Strafford

Presenting a live 90-minute webinar with interactive Q&A

ERISA Equitable Remedies After McCutchen and Amara

Navigating the Scope of Appropriate Equitable Relief and Plan Claims for Subrogation and Reimbursement

WEDNESDAY, JULY 10, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Patrick W. Begos, Member, **Begos Brown & Green**, Southport, Conn.

Terry Connerton, Member, **Metz Lewis Brodman Must O'Keefe**, Pittsburgh

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10**.

Tips for Optimal Quality

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial **1-866-961-9091** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
- Click the SEND button beside the box

If you have purchased Strafford CLE processing services, you must confirm your participation by completing and submitting an Official Record of Attendance (CLE Form).

You may obtain your CLE form by going to the program page and selecting the appropriate form in the PROGRAM MATERIALS box at the top right corner.

If you'd like to purchase CLE credit processing, it is available for a fee. For additional information about CLE credit processing, go to our website or call us at 1-800-926-7926 ext. 35.

Program Materials

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the + sign next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Begos Brown & Green LLP
ATTORNEYS AT LAW

ERISA Equitable Remedies After *McCutchen* and *Amara*

Patrick W. Begos
Begos Brown & Green LLP
Southport CT and Bronxville, NY
pbegos@bbgllp.com
www.bbgllp.com
www.ERISAClaimDefense.com

Outline

- ERISA text and pre-*Amara* rulings
- *Amara* expansion of equitable relief?
- *McCutchen* limitation on equitable relief?
- Impact on plan claims for reimbursement and subrogation
- Best practices

ERISA §502(a)(3)(B), 29 U.S.C § 1132

- "A civil action may be brought …(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain *other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan*[.]

BBG

What relief is equitable?

- Any relief a court of equity could award
  - Virtually any relief is available
- Categories of relief that were typically available in equity
  - *E.g.* injunction, mandamus, and restitution
  - "not compensatory damages"

Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993)

What relief is equitable? (cont'd)

- "Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all.* We will not read the statute to render the modifier superfluous."

Mertens v. Hewitt Associates

So what relief is equitable?

- "We have interpreted the term 'appropriate equitable relief' in § 502(a)(3) as referring to those categories of relief that, traditionally speaking (*i.e.,* prior to the merger of law and equity) were *typically* available in equity."

CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011)

What equitable relief is “appropriate”?

- “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.’”

Varity Corp. v. Howe, 116 S. Ct. 1065 (1996)

What is *appropriate equitable relief*

- Damages for breach of fiduciary duty (*Varity*)
- "Equitable" restitution – constructive trust or equitable lien on particular property (*Knudson*)
- Equitable lien by agreement (*Sereboff*)

What is not *appropriate equitable relief*

- Compensatory damages (*Mertens*)
- Punitive damages (*Mertens*)
- "Legal" restitution – imposition of personal liability for benefits conferred (*Knudson*)
- Relief provided elsewhere by ERISA (*Varity*)

Pre-*Amara* overview

- Claim had to fall under a traditional equitable category
- Beneficiary could not recover plan benefits in the guise of equitable remedy
- "Make-whole" relief was not available

CIGNA v. Amara

- Claim by plan participants for fraudulent modification of pension plan
- Held that terms of SPD could not modify terms of the plan
  - Participants could not maintain a benefit claim premised on promises made in an SPD that contradicted plan
- Extended *dictum* about equitable remedies

Did *Amara* contradict *Mertens*?

- "The case before us concerns a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust). … It is 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. … With the exception of the relief now provided by § 502(a)(1)(B), …the remedies available to those courts of equity were traditionally considered equitable remedies."

What equitable relief did *Amara* endorse?

- Injunctive relief
- Reformation of plan
- Restitution
- Estoppel
- Surcharge

Key takeaway from *Amara*

- The fact that relief takes the form of a money payment does not remove it from the category of traditional equitable relief
- At least when relief is ordered against a fiduciary

"Make-whole" relief allowed

- *McCravy v. Met. Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012)
  - "Before *Amara,* various lower courts, including this one, had (mis)construed Supreme Court precedent to limit severely the remedies available to plaintiffs suing fiduciaries under Section 1132(a)(3)"
- *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448 (5th Cir. 2013)
  - *Amara* "stated an expansion of the kind of relief available under § 502(a)(3)" for breach of fiduciary duty

Kenseth v. Dean Health Plan, Inc. -- F.3d --, 2013 WL 2991466 (7th Cir. June 13, 2013)

- "So the relief available for a breach of fiduciary duty under section 1132(a)(3) is broader than we have previously held, and broader than the district court could have anticipated before the Supreme Court's decision in *Cigna.* Monetary compensation is not automatically considered 'legal' rather than 'equitable.' The identity of the defendant as a fiduciary, the breach of a fiduciary duty, and the nature of the harm are important in characterizing the relief."

Did *Amara* expand the claims that can be asserted against a non-fiduciary?

- "Unum has not advanced a specific theory under which the money judgment against Bilyeu falls within a traditional form of equitable relief. Whether some form of equitable relief might be available here, as well as whether Unum could reformulate its reimbursement agreement to resolve the problems presented here, are thus questions beyond the scope of this appeal."
  - *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012) *cert. denied,* 133 S. Ct. 1242 (2013)

US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013)

- 1132(a)(3) claim by plan fiduciary to recover health benefits paid under plan
- Plan expressly provided for equitable lien on recoveries after benefits paid
- Question was whether plan limited equitable defenses available to participant
  - Specifically, "double recovery rule" and "common-fund doctrine"

McCutchen (cont'd)

- "Equitable lien by agreement … both arises from and serves to carry out a contract's provisions."
- "So enforcing the lien means holding the parties to their mutual promises."
- "Conversely, it also means declining to apply rules – even if they would be 'equitable' in a contract's absence – at odds with the parties' expressed commitments."
- But, when plan is silent on an issue (like allocation of attorneys' fees), equitable doctrine can supply interpretation

Is *McCutchen* limited to claims to enforce lien by agreement?

- "[E]nforcing the lien means holding the parties to their mutual promises."
- Also means "declining to apply rules – even if they would be 'equitable' in a contract's absence – at odds with the parties' expressed commitments."

Might *McCutchen* preclude any equitable relief that contradicts plan?

- ERISA "does not, after all, authorize 'appropriate equitable relief' *at large*[;] … rather, it countenances only such relief as will enforce '*the terms of the plan*' or the statute[.] … That limitation reflects ERISA's principal function: to protect contractually defined benefits. … The statutory scheme, we have often noted, is built around reliance on the face of written plan documents." [emphasis by the Court]
- "[H]ewing to the parties' exchange yields 'appropriate' as well as 'equitable' relief."

So what does 1132(a)(3) allow?

- It does not allow all relief a court of equity could award for breach of trust (*Mertens*)
- It allows all relief a court of equity could award, except the relief provided under 1132(a)(1)(B) – *i.e.* claim to enforce terms of plan (*Amara*)
- It authorizes only such relief as will enforce the terms of the plan or the statute (*McCutchen*)

Mertens/McCutchen v. *Amara*

- Views of "appropriate equitable relief" don't seem reconcilable
- Either the plan is paramount or it is not

Mertens/McCutchen v. *Amara* (cont'd)

- Perhaps there are different equitable regimes
  - Relief available for breach of fiduciary duty (*Amara*)
  - Relief available to enforce terms of plan (*McCutchen*)
  - Relief otherwise available (*Mertens*)
- But 1132(a)(3) does not distinguish between claims brought by fiduciary and claims brought against fiduciary
  - Unless there is broader relief "to redress … violations" of ERISA than "to enforce any provisions of [ERISA] or the terms of the plan"

Questions for future cases

- Are there separate rules for suits against fiduciaries and non-fiduciaries?
- Does the plan limit relief against a fiduciary?
  - Does *McCutchen* limit *Amara*?
- Is make-whole relief available against a non-fiduciary?
  - Does *Amara* expand *Mertens*?
  - What traditional equitable claim would allow that?

The Impact of McCutchen on Plans' Claims for Subrogation and Reimbursement

Presented by: Terry M. Connerton, Esq.
Metz Lewis Brodman Must O'Keefe
535 Smithfield St., Suite 800
Pittsburgh, PA 15222
tconnerton@metzlewis.com
www.metzlewis.com

What Are the Doctrines of Subrogation and Reimbursement?

- **Subrogation:** The Plan steps into the shoes of the Participant and actually brings a lawsuit against a third party for the injury.

- **Reimbursement:** After the Participant brings a lawsuit, the Plan looks for reimbursement of claims paid from any recovery the Participant may receive from a liable third party.

METZ LEWIS BRODMAN MUST O'KEEFE
ATTORNEYS AT LAW

State Anti-Subrogation Measures

- Impose on subrogation rights the "made whole" doctrine
- Reduce subrogation rights by a pro-rata share of attorneys' fees by imposing the "common fund" doctrine
- Eliminate subrogation rights and provisions altogether

What Effect Do States' Anti-Subrogation Laws Have On the Plan's Rights?

Two types of plans:

- **Fully-Insured:** Premiums are paid to an insurance company for the purchase of group insurance policy. The insurance company assumes the risk of paying claims that exceed the amount of premiums collected. Fully-insured plans are subject to state insurance laws.
- **Self-Insured:** Premiums collected in a self-insured plan are deposited into a trust account which is used to pay claims. The employer assumes the risk of paying claims which exceed the amount of premiums collected. To offset the risk, employers many times purchase stop-loss insurance to place a ceiling on the potential costs. Self-insured plans are not subject to state insurance laws.

METZ LEWIS BRODMAN MUST O'KEEFE
ATTORNEYS AT LAW

Supreme Court Maintains a Healthy Interest in Subrogation and Reimbursement Claims Under ERISA

- *FMC v. Holliday,* 498 U.S. 52 (1990)
- *Great-West Life & Annuity Insurance Company v. Knudson,* 534 U.S. 204 (2002)
- *Sereboff v. Mid-Atlantic Medical Services,* 547 U.S. 356 (2006)
- *U.S. Airways v. McCutchen,* 569 U.S. ___ (April 16, 2013)

What Did the Third Circuit Court Rule?

- *U.S. Airways v. McCutchen*, 663 F. 3d 671 (3d Cir. 2011)
- Principle of "unjust enrichment" is broadly applicable to equitable claims and should limit the effectiveness of the Plan's reimbursement provision. Otherwise, the participant would be left with less than full recovery and the Plan would get a windfall.
- Split in the Circuit Courts of whether federal common law could override the express terms of the Plan provisions. Third Circuit said express terms of Plan provisions are <u>not</u> "inviolable" and, based on equitable doctrines and principles, may be subject to modification and equitable reformation.

METZ LEWIS BRODMAN MUST O'KEEFE
ATTORNEYS AT LAW

Supreme Court Disagrees with the Third Circuit

- Participants cannot claim equitable defenses to limit or prevent reimbursement when the action was one to enforce an equitable lien by agreement.
- Explicit terms agreed upon would be enforced; the parties would be held to their mutual promises.
- ERISA §502(a)(3) does not authorize equitable actions at large, but rather only equitable actions to enforce the terms of the Plan.
- However, where Plan terms are silent or ambiguous on a particular issue, courts may look to "common-sense understandings and principles that the parties may not have bothered to incorporate expressly, but that operate default rules to govern in the absence of a clear expression of the parties' [contrary] intent."
- Here, the majority found that: (i) the plan provision was silent on how to allocate attorneys' fees; and (ii) the common fund doctrine provides the appropriate default.

METZ LEWIS BRODMAN MUST O'KEEFE
ATTORNEYS AT LAW

Significance of *U.S. Airways v. McCutchen*

- Reaffirmed *Sereboff v. Mid-Atlantic Medical Services.*
- Answered the question raised in dicta in *Sereboff* whether the relief sought was "appropriate equitable relief" under ERISA §502(a)(3) and whether equitable principles and defenses could be asserted by the participant.
- Reiterated the distinction of equitable lien by agreement vs. equitable lien sought as a matter of restitution or subrogation.

Life After the Supreme Court Decision

- Equity cannot override the plain terms of an ERISA self-insured Plan.
- Suits by self-insured Plans for reimbursement against participants will not be subject to the equity doctrines of "make whole" or "common fund," unless the terms of the reimbursement provisions are silent or ambiguous on those issues. Moreover, in an equitable lien by agreement claim, the strict tracing rules would not apply.
- When a self-insured plan is seeking subrogation or restitutional equitable lien on proceeds, equitable defenses may be raised by participants and applied by the courts as appropriate under ERISA §502(a)(3). Moreover, the strict tracing rules described in *Great West* will apply.
- Suits by fully-insured Plans would be subject to restrictions of State insurance laws.

10 Best Practices to Ensure Enforcement of Plan Provisions

1. The Plan should contain both a subrogation and a reimbursement provision.
2. The reimbursement provision should explicitly renounce the "make whole" and "common fund" doctrines.
3. The reimbursement provision should require first-dollar reimbursement from any recovery.
4. The Plan should exclude the benefits for which a third party would otherwise be liable.
5. The Plan should require reimbursement agreements be signed by the participant and the participant's attorney (if retained) prior to the payment of benefits.

10 Best Practices to Ensure Enforcement of Plan Provisions (cont.)

6. The reimbursement agreements should have the participant acknowledge that the Plan is paying benefits to which the participant is otherwise not entitled.
7. The Plan should be proactive in working with the participant's attorney to ensure that there is an incentive for attorneys to vigorously pursue civil actions (*e.g.*, Plans may agree to share in attorneys' fees and expenses or reduce liens), even if not required to do so.
8. The Plan should notify the liable third party's counsel of its lien.
9. If the Plan seeks substantial reimbursement expenses, it may want to assert its subrogation rights and retain its own attorney to intervene in the case against liable third party.
10. The Plan should include an offset of benefits provision in the event the participant recovers from a liable third party but does not reimburse the Plan.

METZ LEWIS BRODMAN MUST O'KEEFE
ATTORNEYS AT LAW