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Report of the Subcommittee on
CIVIL PROCEDURE

Co-Chairs:

Lissa J. Paris (Management Co-Chair)
Janae L. Schaeffer (Neutral Co-Chair)
Stephen R. Bruce (Plaintiff Co-Chair)

Contributors:

Joel Babineaux
W. Fulton Broemer
Felice Duffy
Karen M. Wahle
Brian Wood

I. CAUSES OF ACTION

A. Section 502(a)(1)(A) Suits to Redress Failure to Provide Required Information

4. Statute of Limitations

A one-year Colorado statute for penalties under state penalty statutes barred a claim for civil penalties under Sections 502(a)(1)(A) and 502(c). Adams v. Cyprus Amax Mineral Co., 44 F. Supp. 2d 1126, 23 EBC 1839 (D. Colo. 1999).

B. Section 502(a)(1)(B) Suits to Enforce Benefit Rights and/or the Terms of a Plan

1. Description of Cause of Action

Distinguishing Section 502(a)(1)(B) Claims from Section 502(a)(3) Claims. In Varity Corp. v. Howe, the Supreme Court suggested that “where Congress elsewhere provided adequate relief for a beneficiary’s injury” such as under Section 502(a)(1)(B), “there will likely be no need for further equitable relief” under Section 502(a)(3). In light of this suggestion, lower courts have analyzed whether the relief sought by a plaintiff under 502(a)(3) is available under Section 502(a)(1)(B) and have dismissed 502(a)(3) actions if the same relief is available under Section 502(a)(1)(B) and there is substantive difference between the plaintiff’s Section 502(a)(1)(B) and 502(a)(3) causes of action. See, e.g., Katz v. Comprehensive Plan of Group Ins., Alltel, 197 F.3d 1084 (11th Cir. 1999); Conley v. Pitney Bowes, 176 F.3d 1044, 1047 (8th Cir. 1999), cert. denied, 2000 U.S. LEXIS 845 (2000).

Other decisions have clarified that a breach of fiduciary duty claim under Section 502(a)(3) is not merely a disguised Section 502(a)(1)(B) claim where the plaintiff alleged a violation of Section 204(g) and related breach of fiduciary duty and not a “mere denial” of benefits. See Bellas v. CBS Inc., 73 F. Supp. 2d 493, 23 EBC 1481 (W.D. Pa. 1999). See also Corsini v. United Healthcare Corp., 51 F. Supp. 2d 103, 23 EBC 1126 (D. R.I. 1999) (complaint included claims of self-dealing “separate and distinct” from mere failure to provide benefits).

Disposition of Section 502 Claims by Trial vs. Summary Judgment. In the wake of the Sixth Circuit’s 1998 decision in Wilkins v. Baptist Healthcare, 150 F.3d 609, 619 (6th Cir. 1998), more courts are considering whether summary judgment is “inapposite” to deciding ERISA benefit claims. In Kearney v. Standard Insurance Co., 175 F.3d 1084, 23 EBC 1177 (9th Cir.) (en banc), cert. denied, 120 S. Ct. 398 (1999), and

Walker v. American Home Shield Long Term Disability Plan, 180 F.3d 1065, 23 EBC 1219 (9th Cir. 1999), the Ninth Circuit recognized that district courts were often granting summary judgment in ERISA disability cases “in the face of conflicting evidence.” In the plurality opinion to **Kearney**, the Ninth Circuit directed district courts to conduct bench trials “on the record,” with discretion to take additional evidence, and make findings of fact if there is a genuine issue of material fact concerning whether a participant is disabled in the sense defined by the policy.¹

District Court decisions in other jurisdictions also seem to signal a trend toward more critical examination of whether disputed issues of material fact preclude summary judgment dispositions. In **Milone v. Exclusive Healthcare Inc.**, 23 EBC 2042 (D. Neb. 1999), summary disposition was precluded by genuine issues of material fact about whether a plan administrator had inconsistently interpreted and applied precertification requirements. In **Degnan v. Publicker Indus., Inc.**, 42 F. Supp. 2d 113, 23 EBC 1245 (D. Mass. 1999), genuine issues of material fact existed about whether an employer knowingly or negligently misrepresented eligibility for full early retirement benefits.

See also **Sumsion v. USX Corp.**, 22 EBC 2657 (W.D. Pa. 1999) (genuine dispute over interpretation of “discounted price” in retiree medical benefit plan precluded summary judgment; record was devoid of evidence on communications about this phrase); **Gillott v. Westinghouse Elec.**, 23 EBC 1500 (W.D. Pa. 1999) (evidence before the court at summary judgment stage did not unequivocally demonstrate that the defendants did not breach their fiduciary duty; contested issues of material fact must be resolved by a factfinder); **Knight v. Cendant Corp.**, 64 F. Supp. 2d 902, 23 EBC 1980 (D.S.D. 1999) (summary judgment in favor of the defendant denied when genuine issues of material fact existed about whether plaintiff detrimentally relied on representations); **Harley v. Minnesota Mining & Manufacturing**, 42 F. Supp. 2d 898, 906-7 (D. Minn. 1999) (genuine issues of material fact precluded summary disposition of allegations of breach of fiduciary duty in investment of plan assets).

Evidence Considered by District Courts

In **Walker v. American Home Shield Long Term Disability Plan**, 180 F.3d 1065, 23 EBC 1219 (9th Cir. 1999), the Ninth Circuit held that a district court did not abuse its discretion in considering evidence from an independent medical expert when the

¹ The plurality **Kearney** opinion on bench trials is similar to the “guidelines” prescribed by the Sixth Circuit in **Wilkins**, although **Kearney** does not cite **Wilkins**.

district court found the medical evidence developed at the claims stage was confusing and conflicting. The Ninth Circuit held that the district court has discretion to go beyond the administrative record if additional evidence is necessary to conduct an adequate de novo review of the benefit decision. Compare **Kearney v. Standard Ins. Co.**, 175 F.3d 1084, 23 EBC 1177 (9th Cir.) (en banc), cert. denied, 120 S. Ct. 398 (1999) (district court has discretion to consider additional evidence, but evidence plaintiff proffered was not necessary to conduct adequate de novo review).

Evidence outside the claims record may also be considered when the evidence is offered to support a procedural challenge to the administrator's decision, see **Wilkins v. Baptist Healthcare**, supra, 150 F.3d at 619, such as a failure to adequately notify the plaintiff of the specific reasons for the denial and describe any additional information necessary to perfect the claim. **Omara v. Local 32B-32J Health Fund**, 1999 U.S. Dist. LEXIS 14323 (E.D.N.Y. 1999) (citing 29 U.S.C. § 1133 and 29 C.F.R. § 2560.503-1(f)).

Appealability of Remands of 502(a)(1)(B) Claims. A remand of a case to a plan administrator is an appealable order. **Perlman v. Swiss Bank Corp.**, 195 F.3d 975, 23 EBC 2177 (7th Cir. 1999).

4. Statute of Limitations

The Supreme Court has held that ERISA does not preempt state notice-prejudice rules that allow late claims for benefits where there is no prejudice to the insurer. **UNUM Life Ins. Co. v. Ward**, 526 U.S. 358, 22 EBC 2745 (1999).

The Second Circuit has joined with the Seventh, Eighth and Ninth Circuits and held that a cause of action for purposes of the statute of limitations may accrue with the "clear" repudiation of a claim--even though a formal claim was not denied until later. **Carey v. Electrical Workers IBEW Local 363 Pension Plan**, ___ F.3d ___, 23 EBC 2273 (2d Cir. 1999).

C. Section 502(a)(2) Suits to Redress Breaches of Fiduciary Duty

2. Plaintiffs

In **Harold Ives Trucking Co. v. Spradley and Coker, Inc.**, 178 F.3d 523, 527 (8th Cir. 1999), the Eighth Circuit held that the employer-sponsor of a health benefit plan, as well as the plan itself, had standing to bring a claim for breach of fiduciary duty against the plan's third party administrator under § 502(a)(2). The court held that the employer-sponsor was a fiduciary of the plan because it "is vested with and exercises discretionary authority and control as the plan sponsor and named administrator." Accordingly, it had standing as a fiduciary to assert the cause of action. In addition, the court found that the

plan itself could bring the § 502(a)(2) claim, citing to ERISA §502(d)(1) for support, which provision states that a plan “may sue or be sued . . . as an entity.”

4. Statute of Limitations

a) General Six-Year Limitations Period

The plaintiff in **Wilson Land Corp. v. Smith Barney Inc.**, No. 97-CV-519, 1999 U.S. Dist. LEXIS 12879 (E.D. N.C. May 17, 1999), successfully avoided the statute of limitations by characterizing his claim as one of omission. Although all relevant actions had taken place over six years prior to the filing of the complaint, plaintiff argued that a new cause of action was triggered when a new trustee took over and an accounting was made, which had occurred within the last six years. Therefore, although the cause of action was time-barred against the original trustee, who had resigned over six years before the action was brought, the new trustee was considered to have violated his fiduciary duty by failing to take corrective action.

Similarly, in **McKeown v. Pacific Bell Direcotry**, No. 97-0427, 1999 U.S. Dist. LEXIS 2281 (N.D. Cal. Feb. 26, 1999), which involved allegations that the defendant fiduciaries had neglected to inform the plaintiffs of a particular clause that affected their retirement benefits, the court held that the underlying claim was one of omission. “Here, plaintiffs are alleging that defendants’ breach specifically consisted of omitting information about the no reductions clause. Clearly, this establishes a claim of breach premised on an omission theory.”

b) Actual Knowledge

The Eighth Circuit addressed the “actual knowledge” requirement in **Brown v. American Life Holdings, Inc.**, 190 F.3d 856 (8th Cir. 1999), by agreeing “with the interpretive principles developed with substantial unanimity by our sister circuits.” The court held that “actual knowledge” requires “actual knowledge of all material facts necessary to understand that some claim exists,” citing **Gluck v. Unisys Corp.**, 960 F.2d 1168 (3d Cir. 1992). If the fiduciary made an imprudent investment, the court explained, knowledge of the transaction would not, itself, constitute “actual knowledge” since the transaction on its face is not a breach. Rather, actual knowledge with respect to this transaction would require “some knowledge of how the fiduciary selected the investment.”

In **Babcock v. Hartmarx Corp.**, 182 F.3d 336 (5th Cir. 1999), the Fifth Circuit held that plaintiffs evidenced “actual knowledge” of the transaction it issue such that their claim was barred by the three-year statute of limitations. The plaintiffs had taken several actions outside the three-year period indicating that they were aware that they had a claim

against the defendant, including filing a formal complaint with the Illinois Department of Insurance and making “veiled references to possible legal action.”

In **Koch v. Dwyer**, No. 98-5519, 1999 U.S. Dist. LEXIS 11101 (S.D.N.Y. July 22, 1999), the plaintiffs, former employees and participants in an ESOP, alleged that the plan fiduciaries breached their fiduciary duties by continuing to hold stock in the company as plan assets as the company was heading toward bankruptcy. Although the complaint was not filed until three years after the bankruptcy, thus putting the plaintiffs on notice that the claim may exist, the court nonetheless held that the action was timely because the underlying conduct complained of was an *omission, i.e.*, continued retention of an imprudent investment and the failure of the current fiduciaries to pursue claims against the prior fiduciaries. Because the plaintiff “is entitled to bring suit for up to six years after the latest date on which that omission could have been cured,” the claim was considered timely.

c) Fraud or Concealment

Wilson Land Corp. v. Smith Barney Inc., No. 97-CV-519, 1999 U.S. Dist. LEXIS 12879 (E.D. N.C. May 17, 1999), also discussed the fraudulent concealment doctrine as it relates to § 413, finding that it requires a plaintiff to show: (1) that defendants engaged in a course of conduct designed to conceal evidence of their alleged wrong-doing, and that (2) the plaintiffs were not on actual or constructive notice of that evidence, despite (3) their exercise of diligence. The court held that fraudulent concealment occurs only if the defendant takes some affirmative action to conceal the breach; mere silence is not enough. Because plaintiffs did not point to any action by the fiduciary that constituted an “affirmative action to conceal a breach,” fraudulent concealment did not apply.

5. Remedies

Cases continue to hold that § 502(a)(2) does not allow individuals to recover damages for themselves. **Strom v. Goldman, Sachs & Co.**, No. 98-7090, 1999 U.S. App. LEXIS 20032, 23 EBC 2068 (2d Cir. 1999) (“Section 502(a)(2) . . . affords no remedies to individual beneficiaries”); **Conley v. Pitney Bowes**, 176 F.3d 1044 (2d Cir. 1999); **In re Unisys Sav. Plan Litig.**, 173 F.3d 145 (3d Cir. 1999); **Matassarini v. Lynch**, 174 F.3d 549 (5th Cir. 1999), cert. denied, 120 S. Ct. 934 (2000); **Bellas v. CBS, Inc.**, 73 F. Supp. 2d 493 (W.D. Pa. 1999); **Long v. Group Long-Term Disability Benefits for Employees of Fleet Financial Group, Inc.**, No. 98-11388, 1999 U.S. Dist. LEXIS 18656 (D. Mass. Oct. 22, 1999).

D. Section 502(a)(3) Claims for Breach of Fiduciary Duty

1. Description of Causes of Action

a) Fiduciary Duty to Disclose Information

i. Whether Or Not Plaintiff Inquires

Some courts have held that the duty to disclose information is created absent an inquiry by the plaintiff. In **Krohn v. Huron Memorial Hospital**, 173 F.3d 542 (6th Cir. 1999), the Sixth Circuit agreed with many sister circuits in holding that the duty to inform entails a negative duty not to misinform and an affirmative duty to inform when the fiduciary knows that silence may be harmful. *Id.* at 548. The Sixth Circuit noted that the United States Supreme Court has expressly declined to reach the question of whether ERISA imposes on fiduciaries the duty to disclose truthful information on their own initiative or only in response to employee's inquiries. The Sixth Circuit then agreed with the District of Columbia and the Third Circuits in holding that the fiduciary's duty to inform is not excused by the beneficiary's failure to understand or ask about a technical aspect of the plan. *Id.* at 549. The court held that the defendant breached its fiduciary duty by failing to provide the plaintiff with pertinent information about the availability of long-term disability benefits and by failing to submit the plaintiff's application for disability benefits to its long-term disability insurer. *Id.* at 552. See also **Bins v. Exxon Co. USA**, 189 F.3d 929, 939 (9th Cir. 1999) (the court expanded the Third Circuit's holding in **Fischer v. Philadelphia Electric Co.**, 96 F.3d 1533, 1538-40 (3d Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997)), *rehn'g, en banc, granted*, 198 F.3d 1191 (9th Cir. 2000).

The Third Circuit held that this type of action requires the plaintiff to demonstrate individual losses for fiduciary breach and the materiality of alleged non-disclosure of information. **In re Unisys Sav. Plan Litig.**, 173 F.3d 145 (3d Cir.), *cert. denied*, 120 S. Ct. 372 (1999).

ii. Proposed Changes in Benefits -- Affirmative Duty to Disclose

The circuits are split as to whether an ERISA fiduciary has an affirmative duty to disclose a proposed change in benefits. In **Bins v. Exxon Co. USA**, 189 F.3d 929, 938 (9th Cir. 1999), *rehn'g, en banc, granted*, 198 F.3d 1191 (9th Cir. 2000), the Ninth Circuit rejected the Second and Fourth Circuit decisions holding there was no duty and expanded the employer's disclosure requirements by requiring that once an employer seriously considers a proposal, the employer has an affirmative duty to disclose the information about the proposal to participants and beneficiaries whom the employer knows or should know are considering retiring and to whom the information would be useful. *Id.* at 934. The **Bins** court adopted the 3-factor test of serious consideration of the Third Circuit in

Fischer but followed the Second Circuit in Ballone v. Eastman Kodak Co., 109 F.3d 717, which held that serious consideration is only one factor in determining materiality. Likewise, in McAuley v. IBM, 165 F.3d 1038 (6th Cir.), cert. dismissed, 120 S. Ct. 38 (1999), the Sixth Circuit stated in dicta that an ERISA fiduciary has a duty to inform beneficiaries of new and relevant information as it arises and advise the beneficiaries of situations which threaten any interest that is relevant to the beneficiary. Id. at 1043. The McAuley court held that serious consideration of a new retirement plan was sufficient to trigger the plan's fiduciary duty to avoid material misrepresentation to employees and defined serious consideration as occurring when senior management "focuses on a particular plan for a particular purpose." Id. at 1043.

In UAW, Local No. 1697 v. Skinner Engine Co., 188 F.3d 130 (3d Cir. 1999), the Third Circuit followed the Sixth Circuit decision in Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir.), cert. denied, 524 U.S. 923 (1998), and held that there was no breach of fiduciary duty when there were no affirmative misrepresentations and the company was not silent when asked. It added that an employer is under no duty to correct a mistaken assumption on the part of the employee participants. UAW, Local No. 1697 at 150-51. Although the Fifth Circuit has not yet considered this question, a District Court held that to be actionable the statement must be an affirmative misrepresentation of current facts regarding future plan benefits. McCall v. Burlington N./Santa Fe Co., 61 F. Supp. 2d 563, 569 (N.D. Tex. 1999) (where there was no material misrepresentation because the statement that a better plan would not follow was true at the time it was made). Id. at 570.

A district court declined to extend the serious consideration test, which has been applied to voluntary early retirement plans, to involuntary severance plans. Winkel v. Kennecott Holdings Corp., 48 F. Supp. 2d 1294, 1301 (D. Utah 1999) (employer does not violate its fiduciary duty to disclose deliberations concerning future changes to an involuntary severance plan because an employer should have less of an obligation to disclose because an employee has no right to participate in an involuntary plan and because no appropriate remedy exists). Id. at 301.

iii. Fiduciary Duty Not to Mislead

In Ames v. American National Can Co., 170 F.3d 751 (7th Cir. 1999), the Seventh Circuit held that company representatives did not breach their fiduciary duty by stating that there was rough comparability of benefit packages because the statement was not an affirmative misrepresentation but merely an opinion. Id. at 758.

iv. Fiduciary Duty to Avoid Conflict of Interest

When the defendant is the administrator of a plan and has the authority to make eligibility determinations for disability benefits, it could breach its fiduciary duty to avoid

conflicts of interest if it classified the plaintiff's eligibility and then stood to benefit from the classification. **Fitts v. Federal Nat'l Mortgage Assoc.**, 44 F. Supp. 2d 317, 326 (D.D.C. 1999).

b) Equitable and Promissory Estoppel

i. Equitable Estoppel

UAW, Local No. 1697 v. Skinner Engine Co., 188 F.3d 130, 151 (3d Cir. 1999), allowed an equitable estoppel action but found neither material misrepresentation nor detrimental reliance because no evidence demonstrated that the employees had ever even considered the promise of a lifetime health and life insurance plan in timing their retirement. See also **Devlin v. Transportation Communications Int'l**, 173 F.3d 94 (2d Cir. 1999).

ii. Promissory Estoppel

The Seventh Circuit has not yet fully resolved the extent to which it will recognize estoppel claims against ERISA plans. **Shields v. Local 705, Int'l Bhd. of Teamsters Pension Plan**, 188 F.3d 895, 899 (7th Cir. 1999). In Shields, the Circuit declined to decide whether promissory estoppel applies to a multi-employer pension plan because the participants failed to establish that the union's promise that the employee's past service would count toward pension benefits was definite or that the participants reasonably relied to their detriment. Id. at 899, 901. In his concurrence, Judge Posner stated that promissory estoppel can never be used to alter the terms of a defined benefit plan, especially as it applies to multi-employer pension plans. Id. at 903. The entire panel expressed concern about the economic effects such causes of action would have on defined benefit plans.

c) Unjust Enrichment

The Fourth Circuit held that absent a specific violation of an ERISA provision or enforcement of terms by an ERISA protected plan, no claim under the federal common law theory of unjust enrichment exists. **Elmore v. Cone Mills Corp.**, 187 F.3d 442, 450 (4th Cir. 1999). In Elmore, the plaintiffs claimed that they were entitled to the remainder of the \$69,000,000 surplus which the defendants had promised to contribute to a new employee stock ownership plan ("ESOP") when the defendants succeeded in their leveraged buyout of the company. The court held that the use of the federal common law theory of unjust enrichment under Provident Life & Accident Insurance Co. v. Waller, 906 F.2d 985 (4th Cir.), cert. denied, 498 U.S. 982 (1990), is the exception, not the rule, for ERISA cases. Elmore, 187 F.3d at 449. This is especially true where, as here, the original plans expressly authorized the defendants to keep the surplus and where allowing an unjust

enrichment claim would not effectuate a statutory policy of ERISA, such as furthering the intent of the plan. Id.

d) Section 502(a)(3) Provides a Private Cause of Action for Violations of Section 1027.

In Medoy v. Warnaco Employees Long-Term Disability Plan, 43 F. Supp. 2d 303, 311 (E.D.N.Y. 1999), the court held that a participant may bring an action for injunctive relief to enforce 29 U.S.C. § 1027 which requires ERISA reporting entities to maintain records for at least six years. Here, the defendant destroyed the plaintiff's files.

e) Indemnity by a Co-Fiduciary

Section 502(a)(3) does not support a claim for indemnity against a co-fiduciary. Meoli v. American Med. Servs. of San Diego, 35 F. Supp. 2d 761, 764 (S.D. Cal. 1999) (assuming that indemnity is appropriate equitable relief, indemnity does not redress a fiduciary breach or a violation of the terms of the statute).

f) Kickbacks

A defendant company that managed a fund's investment business could be liable for profits earned from misuse of the plan's assets when the plaintiff fund trustees sued after discovering that kickbacks had been paid by two of the defendants to two fund trustees in exchange for receiving the fund's investment business. Ossey v. Marolda, No. 96 C 0296, 1999 WL 183754, at *5 (N.D. Ill. Mar. 25, 1999).

g) Limitations on Section 502(a)(3) Causes of Action When Other Relief Is Available

Courts continue to dismiss Section 502(a)(3) claims where relief is available under other ERISA sections. In Bowles v. Reade, 198 F.3d 752 (9th Cir. 1999), the court dismissed the Section 502(a)(3) count because Section 502(a)(2) contained the precise remedy Congress prescribed. In Conley v. Pitney Bowes, 176 F.3d 1044, 1047 (8th Cir. 1999), cert. denied, 2000 U.S. LEXIS 845 (U.S. Jan. 24, 2000), the court held that a plaintiff cannot seek the same benefits in the form of equitable relief when plaintiff had an adequate remedy under Section 502(a)(1)(B). This is true even if the other claims are unsuccessful or barred by the statute of limitations. See Katz v. Comprehensive Plan of Group Insured, Alltel Pension and Benefits Communications, 197 F.3d 1084, 1088-89 (11th Cir. 1999) (adequate remedy under Section 502(a)(1)(B) whether or not the alternative remedy is adjudicated in the plaintiff's favor). In Corsini v. United Health Care Corp., 51 F. Supp. 2d 103, 106 (D.R.I. 1999), a district court held that even if time barred or unsuccessful under 502(a)(1)(B), the 502(a)(3) action fails. However, to the

extent that Sections 502(a)(1)(B) and 502(a)(3) are separate and distinct, plaintiffs are entitled to pursue both kinds of claims. Id. at 106 (claim under Section 502(a)(3) is appropriate for breach of an independent fiduciary duty even if it appears to be based on the same conduct that is cognizable under 502(a)(1)(B). Id. at 107).

In **Elmore v. Cone Mills Corp.**, 187 F.3d 442 (4th Cir. 1999), the Fourth Circuit held that a Variety-type claim must involve a violation of a specific ERISA provision, or enforcement of specific plan terms.

h) Individual Relief Necessary Under 502(a)(3)

Courts continue to hold that a claim for individual relief is essential for a Section 502(a)(3) action. See **Matassarini v. Lynch**, 174 F.3d 549 (5th Cir. 1999), cert. denied, 120 S. Ct. 934 (2000) (where the plaintiff's individual segregated account was unaffected no relief was available under Section 502(a)(3)); cf. **Harold Ives Trucking Co. v. Spradley and Coker, Inc.**, 178 F.3d 523, 527 (8th Cir. 1999) (court denied an injunction until the lower court established on remand whether an individual claim under Section 502(a)(3) existed); **In Re Unisys Savs. Plan Litig.**, 173 F.3d 145, 159 (3d Cir.), cert. denied, 120 S. Ct. 372 (1999); **Bowles v. Reade**, 1999 WL 1132968, at *6, 198 F.3d 752 (9th Cir. Dec. 13, 1999).

i) Waiver

At least one court recognizes the defense of waiver in a reimbursement of overpayment of benefits when the insured can show that the plan itself abandoned its claim to reimbursement. **Bobak v. Federal Express Corp.**, No. 97C 7066, 1999 WL 160223, at *5 (N.D. Ill. Mar. 10, 1999).

2. Plaintiffs

Section 502(a)(3) authorizes suit by a participant, a beneficiary or a fiduciary.

a) Who Is a Participant or Beneficiary?

The Fifth Circuit held that participants and beneficiaries have the same meaning under all sections of ERISA. **Heimann v. National Elevator Indus. Pension Fund**, 187 F.3d 493 (5th Cir. 1999). The Seventh Circuit explicitly extended consistent past court decisions under Section 502(a)(1)(B), which held that participants and beneficiaries include former employees with a colorable claim to vested benefits, to Section 502(a)(3). **Clair v. Harris Trust & Savs. Bank**, 190 F.3d 495, 497 (7th Cir.), pet. for cert. filed (Dec. 9, 1999).

b) Who Are Fiduciaries?

A fiduciary is one who has "substantial control over the assets, management, or administration of an ERISA plan." The entity that administered the Plan's claims for reimbursement from participants (and decided when to sue) was a fiduciary. **Health Cost Controls of Ill., Inc. v. Washington**, 187 F.3d 703, 709 (7th Cir. 1999), cert. denied, 120 S. Ct. 979 (2000). Accord **Administrative Comm. v. Gauf**, 188 F.3d 767, 770 (7th Cir. 1999). **Health Cost Controls of Illinois, Inc. v. Washington** also held that the assignee of an employee-sponsored health plan's reimbursement claim is a fiduciary. The court stated its holding was consistent with the widespread practice of splitting various functions "in the administration of an ERISA plan among specialized providers of service."

The Ninth Circuit reiterated earlier holdings that ERISA plans are not fiduciaries entitled to sue under ERISA. The Circuit also declined to follow the Sixth and First Circuits and held that trust funds, as ERISA plans, are not fiduciaries entitled to sue under ERISA. **Local 159, 342, 343 & 344 v. Norcal Plumbing, Inc.**, 185 F.3d 978, 982 (9th Cir. 1999). In **Local 159**, the court held that a trust fund could qualify as a fiduciary with respect to a distinct ERISA plan and could bring a suit in its own name as long as the trust fund exercised discretionary authority over the management of a separate plan or its assets. **Id.** at 982. Here, because the trust fund and the plan were not separate entities, the trust fund had no standing. **Id.** at 983.

3. Proper Defendants?

a) Non-fiduciaries

Taking a position which the First, Ninth, Tenth and Eleventh Circuits rejected, the Seventh Circuit held that a non-fiduciary cannot be liable for participating in a prohibited transaction under Section 502(a)(3) because a non-fiduciary cannot violate Section 1106. **Harris Trust & Savs. Bank v. Solomon Bros., Inc.**, 184 F.3d 646, 650 (7th Cir. 1999), cert. granted, 120 S. Ct. 784 (2000) (where a trustee for the pension sued a broker as a non-fiduciary in a prohibited transaction for losses resulting from motel property investments). A district court in the Second Circuit held there is a cause of action against a non-fiduciary party-in-interest for participating in a prohibited transaction. **Quint v. Freda**, No. 98 Civ. 4285 (DLC), 1999 WL 65045, at *3 (S.D.N.Y. Feb. 11, 1999) (a lawyer who assisted the plan fiduciaries in creating a bogus labor organization to perpetuate an improper benefit scheme could be liable).

b) Fiduciaries

Courts continue to find that the definition of a fiduciary is functional, broader than the common law definition and does not turn on formal designations. **Smith v. Provident**

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Bank, 170 F.3d 609, 613 (6th Cir. 1999) (court stated if a trustee delegated duties and powers to a brokerage company or to an employee of the trustee, they could both become fiduciaries). See also **CSA 401(k) Plan v. Pension Prof'ls, Inc.**, 195 F.3d 1135, 1138 (9th Cir. 1999).

c) Third Party Plan Administrator

The Ninth Circuit held that a third-party plan administrator who discovered embezzlement by a CEO, notified the plan trustees and conditioned its continuance as administrator on the repayment of the underfunding was not a fiduciary. **CSA 401k Plan v. Pension Prof'ls, Inc.**, 195 F.3d 1135, 1139 (9th Cir. 1999) (where the third party plan administrator had no actual discretionary authority or control over the plan, the Ninth Circuit held that no "Good Samaritan" liability existed).

d) Employers

An employer does not act in its fiduciary capacity when making business decisions. See **Hughes Aircraft Co. v. Jacobson**, 525 U.S. 432 (1999) (when altering the terms of a pension benefit plan or a welfare benefit plan whether it is a contributory, non-contributory or any other type of plan); **Ames v. American Nat'l Can Co.**, 170 F.3d 751 (7th Cir. 1999) (when negotiating the sale of the division); **Sutton v. Bell S. Telecomm., Inc.**, 189 F.3d 1318, 1321 (11th Cir. 1999) (when making a termination decision which occurred apart from the management of the administration of an ERISA plan), pet. for cert. filed (Dec. 21, 1999). Employers can act in their fiduciary capacity when explaining benefits to an employee. **UAW, Local No. 1697 v. Skinner Engine Co.**, 188 F.3d 130, 148 (3d Cir. 1999); **Bins v. Exxon Co., USA**, 189 F.3d 929, 936 (9th Cir. 1999), rehn'g, en banc, granted, 198 F.3d 1191 (9th Cir. 2000).

e) Employer Plan Sponsors

The Sixth Circuit held that an employer participating in a multi-employer plan was not a fiduciary because it was neither the named fiduciary nor the plan administrator and had no authority to interpret or administer the plan. The employer does not act in the fiduciary capacity when adopting, modifying or terminating a welfare plan benefit. **Voyk v. Brotherhood of Local Eng'rs**, 1999 WL 1076603, at *6, 198 F.3d 599 (6th Cir. Dec. 1, 1999) (where the defendant union employer modified a plan to require retiree contributions to maintain their health insurance coverage pursuant to the authority granted in the plan documents).

4. Which Language Controls?

There is inconsistency in the Seventh Circuit regarding which document controls when the language of the ERISA plan conflicts with the language of the summary plan description ("SPD"). See **Health Cost Controls of Ill., Inc. v. Washington**, 187 F.3d 703, 711 (7th Cir. 1999), cert. denied, 120 S. Ct. 979 (2000) (ERISA plan governs unless a plan participant has reasonably and detrimentally relied on the SPD). But see **Spitz v. Tepfer**, 171 F.3d 443, 448 (7th Cir.), on remand, 1999 U.S. Dist. LEXIS 19452 (N.D. Ill. Dec. 9, 1999) (reliance is irrelevant and the SPD language trumps the contrary ERISA language. The court stated that it was following **Mers v. Marriott Int'l Group Accidental Death and Dismemberment Plan**, 144 F.3d 1014, 1023 (7th Cir.), cert. denied, 525 U.S. 947 (1998)).

5. Damages

a) Compensatory and Extracontractual Damages

Courts continue to hold that monetary damages and extracontractual damages are not appropriate equitable relief under Section 502(a)(3). See **MacPherson v. Employers Health Ins.**, 168 F.3d 500, 1999 WL 51508, at *2 (9th Cir. Jan. 22, 1999) (where consequential damages of travel and relocation expenses are not considered equitable relief and the claim for the difference in the treatment overseas and the hypothetical cost of treatment in the United States is extracontractual or compensatory); **Kerr v. Charles F. Vatterott & Co.**, 184 F.3d 938, 943 (8th Cir. 1999) (where recovery of a monetary award for the difference between the return plan participants could have earned on funds during the time the funds were withheld and the return the plan actually earned was considered compensatory even when it left the plaintiff without a remedy).

Although the Seventh Circuit has not yet ruled on whether an employee should reimburse an employer who has mistakenly overpaid pension benefits and delayed two years in recognizing its mistake, a district court held that restitution was appropriate. **Kraft Foods, Inc. Supplemental Benefits Plan I v. Woods**, No. 98C 7794, 1999 WL 1069247, at *3 (N.D. Ill. Nov. 19, 1999).

b) Claims for Subrogation and Reimbursement

Courts are split on whether Plan claims against employees for "reimbursement" of medical expenses request legal or equitable relief. Finding no subrogation (an equitable remedy) but a contract claim for reimbursement, the Ninth Circuit followed its earlier decision in **FMC Medical Plan v. Owens**, 122 F.3d 1258 (9th Cir. 1997) and held that the plan could not recover reimbursement for payments to the defendant employee that the plan appropriately made. **Cement Masons Health and Welfare Trust Fund for**

N. Cal. v. Stone, 197 F.3d 1003, 1005-06 (9th Cir. 1999). The plaintiff sought restitution, declaratory relief and an injunction after the defendant failed to reimburse the fund when he received a third-party settlement award. The court held that "other appropriate equitable relief" does not include contract damages or reimbursement pursuant to the contract and rejected the plaintiff's argument that FMC Med. Plan was wrongly decided. Id. at 1005-07. The court further stated that restitution, under Section 502(a)(3), involves only "ill-gotten gains." Id. at 1006.

In contrast, in Administrative Communications v. Gauf, 188 F.3d 767, 770 (7th Cir. 1999) the Seventh Circuit rejected the Ninth Circuit's narrow holding in FMC Med. Plan and following the Eleventh and Eighth Circuits, held that "a claim for equitable relief under a reimbursement clause in a benefits contract is an equitable claim for purposes of ERISA Section 502(a)(3)." Id. at 771. The court made clear that the plan administrator's claim for reimbursement following an employee's recovery in a third-party tort action was for the purpose of protecting the plan's contractual right to repayment from an employee and was a reimbursement, not a subrogation, right. Id. In Health Cost Controls of Illinois, Inc. v. Washington, 187 F.3d 703, 711 (7th Cir. 1999), cert. denied, 120 S. Ct. 979 (2000), the Seventh Circuit held that the employer-sponsored health plan's reimbursement claim for funds from the holder of an insurance payment resulting from the plan participant's claim for uninsured motorist benefits was equitable relief in the form of a constructive trust. Id. at 709. The court commented that restitution might be legal or equitable depending on whether the case is at law or in equity.

c) Restitution

At least in the Seventh Circuit, restitution can be either equitable or legal relief. See Health Cost Control of Ill., Inc. v. Washington, 187 F.3d 703, 710 (7th Cir. 1999), cert. denied, 2000 U.S. LEXIS 842 (U.S. Jan. 24, 2000); Clair v. Harris Trust Savs. Bank, 190 F.3d 495, 498 (7th Cir.), pet. for cert. filed (Dec. 9, 1999). The fact that the request for relief is described as restitution does not necessarily mean that it is equitable. Id.

i. Breach of Fiduciary Duty

In the Seventh Circuit, restitution is always equitable when sought as a remedy for breach of fiduciary duty because the fiduciary concept is equitable. See Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703, 710 (7th Cir. 1999), cert. denied, 120 S. Ct. 979 (2000); Clair v. Harris Trust & Savs. Bank, 190 F.3d 495, 498 (7th Cir.) (was equitable where class action sought restitution of the wrongful gain the plan received by using interest-free money from the plaintiff's unpaid benefits), pet. for cert. filed (Dec. 9, 1999). In Strom v. Goldman, Sachs & Co., No. 98-7090, 1999 WL 639844, at *5 (2d Cir. Aug. 24, 1999), the Second Circuit held that plaintiffs do not need to show unjust

enrichment to recover restitution under a breach of fiduciary claim. Consequently, the plaintiff's claim for the \$500,000 in life insurance she would have received if the defendant had not breached its fiduciary duty by delaying the insurance application's submission. Analyzing legislative history, the court found that ERISA offered broad remedies to redress fiduciary breaches. It looked to both the NLRA and Title VII to define those remedies and analogized the insurance recovery to Title VII back pay relief. It concluded that Congress mandated make whole relief for breaches of trust.

d) Constructive Trust

The Seventh Circuit held that a constructive trust is always an equitable remedy squarely within Section 502(a)(3). **Clair v. Harris Trust & Savs. Bank**, 190 F.3d 495, 498 (7th Cir.), pet. for cert. filed (Dec. 9, 1999). See also **Health Cost Controls of Ill., Inc. v. Washington**, 187 F.3d 703, 711 (7th Cir. 1999), cert. denied, 2000 U.S. LEXIS 842 (U.S. Jan. 24, 2000) (where a constructive trust was allowed even though it was not a breach of fiduciary claim, the court did not follow the Ninth Circuit in **FMC Med. Plan** which held that a constructive trust was permissible in ERISA claims only when there was a breach of trust).

e) Declaratory Action

In **Spitz v. Tepfer**, 171 F.3d 443, 450 (7th Cir.), on remand, 1999 U.S. Dist. LEXIS 19452 (N.D. Ill. Dec. 9, 1999), the court held that a suit for restitution of illegally gotten plan assets and for declarations concerning rights to funds and a loan under the plan was equitable.

f) Prejudgment Interest

Following the Third Circuit's 1998 decision in **Fotta v. UMWA Health & Retirement Fund** that prejudgment interest is "presumptively" available, awards of prejudgment interest are more routine and less discretionary. In an unpublished decision, the Sixth Circuit held that it was an abuse of discretion to refuse to award prejudgment interest in suit to recover accidental death benefits. **Garber v. Provident Life & Accident Ins. Co.**, 23 EBC 1090 (6th Cir. 1999). In **Kerr v. Charles F. Vatterott & Co.**, 184 F.3d 938, 23 EBC 1328 (8th Cir. 1999), the Eighth Circuit held that a 401(k) plan participant is entitled to recover the amount that a plan actually earned on his funds during the period in which payment was delayed, but not entitled to amount that he hypothetically could have earned because that higher amount could constitute a claim for compensatory damages. See also **Clair v. Harris Trust & Sav.**, 190 F.3d 495, 23 EBC 1649 (7th Cir.) (interest on delayed pension payments may be recovered under equitable remedy of restitution), pet. for cert. filed (Dec. 9, 1999). In **Walsh v. Eastman Kodak Co.**, 53 F. Supp. 2d 569, 574 (W.D.N.Y. 1999), the court refused to allow a retiree to recover interest under

Section 502(a)(3) for a 25-day delay of payments of lump-sum retirement benefits. The District Court distinguished the Third Circuit decision in Fotta v. Trustees of the UMW Health and Retirement Fund, 165 F.3d 209 (3d Cir. 1998), which allowed interest for a 25-year delay. Walsh, 53 F. Supp. 2d at 573.

The selection of the appropriate rate of interest remains discretionary. The Fourth Circuit found no abuse of discretion in a 12% prejudgment interest award where the S&P 500 gained 19% over the period and the district court found 12% was a reasonable rate of return for a balanced portfolio. Fox v. Fox, 167 F.3d 880, 22 EBC 2441 (4th Cir. 1999); Holmes v. Pension Plan of Bethlehem Steel Corp., 1999 U.S. Dist. LEXIS 4613, *7 (E.D. Pa. 1999) (prejudgment interest computed by applying rate under 28 U.S.C. § 1961 for postjudgment interest based on last settled T-bill auction before the accrual of plaintiffs' respective claims).

g) Extracontractual Damages vs Equitable Remedies

As in Kerr v. Charles F. Vanterott & Co., supra, recovery of monetary damages such as for lost profits resulting from a breach of fiduciary duty continues to be denied because of ERISA Section 502(a)(3)'s limitation to "other equitable relief." Hoerberling v. Nolan, 49 F. Supp. 2d 575, 23 EBC 1200 (E.D. Mich. 1999). In a significant elaboration, a plan's claim to reimbursement for medical expenses from proceeds recovered in wrongful death actions was dismissed because the plan's reimbursement claim was not restitution for "ill-gotten gains" or another remedy available under 502(a)(3). Cement Masons Health & Welfare Trust v. Stone, 197 F.3d 1003, 23 EBC 2349 (9th Cir. 1999). Contra Administrative Committee v. Gauf, 188 F.3d 767, 23 EBC 2002 (7th Cir. 1999) (claim to reimbursement under contract is equitable claim for specific performance); Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703, 23 EBC 1744 (7th Cir. 1999), cert. denied, 120 S. Ct. 979 (2000) (reimbursement suits may be treated as seeking equitable relief by imposition of constructive trust).

The Second Circuit has held that equitable relief includes a "make whole" remedy when an employer's alleged breach of fiduciary duty in handling an application for life insurance caused the effective date of the policy to be delayed until four days after the employee's death. Strom v. Goldman, Sachs & Co., ___ F.3d ___, 23 EBC 2068 (2d Cir. 1999).

6. Statute of Limitations

Section 413 sets the statute of limitations for breaches of fiduciary duty. Babcock v. Hartmarx Corp., 182 F.3d 336, 340 (5th Cir. 1999) (where the court held that actual knowledge occurs when the plaintiff knows of the facts that support a claim for

breach of fiduciary but the plaintiff does not have to know the exact cause of action). See also **Bowles v. Reade**, 1999 WL 1132968, 198 F.3d 752 (9th Cir. Dec. 13, 1999).

ii. Accrual of Statute of Limitations

Section 413's six-year statute of limitation begins to accrue in a "Varity" breach of fiduciary claim when the employee takes an irrevocable action in reliance on the fiduciary misrepresentation regardless of when the injury is felt. **Spangler v. Altec Int'l Ltd. Partnership**, 172 F.3d 53, 1999 WL 66189, at *3 (7th Cir.), cert. denied, 120 S. Ct. 47 (1999).

Breach of fiduciary claims accrue when there is a clear repudiation made known to the beneficiaries. **Warzecha v. Nutmeg Co., Inc.**, 48 F. Supp. 2d 151, 158 (D. Conn. 1999) (where there was no clear repudiation because beneficiaries were never denied benefits and never knew about breach, the claims were not time-barred).

III. GENERAL PROCEDURAL ISSUES.

A. Subject Matter Jurisdiction.

The federal courts continue to explore the boundaries of federal question jurisdiction under 28 U.S.C. §1331 in employee benefits litigation. The Second Circuit found subject matter jurisdiction under 28 U.S.C. §1331 where a multiemployer fund sought to recover unpaid fringe benefit contributions from an employer which had not signed the current bargaining agreements but which continued to submit monthly remittance reports. **Brown v. C. Volante Corp.**, 194 F.3d 351 (2nd Cir. 1999), pet. for cert. filed (Jan. 4, 2000). In finding subject matter jurisdiction, the court accepted the fund's argument that the employer had adopted the collective bargaining agreements. The court ruled that it had subject matter jurisdiction under Section 1145 of ERISA.

In an Eighth Circuit decision, **Emmenegger v. Bull Moose Tube Co.**, 197 F.3d 929 (8th Cir. 1999), the court's jurisdiction over a benefits claim case turned on whether a phantom stock plan and a severance plan were ERISA plans. The court split the baby, finding that the phantom stock plan was not an pension benefit plan covered by ERISA, but that the severance plan was an ERISA welfare benefit plan. Accordingly, the court only had jurisdiction over the claims for severance benefits.

A district court ruled that it had no subject matter jurisdiction over an action involving a church plan. **Friend v. Ancilla Systems, Inc.**, 68 F. Supp. 2d 969 (N.D.Ill. 1999).

B. Standing.

A variety of standing issues were addressed in 1999: In the Seventh Circuit, Judge Posner has held that retirees have standing to bring a class action under Section 502(a)(3) for interest on delayed pension payments when they seek interest under the equitable remedy of restitution. **Clair v. Harris Trust & Sav.**, 190 F.3d 495, 23 EBC 1649 (7th Cir.), pet. for cert. filed (Dec. 9, 1999).

An estate has standing to bring an ERISA action under Section 502(a)(3) even though it was not named as beneficiary when the estate alleged that a breach of fiduciary duty had denied it benefits. **Sanders v. Int'l Soc'y for Performance Improvement**, 23 EBC 2334 (D.C. Cir. 1999).

A former employee had standing to bring a Section 502(a)(3) action for breach of fiduciary duty even though he received a lump sum payment of his pension benefits one month before filing suit since he still had a colorable claim to additional benefits. **McHenry v. Bell Atlantic Corp.**, 23 EBC 1977, 1979-80 (E.D. Pa. 1999) (plaintiff who “already survived two dispositive motions . . . is clearly in the zone of interests ERISA was intended to protect”).

An employee who was allegedly fired for whistle blowing--mailing a letter to U.S. DOL complaining about the employer's plan to terminate an ESOP--has standing under ERISA Section 510 as a participant when his status at the time he was fired, not when suit was filed is examined. **McBride v. PLM Int'l, Inc.**, 179 F.3d 737, 23 EBC 1435 (9th Cir. 1999).

Although qualified to sue under ERISA, as well as to be sued, employee benefit plans have not fared well in litigation against the tobacco companies under other federal statutes. In contrast to the successful state court actions by the various state governments, the injuries to health and welfare plans have been held to be too tangential and remotely connected to violations of RICO and antitrust laws to meet the proximate cause requirements of those laws. **Steamfitters Local 420 Welfare Fund v. Philip Morris**, 171 F.3d 912, 23 EBC 1141 (3d Cir. 1999), cert. denied, 120 S. Ct. 844 (2000); **Laborers Local 17 Health & Benefit Fund v. Philip Morris**, 172 F.3d 223 (2d Cir. 1999); **Oregon Laborers Employers Health & Welfare Trust Fund v. Philip Morris**, 185 F.3d 957, 23 EBC 1906 (9th Cir. 1999), cert. denied, 120 S. Ct. 789 (2000).

Compare **Gallagher Corp. v. Russ**, 23 EBC 2214 (Ill. App. Ct. 1999) (even though unincorporated and thus not a “person” under state law, benefit plan has standing to

bring action in state court alleging that actuary engaged in professional negligence; Congress intended that plans be able to sue and be sued like corporations and other legal entities).

1. Enumerated Parties

Generally, courts limit standing to bring ERISA claims to only those parties specifically enumerated in Section 502(a): participants, beneficiaries, fiduciaries, and the Secretary of Labor. **McBride v. PLM Int'l, Inc.**, 179 F.3d 737, 742 (9th Cir. 1999). Other persons are usually left without any ERISA remedy.

a. Participants

ERISA defines “participant” as “any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . or whose beneficiaries may be eligible to receive any such benefit.” Different issues arise depending on whether the individual is an “employee” or “former employee.”

i. Employees

1. Employees and Independent Contractors

ERISA defines an “employee” only as “any individual **employed by an employer.**” The Supreme Court in **Nationwide Mutual Insurance Co. v. Darden**, finding this language to be “completely circular and explain[ing] nothing,” held that the determination of whether an individual is an “employee” for purposes of bringing suit under ERISA should be made under the traditional common law test and agency principles. The common law test adopted by the Court to distinguish employees from independent contractors is composed of thirteen factors, no single one of which is dispositive.

2. Plans With No Employees

The Department of Labor, in its rulemaking authority, has issued regulations defining an “employee” for purposes of determining the existence of an ERISA covered plan. The DOL defines “employee benefit plan” to exclude those plans “under which no employees are participants.” The regulations state that neither the owner of a business (whether incorporated or unincorporated) nor a partner in a partnership, can constitute an “employee.” Most courts, in interpreting who is an “employee” under ERISA, have relied

on the DOL regulations in finding that sole proprietors, owners, and partners are not “employees.”

3. Dual Status Employees

The circuit courts have split regarding the question whether an owner or partner who participates in a plan also covering his common-law employees has standing under ERISA to pursue benefit claims. These cases generally arise in the context of ERISA preemption, when the defendant asserts that the plaintiff’s state law claims are preempted by ERISA. Some courts have held that such dual status employees are not plan participants, and therefore, have no standing to sue. Other circuits, however, have allowed ERISA to govern claims by owners or partners, so long as the plan itself is governed by ERISA because of the inclusion of common-law employees. See, e.g., **Vega v. National Life Ins. Services, Inc.**, 188 F.3d 287, 294 (5th Cir. 1999) (a shareholder of a Texas corporation is not precluded from qualifying as an employee for ERISA purposes so long as the corporation’s benefit plan includes at least one employee participant other than a shareholder or a spouse of a shareholder). These courts reason that even if the self-employed individual is not an employee, he is a beneficiary of the ERISA plan and thereby has standing to pursue claims. **Wolk v. Unum Life Ins. of Am.**, 186 F.3d 352, 356 (3d Cir. 1999) (law firm’s partner-employer who shares coverage with employees under a welfare plan qualifies as a beneficiary with standing to bring suit under ERISA), cert. denied, 120 S. Ct. 792 (2000).

4. Shareholders of Professional Corporations

In **Wolk v. UNUM Life Insurance of America**, id., the Third Circuit held that a law firm’s partner was a beneficiary with standing to bring suit under ERISA for disability benefits. Plaintiff had filed state law claims and wished to remain in state court. She argued that because a law firm partner is an employer, not an employee, she did not have standing to bring ERISA claims. The court emphasized that to so hold would “create the anomaly of requiring some insureds to pursue benefit claims under state law while requiring others covered by the identical policy to proceed under ERISA” Id. at 357.

ii Former Employees

In **Firestone Tire & Rubber Co. v. Bruch**, the Supreme Court defined the circumstances under which a former employee may be considered a “participant” for purposes of standing under Section 502(a). In **Firestone**, the Court held:

In our view, the term “participant” is naturally read to mean either “employees in, or reasonably expected to be in, currently covered

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employment,” or former employees who “have . . . a reasonable expectation of returning to covered employment” or who have “a colorable claim” to vested benefits . . .”. In order to establish that he “may become eligible for benefits,” a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future.”

Courts have held that the requirement of a colorable claim is not a stringent one. **Jackson v. E. J. Brach Corp.**, 176 F.3d 971, 979 (7th Cir. 1999) (plaintiff must demonstrate that “his claim was not frivolous and that it was a claim to ‘vested benefits.’ Claims ‘rooted in existing ERISA law’ are not frivolous.”); **Medoy v. Warnaco Employees’ Long Term Disability Ins. Plan**, 43 F. Supp. 2d 303, 311 (E.D.N.Y. 1999) (“The Second Circuit has rejected a narrow interpretation of ERISA’s standing requirement . . .”); **Leo v. Laidlaw, Inc.**, 38 F. Supp. 2d 675, 678 (N.D. Ill. 1999) (“The requirement of a ‘colorable claim’ means only that the plaintiff must have ‘an arguable claim’ and not that the plaintiff must be able to succeed on that claim”). They have emphasized that the basic standing issue is whether the plaintiff is “within the zone of interests ERISA was intended to protect.”); **Clair v. Harris Trust and Savings Bank**, 190 F.3d 495, 498 (7th Cir. 1999) (“ERISA confines the right to relief to participants, beneficiaries and fiduciaries because they are the classes of persons ERISA is concerned about), *pet. for cert. filed* (Dec. 9, 1999); **Medoy v. Warnaco Employees’ Long Term Disability Ins. Plan**, 43 F. Supp. 2d 303, 310 (E.D.N.Y. 1999).

Many courts have addressed the “reasonable expectation of returning to covered employment” criterion. **McBride v. PLM International, Inc.**, 179 F.3d 737, 742 (9th Cir. 1999). They have considered evidence of the plaintiff’s attempts to obtain reinstatement prior to suit, the plaintiff’s physical ability to perform the job if reemployed, and the plaintiff’s recall rights under a collective bargaining agreement.

The circuits have split in their interpretation of Firestone’s definition of a “colorable” claim. **Jackson v. E.J. Brach Corp.**, 176 F.3d 971 (7th Cir. 1999); **McBride v. PLM Int’l, Inc.**, 179 F.3d 737, 742 (9th Cir. 1999); **Clair v. Harris Trust and Savings Bank**, 190 F.3d 495, 498 (7th Cir.), *pet. for cert. filed* (Dec. 9, 1999). The Ninth Circuit adopted the “but for” standard where the plaintiff alleged that he was discharged because of his opposition to an ESOP termination. **McBride v. PLM Int’l, Inc.**, 179 F.3d 737 (9th Cir. 1999). The court noted that “depriving a plaintiff of standing to sue under ERISA for his employer’s clear violation of Section 410 would, in effect, make standing contingent upon the occurrence of subsequent events entirely within the control of the employer.” *Id.* at 743. The Ninth Circuit held that an employee who was a participant at the time of the alleged ERISA violation and alleges that he was discharged or discriminated against

because of protected whistleblowing activities has standing to sue under ERISA. *Id.*, at 743.

b. Beneficiaries

ERISA Section 3(8) defines “beneficiary” as a “person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.” Most litigation in this area is brought when a spouse or other relative who was not explicitly named by a participant of an ERISA-covered plan as his or her beneficiary seeks benefits under the plan, or when an individual was purportedly dropped as a beneficiary as a result of conduct by the participant.

The Fifth Circuit noted that QDRO recipients have standing to bring ERISA claims. *Matassarin v. F.F. Lynch*, 174 F.3d 549, 563 (5th Cir. 1999), cert. denied, 120 S. Ct. 934 (2000).

c. Fiduciaries

ERISA’s functional definition of “fiduciary” contained in Section 3(21) applies in determining whether an individual is a fiduciary and therefore has standing to pursue an ERISA claim. Under ERISA, fiduciaries have the right to pursue claims against co-fiduciaries, parties in interest, predecessor fiduciaries, and against the Secretary of Labor. Standing issues may arise when the plaintiff is no longer a fiduciary at the time suit is brought, or loses fiduciary status while the lawsuit is pending.

Standing issues also arise when a fiduciary of one plan pursues a claim against a fiduciary of another plan on behalf of plan participants who may have a direct or indirect interest in the operation of the other plan. Generally, fiduciaries of a plan have standing only to sue fiduciaries of the same plan, not fiduciaries of other plans, unless the defendant fiduciaries’ plan is in some way interlocked with that of the plaintiff fiduciaries’ plan such that the conduct of the defendants harms the plaintiffs’ plan. Although it is clear that current fiduciaries have standing to sue former fiduciaries, current fiduciaries have standing to sue fiduciaries of predecessor plans only when the defendant fiduciaries’ actions resulted in later harm to the fiduciaries’ plans.

d. Secretary of Labor

The Secretary of Labor has standing to bring actions pursuant to Section 502(a)(2), (a)(4), (a)(5), (a)(6), (a)(8), (a)(9), and (m).

2. Non-Enumerated Parties

a. Plan

Most courts hold that because an ERISA plan is not an enumerated party, it does not have standing to sue under Section 502(a), even though, under Section 502(d), a plan is a legal entity that can sue and be sued. **Bowles v. Reade**, 198 F.3d 752, 760-61 (9th Cir. 1999); **Local 159 v. Nor-Cal Plumbing**, 185 F.3d 978, 983-84 (9th Cir. 1999). In **Local 159 v. Nor-Cal Plumbing**, a multiemployer trust fund argued that it had standing as a fiduciary since it had fiduciary responsibility over the separate ERISA plan which arose from the trust. 185 F.3d 978, 982 (9th Cir. 1999). The court held that the trust fund and the plan were not distinct entities and therefore the trust fund could not be an ERISA fiduciary with respect to the plan.

b. Union

Courts have also held that, as a non-enumerated party, a union has no standing to sue. **Communications Workers of Am. v. SBC Disability Income Plan**, 1999 WL 1318027 ___ F. Supp. 2d ___ (W.D. Tex. 1999). However, some courts have permitted a union to bring suit on behalf of its members who are participants in the plan. A union also may have standing as a fiduciary to sue in actions regarding appointment or replacement of union trustees.

c. Employer

Likewise, most courts have held that employers do not have standing to sue under Section 502. **Reder v. The Travelers Plan Administrators of Conn., Inc.**, 44 F. Supp. 2d 92, 100 (D. Mass. 1999). An exception, however, occurs when standing is derived from the employer's status as a fiduciary. **Harold Ives Trucking Co. v. Spradley & Coker**, 178 F.3d 523, 526 (8th Cir. 1999) ("Because Harold Ives is vested with and exercises discretionary authority and control as the plan sponsor and named administrator, it is a fiduciary").

Most courts have held that employers lack standing to sue to recover mistaken overpayments of plan contributions under 502(a); many courts allow recovery, however, under the federal common law of ERISA.

d. PBGC

The PBGC has the same standing to sue under Section 502(a)(2) as its predecessor fiduciary.

e. Derivative Standing

Most courts have allowed “derivative” standing by parties not specifically enumerated in ERISA. All circuits which have addressed the issue have held that assignees of participants' and beneficiaries' welfare benefit claims have derivative standing under Section 502(a), noting that ERISA contains no anti-assignment provision with regard to welfare plan benefits, as it does in the context of pension benefits. **I.V. Services of America, Inc. v. Inn Dvlpmt. & Mgmt., Inc.**, 182 F.3d 51, n.3 (1st Cir. 1999). Most of these cases have involved health care providers as assignees.

If the plaintiff cannot demonstrate that it received an assignment, the plaintiff does not have standing to bring an ERISA cause of action. **Ward v. Alternative Health Delivery Systems, Inc.**, 55 F. Supp. 2d 694, 698 (W.D. Ky. 1999). Where the benefit assignment form only assigned the health care provider the right to receive payments and not the right to file suit, the provider demonstrated a colorable claim that it was the participant's assignee. **I.V. Services of America, Inc. v. Inn Dvlpmt. & Mgmt., Inc.**, 182 F.3d 51, n.3 (1st Cir. 1999).

A district court ruled that a plan participant who assigned her interest in receiving benefits under the plan to a medical treatment facility did not forfeit her own right to bring suit. **Hansen v. Aetna Health and Life Ins. Co.**, 1999 WL 1074078 (D. Or. 1999). The court noted that if a participant's status as assignor of benefits deprived her of standing, such assignments would be discouraged and the risks of nonpayment would be increased.

Courts generally will enforce plan provisions prohibiting assignment of benefits. **Neurological Resources, P.C. v. Anthem Ins. Cos.**, 61 F. Supp. 2d 840, 845-46 (S.D. Ind. 1999).

C. Service of Process and Personal Jurisdiction

Section 502(e)(2) states that “process may be served in any . . . district where a defendant resides or may be found.” The courts generally consider this to authorize nationwide service of process that permits the federal courts to exercise personal jurisdiction over any U.S. resident without regard to minimum contacts with the forum state; instead, minimum contacts with the United States is sufficient. But not all courts agree and several hold that to assert personal jurisdiction over a defendant, the defendant must have minimum contacts with the forum to satisfy due process. Other courts hold that independent of the provision for nationwide service of process, ERISA's failure to provide a specific manner of service permits the exercise of jurisdiction only where a plaintiff

satisfies the procedural requirements for service of process, which may implicate state long-arm statutes and a concomitant minimum contacts requirement.

D. Venue

1. Statutory Venue Provisions

Pursuant to §502(e)(2) of ERISA, 29 U.S.C. §1132(e)(2), there are three factors which determine the appropriate venue of an ERISA case. **Trustees of the National Elevator Industry Pension, Health Benefit and Education Funds v. Ramchandi**, 1999 U.S. Dist. LEXIS 3182 (E.D. Pa. 1999) (venue is proper where the plan is administered). Those three factors are:

- (a) where the benefit plan is administered;
- (b) where the breach took place; and/or
- (c) where at least one defendant resides or may be found.

2. Transfer of Venue

Transfer of venue in a federal ERISA case is governed by the generally applicable 28 U.S.C. §1404(a) and 28 U.S.C. §1406(a) [applicable only when suit is filed in the wrong district or venue]. Although ERISA provides for three statutory factors to be considered in determining appropriate venue, federal courts generally apply the same factors used, pursuant to 28 U.S.C. §1404(a), to determine appropriate venue in any other case. **Bryant v. ITT Corp.**, 48 F. Supp. 2d 829, 832-835 (N.D. Ill. 1999). The court breaks down two of the primary factors typically considered in motions under 28 U.S.C. § 1404(a):

A) Convenience of the parties and witnesses:

- 1) plaintiff's choice of forum;
- 2) situs of material events;
- 3) relative ease of access to sources of proof;
- 4) convenience of the witnesses;
- 5) convenience of the parties.

B) Interests of Justice:

- 1) speed at which the case will proceed to trial;
- 2) the respective courts' familiarity with the applicable law;
- 3) desirability of resolving controversies in their locale and the relation of the community to the occurrence at issue.

Some courts apply general venue factors to interpret the three factors established by §502(e)(2) of ERISA. **Boilermaker-Blacksmith National Pension Fund v. Gendron**, 67 F. Supp. 2d 1250, 1257 (D. Kan. 1999). Some courts ignore §502(e)(2) of ERISA entirely, deciding venue issues solely on the factors traditionally relied upon under 28 U.S.C. §1404(a). **Lawrence v. Xerox Corp.**, 56 F. Supp. 2d 442, 452 (D.N.J. 1999) (there is a presumption in favor of plaintiff's choice of forum); **UUB**, 1999 WL 305370 (E.D. Pa. 1999) (shifting inconvenience from one party to another is not grounds for transfer of venue); **Briesch v. Automobile Club of So. Cal.**, 40 F. Supp. 2d 1318, 1322 (D. Utah 1999) (allegations in a venue motion must be supported by affidavits and/or evidence; shifting inconvenience from one party to another is not grounds for transfer of venue); **Central States, Southeast and Southwest Areas Pension Fund v. White**, 1999 WL 447059 (N.D. Ill. 1999) (allegations in a venue motion must be supported by affidavits and/or evidence; shifting inconvenience from one party to another is not grounds for transfer of venue). Some courts may apply issues of public interest and policy in their consideration of venue under §502(e)(2). **Boilermaker-Blacksmith National Pension Fund v. Gendron**, 67 F. Supp. 2d 1250, 1257 (D. Kan. 1999). The court gives special heightened scrutiny to the already presumptive venue issues under 28 U.S.C. 1404(a) in ERISA cases "because the special venue provisions [of ERISA] allow a case to be brought in any district where the plan is administered." Conversely, in **Trustees of the National Elevator Industry Pension, Health Benefit, and Education Funds v. Continental Elevator Co., Inc.**, the court gives some preference to the site of the administration of the Plan. In **Lawrence v. Xerox Corp.**, 56 F. Supp. 2d 442, 453-455 (D.N.J. 1999) the court gave special consideration to the interests of justice when transfer of venue was sought to effect consolidation of ERISA case with related litigation in another jurisdiction.

E. Removal and Relationship to State Proceedings

1. Title 29 U.S.C. § 1441

Under general principles of federal jurisdiction, an ERISA claim filed in state court may be removed to an appropriate federal district court because the claim arises under federal law, provided the technical requirements for removal are otherwise satisfied. This is true even if the state court action is properly filed under the state court's concurrent jurisdiction over ERISA §502(a)(1)(B) actions.

2. Well-Pleaded Complaint Rule

Normally, the determination of whether a plaintiff's complaint arises under federal law is based on "what necessarily appears in the plaintiff's statement of his own claim . . . , unaided by anything alleged in anticipation of defenses which it is thought the defendant may interpose." This concept has come to be known as the well-pleaded complaint rule. **Danca v. Private Health Care Systems, Inc.**, 185 F.3d 1, 4 (1st Cir. 1999); **In re U.S. Healthcare, Inc.**, 193 F.3d 151, 160 (3rd Cir. 1999); **Copling v. The Container Store**, 174 F.3d 590, 594 (5th Cir. 1999); **Giles v. NYLCare Health Plans, Inc.**, 172 F.3d 332, 336 (5th Cir. 1999); **Heimann v. The National Elevator Industry Pension Fund**, 187 F.3d 493, 499 (5th Cir. 1999); **Hull v. Fallon**,

1999 WL 637073 (8th Cir. 1999); **Lyons v. Alaska Teamsters Employer Service Corp.**, 188 F.3d 1170, 1171 (9th Cir. 1999).

The federal courts have, however, recognized an exception to the well-pleaded complaint rule as a basis for removal of a complaint that, on its face, appears to raise a valid state law claim. Removal is proper where a federal law so completely preempts the state law claim that state law jurisdiction is considered displaced. **Copling v. The Container Store**, 174 F.3d 590, 594 (5th Cir. 1999); **Giles v. NYLCare Health Plans, Inc.**, 172 F.3d 332, 336 (5th Cir. 1999); **Heimann v. The National Elevator Industry Pension Fund**, 187 F.3d 493, 499 (5th Cir. 1999); **Smith v. Provident Bank**, 170 F.3d 609, 613 (6th Cir. 1999); **Hull v. Fallon**, 1999 WL 637073 (8th Cir. 1999); **Lyons v. Alaska Teamsters Employer Serv. Corp.**, 188 F.3d 1170, 1172 (9th Cir. 1999); **Butero v. Royal Maccabees Life Ins. Co.**, 174 F.3d 1207, 1211-1212 (11th Cir. 1999). If a state law claim has been displaced and therefore completely preempted by §502(a), then the claim is properly “recharacterized” as one arising under federal law.

3. Conflict Preemption vs. Complete Preemption

Conflict, or ordinary, preemption is based on ERISA §514(a) which provides for the preemption of all state laws that “relate to any employee benefit plan.” **Danca v. Private Health Care Systems, Inc.**, 185 F.3d 1, 4 (1st Cir. 1999); **In re U.S. Healthcare, Inc.**, 193 F.3d 151, 160 (3rd Cir. 1999); **Copling v. The Container Store**, 174 F.3d 590, 595 (5th Cir. 1999); **Giles v. NYLCare Health Plans, Inc.**, 172 F.3d 332, 337 (5th Cir. 1999); **Heimann v. The National Elevator Industry Pension Fund**, 187 F.3d 493, 499-500 (5th Cir. 1999); **Butero v. Royal Maccabees Life Ins. Co.**, 174 F.3d 1207, 1212 (11th Cir. 1999). Conflict preemption merely displaces state law. It generally arises, not within a “well-pleaded complaint,” but as a defense. As such, it cannot serve as the basis for removal jurisdiction. In **Metropolitan Life Insurance Co. v. Taylor**, the Supreme Court stated that “ERISA [conflict] preemption, without more, does not convert a state action into an action arising under federal law.” Conflict preemption is insufficient to override the normal operation of the well-pleaded complaint rule, or to confer the court with removal or federal question jurisdiction. State law claims are not recharacterized as claims arising under federal law. In such situations, the federal law serves as a defense to the state law claim and does not confer federal question jurisdiction.

In contrast, complete preemption not only displaces substantive state law, but also ‘recharacterizes’ preempted state law claims as ‘arising under’ federal law for the purposes of determining federal question jurisdiction. **Danca v. Private Health Care Systems, Inc.**, 185 F.3d 1, 4 (1st Cir. 1999); **In re U.S. Healthcare, Inc.**, 193 F.3d 151, 160 (3rd Cir. 1999). As a result, complete preemption is a rule of federal jurisdiction. According to the Supreme Court, “complete preemption ‘converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,’ generally rendering the entire case removable to federal court at the discretion of the defendant.”

Complete preemption issues arise when an action filed in state court can be recharacterized as an action under ERISA §502(a), within the exclusive remedies provided by

ERISA. In that case, the state law claim is completely preempted and removal to federal court is proper.

Accordingly, complete preemption under §502(a) creates federal question jurisdiction but conflict preemption under §514(a) does not. Removal is not appropriate where the plaintiff would not have standing to pursue a claim under ERISA or the claim does not fit within any of ERISA's nine civil enforcement provisions. **Danca v. Private Health Care Systems, Inc.**, 185 F.3d 1, 5 (1st Cir. 1999); **In re U.S. Healthcare, Inc.**, 193 F.3d 151, 161 (3rd Cir. 1999); **Heimann v. The National Elevator Industry Pension Fund**, 187 F.3d 493, 501 (5th Cir. 1999); **Hull v. Fallon**, 1999 WL 637073 (8th Cir. 1999); **Butero v. Royal Maccabees Life Ins. Co.**, 174 F.3d 1207, 1212 (11th Cir. 1999).

4. Burden of Proof

In filing the notice of removal in federal court, a “bare-bones” contention that an action is governed by ERISA is insufficient. If it is not apparent from the face of the complaint that an ERISA-covered plan is involved, then factual support for that contention must be provided. **Danca v. Private Health Care Systems, Inc.**, 185 F.3d 1, 4 (1st Cir. 1999).

5. Effect of No Standing

A consensus is developing in the courts that where a plaintiff does not have standing to raise an ERISA claim, the case cannot be removed.

6. Removal of Cases Alleging a Consequential Loss of Benefits

Generally, removal will be ineffective when the loss of plan benefits is a consequence of, but not the motivating factor behind, a termination of employment. Thus, even if the plaintiff requests restoration of benefits as damages for a wrongful termination claim, the complaint cannot be removed unless the allegations would otherwise support a claim under Section 510 of ERISA.

7. Removal of Cases Involving Oral Misrepresentation in Precertification

Difficult removal issues also arise when a medical provider (such as a hospital) seeks oral preadmission confirmation of a patient's coverage under a plan. After confirmation is provided, the plan denies benefits either because the patient was not actually covered by the plan or because the claimed expenses were not payable under the terms of the plan. If the medical provider sues in state court as an assignee of the patient, the claim generally will be removable. If, however, the medical provider sues in state court under a theory related to estoppel or negligent misrepresentation, the outcome is less clear.

8. Removal of Cases Involving Issues of Quantity and Quality of Medical Care

In In re U.S. Healthcare, Inc., 193 F.3d 151, 161 (3rd Cir. 1999), the Third Circuit, relying on its prior ruling in Dukes v. U.S. Healthcare, Inc., again emphasized that claims regarding the *quality* of the care received do not fall within the scope of ERISA's civil enforcement provisions. Count Six of the plaintiffs' complaint alleged that U.S. Healthcare was negligent in "not providing for [an in-home] visit by a participating provider [a pediatric nurse], despite assurances . . . that such a visit would be provided and despite a telephone call . . . requesting this service." Id. The Third Circuit ruled that this count raised a claim regarding "adequacy of care" and was therefore "directed toward the HMO's action in its capacity as a medical provider rather than as a benefits administrator." Id. The court noted that "the mere fact that the [plaintiffs] referred in their complaint to a benefit promised by their health care plan does not automatically convert their state-law negligence claim into a claim for benefits under section 502." Id. The court ruled that the doctrine of complete preemption did not apply and therefore the district court did not have removal jurisdiction. Id. at 165.

In contrast, in Hull v. Fallon, plaintiff filed a malpractice action in state court alleging that the doctor who served as the Plan Administrator failed to exercise a sufficient degree of care in diagnosing and treating him when he denied requests for a thallium stress test and instead authorized a treadmill stress test. 1999 WL 637073 (8th Cir. 1999). In spite of the plaintiffs' characterization of his complaint as alleging malpractice, the court found that Hull was claiming that he was denied a thallium stress test. The court noted that "artful pleading" . . . "does not change the fact that plaintiff's claims are based on the contention that [the plan] improperly processed [his] claim for medical benefits."

Similarly, the First Circuit refused to accept plaintiffs' characterization of their cause of action as alleging negligent medical decision-making in the course of a precertification requirement. The defendant in Danca v. Private Health Care Systems, Inc., 185 F.3d 1, 23 EBC 1505 (1st Cir. 1999), denied admission to the psychiatric hospital recommended by the plaintiff's treating physician and instead precertified admission to a different hospital. Id. at 3. According to plaintiffs, the hospital precertified by defendant provided inadequate care which resulted in plaintiff attempting suicide by self-immolation. The court noted that "while the allegedly negligent decision making and consultation may be characterized as medical in nature, this fact alone does not remove the state causes of action from the scope of §502(a)." Id. at 5-6. Nor did the court find controlling the fact that the allegedly negligent conduct was not in itself a final "benefits" determination but only part of a precertification decision. Id. at 6. The court ruled that a federal question justifying removal had been raised because the conduct was indisputably part of the process used to assess a participant's claim for a benefit payment under the plan. Id.

9. Remand Orders Are Not Reviewable on Appeal

The fate of several ERISA cases rested not on the merits, but on the procedural rule that remand orders are not reviewable on appeal. Copling v. The Container Store, 174 F.3d 590,

596 (5th Cir. 1999); **Smith v. Texas Children's Hospital**, 172 F.3d 923, 925 (5th Cir. 1999); **Giles v. NYLCare Health Plans, Inc.**, 172 F.3d 332, 336 (5th Cir. 1999); **Lyons v. Alaska Teamster Employer Service Corp.**, 188 F.3d 1170, 1174 (9th Cir. 1999). A §1447(c) remand may not be reviewed even if the district court's order was clearly erroneous. **Giles v. NYLCare Health Plans, Inc.**, 172 F.3d 332, 336 (5th Cir. 1999).

Non-§1447(c) remands are reviewable, however. Where a district court “clearly and affirmatively relies on a non-§1447 basis for remand,” the order may be reviewed. *Id.* In **Giles v. NYLCare Health Plans, Inc.**, the defendants succeeded in obtaining review of a remand order where the district court specifically noted in its order that “this is an appealable order because the basis of my ruling is an exercise of discretion to remand pendant state law claims” and gave no indication that it believed it lacked subject matter jurisdiction. *Id.*

F. Extracontractual Damages

As in **Kerr v. Charles F. Vanterott & Co.**, *supra*, recovery of monetary damages such as for lost profits resulting from a breach of fiduciary duty continues to be denied because of ERISA Section 502(a)(3)'s limitation to “other equitable relief.” **Hoerberling v. Nolan**, 49 F. Supp. 2d 575, 23 EBC 1200 (E.D. Mich. 1999). In a significant elaboration, a plan's claim to reimbursement for medical expenses from proceeds recovered in wrongful death actions was dismissed because the plan's reimbursement claim was not restitution for “ill-gotten gains” or another remedy available under 502(a)(3). **Cement Masons Health & Welfare Trust v. Stone**, 197 F.3d 1003, 23 EBC 2349 (9th Cir. 1999). Contra **Administrative Committee v. Gauf**, 188 F.3d 767, 23 EBC 2002 (7th Cir. 1999) (claim to reimbursement under contract is equitable claim for specific performance); **Health Cost Controls of Ill., Inc. v. Washington**, 187 F.3d 703, 23 EBC 1744 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 979 (2000) (reimbursement suits may be treated as seeking equitable relief by imposition of constructive trust).

The Second Circuit has held that equitable relief includes a “make whole” remedy when an employer's alleged breach of fiduciary duty in handling an application for life insurance caused the effective date of the policy to be delayed until four days after the employee's death. **Strom v. Goldman, Sachs & Co.**, ___ F.3d ___, 23 EBC 2068 (2d Cir. 1999).

G. Attorney's Fees

Several interesting decisions were issued on attorneys' fees. Attorneys' fees were awarded to a retiree class, even though the defendant employer prevailed on motion for summary judgment, where the employer had already adjusted benefits to remove inappropriate mortality discount from valuation of lump sum benefits in reaction to lawsuit. **McElwaine v. US West Inc.**, 176 F.3d 1167, 23 EBC 1882 (9th Cir. 1999).

The Illinois Appellate Court rejected an argument by the Wal-Mart Stores that an attorney's lien against an employee's benefit to obtain payment under a contingent fee contract constituted an assignment, or an alienation not otherwise required by law. **LeFevre, Zeman**,

Oldfield & Schwarm Law Group v. Wal-Mart Stores, Inc., 706 N.E.2d 130, 22 EBC 2700 (Ill. App. Ct. 1999).

A prevailing plaintiff in a disability denial lawsuit was entitled to multiplier of two considering that his case was highly undesirable to bring an absent adequate multiplier to the lodestar amount and the case appeared to be part of a pattern of similar disability benefit denials by a special risk unit. **Patrick v. UNUM Life Ins. Co.**, 23 EBC 1696 (Cal. Super. Ct. 1999).

In the District of Columbia, plan trustees who sued an employer to collect delinquent contributions were awarded attorneys' fees at market rates substantially higher than the rates they were actually charged by the attorneys when the lower actual rates had been discounted for "public-spirited" reasons. **Hotel Employees Local 25 Welfare Fund v. JPR Inc.**, 23 EBC 2238 (D.D.C. 1999).

When an action was essentially a dispute between a participant and a beneficiary over uncontested benefits, the Fifth Circuit denied an award of fees from the plan to the prevailing participant. **Dial v. NFL Player Supplemental Disability Plan**, 174 F.3d 606, 23 EBC 1590 (5th Cir. 1999) (considering five factors, district court erred in awarding attorneys' fees to participant who challenged plan's payment of one-half of benefits to his ex-wife).

ERISA allows attorneys' fees to be awarded to either party, but defendants are awarded fees only in exceptional cases. **Gibbs v. General Am. Life Ins. Co.**, 167 F.3d 949, 22 EBC 2696 (5th Cir. 1999) (and this case was not exceptional), reh. granted and vacated, 173 F.3d 946 (5th Cir. 1999). Compare **Owen v. SoundView Financial Group Inc.**, 54 F. Supp. 2d 305, 23 EBC 1915 (S.D.N.Y. 1999) (fees awarded to plan where plaintiff who was plan trustee with extensive experience in securities industry acted in bad faith in bringing action challenging stock valuation methods).

In other developments: The Eight Circuit has held that the portion of lodestar fees to be awarded is not just reduced by one-half if one of two defendants is dismissed from an action. **Griffin v. Jim Jamison Inc.**, ___ F.3d ___, 23 EBC 2227 (8th Cir. 1999).

H. Prejudgment Interest

Following the Third Circuit's 1998 decision in **Fotta v. UMWA Health & Retirement Fund** that prejudgment interest is "presumptively" available, awards of prejudgment interest are more routine and less discretionary. In an unpublished decision, the Sixth Circuit held that it was an abuse of discretion to refuse to award prejudgment interest in suit to recover accidental death benefits. **Garber v. Provident Life & Accident Ins. Co.**, 23 EBC 1090 (6th Cir. 1999). In **Kerr v. Charles F. Vatterott & Co.**, 184 F.3d 938, 23 EBC 1328 (8th Cir. 1999), the Eighth Circuit held that a 401(k) plan participant is entitled to recover the amount that a plan actually earned on his funds during the period in which payment was delayed, but not entitled to amount that he hypothetically could have earned because that higher amount could constitute a claim for compensatory damages. See also **Clair v. Harris Trust & Sav.**, 190 F.3d 495, 23 EBC 1649

(7th Cir. 1999) (interest on delayed pension payments may be recovered under equitable remedy of restitution).

The selection of the appropriate rate of interest remains discretionary. The Fourth Circuit found no abuse of discretion in a 12% prejudgment interest award where the S&P 500 gained 19% over the period and the district court found 12% was reasonable rate of return for a balanced portfolio. The defendant argued that a rate of 6.5% was appropriate in that it was comparable to the rate of return earned on the company's other funds. The Fourth Circuit conceded that the rate of 12% was "high," but declined to declare it an abuse of discretion, noting that the district court took notice of the S&P 500's 19% per annum rise during the period in question. **Fox v. Fox**, 167 F.3d 880, 22 EBC 2441 (4th Cir. 1999). See also **Holmes v. Pension Plan of Bethlehem Steel Corp.**, 1999 U.S. Dist. LEXIS 4613, *7 (E.D. Pa. 1999) (prejudgment interest computed by applying rate under 28 U.S.C. 1961 for postjudgment interest based on last settled T-bill auction before the accrual of Plaintiffs' respective claims).

In **Fox v. Fox**, 167 F.3d 880 (4th Cir. 1999), an plaintiff brought suit against her ex-husband as an individual and as the administrator of his company's profit sharing and retirement plans to recover amounts awarded in a domestic relations order. The Fourth Circuit upheld the district court's award of prejudgment interest at the rate of twelve percent. The defendant argued that a rate of 6.5% was appropriate in that it was comparable to the rate of return earned on the company's other funds. The Fourth Circuit conceded that the rate of 12% was "high," but declined to declare it an abuse of discretion, noting that the district court took notice of the S&P 500's 19% per annum rise during the period in question.

A district court declined to award prejudgment interest to a plan participant where the sole reason for the delayed plan payment was the participant's claim in excess of the applicable plan provision. **Owen v. Soundview Financial Group, Inc.**, 54 F. Supp. 2d 305 (S.D.N.Y. 1999).

I. Jury Trials

Although a constitutional right to a jury in ERISA actions is not generally recognized, jury verdicts continue to occur and be reviewed and upheld by the courts of appeals: In **Whatley v. CNA Insurance Cos.**, 189 F.3d 1310, 23 EBC 1902 (11th Cir. 1999), the jury had a basis for finding that former employee met requirements for disability benefits before employment termination; conflicting medical reports raised appropriate issues for jury to resolve. See also **Townsend v. Daniel, Mann, Johnson & Mendenhall**, 196 F.3d 1140, 23 EBC 2118 (10th Cir. 1999) (upholding jury's decision on oral employment contract to provide disability benefits); **Nero v. Industrial Molding Corp.**, 167 F.3d 921, 22 EBC 2798 (5th Cir. 1999) (upholding jury verdict in ERISA and FMLA trial that employer violated ERISA by terminating employee within days after he suffered a heart attack to interfere with right to receive medical benefits).

J. Class Actions

Without compiling statistics, it appears that ERISA class action certifications are increasing. **McHenry v. Bell Atlantic Corp.**, 23 EBC 1977 (E.D. Pa. 1999) (class certified to resolve issue of whether employer breached fiduciary duty by misrepresenting effect on benefits if employees transferred to subsidiary); **Kifafi v. Hilton Hotels Retirement Plan**, 23 EBC 1170 (D.D.C. 1999) (certifying nationwide class to resolve whether employer's "backloading" of pension benefits to later years of service violated ERISA; denying certification of service-counting class since former employee's claim for additional credit for union service was moot because of adjustment in claims phase); **McAuley v. IBM**, 165 F.3d 1038, 22 EBC 2425 (6th Cir.), cert. denied, 120 S.Ct. 38 (1999) (class certified for employees of particular plant who alleged oral misrepresentations about retirement benefits). See also **Caranci v. Blue Cross & Blue Shield of Rhode Island**, 1999 U.S. Dist. LEXIS 14801 (D. R.I. 1999) (certifying certain subclasses and denying certification of others in which no named plaintiff was a member).

Class action principles under Federal Rule 23, with which some ERISA specialists may not be familiar, are being applied. In **Vizcaino v. Western District of Washington U.S. District Court**, 173 F.3d 713, 23 EBC 1209 (9th Cir. 1999), cert. denied, 120 S. Ct. 844 (2000), the Ninth Circuit held that the Federal Rules prohibit a modification of a class definition after a ruling on merits. Microsoft's proposed revision of class definition would have "wipe[d] out the right of numerous class members to share in the benefits of the class adjudication" in contravention of Rule 23.

In **Bowles v. Reade**, 198 F.3d 752, 23 EBC 2337 (9th Cir. 1999), a participant's release of Section 502(a)(2) and (a)(3) claims against a trustee under a settlement agreement was disregarded when the release was without the consent of the plans and the participant's claims were not individual but were on behalf of the plans and all participants.

In **Matassarini v. Lynch**, 174 F.3d 549, 23 EBC 1663 (5th Cir. 1999), cert. denied, 120 S. Ct. 934 (2000), a pro se plaintiff was held to be an inappropriate class representative for an action about misinterpretations of QDRO's where her duty to represent class might conflict with the desire to obtain attorneys' fees and she might be more interested in hurting her former husband than ensuring adequate class representation.