No. 12-35458

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY R. GABRIEL,
Plaintiffs-Appellants

v.

ALASKA ELECTRICAL PENSION FUND, et al.,
Defendants-Appellees

Appeal from the United States District Court
For the District of Alaska,
Honorable Timothy M. Burgess
Case No. 3:06-cv-00192-TMB

BRIEF OF THE SECRETARY OF LABOR, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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BACKGROUND AND INTEREST OF THE SECRETARY OF LABOR

Petitioner Gregory Gabriel, a participant in the Alaska Electrical Pension Fund (Fund), a pension plan governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., seeks en banc reconsideration of the panel decision in this case.

The panel affirmed the district court's dismissal of Gabriel's claims seeking equitable relief from the Fund, as well as from a number of entities and individuals who managed the Fund and were ERISA fiduciaries. As relevant here, the panel held that the equitable remedy sometimes referred to as surcharge only permits a monetary award against an ERISA fiduciary in two circumstances: (1) where the fiduciary has profited at the expense of the trust; or (2) to make good losses to the trust. Thus, the panel concluded that, even if a plan participant suffers losses as a result of fiduciary breaches in administering the plan in which he is a participant, a court may not, as an equitable matter under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), order the plan fiduciaries to make good those losses. Gabriel v. Alaska Elec. Pension Fund, -- F.3d --, 2014 WL 2535469, at *7-*9 (9th Cir. June 6, 2014).

As Judge Berzon argued in dissent, this holding cannot be squared with the Supreme Court's decision in CIGNA Corp. v. Amara, 131 S.Ct. 1866 (2011), or with decisions of the Fourth, Fifth and Seventh Circuits following Amara, and is based on an incorrect reading of those cases and the trust law on which they are based. 2014 WL 2535469, at *15-*18. The Secretary of Labor, who has primary authority for enforcing and administering Title I of ERISA, 29 U.S.C. §§ 1002(13), 1136(b), files this brief in support of Gabriel's petition to the extent that it challenges the panel's erroneous understanding of the equitable remedy of surcharge.

ARGUMENT

EQUITABLE RELIEF UNDER ERISA SECTION 502(a)(3) INCLUDES MONETARY RELIEF THAT MAKES INJURED PLAN PARTICIPANTS AND THEIR BENEFICIARIES WHOLE

A. Amara allows monetary relief for participant losses caused by fiduciary breach

The Supreme Court's Amara decision makes clear that suits against fiduciaries for monetary redress of fiduciary breaches running directly to plan participants and beneficiaries who have been harmed by such breaches are permitted as "appropriate equitable relief" under ERISA section 502(a)(3). In Amara, plan participants in a defined-benefit pension plan challenged the conversion of their plan to a "cash balance" plan, arguing that faulty information that CIGNA provided with regard to the conversion adversely affected their pension benefits. 131 S. Ct. at 1870-71. The trial court found that the disclosures violated CIGNA's duties as a fiduciary under ERISA, and that the plaintiffs were "likely harmed" by these violations. The trial court awarded injunctive relief under section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), ordering the fiduciaries to pay the benefits that the participants expected based on the misleading disclosures. Id. at 1875.

Although the Supreme Court concluded that section 502(a)(1)(B) was not the appropriate avenue for the relief sought by the plan participants, the Court found such authority in ERISA's equitable relief provision, section 502(a)(3). 131 S. Ct. at 1878-80. Noting the maxim that "[e]quity suffers not a right to be without a remedy," Amara, 131 S. Ct. at 1879 (quoting R. Francis, Maxims of Equity 29 (1st Am. ed. 1823)), the Court held that the authorization of "equitable relief" under section 502(a)(3) provides a broad range of equitable remedies for such fiduciary misconduct, including make-whole relief or "surcharge." Id. In the Court's view, its previous decisions denying a loss remedy under section 502(a)(3) were distinguishable because they involved non-fiduciaries, while CIGNA was a fiduciary. Id. at 1880 ("insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in Mertens [v. Hewitt Assocs., 508 U.S. 248 (1993)], is analogous to a trustee makes a critical difference").

The Court further explained that surcharge, or monetary compensation by a fiduciary for loss resulting from "a trustee's breach of duty, or to prevent the trustee's unjust enrichment," is a "traditional equitable remed[y]" falling in the category of "traditionally equitable relief" within the meaning of its previous cases.

Amara, 131 S. Ct. at 1880 (citations omitted). The Court thus rejected the conclusion, adopted by a number of courts, including this one, that equitable monetary relief under 502(a)(3) was unavailable to compensate for losses caused by a trustee's fiduciary breach. See Peralta v. Hispanic Bus., Inc., 419 F.3d 1064, 1076 (9th Cir. 2005). The Court explained that, because Amara involved "a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of the trust[,] it was the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law." 131 S. Ct. at 1879. It further explained:

> The surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary. Thus, insofar as an award of make-whole relief is concerned, . . . the types of remedies the court entered here fall within the scope of the term 'appropriate equitable relief' in § 502(a)(3).

Id. (citations omitted). And, as most relevant here, the Court concluded that "the District Court injunctions requir [ing] the plan administrator to pay already retired beneficiaries money owed them under the plan as reformed" was a "kind of monetary remedy against a trustee, sometimes called 'surcharge,' [that] was 'exclusively equitable.'" Id. at 1880. For example, Amara recognized that actual harm might come from the loss suffered by a participant from a fiduciary's failure to provide proper information. Id. at 1882. Thus, contrary to the understanding of the panel, 2014 WL 2535469, at *7, surcharge, as recognized by the Supreme

Court in Amara, is not limited to restoring losses to a plan or recovering ill-gained profits from a fiduciary.

B. Decisions from the Fourth, Fifth and Seventh Circuits confirm that equitable relief under section 502(a)(3) includes make-whole relief for participant and beneficiary losses

For this reason, three circuits have correctly concluded that Amara abrogated their precedent disallowing such monetary relief and, in all three cases, recognized that surcharge is now available to remedy harm caused to an individual plan participant or beneficiary by a fiduciary's breach of any of its duties. See McCravy v. Metro. Life Ins. Co., 690 F.3d 176 (4th Cir. 2012); Gearlds v. Entergy Servs., Inc., 709 F.3d 448 (5th Cir. 2013); Kenseth v. Dean Health Plan, Inc., 722 F.3d 869 (7th Cir. 2013).

For instance, based on its recognition that Amara had caused a sea change in remedial law under ERISA, which the lower courts had mostly interpreted to forbid monetary relief for plan participants harmed by fiduciary breaches, the Fourth Circuit granted rehearing and vacated its earlier decision holding that surcharge and equitable estoppel were not available remedies under section 502(a)(3). McCravy, 690 F.3d at 180. McCravy involved a plan participant who had a life insurance policy on her daughter through an ERISA-covered welfare plan, which she first obtained when her daughter was a minor. Id. at 178. McCravy continued to renew her coverage yearly and pay annual premiums until her daughter's death at age 25, at which time MetLife, the insurer and administrator of the plan, denied McCravy's claim for benefits. Id. According to MetLife, McCravy's daughter had aged out of coverage under the plan's "eligible dependent children" provision. Id.

McCravy filed suit, alleging that MetLife's actions in accepting the premiums and otherwise misleading her as to coverage on her daughter caused her to forego the opportunity to convert to individual coverage under the plan. 690 F.3d at 178. McCravy alleged that these actions were a breach of MetLife's duties as an ERISA fiduciary under the plan and she sued for recovery under section 502(a)(3), claiming entitlement to either a make-whole surcharge recovery or equitable estoppel. Id.

The district court and Fourth Circuit initially limited McCravy's recovery under section 502(a)(3) to a return of the premiums. 690 F.3d at 178. The case was reheard by the Fourth Circuit, however, after the Supreme Court decided Amara. In reversing its earlier decision, the Fourth Circuit concluded that Amara made it "quite clear" that monetary compensation for a loss resulting from a fiduciary's breach is available under section 502(a)(3). Id. at 181. Thus, the court "agree[d] with McCravy that her potential recovery is not limited, as a matter of law, to a premium refund." Id. Although the court stated that it was for the district court, on remand, to determine whether MetLife in fact breached its duties and whether surcharge or equitable estoppel were appropriate remedies under the facts of the case, id. at 181-82, if it had believed that McCravy could not personally recover her losses, as MetLife had argued, its remand on the surcharge issue would have been completely unnecessary.

Similarly, in Gearlds, the Fifth Circuit held that Amara abrogated its prior decision holding that a claim for monetary damages for a plan participant harmed by fiduciary breaches was unavailable under section 502(a)(3). 709 F.3d at 450, (citing Amschwand v. Spherion Corp., 505 F.3d 342, 343 (5th Cir. 2007) as abrogated). The court read Amara as stating "an expansion of the kind of relief available under § 502(a)(3) when the plaintiff is suing a plan fiduciary and the relief sought makes the plaintiff whole for losses caused by the defendant's breaches of fiduciary duty." 709 F.3d at 450. Thus, the court held that Gearlds, a participant in a health care plan, stated a viable claim for surcharge when he alleged that plan fiduciaries breached their duties under ERISA by misleading him about his coverage in retirement, causing him to forego the opportunity to obtain coverage under his wife's policy, and he argued that "he should be made whole in the form of compensation for lost benefits." Id. at 452. As in McCravy, the Fifth Circuit would not have remanded if loss to the trust or unjust enrichment were a requirement for surcharge to apply.

The Seventh Circuit has likewise recognized that, after Amara, the "relief available for a breach of fiduciary duty under section 1132(a)(3) is broader than we have previously held." Kenseth, 722 F.3d at 880. The court thus held that Kenseth, who sought to have the fiduciaries cover the cost of a medical procedure that they pre-authorized, "may seek make-whole equitable damages as a remedy under section 1132(a)(3) if she can in fact demonstrate that Dean breached its fiduciary duty to her and that the breach caused her damages." 722 F.3d at 882. This holding is directly contrary to the panel's holding that section 502(a)(3) does not provide a monetary remedy to make a participant whole for losses caused by a fiduciary breach.

Indeed, the panel's holding that monetary relief for fiduciary breaches under section 502(a)(3) is limited to the recovery of losses to the plan itself or to the recovery of improper profits from the fiduciary fundamentally misconstrues the significance of Amara. Relief under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2) (which incorporates by reference ERISA section 409, 29 U.S.C. § 1109), is already available for breaches of fiduciary duty that result in "losses to the plan" or to recover any profits a breaching fiduciary improperly made through the use of plan assets. 29 U.S.C. § 1109(a). Thus, the decision in Amara concerning the availability of a loss remedy under section 502(a)(3) was precisely about the availability of a recovery for plan participants who have been harmed when their plans have not. And the post-Amara decisions described above are all about such individual recoveries by participants and beneficiaries and must be understood in that light.

C. The law of equity confirms the availability of such relief

Far from undercutting these holdings, the law of equity fully supports what the Supreme Court in Amara concluded: that courts of equity were empowered to and often did make trust beneficiaries whole for losses caused by breach of trust. Equity provided a variety of remedies for breach of trust. Restatement (Second) of Trusts § 199, at 437 (1957). One equitable remedy was "to compel the trustee to redress [the] breach," including by "the payment of money." Id.; 3 Austin W. Scott & William F. Fratcher, The Law of Trusts § 199.3, at 206 (4th ed. 1987) (Scott 4th); see 3 John Norton Pomeroy & Spensor W. Symons, Equity Jurisdiction § 1080, at 2481-2482 (5th ed. 1941); 2 Joseph Story, Commentaries on Equity Jurisdiction §§ 1266-1278, at 519-534 (12th ed. 1877). That monetary recovery, which was sometimes referred to as "surcharge," required the breaching fiduciary to pay "the amount necessary to compensate fully for the consequences of the breach."[1] Depending on the circumstances, the beneficiary could "charge the

[1] Liability for breach of trust could be imposed "either in a suit brought for that purpose or on an accounting where the trustee [was] surcharged beyond the amount of his admitted liability." George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 862, at 36 (rev. 2d ed. 1995). Although some courts and treatises refer only to the latter remedy, done as part of an accounting, as

trustee with any loss that resulted from the breach of trust, or with any profit made through the breach of trust, or with any profit that would have accrued if there had been no breach of trust." 3 Scott 4th § 205, at 237; see Restatement (Second) of Trusts § 205, at 458.

Thus, for example, courts could order a trustee to "restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Restatement (Third) of Trusts § 205 & cmt. a, at 223 (1992) (emphasis added). See also 4 Austin W. Scott & William F. Fratcher, The Law of Trusts § 24.9, at 1690-91 (5th ed. 2007) (quoting Restatement (Third) of Trusts § 205(b) (1992)); Black's Law Dictionary 1482 (8th ed. 2004); United States v. Mason, 412 U.S. 391, 398 (1973); Mosser v. Darrow, 341 U.S. 267, 270-273 (1951); Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 458, 463-464 (1939). The fact that the Restatement recognizes that this remedy allows restoration of trust distributions refutes the notion that surcharge awards are payable only to the trust. See also Restatement (Third) of Trusts § 211, Illus. 1, at 162 ("[i]f the income of the trust is to be distributed to [the beneficiary], any income recovery from [the trustee] belongs to [the beneficiary]"). Instead, depending on the nature of the breach, the monetary recovery could be paid to the

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"surcharge," others, including the Supreme Court in Amara, use the term "surcharge" to refer more generally to a loss remedy imposed on a breaching fiduciary.

beneficiary rather than the trust itself, as evidenced by numerous cases in equity instructing trustees to pay beneficiaries directly. See, e.g., Gates v. Plainfield Tr. Co., 194 A. 65 (N.J. 1937) (per curiam) (upholding decree that required executor to pay income to life beneficiary); Kendall v. DeForest, 101 F. 167, 170 (2d Cir. 1900) (upholding decree that held trustee liable to beneficiaries for income deficiency resulting from breach of trust that had depleted annuity fund);

It is therefore clear that a suit to compel a fiduciary to provide monetary redress to plan participants and their beneficiaries for a breach of fiduciary duty seeks "equitable relief" and is authorized under section 502(a)(3).

D. ERISA's structure and purpose underscore that the statute allows suits by participants and beneficiaries to recover their own losses attributable to fiduciary breaches

Fiduciaries and fiduciary duties have a central role in the ERISA regime. Fiduciaries have primary responsibility for administration and control of ERISA covered plans. See Mertens, 508 U.S. at 262; 29 U.S.C. § 1002(21)(A). Congress therefore viewed the fiduciary duties imposed by ERISA as affording critical protection for plan participants and beneficiaries. 29 U.S.C. § 1001(b). And Congress intended ERISA to provide "appropriate remedies" and "ready access to the Federal courts" to prevent and to redress violations of those fiduciary duties. Id.

It is thus "hard to imagine" that Congress would have left participants and beneficiaries who have been injured by a breach of ERISA's fiduciary duties without any effective federal remedy. Varity v. Howe, 516 U.S. 489, 513 (1996). But that will be the result in many situations if this Court declines to vacate the panel's decision holding that section 502(a)(3) does not authorize plan participants and beneficiaries to recover their own losses stemming from fiduciary breaches. This is because many breaches, particularly in the context of welfare plans, cause losses only to individual participants and beneficiaries and not to the plan (which, outside the context of pension and collectively-bargained plans, often is not a funded trust or an entity with any assets at all).

For example, a fiduciary's negligence in submitting health insurance premiums may leave a plan participant without coverage during a costly illness. E.g., McFadden v. R&R Engine & Mach. Co., 102 F. Supp. 2d 458 (N.D. Ohio 2000). Similarly, a fiduciary's negligent processing of a life insurance application or premiums may leave a participant's beneficiaries without the insurance proceeds that they expected. E.g., Strom v. Goldman Sachs & Co., 202 F.3d 138, 140-141 (2d Cir. 1999). And a fiduciary's provision of inaccurate information about the tax consequences of distribution options may cause a participant to suffer a substantial tax liability that should have been avoided. E.g., Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 373-374 (4th Cir. 2001). In each of these situations and many others, if section 502(a)(3) did not permit traditional suits in equity for monetary redress of fiduciary breaches that caused participants or beneficiaries to lose payments or distributions from the plan (see Third Restatement § 205(b) at 233), ERISA would provide no meaningful relief for participants and beneficiaries who have been seriously injured by those breaches.

Leaving those participants and beneficiaries without a meaningful federal remedy cannot be squared with ERISA's purpose of providing them with "ready access to the Federal courts" to redress violations of ERISA's fiduciary duties. 29 U.S.C. § 1001(b).[2] Indeed, it is particularly appropriate to interpret section 502(a)(3) as providing the necessary remedy given that Congress intended this provision to be a "'catchall'" that would "act as a safety net, offering appropriate equitable relief for injuries caused by violations that 502 does not elsewhere adequately remedy." Varity, 516 U.S. at 512. Moreover, a holding that section 502(a)(3) does not authorize monetary redress for fiduciary breaches would do more than deprive a large number of injured participants and beneficiaries of an effective federal remedy. It would leave them without any meaningful remedy, given ERISA's expansive preemption provision, which generally displaces all state

[2] Although participants potentially could still seek an injunction compelling the fiduciary to fulfill its duties in the future or, in some circumstances, bring suit on the plan's behalf to remove the fiduciary, those remedies, even in the limited circumstances in which they are available, are hollow ones for individuals who have already suffered devastating financial losses as a result of fiduciary misdeeds.

laws that "relate to any [ERISA covered] plan," 29 U.S.C. § 1144(a), and thus overrides state law remedies against plan fiduciaries arising from a breach of ERISA's fiduciary duties. See, e.g., Peralta, 419 F. 3d at 1069.

For that reason, the narrow reading of section 502(a)(3) mistakenly adopted by the panel would lead inevitably back to the untenable situation prior to Amara, which rightly resulted in a "rising judicial chorus urging" the correction of "an unjust and increasingly tangled ERISA regime." Aetna Health Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (citation omitted). See, e.g., Eichorn v. AT&T Corp., 489 F.3d 590, 591-92 (3d Cir. 2007) (Ambro, J., concurring in denial of petition for rehearing en banc); Lind v. Aetna Health Inc., 466 F.3d 1195, 1200 (10th Cir. 2006); Pereira v. Farace, 413 F.3d 330, 345-346 (2d Cir. 2005) (Newman, J., concurring); Cicio v. Does 1-8, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part), vacated, 542 U.S. 933 (2004); DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 467 (3d Cir. 2003) (Becker, J., concurring). See also Colleen E. Medill, Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3), 39 J. Marshall L. Rev. 827, 852 (2006) (echoing the judicial concern that participants and beneficiaries cannot be left "betrayed without a remedy").

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court grant panel or en banc rehearing of this case, vacate the decision of the panel, and issue a decision recognizing that section 502(a)(3) allows courts to order plan fiduciaries, as "appropriate equitable relief," to make participants whole for the losses they have suffered as a result of fiduciary breaches.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE OF BRIEFS AND VIRUS CHECK

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 29-2(c)(2), I certify that this 15 page amicus brief uses a mono-spaced typeface of 14 characters per inch and contains 3,514 words. Pursuant to Circuit Rule 29-2(c)(2), this brief complies with the 4,200 word limit.

I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

Dated: July 28, 2014

/s/ Elizabeth Hopkins
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2014, true and correct copies of the foregoing - THE SECRETARY OF LABOR'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING OR EN BANC REHEARING - were filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and served electronically via email to the following counsel at the addresses set forth below:

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