attorney fees. Even after Great-West, courts have continued to refuse to apply the common fund doctrine in cases where the terms of the plan clearly provide for full reimbursement without a setoff for participants' attorneys' fees. Most recently, the Seventh Circuit refused to apply state or federal common fund doctrine to reduce a plan's recovery where the terms of the plan expressly provided that participants were responsible for all attorney fees. Varco, 338 F.3d at 688-92.[8] The court found that the state common fund doctrine was preempted by ERISA, since it "contradicts the terms of the Plan and therefore contravenes

[8] Because the Seventh Circuit issued the Varco decision after the briefs were filed by the parties in this case, the defendants relied heavily on the district court decision in Varco. Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 2002 WL 31189717 (N.D. Ill. Oct. 2, 2002). There the district court applied a common fund doctrine, despite clear plan language rejecting it, based on the Seventh Circuit's prior decision in Blackburn v. Sundstrand Corp., 115 F.3d 493 (7th Cir. 1997). The Seventh Circuit reversed this portion of the district court's decision on appeal, distinguishing Blackburn on the ground that the plan in that case did not expressly require participants to pay their own legal fees. Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 388 F.3d at 689. The Seventh Circuit's decision in Varco also appears inconsistent with that court's prior decision in Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544 (7th Cir. 2003), which allowed a beneficiary's attorney to assert state common fund claims against an ERISA plan even if the plan language rejected the doctrine; see also Bishop v. Burgard, 764 N.E.2d 24 (Ill. App. Ct. 2002) (even specific plan language cannot preempt application of common fund rules).

ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents." Id. at 690. The court further found that the federal common fund doctrine should not be applied because it is generally "inappropriate to fashion a common law rule that would override the express terms of a private plan." Id. at 692. Varco confirmed similar, earlier decisions by district courts in the Seventh Circuit. See Admin. Comm. of the Wal-Mart Stores, Inc. v. Hummel, 245 F. Supp. 2d 908, 912 (N.D. Ill. 2003) ("There is too much support for the proposition that state law cannot void explicit and lawful provisions in ERISA plans."); Forsling v. J.J. Keller & Assocs., 241 F. Supp. 2d at 921. See also Wausau Benefits v. Progressive Ins. Co., No. CIV.A. 2:02-CV-107, 2003 WL 21648693 (S.D. Ohio July 9, 2003) (rejecting a common fund defense and distinguishing the Sixth Circuit's application of the common fund doctrine in its unpublished decision in Smith v. Wal-Mart Assocs. Group Health Plan, No. 99-6464, 2000 WL 1909387 (6th Cir. Dec. 27, 2000) on the grounds that the plan in the earlier case did not specifically prohibit the equitable allocation of attorney fees); Yerby v. United Healthcare Ins. Co., 846 So. 2d at 190; Palmerton v. Associates' Health &Welfare Plan, 659 N.W.2d at 188.

Consistent with these cases, once a court has determined that an ERISA plan has stated a valid claim for equitable reimbursement under Great-West, the court

should first look to the terms of the plan to determine the amount that "belong[s] in good conscience" to the plan. If the terms of the plan expressly provide for full reimbursement from third-party recoveries and disclaim responsibility for attorney fees and costs incurred in the pursuit of those recoveries, the terms of the plan should override any "common fund" doctrine that may otherwise be available at state or federal common law. See Guidry v. Sheet Metal Workers' Nat'l Pension Fund, 493 U.S. 365, 376 (1990) ("courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text"). [9]

[9] We note, however, that if a state insurance regulation provided for a setoff for attorney fees (or for that matter prohibited or limited an insurer's subrogation rights), presumably this would be saved under ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) in its application to insured plans, and would override even plain plan language to the contrary. See UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358, 375-76 (1999) (rejecting argument that insurers could displace state insurance regulation by inserting contrary term in plan document).

CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,

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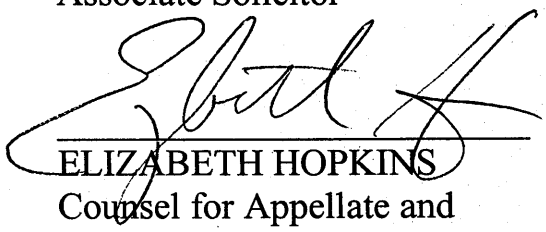

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CERTIFICATE OF SERVICE

I hereby certify that a paper copy of the Brief of Amicus Curiae Elaine L. Chao, Secretary of the United States Department of Labor and a 3½ diskette containing a PDF version of brief, as well as a copy of the Secretary's motion to accept the brief out of time, were sent to counsel listed below by Federal Express overnight courier service, this 11th day of September 2003:

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FORM 6. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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Attorney for Secretary of Labor

Dated: 9/11/03