Comments

Enforcing Subrogation Provisions As “Appropriate Equitable Relief” Under ERISA Section 502(a)(3)

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Employer-sponsored welfare benefit plans1 governed by the Employee Retirement Income Security Act of 19742 (“ERISA”) often contain “subrogation”4 provisions.5 A typical provision provides that a plan participant who is injured by a third party and later sues and recovers from the third party will reimburse the plan for benefits paid for that injury. An illustration demonstrates how subrogation provisions work in ERISA plans:6 Edgar is seriously injured when he is hit by a drunk driver. As a result of the accident, Edgar incurs $175,000 in medical expenses and is unable to work for two months.

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1. ERISA plans may also be sponsored by “employee organizations,” meaning labor unions, associations, etc. “in which employees participate and which exists for the purpose . . . of . . . dealing with employers concerning an employee benefit plan . . . .” 29 U.S.C. § 1002(4) (1994).

2. Employer-sponsored medical and disability plans are examples. The plans at issue will be described in detail later in this Comment. See infra Section I.B.


4. For a definition of subrogation, see infra Section I.A.


6. This illustration is simplified—these situations are likely to be complicated by other issues which are not addressed in this Comment. This Comment is limited to a discussion of whether subrogation provisions are enforceable under ERISA § 502(a)(3). See, e.g., Amber M. Anstine, ERISA Qualified Subrogation Liens: Should They Be Reduced to Reflect a Pro Rata Share of Attorney Fees?, 104 Dick. L. Rev. 359 (2000); David M. Kono, Unraveling the Lining of ERISA Health Insurer Pockets—A Vote for National Federal Common Law Adoption of the Make Whole Doctrine, 2000 BYU L. Rev. 427 (2000).
Edgar works for Acme Company which sponsors the Acme Group Medical and Disability Plans, and Edgar is covered under both plans. Each plan contains a subrogation provision which provides that each Acme plan is entitled to recover any amounts paid by the plan and recovered from a third party tortfeasor. The Acme Group Medical Plan pays Edgar’s doctors and the hospital where he was treated a total of $170,000 for its share of expenses incurred as a result of the accident. The Acme Group Disability Plan pays Edgar benefits totaling $16,000 to replace a portion of Edgar’s salary while he is recovering and unable to work.

Edgar brings a personal injury claim against the drunk driver who caused his injuries, and the action settles for $850,000. The Acme Plans should be entitled to recover from Edgar the $186,000 paid for Edgar’s medical and disability costs, per each plan’s subrogation provision.

If Edgar does not reimburse the Acme Plans as required by the plan terms, the plan fiduciary should be able to bring an action to enforce the terms of the plan in federal court under ERISA’s civil enforcement provision, Section 502(a), which explicitly authorizes federal suits to enforce the terms of an employee benefit plan. Because the Acme Plans are ERISA plans, the action would logically be brought as a federal question in federal court.

A problem arises, however, when such a suit is brought in the Ninth Circuit. Assume Acme Company is a California employer, and brings suit (as fiduciary of the Acme Group Medical and Disability Plans) against Edgar to recover monies paid by the plans. Because both are ERISA plans, the suit is filed in federal court. However, the federal case is sure to be dismissed based on the Ninth Circuit’s deci-

7. See, e.g., FMC Med. Plan v. Owens, 122 F.3d 1258, 1259 (9th Cir. 1997) (“If you bring a liability claim against any third party, benefits payable under this Plan must be included in the claim, and when the claim is settled you must reimburse the Plan for the benefits provided.”).

8. Assuming that Edgar is responsible for $5,000 of the total $175,000 of medical expenses incurred.

9. For example, the employer as plan sponsor may be a plan fiduciary. “[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.” 29 U.S.C. § 1002(21)(A) (1994).

10. 29 U.S.C. § 1132(a) (1994) [hereinafter § 502(a)].

11. Or the employer is located in any other state within the Ninth Circuit’s jurisdiction (California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, or Hawaii).
sion in *FMC Medical Plan v. Owens*,\(^\text{12}\) and other Ninth Circuit cases following *Owens*.\(^\text{13}\) Alternatively, Acme Company may attempt to bring its action in state court.\(^\text{14}\) However, when such claims are brought in state court, they are often dismissed after a finding that ERISA preempts state actions which relate to ERISA plans.\(^\text{15}\)

Assume now that Acme Company has employees throughout the country. A Georgia employee, Susan, is injured in Georgia in an accident similar to Edgar’s in California. The Acme Group Medical and Disability Plans pay benefits similar to Edgar’s ($186,000) for Susan’s injuries. If Susan similarly settles with her drunk driver for $850,000, the plans would simply be able to enforce the subrogation provisions in federal court in the Eleventh Circuit,\(^\text{16}\) and the Acme plans would therefore be reimbursed. As this illustrates, the ERISA plan sponsor, by virtue of having employees in different states, ultimately provides different benefits to participants based on where a suit may be brought. Edgar would essentially receive benefits greater than what was provided for in the plans\(^\text{17}\) for his medical and disability expenses in-

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12. 122 F.3d 1258 (9th Cir. 1997). *See* discussion *infra* Section I.D.1.

13. *See* Fed. Express Corp. v. Van Kleef, No. C-99-4951-VRW, 2000 U.S. Dist. LEXIS 11253 at *1 (N.D. Cal. June 22, 2000) (“This precise issue has been before the Ninth Circuit, which has ruled consistently that an action for the reimbursement of benefits is not equitable in nature.” Motion to dismiss granted.); Reynolds Metals Co. v. Ellis, 202 F.3d 1246, 1249 (9th Cir. 2000) (“Actions by ERISA fiduciaries seeking to enforce an ERISA plan’s contractual reimbursement provisions do not fall within [ERISA § 502(a)(3)]. Therefore, we affirm the district court’s dismissal of Reynolds Metals’ action.”); Cement Masons Health & Welfare Trust Fund v. Stone, 197 F.3d 1003, 1006 (9th Cir. 1999) (“This case is controlled by our decision two years ago in *Owens*, in which we held that reimbursement for payments appropriately made by a plan is not an available remedy under [ERISA § 502(a)(3)].” Dismissal affirmed.)

14. *See* *Owens*, 122 F.3d at 1262 n.2 (“FMC will have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement it is allegedly owed by Owens.”).

15. “[T]he provisions of this [title] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .” 29 U.S.C. § 1144 (1994). *See also* Funk Mfg. Co. v. Franklin, 927 P.2d 944, 947–48 (Kan. 1996) (Supreme Court of Kansas dismissed state court subrogation action, stating: “[this action] does not fall within the state court concurrent jurisdiction . . . . Rather, this action falls directly within [ERISA § 502(a)(3)], . . . which permits civil actions by fiduciaries seeking . . . relief to . . . enforce [a benefit plan’s] provisions or terms . . . . [S]uch actions must be brought in federal court.”).


17. Edgar makes a recovery for his medical expenses from both the tortfeasor and the plans, even though, under the terms of the plans, Edgar’s benefits are calculated by subtracting from what is paid by the plans to Edgar the amount he recovers from the tortfeasor. This leaves Edgar with $850,000 (disregarding attorney fees, etc.), in addition to the $186,000 in benefits paid by the plans to his medical providers. *See* Howe, *supra* note 5, at 663 (“Permitting the tort victim to seek reimbursement of medical expenses from his insurance carrier as well as from a third-party tortfeasor, without a mechanism for the
curred, while Susan would receive the benefits as defined by the terms of the plan. Thus, Edgar and Susan receive different benefits even though they are participants under the same terms in the same medical and disability plans. Further, the plan sponsor is met with choice of forum issues and may even be left with no remedy at all in some states for enforcing its plan's subrogation provision.

The purpose of this Comment is to explore the foundations and implications of the Ninth Circuit's approach regarding the enforcement of subrogation provisions in the context of ERISA plans. First, this Comment describes the ERISA plans and provisions at issue. Next, it examines the Ninth Circuit’s narrow interpretation of the United States Supreme Court’s decision in Mertens v. Hewitt Associates, and the implications of that interpretation for ERISA plans with subrogation provisions. The Comment then contrasts the Ninth Circuit’s approach to the approach of other circuits, discussing how the Ninth Circuit’s approach directly conflicts with the goals of ERISA and the language of Section 502(a)(3). Finally, the Comment explains why the United States Supreme Court should reject the Ninth Circuit’s interpretation of Mertens and Section 502(a)(3) when it considers Great-West Life & Annuity Insurance Co. v. Knudson in the October 2001 term. By rejecting the Ninth Circuit’s approach and interpreting ERISA’s civil enforcement provision to allow for the enforcement of subrogation provisions within ERISA plans, the Court will be adopting an approach that is consistent with the goals and mandates of ERISA.

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18. Susan would be forced to repay the plans from her tort settlement thereby leaving her with $664,000 (disregarding attorney fees).

19. Multistate plans may be faced with having to decide in which court (state or federal), if any, to bring an action to enforce their subrogation provisions, depending on where the insured lives or where the injury occurred. For example, in the Ninth Circuit, the current choice seems to be state court. See supra note 14. However, the same national plan may have to bring suit in federal court for similar facts arising elsewhere, e.g., in the Eleventh Circuit. See Sanders, 138 F.3d at 1352 n.5 (“ERISA preemption would have precluded Blue Cross from suing the Sandersons at law in state court.”).

20. See discussion infra Section II.B.


I. Background

A. Subrogation Defined

Subrogation is formally defined as "[t]he substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor."23 The Ninth Circuit has recognized:

Subrogation is the insurer’s right to be put in the position of the insured, in order to recover from third parties who are legally responsible to the insured for a loss paid by the insurer . . . . The right of subrogation, even when created by agreement between the insured and the insurer, “is designed to compel discharge of the obligation by one who, in equity, should bear the loss.”24

Traditionally, in the insurance context, an insurer asserting its right to subrogation is “viewed as ‘standing in the shoes’ of the insured so that the insurer’s rights are equal to, but no greater than, those of the insured.”25 A subrogation clause in an insurance policy might “giv[e] an insurer the right to take legal action against a third party responsible for a loss to an insured for which a claim has been paid.”26 This type of subrogation provision is typically not included in ERISA welfare benefit plans,27 presumably because ERISA plans should not be involved in, nor should plan assets be use for, litigating claims on behalf of participants against third party tortfeasors.28

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23. BLACK'S LAW DICTIONARY 1440 (7th ed. 1999).
26. HARVEY W. RUBIN, DICTIONARY OF INSURANCE TERMS 315 (3d ed. 1995). For example, in the property insurance context:
   [I]f a third party, through negligence, damages an insured’s car and the insured’s insurance company pays to restore the car, the insurance company has recourse against the third party for the costs involved. The insured cannot sue the third party for damage, since if successful, the insured could collect twice for the same damage.

Id.

28. Rather, plan resources should be used primarily to pay plan benefits. ERISA explicitly requires a plan fiduciary to “discharge his duties . . . solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan . . . .” 29 U.S.C. § 1104(a)(1) (1994). See also Egelhoff v. Egelhoff, No. 99-1529, 2001 U.S. LEXIS 2458 at *15 (Mar. 21, 2001) (observing that “[r]equiring ERISA administrators to . . . contend with litigation would undermine the congressional goal of ‘minimizing the administrative and financial burdens’ on plan administrators—burdens ultimately borne by the beneficiaries”) (citations omitted).
More typically, reimbursement-type subrogation provisions\(^{29}\) are found in ERISA plans.\(^{30}\) "Typical reimbursement provisions provide that if benefits are paid for an injury and the covered person recovers from a third party, the covered person must reimburse the plan."\(^{31}\)

Reimbursement-type subrogation provisions differ from traditional subrogation provisions in that they do not require the plan fiduciary to step into the shoes of the insured to sue on the insured's behalf. Instead, if an insured receives a personal injury recovery, the insured has a contractual obligation to reimburse the plan for any benefits that were paid by the plan for that injury.\(^{32}\)

As an alternative to subrogation, an ERISA plan might simply exclude coverage for any injuries caused by a third person.\(^{33}\) The plan may contain language that states, for example, "the plan may elect to advance payment for medical/disability expenses incurred for an injury or illness caused by a third party . . . . The Administrator has the right to recover in full the medical or disability expenses advanced . . . ."\(^{34}\) In essence, an exclusionary provision says that the plan simply does not cover injuries caused by third parties, though it may elect to advance to the participant the money to pay for those injuries on the condition that the participant reimburse the plan if and when she recovers from a third party.\(^{35}\)

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29. The term "subrogation" will be used to refer to either of these types of subrogation provisions in this Comment unless a distinction is warranted. In light of the solution proposed in this Comment infra Section III, distinguishing the types of subrogation provisions is not necessary, though in the Ninth Circuit, the distinction may be determinative. See discussion infra Section I.D.1. See also Amicus Curiae Brief of Nat'l Ass'n of Subrogation Professionals, Inc. in Support of Petitioners at 1 n.2, Great-West Life & Annuity Ins. Co. (No. 99-1786) (observing, "[i]n this brief and in the case law, the terms "subrogation" ... and "reimbursement" . . . are used interchangeably").

30. See, e.g., ERISA plan language in Reynolds Metals Co. v. Ellis, 202 F.3d 1246, 1247 (9th Cir. 2000) (stating "If the Plans paid for health care services, supplies or treatment and you receive payment from a third party, you must reimburse the Plans, but not more than the amount of the third-party payment you received.").

31. LAWRENCE & RUSSELL, supra note 27, at 4.

32. See id.

33. See id. at 5.

34. Id.

35. See, e.g., Harris Trust & Sav. Bank v. Provident Life & Accident Ins. Co., 57 F.3d 608, 614 (7th Cir. 1995). (The medical plan at issue contained an exclusionary provision: "Medical care benefits are not payable . . . when the Injury or Illness . . . occurs through the act or omission of another person . . . . Provident may elect to advance payment for medical care expenses . . . .").
B. ERISA and ERISA Welfare Benefit Plans

This Comment is limited to a discussion of subrogation provisions within ERISA welfare benefit plans.\textsuperscript{36} Thus, a brief discussion of these plans and the regulatory framework in which they exist is warranted.

One of the primary goals of ERISA is:

\begin{quote}
(P)rotect[ing] . . . participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries . . . [and] by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.\textsuperscript{37}
\end{quote}

ERISA accomplishes this enormous goal in part by its broad preemption provisions,\textsuperscript{38} including ERISA Section 514(a)\textsuperscript{39} which provides that "the provisions of this [title] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to [an] employee benefit plan."\textsuperscript{40} ERISA does not require that employees be provided with ERISA plans, but if a plan sponsor does provide these plans, ERISA governs the plan sponsor's conduct regarding the plans. For example, ERISA requires that the plans be "maintained pursuant to a written instrument"\textsuperscript{41} and that the fiduciary administer the plan "in accordance with the documents and instruments governing the plan . . . ."\textsuperscript{42} ERISA's broad preemption provision enables plan fiduciaries to fulfill this mandate consistently, even among states with different laws.\textsuperscript{43}

ERISA comprehensively regulates employee benefit plans, including employee welfare benefit plans:

\textsuperscript{36} Subrogation clauses are also found in other types of insurance policies, for example property and liability insurance policies. See \textit{Rubin}, \textit{supra} note 26, at 315.

\textsuperscript{37} 29 U.S.C. § 1001(b) (1994).

\textsuperscript{38} A thorough discussion of ERISA preemption and the current state of the law surrounding ERISA preemption is impossible here, given the scope; however, for an excellent discussion of preemption in the context at hand, see \textit{Lawrence & Russell}, \textit{supra} note 27, at 49-61.

\textsuperscript{39} 29 U.S.C. § 1144(a) (1994).

\textsuperscript{40} Id.


\textsuperscript{43} \textit{See} New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657 (1995) (concluding that "[t]he basic thrust of [ERISA preemption] was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans"). \textit{See also} \textit{Egelhoff v. Egelhoff}, No. 99-1529, 2001 U.S. LEXIS 2458 at *15 (March 21, 2001) ("Requiring ERISA administrators to master the relevant laws of 50 states" defeats Congress's goal of "minimizing the burdens" on those administrators who provide benefit plans.) (citations omitted).
The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . .

Welfare plans that typically include subrogation provisions are medical plans (including medical, surgical and hospital) and disability plans (including short and long-term disability).

1. Benefit Plan Terms Under ERISA

ERISA does not dictate which plans must be provided to employees, nor what provisions such plans must contain. ERISA neither forbids nor requires that welfare plans contain subrogation provisions. Rather, "[a] subrogation provision affects the level of benefits conferred by the plan, and ERISA leaves that issue to the private parties creating the plan." ERISA does require, however, that plans "be established and maintained pursuant to a written instrument," and that they "specify the basis on which payments are made to and from the plan."

Further, an ERISA fiduciary is charged with discharging his duties "in accordance with the documents and instruments governing the plan." Thus, if a plan contains a subrogation provision, the fiduciary is under an obligation to enforce that provision. "It is well settled that plan fiduciaries have a fiduciary duty to enforce plan terms as written, including [subrogation] provisions."

45. See, e.g., FMC Med. Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997) (at issue were the subrogation clauses in a health care plan and in short and long-term disability plans).
47. See Ryan v. Fed. Express Corp., 78 F.3d 123, 127 (3d Cir. 1996) ("As with many other substantive terms of welfare plans, ERISA says nothing about subrogation provisions. ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content.").
52. LAWRENCE & RUSSELL, supra note 27, at 13.
2. **The Civil Enforcement Provision—ERISA § 502(a)**

Central to the problem this Comment addresses is the interpretation of ERISA's civil enforcement provision and whether it allows for the enforcement of subrogation provisions. ERISA § 502(a) provides that:

> 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.

The Supreme Court has read ERISA's civil enforcement provision to be exclusive. Therefore if an ERISA plan includes a subrogation provision and the plan fiduciary wishes to enforce such provision, then its only opportunity to do so is under ERISA's civil enforcement provision.

C. **Related Supreme Court Case Law**

1. **FMC Corp. v. Holliday**

In 1990, the Supreme Court heard a case in which an employer brought suit to recover medical benefits paid by its ERISA plan for injuries sustained in an automobile accident. The injured plan participant sued the driver of the automobile that injured her, and the case settled. The employer asserted its right to reimbursement of medical benefits paid under the subrogation provision in the plan. The insured refused to reimburse the plan, claiming that state law precluded subrogation.

The Court considered whether ERISA preempts state law “precluding employee welfare benefit plans from exercising subrogation rights on a claimant’s tort recovery.” The Court held that ERISA did preempt such state law. However, the holding was limited to self-

54. Id. (emphasis added).
55. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (“The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.”).
56. Assuming that ERISA preempts a state law claim for enforcement of a plan's subrogation provision.
58. See id. at 55.
59. See id.
60. See id.
61. Id. at 54.
funded ERISA plans because self-funded ERISA plans are exempt from state laws that 'regulate insurance.'

2. *Mertens v. Hewitt Associates*  

The Ninth Circuit's refusal to allow for the enforcement of subrogation provisions in ERISA plans stems from its interpretation of *Mertens*. At issue in *Mertens* was "whether a nonfiduciary who knowingly participates in the breach of a fiduciary duty imposed by [ERISA] ... is liable for losses that an employee benefit plan suffers as a result of the breach." Pension plan participants sued an actuary—who had provided services to the plan, and who had allegedly underestimated the plan's funding obligations which resulted in a termination of the pension plan—for breach of fiduciary duty owed to the plan.

In a 5-4 decision, the Supreme Court held that a suit for damages resulting from the breach was not authorized under ERISA's civil enforcement provision, Section 502(a)(3), which authorizes suits for "appropriate equitable relief." The majority saw the remedy sought for breach of fiduciary duty as monetary damages and held that such a remedy was not "equitable" relief.

D. Conflicting Interpretations of *Mertens* and "Appropriate Equitable Relief"

1. The Ninth Circuit's Approach

In 1995, the Ninth Circuit explicitly recognized that subrogation gives rise to a claim for equitable relief. However, ignoring its implication in *Barnes* that a claim to enforce a subrogation provision in an ERISA plan is equitable in nature, the Ninth Circuit (contrary to other circuits), beginning with its decision in *FMC Medical Plan v. Owens*,

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62. "Self-funded employee benefit plans are those where benefits are paid directly from an employer's general assets." Lawrance & Russell, *supra* note 27, at 53. On the other hand, in insured plans, "the employer plan sponsor has an insurance policy with a commercial insurance company, which collects premiums and is at risk to pay benefits from its own assets." Id.
63. *Holliday*, 498 U.S. at 61 (noting further that "employee benefit plans that are insured are subject to indirect state insurance regulation ... and are consequently bound by state insurance regulations ... ").
64. 508 U.S. 248 (1993).
65. See discussion *infra* Section I.D.1.
67. See id. at 250.
68. Id. at 255.
70. See discussion *infra* Section I.D.2.
has consistently held that the enforcement of subrogation provisions does not constitute "appropriate equitable relief" under ERISA § 502(a)(3). Thus, under the current state of the law in the Ninth Circuit, subrogation provisions are not enforceable under ERISA.

The Ninth Circuit narrowly interpreted the Mertens decision in a 1997 case involving enforcement of the subrogation provisions in medical and disability plans in FMC Medical Plan v. Owens. Owens was injured in an automobile accident and, as a result, the FMC medical, short-term, and long-term disability plans paid approximately $50,000. Each of the plans contained the following subrogation provision:

If you bring a liability claim against any third party, benefits payable under this Plan must be included in the claim, and when the claim is settled you must reimburse the Plan for the benefits provided. . . . Unless you sign the Company's third party reimbursement form, the Claims Administrator will not process any claim where there is a possible liability of a third party.

Owens signed the reimbursement form, which contained similar language. Owens sued the other driver and received a settlement of $100,000.

FMC, as plan fiduciary, brought suit in federal court under ERISA § 502(a)(3) to enforce the plans' subrogation provisions. The district court held that FMC did have a right to reimbursement under the terms of the plans and determined that subrogation was an equitable remedy authorized by ERISA § 502(a)(3). The Ninth Circuit reversed based on its interpretation of Mertens, stating "[t]he substance of the remedy sought by FMC is money damages for Owens's alleged breach of the Plans, which are contracts. . . . When the substance of the relief is monetary . . . such a remedy is not available under [ERISA § 502(a)(3)]."

The court noted that the provisions at issue were not traditional subrogation provisions, but were instead contractual reimbursement provisions and implied the distinction was crucial:

71. 122 F.3d 1258 (9th Cir. 1997).
72. Id.
73. See id. at 1259.
74. Id.
75. See id.
76. See id.
77. See id. at 1260.
78. Id. at 1262. “[W]hat [FMC] seeks is not a form of equitable relief recognized by the narrow construction of [ERISA § 502(a)(3)] as required by Mertens.” Id.
79. See id. at 1260.
The district court held that FMC's right under the Plans was that of subrogation [which it considered] to be an equitable remedy... The district court's classification of FMC's right under the Plans is flawed. FMC's rights under the Plans is not one of subrogation... FMC's claim is one of contractual reimbursement, not subrogation.80

Further, the court read Mertens to say that the term "other equitable relief" in ERISA § 502(a)(3) is limited solely to "injunction, mandamus and restitution," and that restitution is limited to the "return of 'ill-gotten' assets or profits taken from a plan."81

FMC does not request an injunction or a writ of mandamus. Likewise, what FMC seeks is not restitution. Restitution is referred to in Mertens as the return of "ill-gotten" assets or profits taken from a plan. Owens did not obtain FMC's funds by any fraud or wrongdoing. Owens obtained the funds pursuant to the Plans, which obligated the funds to be paid to him under the circumstances of this case. FMC's claim is for reimbursement of money that Owens rightfully received under the Plans. Essentially, FMC seeks a breach of contract claim for monetary relief, albeit under its classification of "equitable reimbursement."82

Since Owens, the decision not to allow the enforcement of subrogation provisions under ERISA § 502(a)(3) has been followed without question in the Ninth Circuit.83 However, the United States Supreme Court recently granted certiorari on this issue in two Ninth Circuit cases. In the first, Reynolds Metals v. Ellis,84 the Court granted certiorari but the case was dismissed at the request of the parties.85 Immediately thereafter, the Court granted certiorari again, in Great-West Life & Annuity Insurance Co. v. Knudson.86

In Great-West Life & Annuity Insurance Co., Knudson was seriously injured in an auto accident and her ERISA plan paid in excess of

80. Id.
81. Id. at 1261.
82. Id. (citation omitted) (emphasis added).
84. 202 F.3d 1246 (9th Cir. 2000); cert. granted, 531 U.S. 109 (2000); cert. dismissed, 531 U.S. 1061 (2000).
$400,000 for the injuries. The Ninth Circuit held that such "re-
imbursement . . . is not equitable relief within the meaning of [Sec-
tion 502(a)(3)]."

2. A Contrasting Approach

The Eleventh Circuit explicitly rejected the Ninth Circuit's Owens rationale in Blue Cross & Blue Shield v. Sanders. Sanders, who was cov-
ered under an ERISA medical plan, was injured in an automobile acci-
dent. The plan, which contained a subrogation provision, paid approxi-
ately $12,000 for her medical treatment. Sanders success-
fully brought suit against the other driver and recovered $200,000. Blue Cross sued under ERISA § 502(a)(3) for specific performance to
enforce the subrogation provision. The Eleventh Circuit held that Blue Cross had demonstrated that specific performance of the subro-
gation provision was "plausibly 'equitable'" under Section 502(a)(3).

The Eleventh Circuit refused to interpret Mertens as the Ninth Circuit had in Owens and allowed the plan to recover, observing that "Owens appears to be based on an unduly narrow reading of Mertens . . . . Relying on Mertens, the Owens court held that 'equitable relief'

87. See id. at *2.
88. See id. at *3. The plan provision stated that if a
third party may be liable or legally responsible for expenses incurred by a Covered Person for: an illness; or a sickness; or a bodily injury . . . the plan would pay
the covered expenses, but would have the right to recover from the Covered Person any payment for benefits paid for the treatment of such loss . . . which the Covered Person is entitled to receive from the third party.

90. 138 F.3d 1347 (11th Cir. 1998).
91. See id. at 1350.
92. The plan provision stated:
If the Claims Administrator pays or provides any benefits for a Member under this Plan, it is subrogated to all rights of recovery which that Member has in contract, tort or otherwise against any person . . . for the amounts of benefits paid or provided . . . . [A]nd in addition . . . the Member agrees to reimburse the Claims Administrator from the recovered money that amount of benefits the Claims Administrator has paid or provided . . . .

93. See id.
94. See id.
95. See id.
96. Id. at 1352 n.5.
includes *only* injunction, mandamus and restitution."\(^97\) The court concluded that specific performance as a remedy is "a traditional form of equitable relief"\(^98\) and specific performance as a remedy is not "unavailable" under Section 502(a)(3), according to *Mertens*\(^99\).

The Eighth Circuit too held that a plan fiduciary's suit to enforce a subrogation provision was permitted under ERISA § 502(a)(3).\(^100\) In *Ford*, the insured was injured when she fell in a supermarket.\(^101\) Her ERISA medical plan paid nearly $40,000 for her injuries.\(^102\) Ms. Ford sued the supermarket, and her suit settled for $150,000.\(^103\) The ERISA plan sought to recover the amount it had paid for the injuries, pursuant to the plan's subrogation agreement. The Eighth Circuit held that the suit was authorized under ERISA § 502(a)(3) as "appropriate equitable relief," noting that "[the plan fiduciary's] allegation that Ford admittedly failed to reimburse [the plan] as required by the subrogation clause is a claim that Ford failed to comply with a term of the [p]lan."\(^104\)

Similarly, the Seventh Circuit held that a plan administrator seeking to enforce the plan's subrogation provision was indeed "seeking an equitable remedy against [the defendant] to ensure her compliance with the terms of the Plan."\(^105\)

### II. The Problem: The Ninth Circuit's Interpretation of *Mertens* and Section 502(a)(3) Is Inconsistent With ERISA

ERISA requires that plans be maintained pursuant to plan provisions and that fiduciaries discharge their duties in accordance with plan documents. Since ERISA does not preclude plan sponsors from including subrogation provisions in their ERISA plans, subrogation provisions of all types should be enforceable by fiduciaries under Section 502(a)(3) as "appropriate equitable relief . . . to enforce the terms of the plan." The Ninth Circuit does not agree.\(^106\) The implications of the Ninth Circuit's stance are significant for ERISA plans, es-

\(^97\) *Id.* at 1352-53 n.5.
\(^98\) *Id.*
\(^99\) *Id.*
\(^100\) See *S. Council of Indus. Workers v. Ford*, 8 F.3d 966, 969 (8th Cir. 1996).
\(^101\) *Id.* at 968.
\(^102\) *See id.*
\(^103\) *See id.*
\(^104\) *Id.* at 969.
\(^105\) Admin. Comm. v. Gauf, 188 F.3d 767, 770 (7th Cir. 1999).
\(^106\) *See supra* Section 1.D.1.
especially those plans with participants in multiple states, as demonstrated in the example of Acme Company. Enforcement of such provisions currently varies by circuit and as a result, differing benefits may be received by similarly situated participants in the same plan merely based on where the suit may be brought. This defeats ERISA’s goal of uniformity. Further, the Ninth Circuit’s reasoning may result in a windfall for some plan participants in that they may recover for the same injury twice, despite the benefit plan’s contractual terms to the contrary.

Finally, the Ninth Circuit directs that suits to enforce such provisions in employee plans should be brought in state court as there is no federal subject matter jurisdiction (because the Ninth Circuit deems that enforcement of such “subrogation” provisions is not permitted under ERISA). This solution is problematic, however, since state courts generally conclude that they do not have jurisdiction over actions brought under ERISA § 502(a). Under the current legal framework, plans in the Ninth Circuit may be left without a method of enforcing subrogation provisions in ERISA plans, despite ERISA’s mandate that plans be administered in accordance with their terms.

A. Mertens Does Not Preclude the Enforcement of Subrogation Provisions

In Mertens, the United States Supreme Court held that ERISA § 502(a)(3) did not authorize a suit for compensatory damages for losses resulting from a breach of fiduciary duty to the plan because

108. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) (explaining that, as evidenced by ERISA’s broad preemption provision, ERISA is intended to: Ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries.).
109. See FMC Med. Plan v. Owens, 122 F.3d 1258, 1262 n.2 (9th Cir. 1997) (“FMC will have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement it is allegedly owed by Owens.”).
110. See, e.g., Funk Mfg. Co. v. Franklin, 927 P.2d 944, 947–48 (concluding, [t]his action falls directly within 29 U.S.C. § 1132(a)(3) of the ERISA civil enforcement section, which permits civil action by fiduciaries seeking injunctive and equitable relief to redress alleged violations of a benefit plan or to enforce its provisions or terms. In conjunction with 29 U.S.C. § 1132(e)(1), such actions must be brought in federal court.).
such an award was not "a remedy traditionally viewed as 'equitable.'"\textsuperscript{112}

[\textit{W}hat petitioners in fact seek is nothing other than compensatory damages—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief \ldots And though we have never interpreted the precise phrase 'other appropriate equitable relief,' we have construed \ldots similar language \ldots to preclude 'awards for compensatory or punitive damages.'\textsuperscript{113}

Even if the Court correctly read Section 502(a)(3) as precluding compensatory or punitive damages, it does not logically follow that the enforcement of plan terms should be precluded simply because the payment of money would result from a judgment. Merely because money changes hands does not automatically make the relief legal, as distinct from equitable. Rather, "[a] judicial order requiring [participants] to reimburse [a] plan in accordance with the plan terms is the sort of relief that is typically available in equity because it would compel specific performance of an obligation to pay money."\textsuperscript{114}

In \textit{Mertens}, the Supreme Court undertook the task of interpreting the phrase "other appropriate equitable relief" under Section 502(a)(3) in the context of an alleged breach of fiduciary duty.\textsuperscript{115} Enforcement of plan terms was \textit{not} at issue in \textit{Mertens}. The Court explicitly noted that "[n]o one suggest[ed] that any term of the \ldots plan has been violated, nor would any be enforced by the requested judgment."\textsuperscript{116} That language—taken with ERISA's command that plans be administered "in accordance with the documents and instruments governing the plan,"\textsuperscript{117}—makes it clear that \textit{Mertens} is intended to apply only to cases where monetary relief is sought in conjunction with a claim for breach of fiduciary duty, \textit{not} to cases where the relief sought is the enforcement of plan terms. Indeed, the very language of Section 502(a)(3) expressly authorizes a suit "to enforce \ldots the terms of the plan."\textsuperscript{118}

The Ninth Circuit also narrowed the \textit{Mertens} holding by construing it to mean that "other appropriate equitable relief" allows only traditional forms of equitable relief, that is, "injunction, mandamus

\textsuperscript{113} \textit{Id}.
\textsuperscript{114} \textit{Id}.
\textsuperscript{115} Brief for the United States as Amicus Curiae Supporting Petitioners at 15, Great-West Life \& Annuity Ins. Co. (No. 99-1786).
\textsuperscript{116} \textit{See Mertens}, 508 U.S. at 255.
\textsuperscript{117} \textit{Id}.
and restitution.” However, the precise language in *Mertens* is that “equitable relief... [refers] to those categories of relief that were typically available in equity (such as injunction, mandamus and restitution, but not compensatory damages).” The specific language of *Mertens*, then, does not preclude, for example, a suit for specific performance to enforce the terms of a plan.

The Ninth Circuit further limited the relief available under *Mertens* by requiring, under a claim of restitution, a showing of ill-gotten assets. The court found that restitution was not available since “Owens did not gain FMC’s medical payments by any form of fraud, duress or unconscionable behavior.” The court rationalized that because Owens received the funds pursuant to the plan, he did not obtain the “funds by any fraud or wrong-doing.” Even if the Court did intend to limit a claim of restitution to a case where assets were “ill-gotten,” arguably Owens did not rightfully receive the benefits in question—Owens received the benefits subject to the plan’s requirement that he reimburse the plan, which he did not do. Allowing a plan to recover those benefits wrongfully withheld by the participant is equitable relief:

[A]n action to enforce a reimbursement term of a plan is properly viewed as an action for equitable relief because it seeks to prevent unjust enrichment of the participant or beneficiary and because the relief is measured by the unjust gain to the defendant, not by the loss to the plan.

In *Owens* and in subsequent Ninth Circuit cases, the participant is allowed to recover from both the tortfeasor and the ERISA plan, even though the benefits are received subject to an obligation to repay the plan if a recovery is made from a third party. Such unjust enrichment should be remediable under ERISA § 502(a)(3). As the Third Circuit has wisely observed, “it would be inequitable to permit the [insureds] to partake of the benefits of the Plan and then, after they had received a substantial settlement, invoke common law principles to establish a

120. *Mertens*, 508 U.S. at 256.
121. See *Owens*, 122 F.3d at 1261.
122. *Id.*
123. *Id.* (stating: “FMC’s claim is for reimbursement of money that Owens rightfully received under the Plans”).
legal justification for their refusal to satisfy their end of the bargain.\textsuperscript{126}

B. The Risk of No Remedy at All

The Eleventh Circuit, in \textit{Blue Cross \& Blue Shield v. Sanders,}\textsuperscript{127} held that the risk of no remedy was enough to make the relief equitable.\textsuperscript{128} In considering whether Blue Cross could enforce the ERISA plan's subrogation provision under Section 502(a)(3), the court concluded:

\begin{quote}
Blue Cross essentially seeks specific performance of the reimbursement provision of the Plan. Specific performance is an equitable remedy available when legal remedies are inadequate. Legal remedies were inadequate here because ERISA preemption would have precluded Blue Cross from suing the Sanderses at law in state court . . . . Moreover, because Blue Cross had no other available remedy, specific performance is 'appropriate equitable relief' under [Section 502(a)(3)].\textsuperscript{129}
\end{quote}

The dilemma encountered in the Ninth Circuit, however, exposes plan fiduciaries in that jurisdiction to the risk that they will have no remedy at all for enforcing subrogation provisions contained in their plans. The Ninth Circuit has consistently held that subrogation provisions are not enforceable under Section 502(a)(3).\textsuperscript{130} In \textit{Owens}, the Ninth Circuit directs that any claim for reimbursement must be pursued in state court.\textsuperscript{131} However, when such an action is brought in state court, it risks dismissal. For example, in \textit{Jefferson-Pilot Life Insurance Co. v. Krafka,}\textsuperscript{132} plaintiff was the insurer of an ERISA medical plan in which Krafka was a participant.\textsuperscript{133} The insurer paid Krafka's medical expenses (totaling some $22,000) resulting from an auto accident.\textsuperscript{134} Krafka recovered $410,000 from an auto insurance policy, and the medical insurer sought to enforce the reimbursement provision in the medical plan.\textsuperscript{135} The court held that ERISA preempted a

\begin{itemize}
\item \textsuperscript{126} Ryan v. Fed. Express Corp., 78 F.3d 123, 127-28 (3d Cir. 1996) (holding that the plan's subrogation provisions are enforceable under ERISA).
\item \textsuperscript{127} 138 F.3d 1347 (11th Cir. 1998). \textit{See also supra} Section 1.D.2.
\item \textsuperscript{128} \textit{See id.} at 1354.
\item \textsuperscript{129} \textit{Id.} at 1352 n.5 (citations omitted).
\item \textsuperscript{130} \textit{See supra} note 19.
\item \textsuperscript{131} FMC Med. Plan v. Owens, 122 F.3d 1258, 1262 n. 2 (9th Cir. 1997).
\item \textsuperscript{132} 57 Cal. Rptr. 2d 723 (2d Dist. 1996).
\item \textsuperscript{133} \textit{See id.} at 725.
\item \textsuperscript{134} \textit{See id.}
\item \textsuperscript{135} \textit{See id.} The reimbursement contract stated, "I, Ronald Krafka, understand and acknowledge that my medical plan has a subrogation/reimbursement provision which provides that medical benefits paid under the plan are to be reimbursed . . . from any
state claim for reimbursement under the medical plan and the state claim should therefore be dismissed.136 The court observed:

A cause of action is available in federal court to an ERISA fiduciary seeking, as here, reimbursement for medical expenses paid. . . . The ERISA fiduciary can bring an equitable restitution action in federal court to enforce the reimbursement provision of the plan and to prevent the unjust enrichment of the employee.137

Thus, in California, claims to enforce subrogation provisions in ERISA plans are dismissed in state court and plaintiffs are directed to federal court; however, the Ninth Circuit dismisses the same issue, regardless of how the claim is framed.138 Describing this dilemma, a recent appellate court in California remarked: "Under Krafka, the plaintiff must pursue its reimbursement claim in federal court. Under Owens, by contrast, the plaintiff must pursue its reimbursement claim in state court."139 Thus, applicable case law "place[s] a plaintiff seeking reimbursement under the terms of an employee benefit plan in a Catch 22."140 Where a plan fiduciary is unable to enforce the terms of an ERISA plan, he is in violation of ERISA's mandate that plans be administered in accordance with their terms.

C. The Ninth Circuit's Approach Will Adversely Impact ERISA Plans and Plan Participants

Plans contain subrogation provisions to control the costs of providing benefits.141 "As cost containment continues to be a concern, plan fiduciaries must make renewed efforts to view the [subrogation] provisions in their plans as essential elements of their overall cost containment efforts."142 If subrogation provisions are necessary to the financial viability of ERISA plans, then offering such provisions in the form of reimbursement-type subrogation provisions provides a value...
ble benefit to plan participants; that is, the plan initially pays benefits for the injury and expects repayment only if there is a recovery (versus an exclusionary provision in which a plan simply excludes coverage for injuries caused by a third party). However, if no method of enforcement exists for subrogation provisions, plans may simply exclude benefits for injuries caused by third parties in order to reduce costs.¹⁴³

Imagine a plan participant’s surprise when the medical bills resulting from a car accident or medical malpractice, for example, are simply not paid by her medical plan.¹⁴⁴

The Ninth Circuit’s approach may also make it difficult for employers to self-fund¹⁴⁵ their ERISA welfare benefit plans. As the cost of providing health benefits continues to rise, self-funding provides “a viable alternative for funding health benefits, and . . . a cost-efficient method of providing expanded benefit coverage . . . ”¹⁴⁶ In a self-funded plan, the plan sponsor is responsible for paying the claims of the insureds,¹⁴⁷ and therefore bears the risk that claim costs will be high. Subrogation provisions are “commonly found in [self-funded] plans, [and] are designed to preserve plan assets which can be used to pay enhanced benefits . . . ,”¹⁴⁸ but if subrogation provisions are not enforceable, plan sponsors may have to cut back other benefits or may be forced into insuring their plans.

In FMC Corp. v. Holliday,¹⁴⁹ the Court held that ERISA preempts state laws which forbid the enforcement of subrogation provisions in self-funded ERISA plans.¹⁵⁰ Though not asked to consider whether such provisions would be enforceable under ERISA, implicit in the Court’s opinion is that ERISA does permit the enforcement of subrogation provisions. The dissent’s language is telling: Stevens inquired,

¹⁴³. See, e.g., Milt Freudenheim, Consumers Across the Nation Are Facing Sharp Increases in Health Care Costs in 2001, N.Y. TIMES, Dec. 10, 2000, at 40 (observing:
Consumers across the country will face double-digit increases in their healthcare costs starting [in January 2001], reflecting the biggest surge in medical inflation since the early 1990’s . . . . “Rates are going up dramatically in some parts of the country . . . . Some employers have reduced their contributions and some have changed the benefits” to make them less costly . . . .)


¹⁴⁵. See supra note 62.


¹⁴⁷. See LAWRENCE & RUSSELL, supra note 27, at 53.


¹⁴⁹. See discussion supra Section I.C.1.

"[w]hy should a self-insured plan have a right to enforce a subroga-
tion clause against an injured employee while an insured plan may
not?"\textsuperscript{151} \textit{FMC Corp. v. Holliday} sends a confusing message to plan spon-
sors in the Ninth Circuit—those plan sponsors have been told by the
Ninth Circuit that subrogation provisions are \textit{not} enforceable.\textsuperscript{152}

Finally, if the language in \textit{Owens} is read to allow only for the en-
forcement of traditional subrogation provisions, ERISA fiduciaries will
have to include those provisions (unless they instead choose to alto-
gether exclude coverage for injuries caused by third parties), and will
be forced into litigating against third parties who cause injuries to par-
ticipants. Plan assets, however, are to be used "for the exclusive pur-
pose of . . . providing benefits to participants . . .,"\textsuperscript{153} not for litigating
the tort claims of individual participants against third parties. Further,
a plan fiduciary under ERISA is ordered to "[defray the] reasonable
expenses of administering the plan"\textsuperscript{154}—an impossible task if a plan
must get involved in costly tort litigation.

The high cost of litigating may thus preclude plans from contain-
ing traditional subrogation provisions. If reimbursement-type subro-
gation provisions are not enforceable, as currently in the Ninth Circuit,
a plan fiduciary's only choices will be to either include \textit{exclusionary}
provisions or no subrogation provisions at all (thus driving up the cost
of providing the benefits)—in either case, participants are ultimately
harmed by a loss of benefits.\textsuperscript{155}

Finally, if the Ninth Circuit's approach is allowed to stand, plans
with participants in multiple states\textsuperscript{156} will be subject to "considerable
inefficiencies in benefit program operation, which might lead those
employers with existing plans to reduce benefits, and those without
such plans to refrain from adopting them."\textsuperscript{157}

\textsuperscript{151.} Id. at 66.
\textsuperscript{152.} \textit{See} discussion \textit{supra} Section I.D.1.
\textsuperscript{155.} \textit{See} Brief of Amici Curiae American Association of Health Plans at 16, \textit{Great-West Life \\& Annuity Ins. Co.} (No. 99-1786) (explaining that "[t]he Ninth Circuit's decision po-
tentially penalizes Ms. Knudson's fellow beneficiaries [because] . . . premiums . . . may rise . . . and . . . the employer sponsor may decide to either cut back its contribution . . . or eliminate the health benefit plan altogether").
\textsuperscript{156.} Similar to the example of Acme Company.
III. Solution: Subrogation Provisions Should Be Enforceable Under ERISA § 502(a)(3)

A. ERISA Mandates the Uniform Enforcement of Plan Terms

By classifying the enforcement of subrogation provisions as "appropriate equitable relief," fiduciaries will be able to fulfill their duties under plans, including administering plans according to their provisions. Explicitly, ERISA requires that fiduciaries maintain their plans "pursuant to a written instrument" which includes any subrogation provisions. Further, ERISA requires fiduciaries to administer plans "in accordance with [those] documents and instruments governing the plan." In order for fiduciaries to fulfill this duty, plan terms, including subrogation provisions, must be enforceable under ERISA § 502(a)(3). Finally, one participant (Edgar) should not be allowed to retain benefits belonging to the plan, while another (Susan) is held to the terms of the plan—all participants must be uniformly held to the terms of the plan.

B. Enforcement of Subrogation Provisions Is Appropriate Equitable Relief

Though the Court in Mertens undertook the task of interpreting "appropriate equitable relief" in ERISA § 502(a)(3), the relief sought in Mertens was not the enforcement of plan terms, but rather damages sought for a breach of fiduciary duty. Crucially, the Court observed that Section 502(a)(3):

Does not . . . authorize "appropriate equitable relief" at large, but only "appropriate equitable relief" for the purpose of "redress[ing] any violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan. No one suggests that any term of the . . . plan has been violated, nor would any be enforced by the requested judgment.

This language clearly shows that where the enforcement of plan terms is at issue, the Court and Section 502(a)(3) authorize such enforcement.

159. The participant is required to be provided with a Summary Plan Description which must include a "statement clearly identifying circumstances which may result in . . . offset, reduction, or recovery (e.g., by exercise of subrogation or reimbursement rights) of any benefits that a participant . . . might otherwise expect the plan to provide . . . ." Contents to Summary Plan Description, 29 C.F.R. § 2520.102-3(1) (2001). Thus, a participant has notice if the plan contains a subrogation provision.
The Ninth Circuit's conclusion that money damages result when subrogation terms are enforced—and therefore the relief sought is not equitable—is an irrational one.\textsuperscript{162} Allowing the enforcement of subrogation provisions is equitable relief (not monetary damages and therefore legal relief) because:

The object of subrogation is the prevention of injustice. It is designed to promote and accomplish justice, and is the mode which equity adopts to compel the ultimate payment of a debt by one, who, in justice, equity, and good conscience, should pay it. It is an appropriate means of preventing unjust enrichment. The doctrine of subrogation is applied to . . . do equity in the particular case under consideration.\textsuperscript{163}

Other circuits agree that subrogation provisions are enforceable under Section 502(a)(3) because such enforcement does constitute equitable relief. The Eighth Circuit has held that specific performance of a plan's subrogation provision is an equitable remedy under ERISA § 502(a)(3).\textsuperscript{164} Similarly, the Seventh Circuit rejected the Ninth Circuit’s rationale and held that a plan fiduciary seeking to enforce a plan's subrogation provision was indeed seeking equitable relief.\textsuperscript{165} “Our circuit has consistently held that a complaint purporting to state a claim for equitable relief under a reimbursement clause in a benefits contract is an equitable claim for purposes of ERISA § 502(a)(3).”\textsuperscript{166} This approach is the correct approach.

The Ninth Circuit observed that “the Court in Mertens looked to the substance of the remedy sought . . . rather than the label placed on that remedy.”\textsuperscript{167} ERISA § 502(a)(3) makes it clear that a suit may be brought “to enforce . . . the terms of the plan.”\textsuperscript{168} Thus, regardless of how the claim is framed (“specific performance, disgorgement, resti-
tution, reimbursement, constructive trust, etc."

6

"A primary purpose of ERISA is to ensure the integrity and primacy of the written plans."

71 "A primary purpose of ERISA is to ensure the integrity and primacy of the written plans."

72 Since ERISA does not preclude the use of subrogation provisions in welfare benefit plans, the proper interpretation of Section 502(a) (3) allows for the enforcement of such provisions.

73 Consistent with the goals and mandates of ERISA, the Court should hold that the enforcement of subrogation provisions is authorized by ERISA § 502(a) (3) as appropriate equitable relief.

169. See, e.g., Amicus Brief of Nat'l Ass'n of Subrogation Prof'l's, Inc. in Support of Petitioners at 11 n.12, Great-West Life & Annuity Ins. Co. (No. 99-1786) ("Terminology aside, it is clear that the plan and the employer wanted the court to order the participant to restore funds to the plans as required by the terms of the plan. This could be characterized as specific performance, disgorgement, restitution, reimbursement, constructive trust, etc. . . .").


