CLAIMS SEEKING REMOVAL OF A CLAIMS REVIEW FIDUCIARY UNDER 1132(a)(2): SUGGESTED APPROACHES

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The remedial provisions of 29 U.S.C. § 1109[1] have generally been used by plans, such as pension plans, to recoup losses caused by mismanagement of plan assets. However, recently plaintiffs in disability cases are attempting to use the language in section 1109 that allows for "…such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary" [2] to assert a claim under 29 U.S.C. § 1132(a)(2) for removal of the insurer as a plan fiduciary. Although it is well settled that an individual participant or beneficiary is not entitled to bring a claim for breach of fiduciary duty seeking personal relief (*Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 140-142, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)), plaintiffs allege that the relief sought (i.e., removal of the insurer as claims review fiduciary) is relief that inures to the plan.

The claim for this relief is based on allegations that the insurer failed to fairly handle claims; violated the plan terms; denied legitimate claims in order to improve its own profitability; and violated the terms of ERISA. The main purpose of bringing such a claim is to increase the settlement value of the case, based on the threat of having a court issue an injunction preventing the insurer from continuing to act as claims review fiduciary for the plan at issue (effectively disrupting the insurer - insured relationship). A second motive is to obtain an alternative mechanism for seeking to conduct extensive discovery into the insurer's claims handling practices, including handling of claims not involving the claimant or plan at issue.

Plaintiffs generally cite the following language from the *Russell* opinion as a basis for such a claim:

> If in this case, for example, the plan administrator had adhered to his initial determination that respondent was not entitled to disability benefits under the plan, respondent would have had a panoply of remedial devices at her disposal. To recover the benefits due her, she could have filed an action pursuant to § 502(a)(1)(B) to recover accrued benefits, to obtain a declaratory judgment that she is entitled to benefits under the provisions of the plan contract, and to enjoin the plan administrator from improperly refusing to pay benefits in the future. **If the plan administrator's refusal to pay contractually authorized benefits had been willful and part of a larger systematic breach of fiduciary obligations, respondent in this hypothetical could have asked for removal of the fiduciary pursuant to §§ 502(a)(2) and 409.** Finally, in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement [sic] of beneficiaries' statutory rights, it should be noted that ERISA authorizes the award of

[1] "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, *and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."* 29 U.S.C. § 1109 (emphasis added).

[2] The Legislative History reflects Congress' contemplation that "other equitable or remedial relief" would include removal of a fiduciary: "It is expected that a fiduciary . . may be removed for repeated or substantial violations of his responsibilities and that upon such removal the court may, in its discretion, appoint someone to serve until a fiduciary is properly chosen in accordance with the plan." S. Rep. No. 383, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4989.

> attorney's fees. See § 502(g), 88 Stat. 892, as amended, 29 U.S.C. § 1132 (g)(1).

473 U.S. at 146-147 (emphasis added).

However, the *Russell* court also discussed the fact that the remedy of removal of a fiduciary must be viewed in the context of the important duties of a fiduciary, which involve the proper handling of plan assets, not claims decisions:

> Congress specified that this remedial phrase includes "removal of such fiduciary" – an example of the kind of "plan-related" relief provided by the more specific clauses it succeeds. A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather that with the rights of an individual beneficiary.
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> It is of course true that the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest. Those duties are described in Part 4 of Title 1 of the Act, which is entitled "FIDUCIARY RESPONSIBILITY," see §§ 401-414, 88 Stat. 874-890, 29 U.S.C. §§ 1101-1114, whereas the statutory provisions relating to claim procedures are found in Part 5, dealing with "ADMINISTRATION AND ENFORCEMENT." §§ 502(a), 503, 88 Stat. 891, 893, 29 U.S.C. §§ 1132(a), 1133. The only section that concerns review of a claim that has been denied -- § 503 – merely specifies that every plan shall comply with certain regulations promulgated by the Secretary of Labor.

473 U.S. at 142-143.

Thus, the language in *Russell*, in noting the distinction between the section entitled "fiduciary responsibility" and the section entitled "enforcement," suggests that improper claims handling procedures and/or claims decisions are not the types of misconduct that would support an action for removal of a fiduciary. Also of note in this regard is footnote 17, found near the end of the opinion, in which the Court states "[i]ndeed, Congress was concerned lest the cost of federal standards discourage the growth of private pension plans. *See, e.g.,* H.R. Rep. No. 93-533, 1, 9 (1973), 2 Leg. Hist. 2348, 2356; 120 Cong. Rec. 29949 (1974), 3 Leg. Hist. 4971; 120 Cong. Rec. 29210-29211 (1974), 3 Leg. Hist. 4706-4707." Finally, Justice Brennan clearly read the majority opinion to suggest that claims decisions do not subject plan administrators and fiduciaries to the same claims/causes of action/requests for relief as other fiduciary activities. He stated in his concurrence that "[t]o the extent the Court suggests that administrators might not be fully subject to strict fiduciary duties to participants and beneficiaries in the processing of their claims and to traditional trust-law remedies for breaches of those duties, I could not more strongly disagree." *Id.* at 152.

Another case often cited to support such a claim, *Donovan v. Mazzola,* 716 F.2d 1226 (9th Cir. 1983), involved a pension fund created by a labor union. The appellants were members of the Board of Trustees of the pension fund. The Secretary of Labor accused the Board members, as plan fiduciaries, of conducting transactions that were adverse to the interests of the plan and its participants and beneficiaries. The district court held that, under the "prudent person" test, the

individual fiduciaries had conducted transactions (loans and extensions of collateral) that a reasonably competent lender would not have made. The district court also appointed an investment manager to control the pension fund's investment and financial dealings for a period of ten years (but otherwise allowed the appellants to continue to act as plan trustees). Finally, the district court found that the appellants violated their fiduciary duty by paying $250,000 to a friend of one of the appellants to conduct a "feasibility study" without following acceptable procedures for retaining a consultant.

In upholding the district court's determination, the Ninth Circuit used broad, sweeping language regarding the remedies available for breaches of fiduciary duty:

> In effectuating (29 U.S.C. § 1109), Congress intended the courts to draw on principles of traditional trust law. *Eaves v. Penn,* 587 F.2d at 462. "Traditional trust law provides for broad and flexible remedies in cases involving breaches of fiduciary duty." *Id.* Courts also have a duty "to enforce the remedy which is most advantageous to the participants and most conducive to effectuating the purposes of the trust."
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> 716 F.2d at 1235.

The Court went on to discuss the authority for the district court's decision to divest the appellants of their investment functions as plan trustees. In discussing the authority under ERISA allowing this remedy, the Court stated:

> At common law, a court could completely remove a trustee if the court found that continuation as a trustee would harm the beneficiary's interests. II Scott on Trusts § 107, at 841. Under the broad remedial provision of ERISA courts have also found removal of fiduciaries to be an appropriate remedy upon findings of imprudence, divided loyalties, and prohibited transactions. [Citations omitted.] Thus, in the present case where the trustees committed numerous ERISA violations, the district court acted well within its broad discretion in divesting the individual applicants of their investment functions as trustees on the Pension Fund.
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> 716 F.2d at 1238-39.

Thus, a liberal reading of *Donovan* suggests that a fiduciary may be removed in instances where the fiduciary has harmed the beneficiaries' interests, or where a fiduciary is guilty of imprudence, conflict of interest, or participating in prohibited transactions. However, in light of the fact that *Donovan* was a pension case, it is at best questionable precedent (considering the language from *Russell* cited above) that a fiduciary may be removed for alleged improprieties in handling claims for welfare benefits (as opposed to misuse of plan funds or diverting plan assets).

A later Ninth Circuit case that cites *Russell* provides some support to both sides of the argument. In *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock,* 861 F.2d 1406 (9th Cir.1988), the plaintiffs were union employees who participated in a voluntary retirement plan. They alleged that the defendants used the plan's assets to further their own financial interests. In discussing the duties of fiduciaries, and remedies for breaches thereof, the Court cited *Russell* for the proposition that "[o]ne of the overriding goals of ERISA is to prevent the misuse and mismanagement of plan assets by fiduciaries," and that the trustee's duty is to "administer the trust solely in the interest of the beneficiary." *Id.* at 1411. The case also discussed the rationale underlying the remedy of disgorgement of profits:

> The purpose behind this rule is to deter the fiduciary from engaging in disloyal conduct by denying him the profits of his breach. G. Bogert and G. Bogert, the Law of Trusts and Trustees § 543, at 218 (2d ed. 1978). If there is no financial incentive to breach, a fiduciary will be less tempted to engage in disloyal transactions. *Id.* The purpose of the rule is not to make beneficiaries whole for any damages they may have suffered. In fact, whether beneficiaries have been financially damaged by the breach is immaterial. G. Bogert and G. Bogert, *supra,* § 543, at 217. Rather, the objective is to make "disobedience of the trustee to the [duty of loyalty] so prejudicial to him that he and all other trustees will be induced to avoid disloyal transactions in the future." *Id.* at 218.
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> 861 F.2d at 1411-12.

Although benefits claims usually do not include a claim seeking disgorgement of profits, the case language discussing harm to the beneficiary as "immaterial" to a breach of fiduciary duty claim cuts against the argument that benefit claimants have a complete remedy under (a)(1) and therefore are not "harmed."

However, the *Amalgamated Clothing* case also cites *Russell* for the proposition that Congress' concern with the handling of plan assets in pension cases did **not** extend to the handling of individual benefit claims:

> [T]he Court noted in *Russell* that "the crucible of congressional concern [in enacting ERISA] was misuse and mismanagement of plan assets by plan administrators." 473 U.S, at 140 n.8. ERISA "was designed to prevent these abuses in the future." *Id.* The Court cited numerous congressional documents and the remarks of several lawmakers to indicate that the protection of plan assets was one of ERISA's key goals:
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> > The legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. . . . In addition, *frequently the pension funds themselves are abused by those responsible for their management who manipulate them for their own purposes* or make poor investments with them. . . . This legislation . . . sets fiduciary standards to insure that pension funds are not mismanaged. *Id.* (citations omitted) (emphasis added) (quoting Sen. Williams, Sen. Ribicoff, and Sen. Clark.)
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> In contrast to the clear expression of concern regarding the handling of plan assets, the Court noted that the legislative history did not reflect an equal degree of concern for the handling of individual benefit claims. *Id.* at 142. Therefore, the Court concluded that the legislative history did not lend support to the plaintiff's request in *Russell* that the Court create under the catchall relief provision of ERISA § 409(a) a cause of action for extracontractual damages to remedy a fiduciary's mishandling of an individual benefit claim. *Id.* at 144.
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> 861 F.2d at 1414-15.

The Court later reinforced this distinction, again citing *Russell*:

> [T]he court in *Russell* examined the fiduciary duties defined in ERISA, and found that they too stressed the fiduciary's relationship to employee benefit

> plans rather than to individual plan beneficiaries. *Id.* at 142-44. It observed, for example, that ERISA § 404(a)(1) "mandates that 'a fiduciary shall discharge his duties with respect to a plan *solely in the interest of the participants and beneficiaries* and – (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries.'" *Id.* at 143 n.10 (quoting ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)) (emphasis added). In contrast, ERISA defines no duties regarding the handling of individual benefit claims. The statute merely notes that fiduciaries must comply with regulations promulgated by the Secretary of Labor. Thus, the Court found no support in ERISA's fiduciary duty provisions for the individual damage remedy sought by the plaintiff in *Russell*.
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> 861 F.2d at 1415-1416.

Thus, there is support for the proposition that case law involving alleged mishandling of **pension** plan assets is not necessarily controlling in a matter involving the handling of a claim for **welfare** benefits. This is significant because plaintiff's counsel, in the cases we have seen, almost exclusively rely on pension cases to argue the availability of the remedy of removal of a fiduciary under (a)(2).[3] As the Seventh Circuit has noted, the court should not "take judicial language out of its original context and apply it uncritically in a materially different context." *In re Kaiser,* 791 F.2d 73, 76 (7th Cir.1986).

Arguments in Opposition to Plaintiffs' (a)(2) Claims

There are a number of arguments that can be made in opposing plaintiffs' attempt to seek removal of an insurance company as a fiduciary under (a)(2). The first argument is that the claim fails because the insurer is not a "fiduciary." ERISA defines a "fiduciary" as anyone who exercises discretionary authority or control respecting the management or administration of an employee benefit plan. 29 U.S.C. § 1002(21)(A). A third party administrator is *not* a fiduciary where it merely performs ministerial duties or processes claims.[4] 29 CFR § 2509.75-8. Where the Plan does not confer discretionary authority on the insurer or claims handler, the claims administrator is not a fiduciary. *Pacificare v. Martin,* 34 F.3d 834, 837 (9th Cir. 1994); *Kyle Railways, Inc. v. Pacific Administration Services, Inc.,* 990 F.2d 513, 516 (9th Cir. 1993).

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[3] We have found a few published opinions involving welfare benefit cases seeking removal of the fiduciary. In one, the Court found that the claims handling was appropriate, and therefore no basis existed for a finding of breach of fiduciary duty. *Birdsell v. United Parcel Service,* 94 F.3d 1130 (8th Cir. 1996). In another unpublished opinion, the district court found that the plaintiff's lack of knowledge of the handling of any claim besides her own did not satisfy the requirement under *Russell* that the plaintiff demonstrate a "larger systematic breach of fiduciary obligations. " *Williams v. Unum Life Ins. Co.,* 1996 U.S. Dist. LEXIS 4809 (N.D. Cal. March 28, 1996).

[4] "Ministerial duties" include applying rules determining eligibility for participation or benefits; calculating services and compensation credits; preparing employee communications materials; maintaining participants' service and employment records; preparing governmentally mandated reports; calculating benefits; advising participants of their rights under the plan; collecting and applying contributions in accordance with the plan terms; preparing reports concerning benefits; processing claims; and making recommendations with respect to plan administration.

Another argument is that the complaint fails to state facts that would, if proven, establish harm to the plan (as opposed to the individual participants and beneficiaries). It is well settled (at least in the Ninth Circuit) that a claim for breach of fiduciary duty must allege harm to the plan, not to individual beneficiaries. *Ford v. MCI Communications Corp. Health and Welfare Plan,* 399 F.3d 1076, 1082 (9th Cir. 2005); *Cinelli v. Security Pacific Corporation,* 61 F.3d 1437, 1445 (9th Cir.1995); *Farr v. US West,* 58 F.3d 1361, 1364 (9th Cir.1995).

It can also be argued that the allegations in the complaint do not establish the type of harm to the plan that justifies removal of the fiduciary. As stated above, *Russell* may fairly be read to hold that removal of the fiduciary is appropriate only for a "refusal to pay contractually authorized benefits [which is] willful and part of a larger systematic breach of fiduciary obligations." *Russell,* 473 U.S. at 146-47; s*ee also, Katsaros v. Cody,* 744 F.2d 270, 281 (2d Cir. 1984) (plaintiff must show that defendants engaged in repeated or substantial violations of their fiduciary responsibilities). The denial of an individual claim, even one constituting an abuse of discretion, does not support a claim brought on behalf of the plan alleging a "systematic breach of fiduciary obligations." The United States District Court for the Northern District of Georgia articulated this point eloquently in *Byars v. The Coca-Cola Company,* 2004 U.S. Dist. LEXIS 14362, 32 Employee Benefits Cas. (BNA) 2880 (N.D. Ga. March 18, 2004).

The plaintiffs in *Byars* were participants in Coca-Cola's LTD plan, who filed an action on behalf of themselves and similarly situated individuals. Among other claims, the plaintiffs alleged breach of fiduciary duty and sought removal of the plan fiduciaries. In dismissing these claims for relief at the pleading stage, the Court stated:

> In Count IV of their First Amended Complaint, the Plaintiffs bring a claim under section 502(a)(2) of ERISA for breach of fiduciary duty. The Plaintiffs allege that Coca-Cola and Reliastar breached their fiduciary duties owed to the LTD Plan and its participants, and they seek the removal of the LTD Plan fiduciaries and the disgorgement of all compensation received by those fiduciaries. Coca-Cola and Reliastar seek to dismiss Count IV claiming that no relief is available under section 502(a)(2) because the Plaintiffs cannot prove a loss to the plan. The Plaintiffs cannot recover under that section because their First Amended Complaint fails to set forth facts that, if proven, would establish a loss to the plan, a prerequisite to relief under ERISA section 502(a)(2). *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42, 87 L.Ed.2d 96, 105 S.Ct. 3085 (1985); *McDonald v. Provident Indem. Life Ins. Co.,* 60 F.3d 234, 237 (5th Cir. 1995). Accordingly, Count IV is subject to dismissal.
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> The sole allegation of a loss to the plan in this entire action is in Count IV of the Plaintiffs' First Amended Complaint. There, in an amendment to their original complaint, the Plaintiffs tacked on an allegation that fiduciary breaches by Coca-Cola relating to its decisions on benefits claims "caused a loss to the Plan as a whole." (First Amended Complaint, p. 189.) The allegation is devoid of any support upon which this Court can determine that the Plaintiffs can prove a set of facts entitling them to relief under section 502(a)(2). In fact, if anything, the denial of claims actually strengthens the LTD Plan, by making more assets available which are required for the plan to function.

Although *Byars* is obviously not controlling law, it does provide the opportunity to argue that a claim for removal of a fiduciary is fatally defective

because it fails to allege a systematic breach of fiduciary obligations causing harm to the plan, as required by *Russell*, *McDonald*, *Cinelli* and *Farr.*

Typically plaintiffs allege that the relief sought would benefit the plan, but do not specifically allege any harm caused to the plan by virtue of the purportedly improper claims handling. The best argument for removing a fiduciary is that the intent of the plan is to provide benefits to eligible plan participants and beneficiaries, and by mishandling claims the fiduciary is contravening the purpose of the plan. One response to this argument is that "harm to the plan" has without exception been interpreted to mean misuse or misappropriation of plan assets (i.e., pension cases); this is not an issue in cases alleging mishandling of welfare benefit claims under fully insured plans (citing *Russell* and *Amalgamated Clothing*), because there is no depletion of plan assets and no diminution of the plan's ability to pay covered claims.

Another argument against allowing plaintiff to state an (a)(2) claim is that the violations alleged are procedural rather than substantive. As stated in *Russell* and *Amalgamated Clothing*, claims handling is addressed not in the statute substantively, but rather is limited to the DOL regulations. As the Ninth Circuit stated recently in *Ford v. MCI Communications Corp. Health and Welfare Plan, supra,* "a fiduciary's mishandling of an individual benefit claim does not violate any of the fiduciary duties defined in ERISA" (citing *Amalgamated Clothing*). There are several cases which hold (in whole or in part) that ERISA does not provide a remedy for procedural violations that do not work a substantive harm to the plan. *See, e.g., Blau v. Del Monte Corp.,* 748 F.2d 1348, 1353 (9th Cir. 1984); *Hein v. TechAmerica Group, Inc.,* 17 F.3d 1278, 1280-81 (10th Cir. 1994); *Harris v. Pullman Standard, Inc.,* 809 F.2d 1495 (11th Cir. 1987); *Wolfe v. J.C. Penney Co., Inc.,* 710 F.2d 388 (7th Cir. 1983), *disapproved on other grounds as stated in Pierre v. Connecticut Gen. Life Ins. Co.,* 932 F.2d 1552 (5th Cir. 1991). Rather, in cases where a participant or beneficiary alleges that improper claims handling prevented them from receiving a fair and full claim review, the remedy is to remand to the plan with instructions as to how to properly assess the claim. *See, e.g., Pengilly v. Guardian Life Ins. Co. of America,* 81 F.Supp.2d 1010, 1024, n. 7 (if procedural defects prevent claimant from obtaining a fair and full review, remedy is to remand issue to claims fiduciary). As stated above, with a fully insured plan there is no risk that improper claim denials will create a "substantive harm" to the plan. Obviously, this argument depends in part on the court's acceptance of the assertion that the harm alleged is not harm to the plan as a whole.

A related argument is that (a)(2) relief is improper because (a)(1)(B) provides complete relief not only to the plaintiff but to all other participants and beneficiaries who are affected by the allegedly improper conduct. The harm caused by the allegedly improper claims handling procedures is limited to denial of claims which are properly payable under the plan. Under (a)(1)(B), any participant aggrieved by the alleged conduct may bring an action for benefits and to clarify entitlement to future benefits, and for attorney's fees incurred in bringing the action. In the case of insured plans, the insurer provides funds for each eligible participant and/or beneficiary, and therefore the allegedly improper conduct does not cause any depletion of the trust assets. Because the (a)(1)(B) claim affords complete relief for the conduct alleged, and the plan is not otherwise harmed, there is no need to provide the additional remedy of removal of the fiduciary.

A final argument relates to the discovery necessary to pursue this claim for relief. It is well settled that one of the goals of ERISA is prompt and fair claims resolution practices. Several courts have noted that allowing extensive discovery runs counter to this goal. *See Newman v. Standard Ins. Co.,* 997 F.Supp. 1276

(C.D. Cal. 1998); *Waggener v. Unum Life Ins. Co.,* 238 F.Supp.2d 1179 (S.D. Cal. 2002); *Medford v. Metropolitan Life Ins. Co.,* 244 F.Supp.2d 1120 (D. Nev. 2003).[5]

Based on these authorities, counsel can argue that a plaintiff's (a)(2) claim should be disallowed because it may require extensive discovery, after which recovery would still be limited to benefits and attorney's fees. The handling of a plaintiff's claim, whether proper or improper, is not in and of itself sufficient to establish (or to refute) the claim that the insurer's practices and procedures are unfair and/or unreasonable. In order for the Court to determine this claim, it would have to have information regarding the insurer's general claims handling procedures, and information regarding how those procedures have affected other claims. This in turn would involve review of other claims files; depositions of other claims handling and managerial level personnel; and review and analysis of numerous company documents. As set forth in the cases cited above, this is precisely the type of broad ranging, far reaching discovery that defeats a primary goal of ERISA – to resolve disputes over benefits inexpensively and expeditiously.

We also note in passing the incongruity of a claimant who, in the same action, both brings suit against the plan and brings suit on the plan's behalf. While there is case law allowing parties to plead both benefits claims and breach of fiduciary duty claims (*Devlin v. Empire Blue Cross and Blue Shield,* 274 F.3d 76 (2d Cir. 2001)), counsel may ultimately be able to suggest to the Court that the plaintiff be required to make an election of remedies.

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[5] It should be noted that these are all cases involving claims for plan benefits. None of them involve a request that the claims review fiduciary be removed for breach of fiduciary duty. As such, it can be argued that because the plaintiff seeks to remove the fiduciary under (a)(2), cases addressing discovery in the context of an (a)(1) claim are inapplicable. Nevertheless, while the relief sought is different, this does not in our view reduce the applicability of ERISA's goal of resolving such claims expeditiously and economically and without broad discovery.