ERISA CLAIMS: STANDING AND SCOPE OF RELIEF

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1. ERISA Section 502(a)(2).

a. Standing issues under 502(a)(2)

Section 502(a)(2) provides a cause of action for the Secretary of Labor, a plan participant, beneficiary, or fiduciary to obtain "appropriate relief under Section 409 to redress violations of the ERISA fiduciary responsibility provisions defined in Title I." The Supreme Court has held that this section authorizes relief for the benefit of a plan only, and relief cannot flow directly to individual plan participants. Individuals who sue under § 502(a)(2) may do so only on behalf of the plan as a whole. *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134 (1985). Subsequent circuit court decisions strictly follow *Russell* and refuse to allow § 502(a)(2) actions that requested recovery by an individual. *See, e.g., Adamson v. Armco, Inc.,* 44 F.3d 650, 654 (8th Cir.), *cert. denied,* 516 U.S. 823 (1995); *Lee v. Burkhart,* 991 F.2d 1004, 1007 (2d Cir. 1993); *Hozier v. Midwest Fasteners, Inc.,* 908 F.2d 1155 (3d Cir. 1990); *Bryant v. International Fruit Prods. Co.,* 886 F.2d 132, 135 (6th Cir. 1989) (per curiam); *Drinkwater v. Metropolitan Life Ins. Co.,* 846 F.2d 821, 824 (1st Cir.), *cert. denied,* 488 U.S. 989 (1988); *Sokol v. Bernstein*, 803 F.2d 532, 537 (9th Cir. 1986).

The recent surge in litigation charging fiduciaries with breaches of duty with respect to individual account pension plans in connection with plan investments in employer stock has given rise to a new issue concerning the ability of participants in individual account plans to proceed on behalf of such plans under Section 502(a)(2). The issue arises, in part, because of the structure of individual account plans. While participants maintain separate accounts, and can often choose investment options, the Plan trust holds title to monies within the Plan.

The issue first gained prominence in *Milofsky v. American Airlines, Inc.,* 404 F.3d 338 (5th Cir. 2004). Pilots sued American Airlines because transfers from their individual account pension plans to a new plan did not take place in a timely fashion. They claimed that AA breached fiduciary duties under 502(a)(2). They sought damages for the loss of investment income caused by the delay. The district court dismissed plaintiffs' claims for lack of standing. Affirming the decision below, a split panel of the Fifth Circuit held that, in accordance with *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, the suit involved individualized relief for particular harm for a subset of plan participants. It did not seek relief for the plan as a whole. The court rejected the argument that because damages would be paid to the plan, rather than directly to the plaintiffs, *Russell* did not apply. The plaintiffs' request that relief ultimately be channeled to their individual accounts destroyed their claim under 502(a)(2). The court dismissed the argument that because the Plan Trustees retained legal title to Plan assets relief inured to the Plan. "We cannot adopt an interpretation that would allow a plaintiff, merely by praying that relief pass through the plan into individual accounts, to eviscerate the standing requirement imposed by § 502(a)(2) by

engaging in a legal fiction that the suit benefits the plan as a whole." 404 F3d. 338, 344. The court emphasized *Russell's* direction that relief must benefit "the plan" as a whole.'" Id (473 U.S. at 140) The court held that where only a relatively small number of plan participants suffered losses to their account balances because of the plan's losses, the participants could not proceed under § 502(a)(2). The *en banc* circuit court subsequently vacated *Milofsky*, 418 F.3d 429 (5th Cir. 2005), but without much analysis. A court in the Southern District of New York followed the panel decision, in a case decided before the Fifth Circuit vacated the earlier panel decision. *Fisher v. J.P. Morgan Chase & Co.,* 230 F.R.D. 370, 375 (S.D.N.Y. 2005). The weight of decisions indicate this potential restriction on the Section 502(a)(2) is unlikely to become a permanent feature of the law. *See In re Schering-Plough Corp. ERISA Litigation,* 420 F.3d 231, 238 (3d Cir. 2005); *Lively v. Dynegy, Inc.,* – F. Supp. 2d –, 2006 WL 647614 (S.D. Ill. Feb. 15, 2006); *In re Enron Corp. Securities, Derivative & ERISA Litig.,* 284 F. Supp. 2d 511 (S.D. Tex. 2003); *In re Sears, Roebuck & Co. ERISA Litig.,* 2004 WL 407007 (N.D. Ill., Mar. 3, 2004); *In re Dynegy, Inc., ERISA Litig.,* 309 F. Supp. 2d 861 (S.D. Tex. 2004). The cases cited above all involved groups of participants who styled their recoveries as benefiting the plan.

However, the Supreme Court recently granted *certiori* in *LaRue v. DeWolff, Boberg & Assoc.* 450 F3d 570 (4th Cir. 2006). Trying to extend the law developed in the above-cited cases the Plaintiff claimed that defendant's failure to implement timely his investment choices for his 401(k) plan violated 502(a)(2). Relying on ERISA's closely integrated and interdependent remedial provisions, the court rejected plaintiff's claim and reasoned that Congress wanted plan, rather than personal, remedies under 502(a)(2). It distinguished this case from those where the plaintiff's claim would benefit a far broader group of plaintiffs. The Department of Labor filed an amicus brief in plaintiff's motion for rehearing and rehearing *en banc*. In denying those motions (but granting the DOL the right to file a brief) the court held that the DOL's argument that an individual could obtain relief under that ERISA section "is contrary to the plain text of the statute." *LaRue v. DeWolff, Boberg& Assoc*. 458 F3d 359, 361 (4th Cir 2007). It opined that the fiduciary duty provisions serve to protect all beneficiaries, rather than righting individual wrongs. It distinguished other cases allowing relief because plaintiffs constituted a broad class of participants, and remedies would benefit the plan as a whole.

There has also been some controversy concerning the right of a plaintiff who has cashed out his 401(k) investment to later bring a suit under 502(a)(2). While a participant in a defined benefit ("DB") plan may not have standing to sue, the majority of cases indicate that a 401(k) participant does have such standing. See *Kuntz v. Reese* 785 F. 2d 1410 (9th Cir.) *cert. denied*, 479 U.S. 916 (1986), *Coan v.Kaufman* 457 F.2d. 250, 255 (2d Cir. 2006) , *In Re JDS Uniphase Corp. ERISA Litig*. No 03-0473 (2007 U.S. Dist. LEXIS 33813 (D. CA April 24, 2007). The distinction arises because a DB plan participant has received all of the benefits to which he was entitled. However, the 401(k) plan participant claims

that the defendant's breach of fiduciary duty deprived him of all of the benefits to which he was entitled. As the Third Circuit recently concluded: "When determining participant standing under ERISA, the relevant inquiry is whether the plaintiff alleges that his benefit payment was deficient on the day it was paid under the terms of the plan…. If so, he states a claim…. If, on the other hand he seeks extracontractual damages or benefits that never vested, then he is not a participant…." *Graden v. Coextant Systems, Inc.* No 06-2337, 2007 U.S. App. LEXIS 18179 (3d Cir. July 31, 2007). In *Harzewski v. Guidant Corp.*, 489 F.3d 799 (7th Cir. 2007), the court allowed plaintiffs who had cashed out of their pension plans, which were funded in part by an ESOP, to sue. They alleged that the fiduciaries' retention of *Guidant* stock, when they knew it would encounter problems because of the failure of *Guidant* products, breached 502(a)(2). *See also Bridges v. American Electric Power Co.,* #06-4100, 2007 U.S. App. LEXIS 19337 (6th Cir. Aug. 15, 2007).

b. The Scope of "Appropriate Equitable Relief".

1. *Great-West Life & Annuity Ins. Co. v. Knudson*

Courts have struggled to define the scope of "equitable" relief available under § 502(a)(3). In *Mertens v. Hewitt Assocs.,* 508 U.S. 248 (1993), the Court held that the term "equitable relief" refers to "those categories of relief that were typically available in equity. . . " 508 U.S. at 256. Examples of such equitable relief included injunction, mandamus and restitution. *Id.* In *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002), the Court reaffirmed and explained its holding in *Mertens* that "equitable relief" in § 502(a)(3) was to be narrowly construed. For example, for restitution to lie in equity — in the form of a constructive trust or equitable lien — "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." 534 U.S. at 214. The Court also recognized the availability of an equitable remedy for an accounting for profits: "[Where] a plaintiff is entitled to a constructive trust on particular property held by the defendant, he may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing the profits. . ." *Id.* at 214, n.2. The Court further explained that a lawsuit seeking the payment of a sum of money as compensation for a loss resulting from defendant's breach of legal duty is typically a suit for "money damages," the classic form of "legal relief," not available under § 502(a)(3). 543 U.S. at 215.

Even before *Great-West Life*, many courts had taken a narrow view of the scope of equitable relief. In *Buckley Dement, Inc. v. Travelers Plan Admin.*, 39 F.3d 784 (7th Cir. 1994), the Seventh Circuit held that a suit against a claims administrator under § 502(a)(3) who had failed to timely process claims forms such that they fell outside the coverage window could not recover payment of the participant's medical bills which were incurred because such relief was "damages", not "appropriate equitable relief." *See also Helfrich v. PNC Bank, Ky.,*

Inc., 267 F.3d 477 (6th Cir. 2001), *cert. denied,* 122 S. Ct. 1298 (2002) (beneficiary who sued plan administrator alleging breach of fiduciary duty and requesting equitable relief could not recover compensation for losses suffered when administrator failed to transfer assets to higher performing mutual funds because such relief constituted money damages, not restitution, and was not appropriate equitable relief); *Bast v. Prudential Ins. Co. of Am.,* 150 F.3d 1003, 1009 (9th Cir. 1998) (holding that ERISA provided no damages remedy where plan administrator's delay in approving medical procedure allegedly resulted in plan participant's death); *Glencoe v. Teachers Ins. & Annuity Ass'n of Am.,* No. 99-2417, 2000 U.S. App. LEXIS 26046 (4th Cir. Oct. 19, 2000) (ERISA prohibited claim for "restitution" of taxes paid as result of incorrect tax advice given by defendant; claim was actually for compensatory damages not available under § 502(a)(3)); *Farr v. US West,* 151 F.3d 908 (9th Cir. 1998), *cert. denied,* 528 U.S. 1116 (2000) (damages sought for misleading advice regarding tax consequences of lump sum distribution were money damages, not recoverable under § 502(a)(3)); *Kerr v. Vatterott & Co.,* 184 F.3d 938 (8th Cir. 1999) (monetary damages for difference between what participant could have earned and what plan fund actually earned is not equitable relief); *McLeod v. Oregon Lithoprint Inc.,* 102 F.3d 376 (9th Cir. 1996), *cert. denied,* 520 U.S. 1230 (1997) (award of the amount of benefits that plaintiff would have been paid had she elected coverage under a cancer policy, which she claims she would have elected had the plan administrator informed her of her eligibility for it, was compensatory damages and thus not recoverable); *Slice v. Sons of Norway,* 34 F.3d 630 (8th Cir. 1994) (recovery of pension benefit amount previously promised by administrator, but not provided for in plan, was not allowable under 502(a)(3) since it is extra-contractual money damages, not an equitable remedy); *Armstrong v. Jefferson Smurfit Corp.,* 30 F.3d 11 (1st Cir. 1994) (plaintiffs could not seek reimbursement from plan fiduciary of lump-sum tax amount which they were required to pay following fiduciary's alleged failure to properly advise them of tax rules).

Great-West Life arose in the context of a plan insurer's claim for reimbursement for medical expense benefits paid to a participant who later recovered damages in tort from the individual who caused her injuries. The Fourth, Seventh, Eighth, and Eleventh Circuits had held that such claims for reimbursement may be equitable claims under § 502(a)(3)(B). *Administrative Comm. v. Gauf,* 188 F.3d 767 (7th Cir. 1999); *Southern Council of Indus. Workers v. Ford,* 83 F.3d 966 (8th Cir. 1996); *Blue Cross & Blue Shield v. Sanders,* 138 F.3d 1347 (11th Cir. 1998). In contrast, the Ninth Circuit had determined that reimbursement claims are not equitable claims under § 502(a)(3)(B). *Reynolds Metals Co. v. Ellis,* 202 F.3d 1246 (9th Cir.), *cert. granted,* 531 U.S. 1009, *cert. dismissed,* 531 U.S. 1061 (2000); *FMC Med. Plan v. Owens,* 122 F.3d 1258 (9th Cir. 1997).

In *Great-West Life*, the Supreme Court, affirming the Ninth Circuit's decision, held that the plan's insurer sought legal relief — the imposition of

personal liability on the plan participants for a contractual obligation to pay money — which is not authorized by § 502(a)(3). Rejecting the insurer's argument that it sought equitable relief in the form of restitution, the Court held that for restitution to lie in equity, the action generally must seek to restore particular funds or property in the defendant's possession. 534 U.S. at 714. The Court noted that the particular funds the insurer sought to recover — the settlement proceeds of the tort action — were not in the participants' possession, but had been disbursed to a trust and to the participants' attorneys, who were not parties to the lawsuit. *Id.* at 715.

2. Post-*Great-West* Developments in Section 502(a)(3) Breach of Fiduciary Duty Claims

After *Great-West,* three circuits flatly rejected the distinction between the equitable relief available against a non-fiduciary and the equitable relief available against a breaching fiduciary. *See Calhoon v. Trans World Airlines, Inc.,* 400 F.3d 593 (8th Cir.2005) (holding participant whose COBRA payment coupons were sent to the wrong address, resulting in termination of coverage for non-payment of premiums, could not recover medical expenses incurred due to breach); *Callery v. United States Life Ins. Co. in the City of New York,* 392 F.3d 401 (10th Cir. 2004) (holding plan participant could not recover value of life insurance benefits lost due to breach of fiduciary duty); *Rego v. Westvaco Corp.,* 319 F.3d 140 (4th Cir. 2003) (holding relief in the form of stock representing the difference in stock value between the date the participant contended he would have received a plan distribution absent a breach of fiduciary duty and the actual distribution date was not equitable relief).

Other courts that addressed the question suggested that remedies for breach of trust are necessarily equitable and had continuing validity after *Great-West*. *See In re Managed Care Litigation,* 185 F. Supp. 2d 1310 (S.D. Fla. 2002) (citing *Strom v. Goldman Sach* (2d Cir. 1999) and noting that "*Knudson* may not extend to cases concerning a breach of fiduciary duty"); *Dobson v. Hartford Fin. Servs. Group, Inc.,* 196 F. Supp.2d 152,172 (D. Conn. 2002) ("Further supporting the Court's conclusion that the relief sought here is 'appropriate equitable relief' is the fact that the conduct alleged here is a breach of fiduciary duty, rather than a breach of contract. . . . [T]he relief sought by plaintiff here *was* typically available in equity, and is being sought in a case that could *only* have gone forward in equity."), *aff'd on other grounds,* 389 F.3d 386 (2d Cir. 2004); *Zack v. Hartford Life & Acc. Ins. Co.,* 27 EBC 3006 (D. Kan. 2002) (citing *Strom* and holding that neither *Great-West* nor *Mertens* forecloses monetary relief for a breach of fiduciary duty); *see also Mathews v. Chevron Corp.,* 362 F.3d 1172 (9th Cir. 2004) (holding make-whole relief available and declining to reach question whether availability turned on identity of defendant).

With respect to subrogation claims, the Circuits also split. *Gorman v. Carpenters' & Millwrights' Health Benefit Trust Fund,* 410 F.3d 1194 (10th Cir.

2005), arose from a plan beneficiary's action for rescission of a subrogation agreement that he had been required to sign by his health plan in order to obtain payment of medical expenses arising from a motorcycle accident. The agreement required the participant to file a third-party tort action, to pay all associated attorneys' fees and costs, and to obtain the plan's approval before settling the claim for an amount less than the medical expenses paid by the plan. The district court found that these requirements expanded the beneficiary's obligations beyond those required by the plan itself. The Tenth Circuit held the district court's order that the plan pay the beneficiary's legal expenses incurred in obtaining a settlement of the third-party tort claim was "pure equitable relief" under Section 502(a)(3). The court wrote that "the district court acted to restore the parties to the positions they would have occupied had the Fund not acted arbitrarily and capriciously in conditioning payment of vested benefits on signing a contract that imposed terms not contained in the Plan." In *Wal-Mart Inc. v. Carpenter*, 36 Fed. Appx. 80 (4th Cir. 2002) the court permitted a Plan's subrogation claim. It distinguished *Great-West Life* by noting the money paid in settlement of a personal injury case went directly to the plan beneficiary and not a trust. In contrast, the Ninth and Sixth Circuits held that subrogation claims, regardless of whether they sought identifiable monies, were inherently legal. *Westaff (USA), Inc. v. Acre*, 298 F.3d 1164 (9th Cir. 2002); *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004).

In *Sereboff v. Mid-Atlantic Med. Servs., Inc.*, 126 S. Ct. 1869 (2006), the Court resolved many of these conflicts, and held that a health plan fiduciary could recover money from a plan participant or beneficiary through an equitable lien if the fiduciary sued the party that controlled the funds, and plan provisions obligated the participant to repay. The Court found that the claim (for an equitable lien impressed on monies) and relief sought were traditionally equitable in nature. It did not require strict asset tracing in order to identify particular funds in the plaintiff's possession because the equitable lien created by the plan's requirements transformed the reimbursement claim into one at equity. Post *Sereboff* decisions have allowed subrogation claims to proceed because they are based on a contract between the Plan and the participant, and equity traditionally allowed such claims to proceed. *See, e.g. Parrot v. Carillo*, 461 F. 3d. 1367 (11th Cir. 2006) Whether or not *Sereboff* will be expanded into the fiduciary context remains to be seen.

3. "Appropriate Relief"

In addition to being "equitable," relief must also be "appropriate." Although the Supreme Court in *Varity Corp. v. Howe* allowed individual relief, it noted that where an alleged breach of fiduciary duty relates to "the interpretation of plan documents and the payment of claims," § 502(a)(1)(B) provides a remedy "that runs directly to the injured beneficiary." Responding to arguments that permitting individuals to obtain "appropriate equitable relief' on claims for breach of fiduciary duty under § 502(a)(3) would encourage them to "complicate ordinary benefit

claims by dressing them up in 'fiduciary duty' clothing," the Court stated that "we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'"

In response to this admonition, several courts have refused to allow claims for breach of fiduciary duty which merely seek the same remedy otherwise requested under a § 502(a)(1)(B) claim for benefits under the terms of a plan. *See LaRocca v. Borden, Inc.,* 276 F.3d 22 (1st Cir. 2002) (where plan provided employees with adequate remedy, they were not entitled to equitable relief); *Katz v. Comprehensive Plan of Group Ins.,* 197 F.3d 1084 (11th Cir. 1999) (where plaintiff sought $200,000 difference in life insurance benefits between prior and subsequent plans, court held that no remedy was available under § 502(a)(3) because a claim existed under § 502(a)(1)(B) even though the court concluded that no relief was available under the plan); *Wilkins v. Baptist Healthcare System, Inc.,* 150 F.3d 609, 615 (6th Cir. 1998) (applicability of § 502(a)(3)(B) limited to "beneficiaries who may not avail themselves of [§ 502's] other remedies"); *Wald v. Southwestern Bell Corp. Customcare Med. Plan,* 83 F.3d 1002 (8th Cir. 1996); *Forsyth v. Humana, Inc.,* 114 F.3d 1467 (9th Cir. 1987), *aff'd on other grounds,* 525 U.S. 299 (1999). However, no obstacle bars pleading Section 502(a)(1)(B) and 502(a)(3) claims together where the relief sought is independent or alternative. *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 89 (2d Cir. 2001) ("The Supreme Court in *Varity Corp.* did not eliminate the possibility of a plaintiff successfully asserting a claim under both § 502(a)(1)(B), to enforce the terms of a plan, and § 502(a)(3) for breach of fiduciary duty."); *Rawls v. Unum Life Ins. Co. of Am.*, 219 F. Supp. 2d 1063, 1067 (C.D. Cal. 2002); *Black v. Long Term Disability Ins.*, 373 F. Supp. 2d 897, 902 (E.D. Wis. 2005); *Schultz v. Texaco Inc.*, 127 F. Supp. 2d 443, 451 (S.D.N.Y. 2001); *Hall v. LHACO, Inc.*, 140 F.3d 1190, 1197 (8th Cir. 1998) (affirming district court conclusion that request for injunctive relief under Section 502(a)(3) was "different" from relief available under Section 502(a)(1)(B) and thus not precluded by the Section 502(a)(1)(B) claim).

4. ERISA Section 510 Claims

Another significant area in which § 502(a)(3) is invoked is to challenge alleged violations of § 510 which prohibits, among other things, interference with the attainment of benefit rights. In *Spinelli v. Gaughan*, 12 F.3d 853 (9th Cir. 1993), the court relied on *Mertens* to hold that no jury trial right existed in an action invoking § 510 since only the "equitable relief" available under § 502(a)(3) could be obtained; *see also Vargas v. Child Development Council of Franklin County, Inc.,* 269 F. Supp. 2d 954 (S.D. Ohio 2003) (permitting no right to a jury trial for section 510 claims, claims for recovery of benefits, or breach of fiduciary duty claims); *Zimmerman v. Sloss Equip.,* 72 F.3d 822, 827 (10th Cir. 1995 (discussing, but declining to resolve issue)). In *Schwartz v. Gregori*, 45 F.3d 1017, 1021-23 (6th Cir.), *cert. denied,* 516 U.S. 819 (1995), the court held that

both back pay and front pay could be awarded as equitable relief for a retaliatory discharge in violation of § 510. The court expressly stated that while equitable restitution "generally is awarded to prevent unjust enrichment to the defendant, this is not required in every case." *Id.* at 1022. Citing *Swartz, De Pace* held that front pay could be available under Section 502(a)(3) as a remedy for breach of fiduciary duty if reinstatement was not feasible. *DePace v. Matsushita Elec. Corp. of Am.,* 257 F. Supp. 2d 543 (E.D.N.Y. 2003).

After *Great-West,* at least two Circuits have held that backpay is no longer available under § 502(a)(3) as a remedy for § 510 violations. *Millsap v. McDonnell Douglas Corp.,* 368 F.3d 1246 (10th Cir. 2004). In *Millsap,* the district court found that the defendant had violated Section 510 by selecting a plant for closure in order to maximize its surplus from its pension plans. Nonetheless, the circuit court reasoned that backpay was unavailable because it was "remedially analogous to personal injury or breach of contract claims" and was compensatory in nature because it was measured by the employee's loss rather than the employer's gain. However, the *Millsap* class did receive "restoration of benefits" by way of a settlement. *See Eichorn v. AT&T Corp.*, 05-5461, 2007 U.S. App. LEXIS (3d Cir. May 2, 2007) (back pay unavailable under § 502(a)(3) for § 510 violation).

B. Remedies Available from the Breaching Fiduciary

1. General Rule

ERISA Section 409(a) imposes liability on a breaching fiduciary to a) make restitution to the plan of losses resulting from the breach, b) disgorge profits obtained by the fiduciary through breach of duty, and c) be subject to other equitable or remedial relief deemed appropriate by the court, including removal of the fiduciary.

Section 409(a) makes a fiduciary responsible only for losses resulting from a breach of duty. If no loss results from a breach, then no monetary liability exists. *See Matassarin v. Lynch,* 174 F.3d 549 (5th Cir. 1999), *reh. denied,* 189 F.3d 471, *cert. denied,* 528 U.S. 1116 (2000) (alleged failure of fiduciaries to conform ESOP to tax code did not result in loss to plan; therefore, no basis for liability under § 409(a)); *Meinhardt v. Unisys Corp.,* 74 F.3d 420, 445 (3d Cir.), *cert. denied,* 519 U.S. 810 (1996); *Kuper v. Iovenko,* 66 F.3d 1447, 1459 (6th Cir. 1995) ("a plaintiff must show a causal link between the [breach] and the harm suffered [to] the plan"); *Roth v. Sawyer-Cleator Lumber Co.,* 16 F.3d 915 (8th Cir. 1994); *Friend v. Sanwa Bank California,* 35 F.3d 466, 469 (9th Cir. 1994) ("ERISA holds a trustee liable for a breach of fiduciary duty only to the extent that losses to the plan result from the breach"); *Diduck v. Kaszycki & Sons Contractors, Inc.,* 974 F.2d 270, 279 (2d Cir. 1992) ("[P]roof of a causal connection . . . is required between a breach of fiduciary duty and the loss alleged"); *Ironworkers Local No. 272 v. Bowen,* 695 F.2d 531, 536 (11th Cir.

1983) (loss existed but did not result from alleged breach); *Brandt v. Grounds,* 687 F.2d 895, 898 (7th Cir. 1982) (Section 409 "clearly indicates that a causal connection is required between the breach of fiduciary duty and the losses incurred by the plan").

2. Measure of Losses

Courts have applied a variety of measures for determining losses. In *Donovan v. Bierwirth,* 754 F.2d 1049 (2d Cir. 1985), the court held that the measurement of "loss" requires a court to determine what a plan actually earned on a challenged investment compared to what would have been earned if the assets had been available for other plan purposes. *Accord, GIW Indus. v. Trevor, Stewart, Burton & Jacobsen, Inc.,* 895 F.2d, 729, 733 (11th Cir. 1990); *Dardaganis v. Grace Capital, Inc.,* 889 F.2d 1237, 1243-4 (2d Cir. 1989). Other courts have compared the loss on imprudent investments to other measures of investment return, including prevailing interest rates or the return originally anticipated on the imprudent investment. *See Katsaros v. Cody,* 744 F.2d 270, 281 (2d Cir.), *cert. denied, sub. nom., Cody v. Donovan,* 469 U.S. 1072 (1984); *Donovan v. Mazzola,* 716 F.2d 1226, 1232-33 (9th Cir. 1983). In *California Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1047 (9th Cir. 2001), the Ninth Circuit held that, where a fiduciary commits multiple breaches resulting in both losses and gains, "[the] fiduciary is liable for the total aggregate loss of all breaches" and "may be permitted to balance losses and gains attributable to multiple breaches . . ." In *Reich v. Valley National Bank of Arizona,* 837 F. Supp. 1259 (S.D.N.Y. 1993), the court held that the losses recoverable as a result of an imprudent purchase of stock by a leveraged ESOP equaled the total payments which ESOP made on its loan.

The *Donovan v. Bierwirth* court determined that any ambiguities in measuring losses should be resolved against the breaching fiduciaries. 754 F.2d 1049, 1056 (2d Cir. 1985); *see also, Roth v. Sawyer-Cleator Lumber Co.,* 61 F.3d 599, 602 (8th Cir. 1995); *Kim v. Fujikawa,* 871 F.2d 1427, 1430-31 (9th Cir. 1989) (burden is on breaching fiduciaries to transactions); *Leigh v. Engle,* 727 F.2d 113, 138-39 (7th Cir. 1984) (doubts as to amount of disgorgement should be resolved against breaching fiduciaries).

3. Prejudgment Interest

Prejudgment interest is frequently awarded but is discretionary with the court. *See Diduck v. Kaszycki & Sons Contractors Inc.,* 974 F.2d 270, 286 (2d Cir. 1992) ("a court has wide discretion . . . to award prejudgment interest"); *Holmes v. Pension Plan of Bethlehem Steel Corp.,* 213 F.3d 124, 131-32 (3d Cir. 2000); *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458, 1465 (9th Cir.), *cert. denied,* 471 U.S. 1137 (1985); (whether to award prejudgment interest to an ERISA plaintiff is "a question of fairness, lying within the court's sound discretion, to be answered by balancing

the equities"); *Katsaros v. Cody,* 744 F.2d 270, 281 (2d Cir.), *cert. denied sub. nom., Cody v. Donovan,* 469 U.S. 1072 (1984); *Donovan v. Bryans,* 566 F. Supp. 1258, 1264-66 (E.D. Pa. 1983); *Donovan v. Tricario,* 5 EBC 205 (S.D. Fla. 1984) (declining to award interest); *Leigh v. Engle,* 669 F. Supp. 1390, 1405-6 (N.D. Ill. 1987), *aff'd*, 858 F.2d 361 (7th Cir. 1988), *cert. denied, sub. nom., Estate of Johnson v. Engle,* 489 U.S. 1078 (1989) (declining to award interest).

4. Disgorgement of Profits

Disgorgement of profits obtained through a fiduciary breach has also been ordered by courts. *See Herman v. S.C. Nat'l Bank,* 140 F.3d 1413 (11th Cir. 1998), *cert. denied,* 525 U.S. 1140 (1999) (remedy of disgorgement available against party in interest); *Lowen v. Tower Asset Mgmt.,* 829 F.2d 1209, 1221 (2d Cir. 1987); *Leigh v. Engle,* 727 F.2d 113, 122, 137 (7th Cir. 1984) (but see the same case on remand, 669 F. Supp. 1390, 1404 (N.D. Ill. 1987), *aff'd,* 858 F.2d 361 (7th Cir. 1988), *cert. denied, sub. nom., Estate of Johnson v. Engle,* 489 U.S. 1078 (1989) (finding that no profits arose through use of plan assets and thus that no disgorgement was required)); *Brink v. Da Lesio,* 496 F. Supp. 1350, 1385 (D. Md. 1980), *aff'd in part and rev'd in part,* 667 F.2d 420 (4th Cir. 1981); *Donovan v. Tricario,* 5 EBC 2057, 2065-6 (S.D. Fla. 1986).

5. Constructive Trust

In *Amalgamated Clothing & Textile Workers Union v. Murdock,* 861 F.2d 1406 (9th Cir. 1988), the court held that a constructive trust could be imposed for the benefit of former plan participants and beneficiaries on profits allegedly obtained through fiduciary breaches, even though the plan had terminated and the participants had received distributions of their full accrued defined benefits.

6. Preliminary and Permanent Injunction

Both preliminary and permanent injunctive relief can be awarded against breaching fiduciaries. *Marshall v. Teamsters Local 282 Pension Trust Fund,* 458 F. Supp. 986, 987, 992 (E.D.N.Y. 1978); *Marshall v. Glass/Metal Assocs. & Glaziers & Glassworkers Pension Plan,* 507 F. Supp. 378, 385 (D. Haw. 1980); *Donovan v. Bierwirth,* 754 F.2d 1049, 1055-6 (2d Cir. 1985); *Schwartz v. Interfaith Med. Ctr.,* 715 F. Supp. 1190 (E.D.N.Y. 1989) (preliminary injunction requiring compliance with ERISA); *Beck v. Levering,* 947 F.2d 639 (2d Cir. 1991), *cert. denied, sub. nom., Levy v. Martin,* 504 U.S. 909 (1992) (upholding permanent injunction against principals of investment firm from ever serving as fiduciaries or service providers to ERISA plans); *Martin v. Feilen,* 965 F.2d 660 (8th Cir. 1992), *cert. denied, sub. nom. Henss v. Martin,* 506 U.S. 1054 (1993) (holding that it was an abuse of discretion for district court not to issue injunction barring individuals from providing fiduciary or other services to ERISA plans); *Reich v. Lancaster,* 843 F. Supp. 194 (N.D. Tex. 1993) (permanent injunction against service as a fiduciary or service provider), *aff'd,* 55 F.3d 1034 (5th Cir.

1995). Injunctive relief may be appropriate even if no loss to the plan has occurred. *Brock v. Robbins,* 830 F.2d 640, 646-47 (7th Cir. 1987); *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (opinion of then-Judge Scalia, concurring and dissenting).

7. Removal of Fiduciary/Appointment of a Receiver

Removal of the fiduciary and appointment of a receiver or successor trustee may be appropriate in cases of serious breaches of trust, depending on the circumstances. *See Moore v. American Fed'n of Television and Radio Artists,* 216 F.3d 1236, 1247 (11th Cir. 2000); *Birdsell v. UPS of Am.,* 94 F.3d 1130 (8th Cir. 1996); *Reich v. Lancaster,* 55 F.3d 1034, 1054 (5th Cir. 1995) ("ERISA imposes a high standard on fiduciaries, and serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction"). *Compare Marshall v. Snyder,* 572 F.2d 894, 901 (2d Cir. 1978) (receiver appointed) *with Donovan v. Bierwirth*, 680 F.2d 263, 276 (2d Cir.), *cert. denied, sub. nom., Bierwirth v. Donovan,* 459 U.S. 1069 (1982) (receivership not warranted on facts). Since removal is an appropriate equitable remedy, courts also have power to adopt lesser remedies, such as power to appoint plan investment managers or administrators. *Donovan v. Mazzola*, 716 F.2d 1226, 1338-39 (9th Cir. 1983); *Katsaros v. Cody,* 744 F.2d 270, 281-83 (2d Cir.), *cert. denied, sub. nom., Cody v. Donovan,* 469 U.S. 1072 (1984).

8. Rescission

Rescission of illegal transactions may also be an appropriate remedy for a breach of trust. *Eaves v. Penn,* 587 F.2d 453, 462-62 (10th Cir. 1978). If a transaction would create an illegal prohibited transaction, a court will not enforce it. *M & R Inv. Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982).

9. Alienation of Pension Benefits of a Fiduciary Who Breached a Duty to the Plan

In *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365 (1990), the Supreme Court resolved a circuit conflict and held that ERISA § 206(d) prohibited alienation of the pension benefits of an ex-union official who had embezzled union funds. The Court expressly left open the issue whether a plan could alienate benefits of a fiduciary who had breached a duty to that plan. Most courts addressing this issue have followed the holding of *Crawford v. La Boucherie Bernard Ltd.,* 815 F.2d 117 (D.C. Cir.), *cert. denied, sub. nom., Goldstein v. Crawford,* 484 U.S. 943 (1987), in which the D.C. Circuit applied trust law principles to permit such an alienation. *See Parker v. Bain,* 68 F.3d 1131, 1140 (9th Cir. 1995); *Coar v. Kazimir,* 990 F.2d 1413 (3d Cir.), *cert. denied,* 510 U.S. 862 (1993); *Reich v. Davidson Lumber Sales,* 154 Bankr. 324 (D. Utah 1993), *rev'd on other grounds, sub nom., Reich v. Stangl,* 73 F.3d 1027 (10th Cir. 1995), *cert. denied, sub. nom., Stangl v. Reich,* 519 U.S. 807 (1996);

Friedlander v. Doherty, 851 F. Supp. 515 (N.D.N.Y. 1994); *In re: Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey,* 160 Bankr. 882 (S.D.N.Y. 1993); *Pension Ben. Guaranty Corp. v. Solmsen,* 743 F. Supp. 125 (E.D.N.Y. 1990). *But see Herberger v. Shanbaum,* 897 F.2d 801 (5th Cir.), *cert. denied,* 498 U.S. 817 (1990) (such an alienation is not permissible under the rationale of *Guidry*); *In re Loomer*, 198 Bankr. 755 (D. Neb. 1996). In 1997, Congress codified a limited exception in ERISA § 206(d)(4), which permits plans to offset benefits in the following circumstances: (1) the participant is convicted of a crime involving the plan; (2) an action for breach of ERISA's fiduciary provisions result in a civil judgment, consent order, or decree; or (3) the participant has entered into a settlement agreement resulting from an allegation of fiduciary breach brought by the DOL or PBGC. *See also United States v. Novak*, 2007 U.S. App. LEXIS 3804 (9th Cir. Feb. 22, 2007) in which the court held that the Mandatory Victims Restitution Act of 1996 P.L. 104-132 allowed pension benefits in pay status to be available as a source of funds to compensate crime victims.

10. Restitution

Numerous cases describe the liability of breaching fiduciaries to make restitution as joint and several. *In re Masters Mates & Pilots Pension Plan & TRAP Litig.*, 957 F.2d 1020 (2d Cir. 1992); *Donovan v. Robbins*, 752 F.2d 1170, 1185 (7th Cir. 1985) (Coffey, J., Concurring); *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983); *District 65 Retirement Trust v. Prudential Secs., Inc.*, 925 F. Supp. 1551 (N.D. Ga. 1996); Davidson v. Cook, 567 F. Supp. 225, 240 (E.D. Va. 1983), *aff'd*, 734 F.2d 10 (4th Cir.), *cert. denied, sub. nom., Accardi v. Davidson*, 469 U.S. 899 (1984). Thus, plaintiffs may bring an action against some fiduciaries without bringing an action against all of them. *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 332 (3d Cir. 1984) (in breach of fiduciary duty action, unsued trustees were not indispensable parties because multiple trustees may be held jointly and severally liable); *Jennings v. Pierce*, No. 93-C-2539,1995 U.S. Dist. LEXIS 2385, at *2-3 (N.D. Ill. Feb. 27, 1995). In *Donovan v. Tricario*, 5 EBC 205 (S.D. Fla. 1984), the court held a defendant trustee liable to restore all losses not previously restored through a settlement

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