THE EMERGING THEORY OF “MAKE-WHOLE” RELIEF UNDER ERISA: THEMES AND APPROACHE

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The latest effort by plaintiff's attorneys to expand the relief available under ERISA involves making a prayer under § 1132 (a)(3) for "make-whole" relief. Historically, it has been clear that monetary damages are not available under (a)(3). *Aetna Life Ins. Co. v. Bayona,* 223 F.3d 1030, 1033 (9th Cir. 2000); *Bast v. Prudential Ins. Co.,* 150 F.3d 1003, 1010 (9th Cir. 1998); *Sokol v. Bernstein,* 803 F.2d 532, 536-37 (9th Cir. 1986). However, some courts have taken issue with the position that victims of breaches by ERISA fiduciaries should not be made "whole." For example, in *Mertens v. Hewitt,* 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed. 161, Justice White (in dissent) lamented "the anomaly of interpreting ERISA so as to leave those Congress set out to protect – the participants in ERISA-governed plans and their beneficiaries – with less protection . . . than they enjoyed before ERISA was enacted." 508 U.S. at 267. He also stated that it was "perverse" to construe ERISA "so as to deprive beneficiaries of remedies they enjoyed prior to the statute's enactment." *Id.* at 274.

Starting with *Mertens v. Hewitt, supra,* the Supreme Court held that the phrase "appropriate equitable relief" under 502 (a)(3), excluded compensatory damages, even though "money damages were available in [equity] courts against a trustee." 508 U.S. at 255-256. Justice Scalia described money damages as "the classic form of legal (as opposed to equitable) relief." *Id.* The Court held that the remedies that were typically available in equity were injunction, mandamus, and restitution, and therefore "appropriate equitable relief" did not and could not include compensatory damages. In dissent, Justice White discussed the common law of trusts and opined that

> Given this history, it is entirely reasonable in my view to construe § 502(a)(3)'s reference to "appropriate equitable relief" to encompass what was equity's routine remedy for such breaches – a compensatory monetary award **calculated to make the victims whole**, a remedy that was available against both fiduciaries and participating nonfiduciaries.
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> 508 U.S. at 266-267 (emphasis added).

Later, in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), the Court further limited recovery under (a)(3), holding that a subrogation action under ERISA was "quintessentially an action at law" and therefore could not be brought under (a)(3) even though the plaintiff described the action as one for restitution. *Id.* at 210. In so holding, Justice Scalia emphatically stated that (in the Court's view) equitable relief (as interpreted by ERISA) meant less than "all" relief and did not include *any* form of monetary relief:

> As we explained in *Mertens*, "'equitable relief must mean *something* less than *all* relief." 508 U.S. at 258, n. 8. Thus, in *Mertens* we rejected a reading of the statute that would extend the relief obtainable under § 502 (a)(3) to whatever relief a court of equity is empowered to provide in the particular case at issue (which could include legal remedies that would otherwise be beyond the scope of the equity court's authority). Such a reading, we said, would "limit the relief *not at all* and "render the modifier ['equitable'] superfluous." *Id.*, at 257-258. Instead, we held that the term "equitable relief" in § 502(a)(3) must refer to "those categories of relief that were *typically* available in equity . . . ." *Id.,* at 256.
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> Here, petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money – relief that was not typically available in equity. "A claim for money due and owing under a

> contract is 'quintessentially an action at law.'" *Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Wells,* 213 F.3d 398, 401 (CA7 2000) (Posner, J.). "Almost invariably . . .suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' a phrase that has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Bowen v. Massachusetts,* 487 U.S. 879, 918-919, 101 L.Ed.2d 749, 108 S.Ct. 2722 (1988) (Scalia, J., dissenting). And "money damages are, of course, the classic form of *legal* relief." *Mertens, supra,* at 255.
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> 534 U.S. at 209-210.

Prior to *Great-West*, some courts had held that certain forms of monetary relief were available under (a)(3) as "make-whole" relief. For example, in *Strom v. Goldman, Sachs & Co.,* 202 F.3d 138 (2d Cir. 1999), the Court allowed suit under (a)(3) by a widow who alleged that her husband had sought supplemental insurance which did not become effective before his death due to the employer's negligence. The Court held that if the plaintiff could establish that the employer breached its fiduciary duty, plaintiff would be entitled to "make whole" relief to redress the breach. In *Fotta v. Trustees of the United Mine Workers,* 165 F.3d 209 (3d Cir. 1998) the Court held that interest on late plan payments was a viable remedy under (a)(3) to "make the plaintiff whole" by eliminating the effect of the defendant's breach of fiduciary duty. *Accord, Dunnigan v. Metropolitan Life Ins. Co.,* 277 F.3d 223, 229 (2d Cir. 2002); *Clair v. Harris Trust & Savings Bank.* 190 F.3d 495, 498-499 (7th Cir. 1999) ("[e]quity sometimes awards monetary relief . . ."). However, in *Great-West* the Court clearly appeared to foreclose the notion that either "make-whole" relief or monetary damages (regardless of label) could be obtained under (a)(3). Moreover, Justice Scalia noted that the *amicus* brief filed by the United States "argue[d] that the common law of trusts provides petitioners with equitable remedies that allow them to bring this action under § 502(a)(3)…" but distinguished the remedies previously available in equity by holding that "[t]hese setoff remedies do not give the trustee a separate equitable cause of action for payment from other moneys." *Id.* at 219-220.

Even after *Great-West,* the Secretary of Labor continued to argue in amicus briefs that monetary relief should be available from a breaching fiduciary where necessary to put the plaintiff in the same position they were in prior to the breach. In litigation arising from the Enron bankruptcy, the Department said:

> Under the common law [of trusts], monetary relief from a breaching fiduciary was traditionally, typically, and exclusively available from the courts of equity, and is therefore "equitable" under the reasoning of *Great-West*. As stated in the Restatement of Trusts (one of the authoritative texts which *Great-West* urges courts to consult in determining whether relief is equitable), monetary relief against breaching fiduciaries is equitable when it restores the beneficiary to "the position [in which] he would have been if the trustee had not committed the breach of trust."
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> Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss at 51, *In re Enron Corp.,* No. MDL 1446, 2002 WL 32116900 (S.D. Tex. Mar. 28, 2002).

A few courts agreed. *See, e.g. In re Managed Care Litigation,* 185 F.Supp.2d 1310 (S.D. Fl. 2002); *Dobson v. Hartford Financial Services Group, Inc.,* 196 F.Supp.2d 152 (D. Conn. 2002); *Zack v. Hartford Life & Accident Ins. Co.,* 27 EBC 3006 (D. Kan. 2002); *Mathews v. Chevron Corp.,* 362 F.3d 1172 (9th Cir. 2004).

The current argument in favor of compensatory damages as "make-whole" relief under (a)(3) comes from Justice Ginsburg's concurrence in *Aetna Health Inc. v. Davila,* 542 U.S. 200, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004). *Davila* is essentially a pre-emption case, not a remedies case; the Court noted in a footnote that "[r]espondents have thus chosen not to pursue any ERISA claim, including any claim arising under ERISA § 502(a)(3)." 542 U.S. at 236, n.7. However, Justice Ginsberg in concurring suggested that "the Act, as currently written and interpreted, may 'allo[w] at least some form of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench.'"[1] (Emphasis in original.) This idea did not spring fully formed like Athena from Justice Ginsburg's medulla oblongata. Rather, she adopted a position originally articulated by the Solicitor of Labor in an amicus brief in *Davila*, in footnote 13:

> Although this Court has construed Section 502(a)(3) not to authorize an award of money damages against a non-fiduciary, it has also recognized that the "equitable relief" authorized by Section 502(a)(3) means relief typically available in equity. See *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 210, 217 (2002); *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 248-250, 256-258 (1993). Neither *Great-West* nor *Mertens* involved actions against a fiduciary. After *Great-West*, the government has taken the position in several cases pending in the courts of appeals that Section 502(a)(3) allows at least some forms of "make-whole" relief against a breaching fiduciary in light of the general availability of such relief in equity at the time of the divided bench. See generally Sec'y of Labor Amicus Br, at 19-23, *Mathews v. Chevron Corp.,* Nos. 02-15936 & 02-16209 (9th Cir. filed Nov. 25, 2002). Historically, a beneficiary's claim against a trustee for breach of trust was typically remedied *exclusively* in the courts of equity because the beneficiary had only an equitable, not a legal interest, in the trust and its assets. See Restatement (Second) of the Law of Trusts §§ 2 cmts. e and f, 197 (1959). A beneficiary therefore could maintain a suit in equity to obtain various forms of relief, including to compel the trustee to perform his [sic] duties as trustee, to enjoin the trustee from committing a breach, and "to compel the trustee to redress a breach of trust." *Id.* § 199(a)-(c). The trustee's liability in the event of a breach gave rise to various alternative remedies, including a remedy that "will put [the beneficiary] in the position in which he would have been if the trustee had not committed the breach of trust." *Id.* § 205 & cmt. a. A monetary recovery in those circumstances did not require a showing of unjust enrichment, See, *e.g., id.* § 205, cmt. c; *Strom v. Goldman, Sachs & Co.,* 202 F.3d 138 (2d. Cir. 1999); *Bowerman v. Wal-Mart Stores, Inc.,* 226 F.3d 574 (7th Cir. 2000); see generally George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* 861, at 3-4 (rev. 2d 1995). Neither *Great-West* nor *Mertens* supports the proposition that Congress intended that the courts should ignore that settled trust-law understanding dating from the days of the divided bench. There is no occasion for the Court to address that issue here. Judicial acceptance of this position would, however, provide an effective remedy in many cases where the remedy under Section 502(a)(1)(B) may be inadequate.
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> *Aetna Health Ins. Co. v. Davila,* Supreme Court of the United States No. 02-1845, Brief for the United States as *Amicus Curiae,* 27-28, n.13 (2004).

[1] Citing Brief for the United States as *Amicus Curiae* at 27-28.

Plaintiffs are specifically citing to Justice Ginsburg's concurrence[2], and also continuing to argue that the Supreme Court has never addressed whether (a)(3) allows an award of money damages against a fiduciary. One court in the Northern District of California has addressed this issue. In *Thomas v. Unum Life Ins. Co.,* Civil Action No. 04-3283, Judge Martin Jenkins squarely rejected this argument, holding that "[c]ase law overwhelmingly supports the view that the type of monetary relief sought by Plaintiff is *not* available under any ERISA provision." The Ninth Circuit also addressed this argument in *McLeod v. Oregon Lithoprint,* 102 F.3d 376 (9th Cir.1978). In *McLeod,* the Ninth Circuit squarely rejected the distinction between suing a fiduciary as opposed to a non-fiduciary under (a)(3), stating that: "given the statutory structure and policy compromises of ERISA, we cannot construe 'appropriate equitable relief" under § 502(a) (3) in an expanded manner on the basis that a plan participant is bringing an individual action against a fiduciary, rather than against a nonfiduciary." *Id.* at 378.

In the aftermath of *Davila*, courts appear reluctant to expand upon the limited remedies available under the Supreme Court's interpretation of Section 502. Plaintiffs have argued that *Mertens* is limited because it involved claims against a **non-fiduciary**, and *Great-West* is similarly limited because it did not involve a claim against fiduciary involving the trust res. However, courts have not been quick to agree. In *Callery v. The United States Life Insurance Company,* 392 F.3d. 401 (10th Cir. 2004), the court rejected the argument that monetary relief that was "typically available in equity" was provided under ERISA for breaches of fiduciary duty. Plaintiff alleged that the fiduciary failed to tell her that her life insurance coverage on her husband became void upon divorce, and sought the life insurance benefits after his death as an equitable remedy. Relying on *Great-West*, the court stated "we must adhere to the Supreme Court's **rather emphatic** guidance and therefore conclude that in a suit by a beneficiary against a fiduciary, the beneficiary may not be awarded compensatory damages as 'appropriate equitable relief' under § 502(a)(3) of ERISA." *Id.* at 409 (emphasis added).

In *Skiles v. E. I. DuPont Employee Life Ins. Plan,* 2005 U.S. Dist LEXIS 8957, 34 Employee Benefits Cases (BNA) 2149 (E.D. Tenn. 2005), the plaintiffs alleged *inter alia* that the fiduciary breached its duty by failing to notify a disabled employee of her option to increase her life insurance coverage. The court held that a triable issue existed as to whether defendant had breached its fiduciary duty, but also found that plaintiffs' claim seeking payment of additional life insurance benefits to be "the classic form of *legal* relief" and therefore was barred under *Great-West.* However, the court also joined in the chorus of voices seeking Congressional attention to this issue:

> The Court acknowledges the extreme unfairness of the instant result, but is duty bound to apply the law as passed by Congress and interpreted by the higher courts. In sum, the Supreme Court's broad interpretation of the scope of ERISA preemption combined with its narrow construction of the "equitable relief" available under § 1132(a)(3) has created, in the words of Justice Ginsberg, a "regulatory vacuum." *Aetna Health Inc. v. Davila,* 124 S.Ct. 2488, 2503, 159 L.Ed.2d 312, 542 U.S. 200 (2004)(Ginsburg, J., concurring). The unfortunate result is that the law as it currently stands does not provide the sort of remedy Plaintiffs seek. In addition to being

[2] Justice Ginsburg appears to acknowledge that such relief is not at present available by her statement that "Congress . . . intended ERISA to replicate the core principles of trust remedy law, including the make-whole standard of relief." [Citation omitted] I anticipate that Congress, or this Court, **will one day so confirm**." *Id.* at 2504 (emphasis added).

patently unfair, the Court notes there are serious policy implications in imposing such strict limitations on the ability of participants and beneficiaries to recover consequential damages for breaches of ERISA fiduciary duties. *See Cicio v. Does,* 321 F.3d 83, 106 (2d. Cir. 2003) (Calabresi, J., dissenting) (describing legal void created by *Mertens* and *Great-West* as a "gaping wound"). Accordingly, the Court hopes Congress and/or the Supreme Court will direct their attention to these matters and attempt to rectify the shortcomings in the law. However, for present purposes, the Court is powerless to do other than follow the dictates of *Great-West* and *Crosby* and will grant Defendant's motion for summary judgment on Count Three.

In *Calhoon v. Trans World Airlines,* 400 F.3d 593 (8th Cir. 2005) the claimants blamed the fiduciary for the lapse of the claimants' COBRA coverage, and sought "restitution" of their uncovered medical bills and costs. The court cited *Great-West* in distinguishing between a remedy measured by loss to the claimant (not recoverable) and a remedy measured by (unreasonable) gain to the defendant (recoverable). *Id.* at 596-597. The Court held that, to the extent that "make-whole" relief was supported by *Strom v. Goldman, Sachs, supra, Great-West* "appears to foreclose *Strom's* 'make-whole' remedial scheme." *Id.* at 598, citing *De Pace v. Matsushita Electric Corp of Am.,* 257 F.Supp.2d 543, 563 (E.D.N.Y. 2003). The court also dismissed the claimants' attempt to distinguish *Great-West* by arguing that "their claim is against a fiduciary, while Great-West involved a suit against a non-fiduciary." The court stated "[w]e agree with the Tenth Circuit's rejection of this argument and conclude that the status of the defendant, although perhaps relevant to whether a case could be brought in equity, does not affect the relevant inquiry of what type of relief was generally available." *Id.*

There are post *Great-West* cases suggesting that limited relief involving money may be available under (a)(3); however, these cases involve unusual factual scenarios. In January, the Second Circuit held that although a participant's claim against a health care provider for negligent claim denial, and negligent hiring and supervision of plan doctors was pre-empted by ERISA, the district court would be required to allow plaintiff the opportunity to state a claim for breach of fiduciary duty. *Rubin-Schneiderman v. Merit Behavioral Care Corp.,* 121 Fed.Appx. 414 (2d. Cir. 2005). In so holding, the court noted "Justice Ginsburg's statement in her concurrence in *Davila* that § 502(a)(3) may 'allo[w] at least some forms of "make-whole" relief against a breaching fiduciary.'"

In June, the Tenth Circuit affirmed an award of attorney's fees to a claimant under (a)(3) in *Gorman v. Carpenters' & Millwrights' Health Benefit Trust Fund,* 410 F.3d 1194 (10th Cir. 2005). The claimant in *Gorman* was covered under an employer provided health and disability plan and suffered injuries in a motorcycle accident. The Plan took the position that the plan documents required the claimant to file and prosecute (at the claimant's expense) a third party action in order to receive plan benefits. The claimant did so, and obtained a settlement ($80,000) that was slightly less than the amount that the Plan paid the claimant ($86,000). The district court held that the Plan's interpretation of the plan documents (i.e., requiring the claimant to bring the third party action) was unreasonable, and imposed the following resolution under its powers of equity: 1) the court directed that $30,000 of the settlement be paid to the claimant's attorneys for their costs and fees in prosecuting the third party action; 2) the court directed that the balance of the settlement be paid to the Plan, under its subrogation rights; and 3) the court directed the Plan to pay the claimant's attorney's fees incurred in connection with the ERISA action. Interestingly, it was the Plan, not the claimant, who appealed this result to the Court of Appeal. The Tenth Circuit had a predictable reaction to the notion that the Plan

could force the claimant to solely bear the costs and fees of maintaining a third party action, and then could also claim subrogation rights to the entire amount of the judgment of settlement resulting therefrom: it didn't like it. The Court of Appeal upheld the district court's result, mainly on the basis of fundamental fairness:

> Prior to the signing of the [subrogation agreement], the parties were in the following position: the Fund had a subrogation right to "all sums" recovered in an amount equal to the benefits and a refund right to the amount equal to such services or benefits that the Plan provided. Rec. at 203-04. Plaintiff had an obligation to cooperate in such subrogation and refund. However, he also had the right to decide whether or not to bring a third-party action, depending on how he evaluated factors such as the stress of litigation, the strength of his case, and the likelihood of recovery. Among the factors Plaintiff would have to consider in deciding whether or not to bring a third-arty action was that the Fund was entitled to a full refund in the amount of any benefits paid. If Plaintiff choose [sic] not to file an action under these circumstances, he would incur no attorney's fees or other litigation-related expenses. The Fund always had the right to file its own third-party action for subrogation, in which case the Fund would bear its own costs and fees incurred as a result of its decisions to file an action.
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> In its equitable resolution, the district court imposed responsibility for the attorney's fees and costs on the party that made the decision to file the third-party action – the Fund. At the same time, the district court recognized the Fund's right under the 1999 [subrogation agreement] to a repayment in the amount of the benefits it paid Plaintiff by requiring that Plaintiff repay the Fund the full remainder of the settlement.
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> The fact that the relief sought in the present case involved the attorney's fees incurred in the third-party action does not mean that Plaintiff sought monetary relief instead of equitable relief within the meaning of § 1132(a)(3). As we recently noted, "any equitable relief, including those forms explicated by the Court as available under [§ 1132(a)(3)], must involve the direct or indirect transfer of money, as we cannot read the statute to proscribe all forms of relief." *Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard,* 393 F.3d at 1125 (plan administrator's suit for equitable restitution is "appropriate equitable relief.").
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> We hold on the unique facts of this case, the district court's action granted "appropriate equitable relief" within the meaning of 29 U.S.C. § 1132(a)(3)(B).
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> 410 F.3d at 1201-02.

This opinion does not make reference to "make-whole" relief, either directly or by reference to Justice Ginsburg's concurrence. However, it is clear from the text of the opinion that the Court of Appeal (as well as the district court) was concerned that the claimant not suffer any out of pocket expenses or monetary loss as a result of the fiduciary's unreasonable interpretation of the plan. The Court's intent, beyond doubt, was to make the claimant "whole." While this fact pattern is perhaps on the extreme end of the spectrum, it is a good example of the manner in which courts, under certain circumstances, may use (a)(3) as a means of providing "make-whole" relief.

Going back to *Russell's* holding that "[t]he six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly," 473 U.S. 134 at 146 (1985) (emphasis in original), we think it unlikely that the courts will allow plaintiffs to seek compensatory damages as a form of relief under (a)(3). To the extent that plaintiffs seek to recover damages for emotional distress, and/or punitive damages, these elements of recovery will likely continue to be foreclosed. Conversely, the courts will continue to allow claims for equitable relief in the form of interest on delayed benefit payments or other forms of restitution of money that unjustly enriches the defendant (essentially actions for constructive trusts). [This would not include a claim under (a)(3) for "restitution of benefits," which is an (a)(1) claim. *Horvath v. Keystone Health Plan East,. Inc.,* 333 F.3d 450, 457 n. 3 (3d Cir. 2003).] However, cases such as *Gorman* may indicate a willingness on the part of courts to intercede in cases involving unduly burdensome or onerous plan provisions, and to modify the contracts so as to make them fair to participants as well as to plan administrators. Whether *Gorman* is an aberration or a harbinger remains to be seen. In the interim, we suggest that defense counsel vigorously argue the interpretation of *Great-West* articulated in *Callery*, *Skiles*, and *Calhoon* that the Supreme Court has effectively foreclosed **any** form of "make-whole" relief pending Congressional modification of ERISA.