Nos. 10-1074, 10-1131

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEBBIE MCCRAVY,

Plaintiff-Appellant/Cross-Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant

ON APPEAL FROM THE DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Cases--(continued):

Federal Cases--(continued):

State Cases:

Federal Statutes:

Federal Statutes--(continued):

Miscellaneous:

STATEMENT PURSUANT TO RULES 29 AND 35 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Petitioner Debbie McCravy seeks panel or en banc reconsideration of the panel decision in this case. The Secretary of Labor, who has primary authority for enforcing and administering Title I of ERISA, 29 U.S.C. §§ 1002(13), 1136(b), files this brief in support of McCravy's petition.

Relying on the Supreme Court's decisions in Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) and Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 206, 221 (2002), the panel concluded that section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), does not allow the court to surcharge MetLife for the life insurance proceeds that McCravy would have received but for its alleged fiduciary breaches. McCravy v. Metropolitan Life Ins. Co., --F.3d--, No. 10-1074, 2011 WL 1833873, at **2-*4.

On the same day that the panel issued its decision, however, the Supreme Court decided CIGNA Corp. v. Amara, No. 09-804, 2011 WL 1832824 (S. Ct. May 16, 2011). Contrary to the panel's decision holding that surcharge is unavailable, the Supreme Court's decision in CIGNA states that surcharge is an available remedy under section 502(a)(3). Id. at *13-*14. The CIGNA opinion explains that surcharge, or monetary compensation by a fiduciary for loss resulting from the fiduciary's breach of duty, was a "traditional equitable remed[y]" (id. at *12) and thus falls within the "category of traditionally equitable relief" (id. at *13)

authorized by section 502(a)(3). The opinion further explains that Mertens and Great-West do not foreclose "make-whole" "monetary 'compensation'" from qualifying as "appropriate equitable relief" under section 502(a)(3) when the relief is awarded for the breach of a duty by an ERISA fiduciary. CIGNA, 2011 WL 1832824, at *13. The panel's decision is thus incompatible with CIGNA, and rehearing or rehearing en banc should be granted to align the law in this Circuit with the recent holding of the Supreme Court. See Fed. R. App. P. 35(b)(1)(A).

ARGUMENT

AS CIGNA NOW MAKES CLEAR, APPROPRIATE EQUITABLE RELIEF UNDER ERISA SECTION 502(a)(3) INCLUDES RELIEF THAT MAKES INJURED PARTICIPANTS AND BENEFICIARIES WHOLE AND THUS PERMITS THE COURT TO SURCHARGE METLIFE FOR THE INSURANCE PROCEEDS THAT MCCRAVY WOULD HAVE RECEIVED BUT FOR THE ALLEGED BREACHES OF FIDUCIARY DUTY

The panel, expressly relying on the Supreme Court's decision in Great-West, held that "the district court did not err in limiting McCravy's damages to the premiums withheld by MetLife." 2011 WL 1833873, at *3. The panel reasoned that because McCravy was "not the true owner of any funds in MetLife's possession," she was not seeking equitable restitution from MetLife within the meaning of Great-West, and was likewise not entitled to sanction MetLife under section 502(a)(3). Id. Moreover, the panel noted that its "resolution of [the surcharge] issue conforms to that of several other circuits" that have likewise

disallowed the recovery of benefits that a plan participant or beneficiary would have been paid but for the breach of fiduciary duty. Id. at *4 (citations omitted). Contrary to the conclusion of these courts and of the panel, the Supreme Court's CIGNA decision now makes clear that suits against fiduciaries for monetary redress of fiduciary breaches are fully consistent with the Supreme Court's decisions in Mertens and Great-West, are permitted as "appropriate equitable relief" under ERISA section 502(a)(3).

In CIGNA, plan participants in a defined benefit pension plan challenged the conversion of their plan to a "cash balance" plan, arguing that faulty information that CIGNA provided with regard to the conversion adversely affected their pension benefits. 2011 WL 1832824, at * 3. The district court found that the disclosures violated CIGNA's duties as a fiduciary under ERISA, and that the plaintiffs were "likely harmed" by these violations. Id. at *3, *8. Consequently, it ordered the plan reformed and benefits paid under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and it declined to decide whether it could provide the same relief under section 502(a)(3). Id. at *3, *11. After the Second Circuit affirmed, the Supreme Court granted certiorari to decide "whether a showing of 'likely harm' is sufficient to entitle plaintiffs to recover benefits based on faulty disclosures." Id. at *9. Thus, the dispute in the case was about "the appropriate legal standard in

determining whether members of the relevant employee class were injured." Id. at *14.

The Supreme Court resolved this dispute in CIGNA by concluding that the provision upon which the district court relied, "namely, the provision for the recovery of plan benefits," section 502(a)(1)(B), did not provide any authority to impose this remedy, which essentially rewrote the plan. CIGNA, 2011 WL 1832824, at *9-*11. The Court instead found such authority in section 502(a)(3), observing that "[t]he district court strongly implied, but did not directly hold, that it would base its relief upon [502(a)(3)] were it not for (1) the fact that [§ 502(a)(1)(B)] provided sufficient authority; and (2) certain cases from this Court that narrowed the application of the term 'appropriate equitable relief[.]" CIGNA, 2011 WL 1832824, at *11 (citing, Mertens and Great-West). Having determined that section 502(a)(1)(B) did not provide the authority, and thus resolved the first concern, the Court found the district court's concern about the limitations on 502(a)(3) remedies "misplaced." Id.

Addressing section 502(a)(3), the Court explained that, because CIGNA involved "a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of the trust[,] it was the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law." 2011 WL 1832824, at *12. The Court then

described how the injunctions and other relief entered by the district court resembled "traditional equitable remedies," including reformation, estoppel, and, as most relevant here, surcharge, which is "a form of monetary 'compensation' for a loss resulting from a trustee's breach or to prevent the trustee's unjust enrichment." Id. at *13 (citations omitted). It further explained:

> The surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary. Thus, insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in Mertens, is analogous to a trustee makes a critical difference. In sum, contrary to the district court's fears, the types of remedies the court entered here fall within the scope of the term 'appropriate equitable relief' in § 502(a)(3).

Id. (citations omitted). Moreover, in answering the primary question on which it had granted certiorari – the applicable standard in determining whether the members of the participant class had been harmed – the Court held that "although a fiduciary can be surcharged under § 502(a)(3) only upon a showing of actual harm," (id. at *15), "it is not always necessary to meet the more rigorous standard implicit in the words 'detrimental reliance.'" Id. Thus, the Court's central holding, upon which it remanded "for further proceedings consistent with this opinion," id., was that section 502(a)(3) allows for equitable remedies such as surcharge without a showing of detrimental reliance. CIGNA, 2011 WL 1832824, at *15 ("We are asked about the standard of prejudice. And we conclude that the standard of

prejudice must be borrowed from equitable principles, as modified by the obligations and injuries identified by ERISA itself").[1]

As a fiduciary under an ERISA plan, MetLife was charged with the highest, trust-law based duties of loyalty and care. Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982). In this case, McCravy claims that she would have converted the ERISA group life insurance coverage to individual coverage, as allowed under the plan, if MetLife had not breached its duties as an ERISA fiduciary by misleading her as to coverage by accepting premiums and failing to notify her in a timely manner that her daughter was no longer eligible for coverage under the ERISA policy. Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 381 (4th Cir. 2001) ("an ERISA fiduciary that knows or should know that a beneficiary labors under a material misunderstanding of plan benefits that will

[1] Because the Court's discussion of surcharge under section 502(a)(3) was essential to answer this question of the applicable standard of harm for the members of the participant class, it is not dicta that lower courts are free to ignore, as the concurring Justices would have it. See CIGNA, 2011 WL 1832824, at *18 (Scalia, J., concurring in judgment). But even if the discussion of surcharge is viewed as dicta, it is ordinarily the duty of a lower court to follow recent Supreme Court dicta. See United States v. Fareed, 296 F.3d 243, 247 (4th Cir. 2002) (following "the *dictum* endorsed by six justices" of the Supreme Court), citing Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) (federal court of appeals is "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements"); Laber v. Harvey, 438 F.3d 404, 418 n.12 (4th Cir. 2006) (acknowledging that "it is arguable" that the broad statements in two Supreme Court cases is dicta, but concluding that "whether that rule was dicta or holding is close enough to require us to overrule, instead of distinguish" earlier Fourth Circuit cases).

inure to his detriment cannot remain silent-especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions"). As remedy for this fiduciary breach, she seeks from MetLife payment of the amount of the insurance proceeds she would have been entitled to had she been timely informed by MetLife of her right to convert to an individual policy. The panel's conclusion that ERISA's equitable remedies provision allows for no remedy in these circumstances other than the return of premiums for the loss of life insurance coverage that she suffered based on MetLife's fiduciary breaches cannot be squared with the Supreme Court's decision in CIGNA recognizing just such a remedy.

As CIGNA explains, equity courts traditionally and indeed exclusively had the power to surcharge a fiduciary for losses resulting from "a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary." 2011 WL 1832824, at *13, citing Restatement (Second) of Trusts § 201(1957); John Adams, Doctrine of Equity: A Commentary on the Law as Administered by the Court of Chancery 59 (7th Am. Ed. 1881); 4 John Norton Pomeroy & Spencer W. Symons, Equity Jurisdiction § 1079 (5th ed. 1941); 2 Joseph Story, Commentaries on Equity Jurisdiction §§ 1261, 1268 (12 ed. 1877). Moreover, equity courts surcharged fiduciaries for breaches very similar to the one at issue in this case. See, e.g., Marriott v. Kinnersley, Tamlyn 470, 48 Eng. Rep. 187, 188 (High Ct. Ch. 1830) (trustee charged with losses resulting from failure to

pay premium on life insurance policy); Appeal of the Harrisburg Nat'l Bank, 84 Pa. 380, 383 (1877) (court of equity may surcharge administrator of estate with life insurance policy proceeds that the administrator negligently lost). See also Brown v. Aventis Pharmaceuticals, Inc., 341 F.3d 822, 827-28 (8th Cir. 2003) (upholding an order for the employer to obtain a life insurance certificate as appropriate equitable relief under section 502(a)(3) where the terminated employee was not told of her COBRA conversion rights). And in these cases and others, depending on the nature of the breach, the monetary recovery could be paid to the beneficiary rather than to the trust itself. See, e.g., Gates v. Plainfield Trust Co., 194 A. 65 (N.J. 1937) (per curiam) (upholding decree that required executor to pay income to life beneficiary); Kendall v. DeForest, 101 F. 167, 170 (2d Cir. 1900) (upholding decree that held trustee liable to beneficiaries for income deficiency in annuity fund); United States v. Mitchell, 463 U.S. 206, 226 (1983) (relying on trust law in holding that individual Indian beneficiaries could sue for monetary compensation for losses allegedly caused by government's mismanagement of timber). All of this is in keeping with the "'distinctively equitable'" remedies developed by equity chancellors "that were 'fitted to the nature of the primary right' that they were intended to protect." CIGNA, 2011 WL 1832824, at *12 (citations omitted).

Like the district court and numerous other courts, the panel construed dicta in the Supreme Court's decisions in Mertens and Great-West to foreclose suits

under section 502(a)(3) for monetary redress of losses caused by a breach of fiduciary duty unless such relief amounts to equitable restitution as in Great-West. See Goeres v. Charles Schwab & Co., 220 Fed. Appx. 663 (9th Cir. 2007); Todisco v. Verizon Communications, Inc., 497 F.3d 95, 99-100 (1st Cir. 2007); Coan v. Kaufman, 457 F.3d 250, 262-64 (2d Cir. 2006) (reversing prior holding recognizing surcharge in Strom v. Goldman, Sachs & Co., 202 F.3d 138, 144 (2d Cir. 1999)); Calhoon v. TWA, 400 F.3d 593, 596-98 (8th Cir. 2005); Callery v. United States Life Ins. Co., 392 F.3d 401, 404-09 (10th Cir. 2004); Helfridge v. PNC Bank, Ky., Inc., 267 F.3d 477, 481-82 (6th Cir. 2001). What these cases failed to recognize is the "critical difference" between fiduciaries and non-fiduciaries. CIGNA, 2011 WL 1832824, at *13 ("insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in Mertens, is analogous to a trustee makes a critical difference").[2]

[2] It is no less true in this case than in CIGNA that MetLife is analogous to a common-law trustee, and the Supreme Court has drawn on trust-law principles in defining the scope of the fiduciary's duties under ERISA (and a court's review of the fiduciary's actions), as well as in determining the scope of ERISA's equitable relief provision for both pension and welfare plans. See Central States, Southeast & Southwest Areas Pension Fund v. Central Transp. Inc., 472 U.S. 559, 570 (1985) (describing ERISA duties of fiduciaries of pension plan); Sereboff v. Mid-Atlantic Medial Servs., Inc., 547 U.S. 356, 361-62 (2006) (suit by fiduciary of health insurance plan). See also Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105,111 (2008) (court must "analogize a plan administrator [as a fiduciary of a life insurance plan] to the trustee of a common-law trust").

Thus, CIGNA now makes clear that this reading of Supreme Court precedent is in error.

In so doing, the Supreme Court in CIGNA has corrected the narrow reading of section 502(a)(3) mistakenly adopted by a number of courts since Mertens and Great-West, which has led numerous courts, including the district court in this case, to decry the irrational and unjust results that have followed. JA 159; Aetna Health Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (noting the "rising judicial chorus urging" the correction of "an unjust and increasingly tangled ERISA regime")(citation omitted); Eichorn v. AT&T Corp., No. 05-5461, 2007 WL 1574869, at *1-*2 (3d Cir. May 31, 2007) (Ambro, J., concurring in denial of petition for rehearing en banc); Lind v. Aetna Health Inc., 466 F.3d 1195, 1200 (10th Cir. 2006); Pereira v. Farace, 413 F.3d 330, 345-346 (2d Cir.2005)(Newman, J., concurring); Cicio v. Does 1-8, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part), vacated, 542 U.S. 933 (2004); DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 467 (3d Cir. 2003) (Becker, J., concurring). Now participants and beneficiaries need no longer be left "betrayed without a remedy." Colleen E. Medill, Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3), 39 J. Marshall L. Rev. 827, 852 (2006); see, e.g., Amschwand v. Spherion Corp., 505 F.3d 342 (5th Cir. 2007) (no remedy for loss of insurance coverage by widow whose dying husband was

misinformed after numerous inquiries that he was fully covered under the policy). See also CIGNA, 2011 WL 1832824, at *12 (relying on the equitable maxim that "'[e]quity suffers not a right to be without a remedy'") (citation omitted). The CIGNA ruling thus restores fiduciaries to their central role of responsibility, see Mertens, 508 U.S. at 262; 29 U.S.C. § 1002(21)(A), and again ensures that ERISA function as Congress intended, to provide "appropriate remedies" and "ready access to the Federal courts" to prevent and to redress violations of those fiduciary duties. 29 U.S.C. § 1001(b). This Court should rehear this case and follow suit.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court grant panel or en banc rehearing of the matter, vacate the decision of the panel and reverse the decision of the district court.

Respectfully submitted,

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I hereby certify that on May 31, 2011, I electronically filed the foregoing Brief for the Secretary of Labor as Amicus Curiae In Support of Petition for Rehearing or Rehearing En Banc, with the Clerk of the Court of Appeals for the Fourth Circuit by using the Court's electronic filing system, which will send notice to the following registered users:

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Dated: May 31, 2011

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I certify that the foregoing brief complies with the type-volume limitation set forth in Fed. R. App. P. 32 (a) (7) (C) (i). The brief contains 2801 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a) (7) (B) (iii). The brief was prepared by using Microsoft Office Word, 2003 edition.

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