No. 14-723

IN THE

Supreme Court of the United States

ROBERT MONTANILE,

Petitioner,

v.

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The petition in this case was granted to resolve an important question regarding the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). That question is:

Does a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seek "equitable relief" within the meaning of ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), if the fiduciary has not identified a particular fund that is in the participant's possession and control at the time the fiduciary asserts its claim?

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The opinion of the Eleventh Circuit in this case is unreported. Pet. App. 1-18. The district court's order granting summary judgment is also unreported. Pet. App. 19-45.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 2014. Pet. App. 1. The petition for writ of certiorari was filed on December 16, 2014, and this Court granted the petition on March 30, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, as amended, provides in relevant part:

(a) Persons empowered to bring a civil action

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; . . .

INTRODUCTION

In 2008, Petitioner Robert Montanile was severely and permanently injured by a drunk driver. Mr. Montanile recovered money in tort, and thereafter needed to use the proceeds for legal fees, daily living, and the care of his young daughter. After the money was spent, the fiduciaries of his health plan, the Board of Trustees of the National Elevator Industry Health Benefits Plan ("Respondent"), sued Mr. Montanile to recoup $121,044.02 it had paid for his medical expenses.

The lower courts entered and affirmed a $121,044.02 judgment of personal liability against Mr. Montanile to be satisfied out of any assets he possesses. At issue here is whether such a judgment is available under section 502(a)(3) of ERISA. The answer is no.

Section 502(a)(3) of ERISA authorizes "equitable relief." Under this Court's precedents, that phrase has a specific meaning: if the relief sought was "typically available" in pre-merger equity courts, it is available under ERISA. Otherwise, it is not. Historically, equitable relief was about the giving or enforcing of rights as to particular things—a parcel of land, a piece of personal property, a specific fund. Legal relief, in contrast, was about the recovery of money out of a defendant's general assets. Here, there is no thing against which Respondent is enforcing a right; the tort proceeds are gone. What Respondent instead seeks to impose is personal liability for a contractual obligation to pay money. That is not equitable relief. It is a claim for damages—the most classic form of legal relief.

The equitable remedy that Respondent requested in its complaint, an equitable lien by agreement, does not change the legal nature of Respondent's actual claim.

Unlike a true contract, an equitable lien by agreement is limited in effect: it only has power over a specific thing and its traceable products. It cannot reach other assets of the defendant. Yet that is precisely what Respondent asks this Court to sanction.

Respondent prevailed below by painting the strictures of equity as unpalatable. Such policy arguments, of course, should be directed at Congress. But Respondent's predictions of woe—that tort proceeds will be spent to stymie plans—are also wrong: Professional responsibility rules generally require attorneys to preserve funds on which a lien has been asserted. A preservation agreement provides further protection. Fiduciaries can seek an injunction to prevent dissipation. And, of course, proceeds converted to traceable products are always recoverable. Put simply, ERISA plans will get their money, unless they sleep on their rights.

At the same time, it is not mawkish to observe that these reimbursement cases are about monies paid to provide medical care for injured workers. Repose matters for all defendants, but particularly for them. Where a plan acts promptly and forthrightly, a participant can understand the claim and know with some certainty when it will be resolved. Respondent's rule, which permits secondary litigation years later, rewards delay and imposes emotional uncertainty on victims who should be spared that burden.

Reversal is warranted.

STATEMENT OF THE CASE

A. Factual Background

On December 1, 2008, Robert Montanile was seriously injured when a drunk driver ran a stop sign and struck his automobile. Pet. App. 6; JA 23 (¶2); JA 75 (¶2). Mr. Montanile underwent lumbar spinal fusion surgery and other treatment to alleviate his pain and loss of function. Pet. App. 6; JA 75-76 (¶3). He requires ongoing medical care and continues to suffer pain and physical limitations. JA 75-76 (¶¶3-4).

Mr. Montanile was a participant in an ERISA-governed welfare plan administered by Respondent. Pet. App. 1-2; JA 23 (¶1).[1] As required by ERISA, "[t]he Plan paid Montanile's initial medical expenses of $121,044.02." Pet. App. 6; JA 23 (¶3).

Mr. Montanile hired a personal injury lawyer to sue the drunk driver. Pet. App. 6; JA 76 (¶5). After months of litigation, he obtained a $500,000 settlement. Pet. App. 6; JA 57-58 (¶5); JA 76 (¶5). Out of that settlement, Mr. Montanile paid his personal injury lawyers a $200,000 contingency fee and $63,788.48 in expenses. Pet. App. 6.

At that point, $236,211.52 of the settlement remained. But most of those funds were held in a client trust account pending the resolution of claims asserted by various third parties. JA 76 (¶5); JA 78-80 (Exh. A) (identifying $152,597.76 of asserted claims for which funds were being preserved). The largest asserted claim was that of

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[1] The Plan is a large multi-employer arrangement with approximately $1 billion in assets and more than 500 participating employers. *See* National Elevator Industry Health Benefit Plan, 2009 Form 5500 Annual Return/Report of Employee Benefit Plan (filed with the Dep't of Labor on Oct. 13, 2010), *available at* http://efast.dol.gov/portal/app/disseminate?execution=e1s1.

Respondent. JA 79 (indicating $108,607.07 for "Blue Cross Blue Shield/Health Care Lien").[2]

As a result of these third party claims, less than $90,000 was available for Mr. Montanile, "the custodial single parent for [his] 12-year old daughter," JA 77 (¶7) to use "in supporting [his] daughter and in maintaining [their] home." JA 76 (¶6). *See also* JA 76 (¶6) ("After payment of attorney fees and costs, satisfaction of liens, medical expenses, and other expenses, the amount remaining from the settlement as compensation for my injuries was approximately $90,000.").[3]

Indeed, it is beyond dispute that Mr. Montanile, seriously injured and permanently impaired, was not "made whole" by his tort settlement. JA 75-76 (¶3) ("I have been given a permanent partial impairment rating of 25%"); JA 76 (¶5) ("The amount recovered was not sufficient to compensate me for past and future medical expenses, past and future lost wages, losses associated with other out-of-pocket expenses, or compensation for my intangible losses.").

Concerned about his future ability to support himself and his daughter, Mr. Montanile retained ERISA attorney Brian S. King "to assist him in addressing [Respondent's] claim for reimbursement" for which

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[2] At the time, Mr. Montanile and his counsel believed the Plan had paid $108,607.07 of medical expenses. JA 78-80 (Exh. A). Mr. Montanile ultimately learned, however, that the Plan had paid $121,044.02. Compl. 2, July 11, 2012, ECF No. 1.

[3] *See also* JA 79-80 (Exh. A) (indicating that a total of $88,809.28 was made available to Mr. Montanile: $58,884.39 was advanced on April 29, 2011, $1,628.89 was advanced on July 1, 2011, and $28,296.00 were the "Final Funds Available to Client").

$108,607.07 was being preserved. JA 23 (¶6); JA 35 (¶3). Mr. King immediately endeavored "to verify the validity" and amount of Respondent's asserted claim. JA 35 (¶4).[4]

On June 6, 2011, Mr. King wrote to Respondent's counsel, Kejo Bryan-Carby. JA 68-74. Mr. King requested documents necessary to verify the validity and amount of the Plan's reimbursement claim, including "[a]ll documents under which the Plan was operated from January 1, 2008[] to the present." JA 70. And Mr. King specifically "reserve[d] the right to assert defenses based on the common fund doctrine and the made whole rule." JA 74.[5]

"Thereafter King and [Ms.] Bryan-Carby[] exchanged a series of letters in which King requested information and documents to verify the validity of the subrogation claim." JA 24 (¶7). "Eventually the Plan sent to King various documents including the National Elevator Bargaining Association Agreement [and] the Restated

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[4] *See also* JA 72 (requesting "a detailed statement of all monies paid on behalf of Mr. Montanile which you claim form any part of your claim for reimbursement, along with copies of all cancelled checks proving payment for those medical expenses.").

[5] Mr. King correctly observed that "*Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), left open the question of whether the made whole rule must be taken into account in evaluating what is 'appropriate equitable relief' authorized under 29 U.S.C. § 1132(a)(3)." JA 74 (citing *Sereboff*, 547 U.S. at 368, n.2). His position would ultimately be rejected by this Court, but not until April 16, 2013, in *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013) (holding that plan terms can override equitable doctrines).

Agreement and Declaration of Trust . . .” as well as the operative summary plan description (“SPD”). JA 24 (¶9).

After carefully reviewing the documents provided by Ms. Bryan-Carby, Mr. King reached the conclusion that the Plan did not include an enforceable subrogation or reimbursement provision because the language relied upon by Respondent was found only in the SPD. JA 66-67 (¶¶1-3). *See also* Brief for the Appellant at 7-11, *Board of Trustees of the Natl. Elev. Industry Health Benefit Plan v. Montanile*, 593 F. App’x 903 (11th Cir. 2014) (No. 14-11678) 2014 WL 2556236, at *7 (discussing each of the documents provided to Mr. King by Ms. Bryan-Carby); *id.* at 15-28 (explaining and defending the precise conclusion reached by Mr. King in late 2011—*i.e.*, that a reimbursement provision found *only* in the SPD of an ERISA welfare plan is not enforceable in light of *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011)).[6]

On November 30, 2011, Mr. King wrote Respondent’s counsel and “informed her that he did not believe the governing plan documents provided the Plan with any subrogation rights and asked that she produce a governing plan document containing language that entitled the Plan to assert its subrogation claim.” JA 24 (¶10). In that letter, Mr. King “indicated that if the Plan

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[6] Several courts have reached the same conclusion. *See, e.g.*, *Mull v. Motion Picture Industry Health Plan*, 51 F.Supp.3d 910, 918-25 (C.D. Cal. Sept. 30, 2014) (concluding, based on post-*Amara* Ninth Circuit authority, that “[Participants and Beneficiaries] Are Entitled to Judgment Because No Plan Document Contains a Third-Party Recovery Reimbursement Provision, Only the Summary Plan Description (‘SPD’) Does”). The courts in this case, however, disagreed. *See* Pet. App. 12-17 (court of appeals rejecting the position of Mr. Montanile on the “plan document” question); Pet. App. 25-30 (district court rejecting same).

did not respond by December 14, 2011, he intended to disburse the [disputed] settlement funds to Montanile." JA 24 (¶11).

On December 12, 2011, Respondent's counsel wrote back to Mr. King "maintain[ing the] position that the SPD, which contains subrogation language for the Plan, was the governing plan document." JA 24 (¶12). The Plan also made a settlement offer. JA 24-25 (¶12).

On December 13, 2011, Mr. King responded by letter "reiterat[ing] Montanile's position that the Plan was not entitled to any subrogation recovery because the SPD language was not based on any governing plan document language . . . ." JA 25 (¶13). He made a settlement counteroffer. JA 25 (¶13). "The Plan rejected Montanile's counteroffer and provided a final counteroffer of its own . . . stat[ing] that failure to accept its final offer would result in litigation." JA 25 (¶14); JA 35 (¶11).

On January 6, 2012, "King wrote and requested that if the Plan intended to litigate the matter, it do so within 14 days. He stated that he would release the funds to Montanile if he had not been served with the Plan's Complaint by January 20, 2012." JA 25 (¶15); JA 35 (¶12). "The Plan did not respond to the [January 6, 2012] letter and King's office disbursed the [approximately $100,000 in disputed settlement] funds to Montanile on February 2, 2012." JA 25 (¶16); JA 35 (¶13).

In the six months that followed, Respondent did not contact Mr. King or take any action against Mr. Montanile. *See* JA 25 (¶¶15-17); JA 35 (¶¶12-14). *See also* Pet. App. 34 (district court noting that "[t]here is . . . no dispute that

Plaintiff filed suit against Defendant six months after the parties exchanged final settlement offers").

B. Procedural History

On July 11, 2012, Respondent sued Mr. Montanile under 29 U.S.C. § 1132(a)(3) seeking reimbursement of the benefits that the Plan paid to his medical providers. Pet. App. 7. Section 502(a)(3) of ERISA authorizes a fiduciary to seek "appropriate equitable relief" to "enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). Respondent did not seek any provisional relief to preserve the settlement money.

Relying on *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), Respondent sought reimbursement in the form of an equitable lien by agreement to "enforce . . . the terms of the [National Elevator Plan]." Brief for the Appellant at 12, *Montanile*, 593 F. App'x 903 (No. 14-11678). But by the time the lawsuit was filed, Mr. Montanile was no longer "in actual or constructive possession of any but a small portion of the proceeds realized from the settlement of his claims." JA 57 (¶14).

After exchanging Rule 26(a) disclosures, the parties cross-moved for summary judgment. Brief for the Appellant at 12-13, *Montanile*, 593 F. App'x 903 (No. 14-11678). Mr. Montanile argued that the governing plan documents did not give the Plan any reimbursement rights. JA 27-30. As Mr. Montanile explained:

> The Bargaining Association Agreement and the Restated Agreement and Declaration of Trust are the only documents that were negotiated between the employers and the employee union. Those documents establish the rights and obligations between the

> parties. They are silent about the subrogation and reimbursement rights for the Plan. . . . [B]y definition, the SPD is a summary of other governing plan documents. The Plan may not create subrogation and reimbursement rights out of thin air, unilaterally place them in the SPD, and insist that this Court enforce those rights.

JA 27-28. Mr. Montanile also sought an award of attorneys' fees against Respondent on the grounds that it acted culpably in delaying suit for months after the money had been disbursed. JA 30-33.

In opposing Respondent's motion for summary judgment, Mr. Montanile renewed his argument that the SPD did not create a valid reimbursement right. JA 59-63. But he *also* argued that the reimbursement it sought did not constitute "appropriate equitable relief" because the funds on which it wished to assert an equitable lien by agreement had been dissipated. Pet. App. 8. In his view, the lawsuit was particularly unfair because Respondent had "failed to act responsibly and promptly in protecting the reimbursement interests of the Plan." JA 64-65. Not only did Respondent wait six months before filing suit, but it did *nothing* to prevent distribution of the funds to Mr. Montanile or to preserve them after disbursement. JA 65.

Relying on affidavit testimony attached by Respondent to its reply brief, the district court held that the reimbursement provision of the SPD was enforceable because it did not conflict with the Declaration of Trust and the Bargaining Association Agreement, which were silent on reimbursement. Pet. App. 26-28. And it distinguished *Amara* on the grounds that the SPD "in this case did not inaccurately describe plan information or add new inconsistent terms." Pet. App. 29.

With respect to whether Respondent sought "appropriate equitable relief" in demanding a judgment against Mr. Montanile's general assets, the district court acknowledged that "*Sereboff* did not address the issue of a beneficiary's dissipation of assets because the funds there were placed in a separate account throughout the duration of the case" and that the "Eleventh Circuit has similarly not had occasion to address the issue of dissipation." Pet. App. 40. Nevertheless, believing that it was following "the overwhelming majority of circuit courts," the district court granted summary judgment to Respondent. Pet. App. 40.

Mr. Montanile timely appealed. Pet. App. 9. He argued that the Reimbursement Provision of the SPD is not an enforceable term of the Plan because a single document cannot qualify as both the SPD required by 29 U.S.C. § 1022 and the "written instrument" required by 29 U.S.C. § 1102. Brief for the Appellant at 17-21, *Montanile*, 593 F. App'x 903 (No. 14-11678). And even if a single document could theoretically serve both functions, the SPD at issue here did not as a factual matter. *Id.* at 21-28.

Mr. Montanile also argued that 29 U.S.C. § 1132(a)(3) authorizes equitable relief only to the extent available at common law. *Id.* at 15. At common law, an equitable lien by agreement could be enforced against specific property within the current possession and control of the debtor but not against his general assets. *Id.* Because Mr. Montanile's settlement fund was almost entirely dissipated in good faith prior to the initiation of this lawsuit, the magistrate judge erred in granting summary judgment to Respondent and imposing personal liability on Mr. Montanile. *Id.*

After the parties had fully briefed Mr. Montanile's appeal, a divided three-judge panel of the Eleventh Circuit in *AirTran Airways, Inc. v. Elem.* Pet. App. 46-76, decided the question presented and rejected the position advocated by Mr. Montanile and endorsed by the United States. Pet. App. 53-54. Judge Martin dissented. *See* Pet. App. 65 (Martin, J., dissenting) ("Supreme Court precedent makes clear that a plaintiff proceeding in equity to recover funds from a defendant must, at a minimum, show that those funds are presently in the defendant's possession.").

Shortly thereafter, a different Eleventh Circuit panel heard oral argument on Mr. Montanile's appeal. Less than one week after hearing oral argument, that panel rejected Mr. Montanile's arguments and affirmed the district court. Pet. App. 2. Citing circuit precedent from 1990, the panel concluded that a single document can serve as both the written instrument and the SPD, and that the SPD in this case filled both roles. Pet. App. 12, 17.[7]

The panel acknowledged that its holding was in tension with *Amara*. Pet. App. 14 ("[D]icta from the Supreme Court is not something to be lightly cast aside. . . ."). Yet it distinguished *Amara* on the narrow grounds that in that case, this Court "had no occasion to

[7] The panel's factual determination rested on its unwillingness to hold that the multibillion dollar Plan had violated ERISA by failing to enact a written instrument at all: "[I]f the enforceable terms of the Plan were limited to those found in the Trust Agreement, there would be *no* governing document that specifies Plan participants' rights or obligations regarding benefits. . . . We refuse to embrace such an outcome." Pet. App. 17.

consider whether the terms of a summary plan description are enforceable where it is the only document that 'specif[ies] the basis on which payments are made to and from the plan, as required by § 1102(b)." Pet. App. 15.

The panel also noted that Mr. Montanile's equitable relief argument "is now foreclosed by [the] recent holding in [*AirTran*]." Pet. App. 11. It therefore concluded that "the Board can impose an equitable lien on Montanile's settlement even if dissipated . . . ." Pet. App. 11.

On December 16, 2014, Mr. Montanile timely petitioned this Court for a writ of certiorari. *Board of Trustees of the National Elevator Industry Health Benefit Plan v. Montanile*, 593 F. App'x 903 (11th Cir. 2014), *petition for cert. filed*, 2014 WL 7242807 (U.S. Dec. 16, 2014) (No. 14-723). The petition presented only the "equitable relief" question.[8]

SUMMARY OF ARGUMENT

If *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) remains good law, Respondent's claim must fail. As this Court wrote then:

> Here, the funds to which [the Plan] claim[s] an entitlement under the Plan's reimbursement provision—the proceeds from the settlement of [the beneficiaries'] tort action—are not in [the beneficiaries'] possession. . . . The basis for [the Plan's] claim is <u>not</u> that [the beneficiaries] <u>hold</u> particular funds that, in good conscience,

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[8] Although the "plan document" question itself has confounded lower courts (*supra* 7 n.6), Petitioner elected to submit a single-question petition in order to maximize the likelihood of further review.

> belong to [the Plan], but that [the Plan is] contractually entitled to *some* funds for benefits that they conferred. The kind of restitution that [the Plan] seek[s], therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon [the beneficiaries].

Great-West, 534 U.S. at 214 (underlining added) (italics in original). Because seeking "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money" is legal relief, this Court held that the fiduciary's claims in *Great-West* were not cognizable under section 1132(a)(3) of ERISA. *Id.* at 213, 218. Nothing about this case requires, or permits, a different result.

Like the fiduciary in *Great-West*, Respondent wants to enforce a contractual reimbursement provision in its ERISA plan but *not* by equitably attaching specific funds in the possession of a plan participant. Like the fiduciary in *Great-West*, what Respondent seeks is a personal money judgment. And like the fiduciary in *Great-West*, Respondent is not entitled to such a remedy.

As such, Respondent's litigation strategy has been two-fold: (i) to assert that the "equitable lien by agreement" remedy endorsed by this Court in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), somehow trumps the core teaching of *Great-West* and (ii) to offer policy arguments urging de facto abrogation of this Court's longstanding, but admittedly controversial, interpretation of 29 U.S.C. § 1132(a)(3).[9] That strategy should not succeed.

In *Sereboff*, this Court recognized that a fiduciary may seek an equitable lien by agreement pursuant to 29 U.S.C. § 1132(a)(3). But *Sereboff* said nothing about the dispositive issue here: is such a lien enforceable when the particular funds to which the lien attached are not in the possession or control of the defendant? The answer is no. Indeed, it is axiomatic that liens follow specific things, not specific persons. As the First Restatement on Restitution put it: "An equitable lien can be established and enforced only if there is some property which is subject to the lien. . . . Where, however, the property subject to the equitable lien can no longer be traced, the equitable lien cannot be enforced." Restatement (First) of Restitution § 161 cmt. e, at 652 (1937).

Virtually conceding that point, Respondent appears to offer a newly minted rationale in support of the decision below: the "deficiency decree." Brief of Respondent at 19-20, *Board of Trustees of the Natl. Elev. Industry Health Benefit Plan v. Montanile*, No. 14-723 (filed Feb. 19, 2015) ("Orange Br."). But this new position cannot justify affirmance. It is well-settled that the deficiency judgment is a legal remedy that might be awarded by equity courts in particular circumstances. That a pre-merger court of equity could and did award such a remedy does not make

[9] *See, e.g.*, John H. Langbein, *What ERISA Means By 'Equitable': The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 Colum. L. Rev. 1317, 1361 (2003) ("It was Justice Scalia, or rather, the five-member Supreme Court majority assembled for his opinions, and not Congress, which gave the term [appropriate equitable relief] the unnatural and dysfunctional meaning propounded in *Mertens* and *Great-West*.").

that remedy equitable—any more than a jockey driving a car makes it a horse. Indeed, this Court expressly rejected the very premise of Respondent's argument over twenty years ago in *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993) (holding that "equitable relief" does *not* mean "whatever relief a court of equity is empowered to provide in the particular case at issue."). In any event, Respondent's new position would—at a minimum—necessitate reversal and remand to litigate its applicability on the merits.

With all due respect, Petitioner suggests that the rejection of his position is not the result of analysis of pre-merger equity practice; instead, it is the result of the lower courts' acceptance of policy arguments advanced by fiduciaries such as Respondent. But, as this Court has repeatedly noted, those arguments should be directed at Congress. And, in any event, they are wrong. The rule advanced by Respondent is unnecessary, overbroad, and strikes a poor balance between competing goals of ERISA. It is neither equitable nor sensible.

ARGUMENT

I. As *Great-West* Held: "Personal Liability . . . for a Contractual Obligation to Pay Money" Is Not "Equitable Relief" Under 29 U.S.C. § 1132(a)(3).

Two decades ago, this Court first interpreted the phrase "equitable relief" in 29 U.S.C. § 1132(a)(3). *See Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). The Court held that the plaintiffs in that case did not seek "equitable relief" because the objective of their lawsuit was to recover compensatory damages—not "a remedy traditionally viewed as 'equitable.'" *Id.* at 255.

In deciding *Mertens*, this Court rejected the position advanced by the United States that "equitable relief" meant "whatever relief a court of equity is empowered to provide in the particular case at issue," even while acknowledging that the phrase in isolation could bear that meaning. *Id.* at 256. Rather, the Court held that by choosing the phrase "equitable relief," Congress intended to create a private right of action that allowed only the recovery of "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* (emphasis in original).

Although *Mertens* established the "typically available in equity" standard, it applied that standard in a particular setting: a lawsuit brought by ERISA plan participants and beneficiaries *against a* <u>*non*</u>*-fiduciary*. *Id.* at 250-51. It did not address what remedies would qualify as typically available in equity when sought by ERISA plan participants and beneficiaries in litigation *against a fiduciary*.[10] And it also did not address what remedies would qualify as typically available in equity when sought *by a fiduciary* in litigation against a plan participant. That question eventually reached the Court in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

In *Great-West*, this Court applied the *Mertens* standard and squarely held that the phrase "equitable relief" in 29 U.S.C. § 1132(a)(3) was not intended by Congress to authorize ERISA fiduciaries to seek judicial

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[10] That question eventually reached the Court in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), which held that, in a suit by a beneficiary against a fiduciary, section 1132(a)(3) authorized reformation, estoppel, and surcharge. *Id.* at 1879-80.

imposition of personal liability on plan participants for breach of contract. To this day, *Great-West*'s core holding remains good law. And for good reason. *Great-West*'s recognition of the limited judicial remedies available to fiduciaries in litigation against plan participants is based on an appreciation of the "balance between . . . competing goals that the text adopted by Congress has struck." *Mertens*, 508 U.S. at 263.

A. The text of 29 U.S.C. § 1132(a) does not authorize fiduciaries to seek imposition of personal liability on plan participants.

29 U.S.C. § 1132(a) contains ERISA's exclusive remedial provisions. When ERISA was enacted, there were six. *See* 29 U.S.C. §§ 1132(a)(1)-(6) (1974). Today, there are ten. *See* 29 U.S.C. §§ 1132(a)(1)-(10) (2012) (amended to include paragraphs (7) and (8) by Pub. L. No. 103-66, § 4301, 107 Stat. 376 (1993); amended to include paragraph (9) by Pub. L. No. 103-401, § 2, 108 Stat. 4172 (1994); amended to include paragraph (10) by Pub. L. No. 109-280, §§ 202(c)-221(c), 120 Stat. 884 (2009)).

Five of these provisions create a cause of action for plan participants and beneficiaries. *See* 29 U.S.C. §§ 1132(a)(1), (2), (3), (4), and (9). Three of these provisions create a cause of action for plan fiduciaries. *See* 29 U.S.C. §§ 1132(a)(2), (3), and (9). Six of these provisions create a cause of action for the Secretary of Labor. *See* 29 U.S.C. §§ 1132(a)(2), (4), (5), (6), (8), and (9). One of these provisions creates a cause of action for States. *See* 29 U.S.C. § 1132(a)(7). Two of these provisions create a cause of action for employers. *See* 29 U.S.C. §§ 1132(a)(8) and (10). And exactly *none* authorizes a plan fiduciary to seek imposition of personal liability on a plan participant for a contractual obligation to pay money.

Section 502(a)(1) of ERISA imposes liability for a contractual obligation to pay money, but it does not authorize litigation *by a fiduciary*. *See* 29 U.S.C. § 1132(a)(1)(B) (authorizing a participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."). Indeed, as this Court expressly noted in *Great-West*:

> Congress authorized "a participant or beneficiary" to bring a civil action "to enforce his rights under the terms of the plan . . . ." 29 U.S.C. § 1132(a)(1)(B) (1994 ed.). But Congress did not extend the same authorization to fiduciaries.

Great-West, 534 U.S. at 221.

Unlike section 502(a)(1), section 502(a)(2) of ERISA does authorize litigation by a fiduciary. *See* 29 U.S.C. § 1132(a)(2) (authorizing a civil action "by the Secretary, or by a participant, beneficiary *or fiduciary* for appropriate relief under section 1109 of this title") (emphasis added). But it does not authorize litigation *against a participant or beneficiary*—only against another fiduciary. And it imposes liability for the breach of statutory (not contractual) duties. *See* 29 U.S.C. § 1109(a) (A "fiduciary . . . who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . .").

Section 502(a)(3) of ERISA is the only provision in the statute that permits a fiduciary to sue a plan participant for breach of contract. *See* 29 U.S.C. § 1132(a)(3) (authorizing litigation by, *inter alia*, a fiduciary to obtain "appropriate equitable relief . . . to enforce . . . the terms of the plan").[11] But this Court made clear in *Great-West* that section 1132(a)(3) does *not* authorize a fiduciary to seek judicial imposition of a personal money judgment:

> 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. 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, as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty. And [m]oney damages are, of course, the classic form of *legal* relief.

Great-West, 534 U.S. at 210 (internal quotation marks and citations omitted) (alteration in original).

That core holding of *Great-West* reflects this Court's recognition of the fact that Congress knew how to authorize fiduciaries to seek money damages for breach of contract when it so desired. *See, e.g.*, 29 U.S.C. § 1451(a)-(b) ("A plan fiduciary . . . may bring an action for

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[11] The other provisions of ERISA that create a private right of action for fiduciary plaintiffs do not authorize litigation against plan participants or beneficiaries. *See* 29 U.S.C. § 1132(a)(9) (permitting litigation against an annuity provider); *id.* § 1451(a)-(b) (permitting litigation against an employer for withdrawal liability).

appropriate legal or equitable relief, or both" against an employer for withdrawal liability) (emphasis added). *See also Mertens*, 508 U.S. at 258 (expressly noting "the distinction Congress drew between . . . 'equitable' and 'legal' relief in the very same section of ERISA . . . .") (citing 29 U.S.C. § 1132(g)(2)(E)).[12]

B. Limiting the scope of relief available to fiduciaries in litigation against participants was a sensible balance struck by Congress.

Overpayments in cases such as this one, as well as in other settings like disability and pension, could result in the depletion of plan assets. That said, it is hard to believe that plan fiduciaries require the ability to seek judicial imposition of personal liability on participants in order to effectively protect plan assets.

Pension and disability cases will constitute the mine run of overpayment disputes, and in such cases there is clearly no need for the fiduciary to seek money damages against the participant. Fiduciaries regularly offset alleged overpayments against continued benefits. *See, e.g.*, *Northcutt v. Gen. Motors Hourly-Rate Employees Pension Plan*, 467 F.3d 1031 (7th Cir. 2006) (ERISA plan suspended future benefit payments when participants refused to repay the plan after receiving retroactive social

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[12] Section 502(g) of ERISA deals with "awards in actions involving delinquent contributions." 29 U.S.C. § 1132(g). In pertinent part, it provides that "[i]n any [successful] action under this subchapter by a fiduciary . . . to enforce section 1145 of this title . . . , the court shall award . . . , (A) the unpaid contributions, (B) interest on the unpaid contributions, (C) . . . liquidated damages . . . , (D) reasonable attorney's fees . . . , and (E) such other *legal or equitable relief* as the court deems appropriate." 29 U.S.C. § 1132(g)(2) (emphasis added).

security awards); *White v. Coca-Cola Co.*, 542 F.3d 848 (11th Cir. 2008) (ERISA plan reduced future benefits to recoup overpayments resulting from participants' receipt of social security disability benefits). And where that is not possible or desirable, fiduciaries can seek to recover the specific overpayment or its traceable product which remains in the hands of the participant or is in the hands of a third person who does not qualify as a bona fide purchaser for value. *See infra* 29-35 (explaining the proper enforcement of an equitable lien).[13] This will cover most tort recovery reimbursement cases as well.

On the other hand, permitting plan fiduciaries to seek judicial imposition of personal liability against participants risks converting participants into insurers of plan negligence. *See, e.g.*, Ellen Schultz, *'Overpaid' Pensions Being Seized*, Wall St. J. (Aug. 13, 2010), *available at* http://www.wsj.com/articles/SB10001424052748703723504575425421188456544. Moreover, as evidenced by this case, it incentivizes unnecessary delay in the exercise of plan reimbursement rights. *See supra* 6-9 (describing Respondent's conduct).

In sum, the decision to limit the relief available to fiduciaries in litigation against participants is sensible. And this Court was correct to recognize the "balance between . . . competing goals that the text adopted by Congress has struck." *Mertens*, 508 U.S. at 263.

[13] If (as in this case) there is a heated disagreement over the legitimacy and/or size of the plan's reimbursement claim, the fiduciary can–and should–seek an injunction to preserve the funds in dispute. That is precisely what occurred, for example, in both *Sereboff*, 547 U.S. at 360, and *McCutchen*, 133 S. Ct. at 1543.

II. The Decision Below Must Be Reversed and Remanded Because It Affirmed a Judgment of Personal Liability By Incorrectly Calling It an Equitable Lien.

At bottom, this case is no different from *Great-West*. Like the fiduciary in *Great-West*, Respondent wants to enforce a contractual reimbursement provision in its ERISA plan but *not* by equitably attaching specific funds in the possession of a plan participant. Like the fiduciary in *Great-West*, what Respondent seeks is a personal money judgment. And like the fiduciary in *Great-West*, Respondent is not entitled to such a remedy. In holding otherwise, the decision below violated the core teaching of *Great-West* based upon a fundamental misunderstanding of this Court's holding in *Sereboff* and the well-settled historical rules governing equitable liens.

A. *Great-West* made clear that a personal money judgment is not equitable relief *even if* it arises from a dissipated but identifiable fund.

As explained above (*see supra* 16-21), *Great-West* established the core principle that 29 U.S.C. § 1132(a)(3) does not authorize the imposition of personal liability upon a participant for breach of contract, because such a recovery from the participant's general assets does not constitute equitable relief. The facts of *Great-West* are striking similar to those at issue in this case:

Janette Knudson was severely injured in a car accident, and a portion of her medical expenses were paid by Great-West Life & Annuity Ins. Co. ("Great West") because Janette was the beneficiary of a welfare benefit plan. *Great-West*, 534 U.S. at 207. A reimbursement provision in the plan obligated Janette to reimburse the plan from any settlement with a third-party tortfeasor. *Id.* at 207.

Janette and her husband did obtain a $650,000.00 tort settlement, but they did not fully reimburse the plan for the $411,157.11 that the plan (and Great-West as stop-loss insurer) had paid on Janette's behalf. Instead, the tort settlement was allocated between creditors and a Special Needs Trust. Over half of the settlement was spent to pay creditors ($373,426 to the attorneys for their fees and costs and $5,000 to Medi-Cal), a small amount ($13,828.70) was segregated to reimburse Great-West, and $256,745.30 was allocated to a Special Needs Trust. *Id.* at 207-08.[14]

Great-West and the ERISA plan sued the Knudsons under 29 U.S.C. § 1132(a)(3) to recover the $411,157.11 in medical expenses that had been paid on Janette's behalf. *Id.* at 208. This Court affirmed the grant of summary judgment in favor of the Knudsons. *Id.* at 221.

The Court recognized that plaintiffs can obtain restitution in equity by seeking an equitable lien or constructive trust, *id.* at 213, but the Court next quoted a critical governing principle:

> [W]here "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." Restatement of Restitution, *supra*, § 215, Comment *a*, at 867. Thus, for restitution to

[14] The Court's opinion does not appear to account for the remaining $1,000. Presumably it was also dissipated.

> lie in equity, 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.

Great-West, 534 U.S. at 213-14.

The Court then proceeded to point out that: "the funds to which petitioners claim an entitlement under the Plan's reimbursement provision—the proceeds from the settlement of [the Knudsons'] tort action—are not in [the Knudsons'] possession." *Id.* at 214. Rather, the facts showed that the settlement proceeds had been partially dissipated (*e.g.*, used to pay the Knudson's non-ERISA creditors such as Medi-Cal) and partially preserved, but in a Special Needs Trust that placed the money beyond the Knudsons' control. *Id.* at 214.[15]

Because the plaintiffs' reimbursement claim was "not that [the Knudsons] hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits that they conferred[,]" the Court held that "[t]he kind of restitution

[15] Respondent glibly asserts that "the settlement funds in *Great-West* were *never* attached to anything held by the beneficiary," Orange Br. 18, because "the 'state court's order provided that the defendants would pay the settlement amount allocated to the Special Needs Trust directly to the trust . . . .'" *Id.* Even if that were true with regard to the *preserved* funds (*i.e.*, assets of the Special Needs Trust), it is not true with regard to the *dissipated* funds (*e.g.*, monies used by the Knudsons' attorney to pay, for example, Medi-Cal).

that petitioners [sought]" was not equitable. *Id.* at 214 (emphasis in original).

B. The decision below violated the core teaching of *Great-West* based on a misreading of *Sereboff.*

In this case, the court of appeals adopted a position that directly conflicts with the core teaching of *Great-West* based on a fundamental misunderstanding of *Sereboff v. Mid-Atlantic Medical Services*, 547 U.S. 356 (2006). *See, e.g.*, Brief for the United States as Amicus Curiae at 9-15, *Thurber v. Aetna Life Ins. Co.*, 134 S. Ct. 2723 (U.S. May 6, 2014) (No. 13-130), 2014 WL 1783200 (explaining the lower courts' misreading of *Great-West* and *Sereboff*). Because the decision below turns on the court's misreading of *Sereboff*, a brief discussion of that case—and the Court's opinion—is warranted:

In *Sereboff*, this Court permitted a plan fiduciary to enforce a reimbursement provision by seeking a judgment against a specifically identifiable fund that was—unlike in *Great-West*—in the beneficiaries' possession and control. *Sereboff*, 547 U.S. 356. As in *Great-West*, the ERISA participant and beneficiary (the Sereboffs) were injured in a car accident and some of their medical expenses were paid by an employer-sponsored health insurance plan. *Id.* at 360. After the Sereboffs commenced a tort suit against third parties, Mid Atlantic promptly asserted its right to be reimbursed out of any potential recovery, and it continued to assert its reimbursement right during the pendency of the Sereboffs' tort suit. *Id.* at 360.

When the Sereboffs settled for $750,000, Mid Atlantic quickly filed a suit under 29 U.S.C. § 1132(a)(3), seeking to recover the $75,000 in medical expenses that it had paid. Mid Atlantic sought a temporary restraining order and preliminary injunction to preserve a portion of the tort recovery. The parties ultimately entered into a court-approved stipulation whereby the Sereboffs would preserve $75,000 "of the settlement funds." *Id.* at 360. This fact was critical to the Court's holding that Mid Atlantic's lawsuit was authorized by ERISA. Pointing to the portion of the settlement fund that was "set aside and 'preserved [in the Sereboffs'] investment accounts,'" the Court held that "the nature of the recovery" sought by Mid Atlantic was equitable because "*[u]nlike Great-West*, Mid Atlantic did not simply seek 'to impose personal liability . . . for a contractual obligation to pay money.'" *Id.* at 362-63 (emphasis added).

The Court next concluded that "case law from the days of the divided bench confirms that [the basis for] Mid Atlantic's claim is equitable." *Id.* at 363. Citing *Barnes v. Alexander*, 232 U.S. 117 (1914), the Court explained that the plan's reimbursement provision "specifically identified a particular fund, distinct from the Sereboffs' general assets . . . and a particular share of that fund to which Mid Atlantic was entitled," so Mid Atlantic "could rely on a 'familiar rule of equity' . . . [which] allowed [Mid Atlantic] to 'follow' a portion of the recovery 'into the Sereboffs' hands' 'as soon as the settlement fund was identified,' and impose on that portion a constructive trust or equitable lien." *Sereboff*, 547 U.S. at 364 (citing and quoting *Barnes v. Alexander*, 232 U.S. 117, 121, 123 (1914)) (internal quotation marks and brackets omitted).

The Court clarified that Mid Atlantic was seeking "an equitable lien 'by agreement.'" *Sereboff*, 547 U.S. at 364-65. This meant, according to the Court, that Mid Atlantic did not need to "satisfy the 'strict tracing rules' for 'equitable restitution.'" *Id.* at 365 (quoting Reply Brief for

Petitioners at 8, *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006) (No. 05-260), 2006 WL 165865, at *8 ("*Sereboff* Reply")).

This language has been widely misinterpreted and misunderstood. *See, e.g.*, Orange Br. 16-17 (asserting that *Sereboff* rejected the requirement that an equitable lien can be enforced only against property that is in the possession of the defendant at the time of enforcement). The tracing that the Court was referring to was "the tracing requirement of the sort asserted *by the Sereboffs*." *Sereboff*, 547 U.S. at 365 (emphasis added). The Sereboffs had argued that an equitable lien was unavailable because the plan could not specifically identify an asset that the Sereboffs had misappropriated from the plan; rather, the plan sought an equitable lien on an asset that was recovered from a third party. *Sereboff* Reply at 9-10 (arguing that Mid Atlantic could not recover because the settlement fund in the Sereboffs' possession could not be traced back to Mid Atlantic); *see also id.* at 8 (equitable liens had "strict tracing rules").

To be sure: the Court rejected the need to trace an asset from the hands of the plaintiff to the hands of the defendant.[16] But, in so doing, the Court unquestionably did *not* overrule the core teaching of *Great-West—i.e.*, that "where 'the property [sought to be recovered] or its

[16] It acknowledged that equitable liens were "often" imposed when "an asset belonging to the plaintiff had been improperly acquired by the defendant and exchanged by him for other property." *Sereboff*, 547 U.S. at 364. But the Court explained that an equitable lien *by agreement* was different: it was available even though "[t]he plaintiffs . . . could not identify an asset they originally possessed, which was improperly acquired and converted into property the defendant held." *Id.* at 365 (discussing *Barnes*, 232 U.S. 117).

proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].'" *Great-West*, 534 U.S. at 213-14 (quoting Restatement of Restitution & Unjust Enrichment § 215 cmt. a, at 867 (1936)).

C. An equitable lien, unlike a personal money judgment, is only enforceable against specific property or its traceable proceeds.

Sereboff cannot possibly have held what Respondent claims it did because, as previously explained by the United States, such a holding is irreconcilable with black-letter principles that this Court has repeatedly held must undergird any claim for equitable relief under ERISA. *See, e.g.*, Brief for the United States as Amicus Curiae at 12, *Thurber*, 134 S. Ct. 2723 (No. 13-130) (making that point). As explained next, it is beyond any serious dispute that an equitable lien can only be enforced against specifically identified property or its traceable product.

1. An equitable lien by agreement cannot exist in the absence of an agreement that the plaintiff is entitled to a specifically identifiable fund. An equitable lien by agreement "must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness and intent that the property so described, or rendered capable of identification, is to be held, given, or transferred as security for the obligation." 4 Spencer W. Symons, *Pomeroy's Treatise on Equity Jurisprudence as Administered in the United States of America* § 1235, at 698 (5th ed. 1941) ("4 Pomeroy"); *see also* Christopher G. Tiedeman, *A Treatise on Equity Jurisprudence* § 385, at

463-64, § 387, at 465 (St. Louis, F.H. Thomas Law Book Co. 1893) ("Tiedeman"). An equitable lien can exist upon property to be acquired in the future, and it will be "enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of the contract." 4 Pomeroy § 1236, at 700; *see also* Tiedeman § 386, at 464.

In *Sereboff*, "the 'Acts of Third Parties' provision in the Sereboffs' plan specifically identified a particular fund, distinct from the Sereboffs' general assets—'[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise)'—and a particular share of that fund to which Mid Atlantic was entitled . . . ." 547 U.S. at 364. And *Barnes v. Alexander*, 232 U.S. 117 (1914), on which the Court relied heavily, underscores this point.

In *Barnes*, two attorneys (Street and Alexander) claimed an equitable lien upon a settlement fund that was in the hands of the widow of their co-counsel (Barnes). *Barnes*, 232 U.S. at 119. Street and Alexander based their claim on Barnes' promise to pay them one-fourth of his contingent fee, *id.* at 119, and a primary focus of the Court's attention was whether that agreement was merely "a personal promise that gave [Street and Alexander] no specific claim against the [settlement] fund." *Id.* at 120. The Court explained that Barnes' agreement with Street and Alexander was "aimed only at the fund. Barnes gave no general promise of reward; he did not even give a promise qualified and measured by success to pay anything out of his own property, referring to the fund simply as the means that would enable him to do it." *Id.* at 121.

2. An equitable lien can be enforced only against the specifically identifiable property that is the subject of the

agreement, or its traceable product. Respondent asserts that an equitable lien can be enforced as long as the specifically identifiable property that was the subject of the lien was in the hands of the defendant at any point in time. Orange Br. 16-17. But that is simply not true.

An equitable lien entitles a plaintiff to have the specifically identifiable property that is the subject of the lien—or its traceable product—seized and sold so that the proceeds of the sale (either entirely or in part) can be paid to plaintiff. "In equity the word 'lien' . . . denotes a right of a particular nature over a thing constituting incumberance upon it and the lien may be enforced *by a proceeding against it* . . . ." 1 Leonard A. Jones, *A Treatise on the Law of Liens* § 2, at 4 (Edward M. White ed., 3d rev. ed. 1914) ("*Jones on Liens*") (emphasis added).[17] That same treatise explains further:

> [I]t is necessary that the property or funds upon which the lien is claimed should be distinctly traced, so that the very thing which is subject to the special charge may be proceeded against in an equitable action, and sold under decree to satisfy the charge.

Id. § 34, at 35.

To be clear: an equitable lien does not give the plaintiff "a right to recover a sum of money generally out of the defendant's assets." 4 Pomeroy § 1234, at 694 (describing legal contractual remedies as "mere recoveries of money"

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[17] The sentence further explains that a common law lien required the plaintiff to have possession "of the thing," but an equitable lien does not require such possession. *Jones on Liens* § 2, at 4; *see also id.* § 3, 4-5.

and equitable remedies as being "as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing,—a tract of land, personal property, or a fund,—rather than a right to recover a sum of money generally out of the defendant's assets"); *see also* Restatement (First) of Restitution § 161 cmt. e (1937).

Respondent contends that equitable liens by agreement are "merely a means to the end of satisfying a claim for the recovery of money," and that "the *real* remedy, the final object of the proceeding, is the pecuniary recovery." Orange Br. 20 (quoting *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 262-63 (1999), quoting 1 Spencer W. Symons, *Pomeroy's Treatise on Equity Jurisprudence as Administered in the United States of America* § 112, at 147 (5th ed. 1941) ("1 Pomeroy")).[18] But the quoted language from the Pomeroy treatise cannot be read in isolation. The very section that Respondent cites categorizes an equitable lien as resulting in "not a *general* pecuniary judgment, but . . . a decree of money to be obtained and paid out of some particular fund or funds." 1 Pomeroy § 112, at 147-48. It states that equitable liens and all other similar remedies are enforced "by a sale total or partial of the fund, or by a sequestration of its rents, profits, and proceeds." *Id.* at 148. And the chapter on equitable liens is similarly explicit:

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[18] There can be no serious contention that *Dep't of Army*, 525 U.S. 255, is controlling or even persuasive here, because the Court was utilizing a functional test, rather than an historical one, when it held that a suit to enforce an equitable lien was one for "money damages" within the meaning of a statute waiving sovereign immunity. *Id.* at 262-63.

> An equitable lien . . . is simply a right of a special nature *over* the thing, . . . so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents or profits in the other, applied upon the demand of the creditor in whose favor the lien exists.

4 Pomeroy § 1233, at 692. Because an equitable lien is "a remedy that operates directly upon [the thing concerning which the contract deals]," *id.* § 1234, at 695, it cannot be awarded unless "the thing"—a specifically identifiable *res*—is intact at the time of enforcement.

3. The enforcement of an equitable lien is limited to specifically identifiable property or its traceable product because the remedy is a powerful one: it entitles the plaintiff to priority over other creditors. Restatement (First) of Restitution § 161 cmt. c, at 652 (1937).[19]

This priority extends to any property that is traceable to the property that was initially the subject of the lien:

> Where property is subject to an equitable lien and the owner of the property disposes of it and acquires other property in exchange, he holds the property so acquired subject to the lien, in accordance with the rules stated in §§ 202-215 (Chapter 13). So

[19] The exception is where the property has been acquired by a bona fide purchaser. *Id.* If that has occurred, the equitable lien is terminated in accordance with the "principle that a person who innocently has acquired the title to property for which he has paid value is under no duty to restore it . . . ." *Id.* § 172 cmt. a, at 692.

> also, where the property which is subject to the lien is mingled with other property in one indistinguishable mass, the lien can be enforced against the mingled mass (see § 209).

Restatement (First) of Restitution § 161 cmt. e, at 652 (1937). This is true even if the property is in the hands of third parties. If the third parties are not bona fide purchasers for value, then the plaintiff may proceed against those third parties. *Id.* § 161 cmt. d, at 652. *Cf. Jones on Liens* § 30, at 29 (equitable lien by agreement on real or personal property "will be enforced in equity, not only against [the owner of the property] but also against third persons who are either volunteers, or who take the estate on which the lien is given, with notice of the stipulation.").

But if the specifically identifiable fund that was the subject of the equitable lien has been dissipated, the equitable lien is no longer enforceable. This well-established principle was invoked in *Great-West*, 534 U.S. at 213-14, and is explicit in the Restatement:

> [I]f it is shown that the property or its proceeds have been dissipated so that no product remains, his claim is only that of a general creditor of the wrongdoer. Thus, if the wrongdoer has used the money of the claimant in speculation and has lost it all, the claimant cannot enforce a constructive trust of or an equitable lien upon other property of the wrongdoer, and has only a personal claim against the wrongdoer, and is not entitled to priority over other creditors of the wrongdoer.

Restatement (First) of Restitution § 215 cmt. a, at 867 (1937); *see also id.* § 215(1), at 866 ("[W]here a person wrongfully disposes of the property of another but the property cannot be traced into any product, the other has merely a personal claim against the wrongdoer and cannot enforce a constructive trust or lien upon any part of the wrongdoer's property."); *A. Person, Harriman & Co. v. Oberteuffer*, 59 How. Pr. 339, 341-42 (1880) ("All the cases point to one conclusion—that the identical property or its proceeds must be traced in order to uphold the [equitable] lien.").

Indeed, the plaintiff seeking the equitable lien bears the burden of proving that the specifically identifiable fund—or its traceable product—has not been dissipated. Restatement (First) of Restitution § 215 cmt. b, at 868 (1937) ("*Burden of proof.* A person whose property is wrongfully taken by another is not entitled to priority over other creditors unless he proves that the wrongdoer not only once had the property or its proceeds, but still has the property or its proceeds or property in which the claimant's property or its proceeds have been mingled indistinguishably.").

D. What the lower courts labelled an equitable lien was in fact a personal money judgment.

In awarding summary judgment to Respondent, the magistrate judge held "that any dissipation of settlement funds by Defendant is immaterial." Pet. App. 35 n.2; *see also* Pet. App. 40. He acknowledged that "*Sereboff* did not address the issue of a beneficiary's dissipation of assets because the funds there were placed in a separate account throughout the duration of the case[,]" Pet. App. 40, but he nonetheless determined that Mr. Montanile's dissipation was "insufficient to void Plaintiff's right to enforce the reimbursement provision." Pet. App. 42. As such, he concluded that Respondent had "a right . . . to seek reimbursement," and that "such reimbursement constitutes 'appropriate equitable relief.'" Pet. App. 44.

In the Judgment, the magistrate judge awarded Respondent "an equitable lien . . . on [Mr. Montanile's] recovery from the third-party driver involved in the underlying car accident," but he did not limit Respondent's compensation to the portion of such "recovery" that remained in Mr. Montanile's possession. Instead, he awarded the equitable lien "in the amount of $121,044.02," Final Judgment, Mar. 18, 2014, ECF No. 46, without any concern for whether the judgment would be satisfied out of Mr. Montanile's general assets.

In affirming the Judgment, the court of appeals expressly held that Respondent "can impose an equitable lien on Montanile's settlement, even if dissipated." Pet. App. 11. But the enforcement of an equitable lien on any assets *other than* the specific property on which the lien was attached (or its traceable product) is simply personal liability—the precise type of legal relief that *Great-West* made clear is unavailable under 29 U.S.C. § 1132(a)(3).

Reversal is warranted.

III. Respondent's New Deficiency Judgment Theory Does Not Warrant Affirmance.

In its petition stage brief, Respondent repeats the only argument that it advanced in the lower courts: that a participant need not "possess the identified funds at the time of suit for a plan to enforce its equitable lien by agreement." Orange Br. 16-17. As explained above, that argument is wrong.

Respondent also advances a new theory of "equitable relief" as an alternative ground on which the decision below might be affirmed: the deficiency judgment. *See* Orange Br. 19 (citing Fed. Equity R. 10 (1912) for the proposition that "'[i]n suits for the foreclosure of mortgages, or for the enforcement of other liens, a decree may be rendered for any balance found to be due to the plaintiff over and above the proceeds of the sale or sales' of the property that was subject to the lien . . . .").[20] As explained below, this deficiency judgment theory cannot serve as a basis for affirmance.

A. A deficiency decree is not equitable relief.

It is now clearly settled that "equitable relief" does *not* mean "whatever relief a court of equity is empowered to provide in the particular case at issue." *Mertens*, 508 U.S. at 256. As this Court has acknowledged, equity courts "could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of [their] authority.'" *Id.* at 256 (quoting 1 Pomeroy § 181, at 257). The mere fact that a legal remedy *could* have been granted by an equity court does not make the remedy an "equitable" one that is available under 29 U.S.C. § 1132(a)(3). And the deficiency judgment is a paradigmatic example of one such legal remedy. *In re Smith*, 270 B.R. 557, 561 (Bankr. W.D.N.Y. 2001) ("A judgment of foreclosure and sale arises out of a foreclosure, as an equitable suit. . . . In contrast, a deficiency judgment is a legal remedy . . . that is incidental to the foreclosure.").

[20] In making this argument, Respondent effectively concedes that an equitable lien can be enforced only against property in the hands of the defendant because the lien is enforced by selling property. If the property does not exist, then there is obviously nothing to sell.

As explained in 1934 by a law review article entitled, "Deficiency Judgments and Decrees," an action to foreclose a mortgage was equitable, but equity courts were not initially permitted to "render a personal judgment against the mortgagor or any other defendant for . . . any deficiency." Oliver K. Eaton, *Deficiency Judgments and Decrees*, 20 Va. L. Rev. 743, 743 (1934); *see also Dunkley v. Van Buren*, 3 Johns. Ch. 330 (1818) (denying motion, in mortgage foreclosure proceeding, to require mortgagor to pay any deficiency).

There was then a "distinct advance in equity jurisprudence":

> [U]nder the rule that, where a Court of Equity obtains jurisdiction of an action, it will retain it and administer full relief, both legal and equitable, it has been held that, where a Court of Equity acquires jurisdiction for the foreclosure of a mortgage, it may retain jurisdiction for the administration of full relief, and, as a part of such relief, may render a deficiency judgment.

Eaton, 20 Va. L. Rev. at 743 (quoting 42 Corpus Juris § 1974 and stating that "[i]n support of the modified text Corpus Juris cites authorities in the United States Courts, Idaho, Kentucky, New Jersey and New Mexico"); *see also Reichert v. Stilwell*, 64 N.E. 790, 792 (1902) (explaining that equity courts previously "had no power to include a provision for deficiency in a decree of foreclosure," but a New York statute bestowed that authority as "an incidental remedy, dependent wholly upon the statute and subsidiary to the main object of the action"); *Culver v. Judge of Superior Court of Detroit*, 23 N.W. 469, 471 (Mich. 1885) (explaining that a Michigan statute bestowed upon equity courts the power to render deficiency decrees in foreclosure suits because previously "[a] separate suit at law upon the bond or note was necessary for the recovery of the deficiency, where one arose . . . ."). It is thus clear that a deficiency decree is a legal remedy that equitable courts were sometimes permitted to award as a legal adjunct to the equitable foreclosure remedy.

B. Even if a deficiency decree is available under 29 U.S.C. § 1132(a)(3), the decision below must be reversed and remanded.

Respondent did not seek a deficiency decree in the lower courts. Thus, even if this Court finds that such a remedy is available under 29 U.S.C. § 1132(a)(3), the decision below must be reversed and remanded so that Mr. Montanile will have an opportunity to challenge its availability in this case.

There is good reason to believe that Mr. Montanile will prevail on remand. For example, the present case is substantially identical to *Fidelity Deposit Co. v. Central Bank*, 48 F.2d 477 (8th Cir. 1931). There, Plaintiff had advanced money and, as a result, had an equitable lien by assignment, which it subsequently sought to collect. The court of appeals held that the plaintiff clearly had an equitable lien on funds currently in the debtor's possession. *Id.* at 478 ("That the appellant had an equitable lien on the retained percentages in the hands of the improvement district cannot be denied.").

The court of appeals nonetheless refused to enforce the equitable lien due to the plaintiff's delay in taking action before the funds were disbursed. After notice of impending dissipation was given in August and September, the lienholder replied on October 1 that it was referring the matter to its home office but then made no further response before the funds were disbursed on November 12. *Id.* at 479-80. The court of appeals held that the lienholder's 42 days of doing nothing vitiated its ability to obtain monetary relief: "[u]nder such circumstances, [defendants] were not called upon to hold the funds indefinitely. The rule is that 'an equitable lien may be lost by negligent and unreasonable delay in proceeding to enforce it.'" *Id.* at 480 (citing cases).[21]

The delay here of six months far exceeded the one in *Fidelity Deposit* and was even more unreasonable.[22]

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[21] Indeed, the forfeiture of the right to a deficiency judgment may occur for reasons other than negligent and unreasonable delay. *Cf Pioneer Dodge Center, Inc. v. Glaubersklee*, 649 P.2d 28, 30 (Utah 1982) (deficiency judgment barred because lienholder's sale was not handled in a commercially reasonable manner).

[22] Before he had ever disbursed any of the settlement money, Mr. Montanile's ERISA attorney, Brian King, had a valid legal basis to challenge the Respondent's claim for full reimbursement. First, he correctly observed that "the Supreme Court in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), left open the question of whether the made whole rule must be taken into account in evaluating what is 'appropriate equitable relief' authorized under 29 U.S.C. § 1132(a)(3)." JA 74 (citing *Sereboff*, 547 U.S. at 368, n.2). It took a Supreme Court opinion to resolve this question, and that decision was not issued until April 16, 2013. *See US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013). Second, Mr. King believed that the reimbursement provision was found only in the SPD and was thus unenforceable under *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878 (2011) ("[W]e conclude that the summary documents, important as they are, provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the *terms* of the plan for purposes of § 502(a)(1)(B).") (emphasis in original). This is an issue on which courts continue to disagree. *See, e.g.*, *supra* 7 n.6.

After six months of negotiation, Respondent made a "final offer," Thus, the longstanding rule in equity applied by the court of appeals in that case is similarly applicable here. *See also Zack v. City of Minneapolis*, 601 F. Supp. 117, 120 (D. Minn. 1985) ("[I]t is a basic principle of equity that undue delay in enforcing one's rights to the prejudice of another bars enforcement of those rights . . . . [An] equitable lien may be lost by negligent and unreasonable delay in enforcing it.").

It is beyond any serious dispute that the district court did not assess Respondent's negligence or unreasonable delay in this context. *See* Pet. App. 34-35 (noting that "[t]here is . . . no dispute that Plaintiff filed suit against Defendant six months after the parties exchanged final settlement offers," but finding such delay legally irrelevant because "ERISA does not specify a limitations period for a fiduciary's actions to enforce a reimbursement provision [and therefore] this Court is guided by Florida's *five-year* statute of limitations for breach of written contract actions") (emphasis added).

Thus, according to the decision below, Respondent could have unreasonably delayed for one day short of *five years* and it would still be entitled to a personal money judgment against Mr. Montanile's general assets. That cannot possibly be what was intended by Congress in

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and threatened to sue if its offer was not accepted. JA 25 (¶14); JA 35 (¶11). In response, Mr. King asked that, "*if* the Plan intended to litigate the matter, it do so within 14 days." JA 35 (¶12) (emphasis added); *see also* JA 25 (¶15). And he explicitly notified Respondent that he would release the funds to Mr. Montanile if Respondent failed to file suit within that reasonable two-week period. JA 25 (¶15); JA 35 (¶12). The Plan did absolutely nothing. It did not even ask for more time to file its lawsuit. *See* JA 25 (¶¶16-17); JA 35 (¶¶13-14). Still, Mr. King waited for an additional 14 days before disbursing the settlement funds to Mr. Montanile. JA 25 (¶16); JA 35 (¶13).

limiting fiduciary remedies under 29 U.S.C. § 1132(a)(3) to "appropriate equitable relief."

IV. The Court Should Not Be Influenced by Respondent's Misguided Policy Arguments.

Respondent's primary defense of the decision below is on policy grounds. *See, e.g.*, Orange Br. 20 ("All of this points up at a bigger principle: Equity jurisdiction is founded on the maxim that equity suffers not a right to be without a remedy.") (internal quotation marks omitted). Respondent's arguments are misguided.

A. The position advanced by Petitioner and endorsed by the United States does not result in the proliferation of dissipation.

According to Respondent, "Montanile's position . . . would create perverse incentives for beneficiaries" to spend settlement funds before the plan could act. Orange Br. 20. But, in reality, the inability of fiduciaries to reach a participant's general assets will not cause any increase in the intentional dissipation of tort settlements by injured ERISA participants.[23] The reason is simple:

Personal injury attorneys virtually never release funds without first giving the plan an opportunity to act. Indeed, ABA Model Rule 1.15(e) requires lawyers to keep separate any "property in which two or more persons . . . claim interests . . . until the dispute is resolved." ABA

[23] Petitioner's position is currently the law in two circuits. *See Treasurer, Trustees of Drury Indus., Inc. Health Care Plan & Trust v. Goding*, 692 F.3d 888 (8th Cir. 2012); *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012). There is no evidence of a "dissipation explosion" in those jurisdictions.

Model Rule of Prof'l Conduct Rule 1.15(e) (2015). And every state has imposed a nearly identical obligation.[24]

In reality, tort settlements are typically released to and spent by an injured ERISA participant only after a plan has been notified that the lien (or its amount) is disputed and then fails to act. This case is illustrative. *See supra* 8-9 (Respondent was notified by Mr. King that funds would be released to Mr. Montanile within 14 days if no lawsuit was filed; Respondent then ceased all correspondence and waited six months before bringing

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[24] *See e.g.*, Ala. R. Prof'l Conduct 1.15(c); Alaska R. Prof'l Conduct 1.15(e); Ariz. R. Prof'l Conduct 1.15; Ark. R. Prof'l Conduct 1.15; Colo. R. Prof'l Conduct 1.15A; Conn. R. Prof'l Conduct R. 1.15(f); Del. Lawyers' R. Prof'l Conduct 1.15(c); R. Regulating Fla. Bar 5-1.1(f); Ga. R. Prof'l Conduct 1.15(I)(d); Haw. R. Prof'l Conduct 1.15; Idaho R. Prof'l Conduct 1.15(e); Ill. R. Prof'l Conduct 1.15(c); Ind. R. Prof'l Conduct 1.15; Iowa R. Prof'l Conduct 32:1.15; Kan. R. Prof'l Conduct 1.15; Ky. S. Ct. R. 3.310 (1.15); La. R. Prof'l Conduct 1.15(e); Me. R. Prof'l Conduct 1.15; Md. Lawyers' R. Prof'l Conduct 1.15; Mass. R. Prof'l Conduct 13:207; Mich. R. Prof'l Conduct 1.15; Minn. R. Prof'l Conduct 1.15; Miss. R. Prof'l Conduct 1.15; Mo. R. Prof'l Conduct 4-1.15(e); Mont. R. Prof'l Conduct 1.15; Neb. Ct. R. of Prof. Cond. § 3-501.15(e); Nev. R. Prof'l Conduct 1.15; N.H. R. Prof'l Conduct 1.15; N.J. R. Prof'l Conduct 1.15; N.M. R. Prof'l Conduct 16-115; N.Y. R. Prof'l Conduct R. 1.15(b)(4); N.C. R. Prof'l Conduct 1.15-2; N.D. R. Prof'l Conduct 1.15; Ohio R. Prof'l Conduct 1.15; Okla. R. Prof'l Conduct 1.15; Or. R. Prof'l Conduct 1.15-1; Pa. R. Prof'l Conduct 1.15; R.I. R. Prof'l Conduct 1.15; S.C. R. Prof'l Conduct 1.15; S.D. R. Prof'l Conduct 1.15; Tenn. R. Prof'l Conduct 1.15; Tex. Disciplinary R. Prof'l Conduct 1.14; Utah R. Prof'l Conduct 1.15; Vt. R. Prof'l Conduct 1.15; Va. R. Prof'l Conduct 1.15; Wash. R. Prof'l Conduct 1.15A; W. Va. R. Prof'l Conduct 1.15; Wis. R. Prof'l Conduct for Attorneys 20:1.15; Wyo. R. Prof'l Conduct for Attorneys at Law 1.15(f); *see also Johnstone v. State Bar of Cal.*, 410 P.2d 617, 618 (Cal. 1966).

suit). To be blunt: the rule advanced by Respondent is a solution in search of a problem.

B. The position advanced by Petitioner and endorsed by the United States does not leave ERISA fiduciaries without a remedy.

According to Respondent, "Montanile's position . . . would leave plans with no way to enforce their otherwise-valid reimbursement provisions . . . ." Orange Br. 20. Respondent's speculation is unfounded and overblown.

1. If a participant or beneficiary does not agree to preserve disputed settlement funds, plans can sue under 29 U.S.C. § 1132(a)(3) to enjoin the dissipation of funds and can take immediate steps to have those funds preserved. And in truly exceptional cases where the participant has already spent some or all of the settlement funds, the robust nature of the equitable lien remedy provides significant protection:

- If the participant has used settlement funds to obtain an asset, the plan can trace the settlement funds to the purchase of that asset and can enforce the equitable lien against that asset. Restatement (First) of Restatement § 161 cmt. e, at 652 (1937).

- If the participant *gives* the settlement funds to another person, the plan can trace the settlement funds to that person and enforce the equitable lien against that person. *Id.* § 161 cmt. d, at 652.

- If the participant uses the settlement fund to obtain goods or services from another person with notice of the lien, the plan can trace and collect the settlement funds from that person as well. *Id.*

The plan is left without a remedy only if, after the plan fails to act, the participant uses the settlement funds to purchase services (*e.g.*, childcare) or consumable goods (*e.g.*, food) from a bona fide purchaser for value.

2. What Respondent decries is not the absence of a meaningful remedy but rather the absence of *its preferred remedy*—money damages for breach of contract. That is ironic given the unprecedented subrogation/reimbursement tools available to an ERISA plan that are unavailable under the laws of virtually every one of the fifty states. *See generally* Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 Loy. U. Chi. L. J. 49 (2008). *See also* Matthiesen, Wickert & Lehrer, S.C., *Med Pay/PIP Subrogation in All 50 States* (last updated April 16, 2015), https://www.mwl-law.com/wp-content/uploads/2013/03/med-pay-pip-subrogation-in-all-50-states1.pdf (summarizeing the relevant subrogation law in each of the 50 states).

This dispute is illustrative. Respondent's own documents provided for a right of subrogation. Pet. App. 5. Respondent could have pursued the tortfeasor directly and ensured that it recouped the medical expenses advanced to Mr. Montanile. Alternatively, it could have protected its interest by intervening in Mr. Montanile's lawsuit against the tortfeasor. *See* Fla. R. Civ. P. 1.230; *Union Cent. Life Ins. Co. v. Carlisle*, 593 So.2d 505 (Fla. 1992) (permitting insurer to intervene in insured's tort suit but limiting insurer's involvement). Either approach would have been more efficient than the sit-on-its-hands approach the Plan chose to take.

C. Any plea for more robust civil remedies should be directed at Congress.

Even if Respondent were correct that the position advanced by Mr. Montanile and endorsed by the United States will leave fiduciaries without a meaningful remedy for certain violations of ERISA, that is no reason to ignore the text of 29 U.S.C. § 1132(a)(3) as consistently interpreted by this Court for over two decades.

Dissatisfaction with this Court's interpretation of 29 U.S.C. § 1132(a)(3) is not new. For example, in direct response to *Great-West* and concerns expressed by ERISA plan fiduciaries, current Speaker of the United States House of Representatives John A. Boehner sponsored a bill which included an amendment to section 502(a)(3) of ERISA that is the very embodiment of Respondent's position here. Pension Protection Act of 2005, H.R. 2830, 109th Cong. § 307 (2005). It failed.

Like fiduciaries, advocates for ERISA plan participants and beneficiaries have also expressed dissatisfaction with this Court's interpretation of 29 U.S.C. § 1132(a)(3). For years, they have complained that this Court's narrow reading of the phrase "equitable relief"—coupled with ERISA's broad preemption provision—leaves aggrieved workers and their beneficiaries without any remedy for clear statutory violations which often result in catastrophic injuries. *See generally* Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 Hastings L.J. 131 (2009).[25]

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[25] In one infamous case where a child failed to survive because of a Plan's wrongful determination that hospitalization of the mother

In response to this "regulatory vacuum," *see Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring), there have been several legislative proposals to override this Court's past decisions interpreting the meaning of "appropriate equitable relief" in 29 U.S.C. § 1132(a)(3). *See, e.g.*, Omnibus Budget Reconciliation Act of 1993, S. 1134, 103d Cong. § 12312(a) (1993) (proposed amendment to 29 U.S.C. § 1132(a)(3) introduced in Senate three weeks after *Mertens* decision); Employee Pension Freedom Act of 2002, H.R. 3657, 107th Cong. § 403(c) (2002) (proposed amendment to 29 U.S.C. § 1132(a)(3) introduced in House three weeks after *Great-West* decision); Intergenerational Financial Obligations Reform Act of 2002, S. 2032, 107th Cong. § 403(c) (2002) (proposed amendment to 29 U.S.C. § 1132(a)(3) introduced in Senate three months after *Great-West* decision). These attempts also failed.

Put simply, Congress is aware that 29 U.S.C. § 1132(a)(3) sometimes leaves aggrieved ERISA stakeholders without a remedy. And Congress—not this Court—is the body to which any request to amend ERISA should be directed. *See Mertens*, 508 U.S. at 254, 262 (noting that ERISA is a "carefully crafted and detailed enforcement scheme" that "resolved innumerable disputes between competing interests . . . .").

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was not medically necessary, the district court found that the plaintiff nonetheless had no remedy under ERISA. *See Corcoran v. United Healthcare, Inc.*, No. CIV. A. 90-4303, 1991 WL 353841 (E.D. La. Apr. 3, 1991). In affirming the district court, the Fifth Circuit expressly noted that "[t]he acknowledged absence of a remedy under ERISA's civil enforcement scheme for medical malpractice committed in connection with a plan benefit determination does not alter our conclusion. . . ." *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir. 1992).

CONCLUSION

For the reasons set forth above, the judgment of the Eleventh Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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