The View from Proskauer

The Evolution of ERISA § 502(a)(3) Cases Seeking Monetary Recovery From Plan Participants

Brian S. Neulander, Proskauer Rose LLP

Although ERISA is most frequently looked to as a vehicle for plan participants to recover plan benefits, there are a variety of circumstances in which plans seek recovery of payments made to plan participants, including the following three common scenarios:

i. Enforcement of subrogation and reimbursements provisions;
ii. recovery of paid disability benefits after the participant receives an award of retroactive Social Security benefits; and
iii. recovery of an overpayment resulting from, for example, a mistakenly calculated benefit payment or a misrepresentation by a participant that induced the plan to make a payment, or stream of payments, that was in fact not owing.

Claims by plans or their fiduciaries to recover payments made to participants are inhibited by the strictures of ERISA's civil enforcement scheme. The only recognized avenue for recovery, ERISA § 502(a)(3), limits recovery to equitable relief. In *Great-West Life Insurance & Annuity Co. v. Knudson*, 534 U.S. 204 (2002), the Supreme Court held that this provision authorizes only those forms of relief that were available from the courts of equity in the days of the divided bench. Following *Great-West*, courts struggled to determine whether and in what circumstances plan fiduciaries can recover money from plan participants. Based on the Supreme Court's more recent decision in *Sereboff v. Mid Atlantic Medical Services, Inc*., 547 U.S. 356 (2006), however, courts have permitted relief against participants when the plan contains clear overpayment recovery and/or offset provisions. Within the last year, some courts have allowed recovery even without the identification of specific, identifiable funds from which reimbursement is sought.

The Supreme Court's Framework for Equitable Relief Under Section 502(a)(3)

In *Great-West*, a participant was injured in a car accident and the proceeds from a settlement with the tortfeasor were placed in a special needs trust. The Court held that the plan could not enforce its subrogation provision to recover already paid medical costs from the participant because the funds at issue were held in trust, *i.e*., the settlement proceeds sought by the plan were not in the participant's "possession." In so ruling, the Supreme Court interpreted § 502(a)(3) as authorizing only relief that was traditionally available in courts of equity. The Court specifically held that because Great-West sought legal relief, *i.e.*, the imposition of personal liability to obtain money damages, a remedy was not available under § 502(a)(3). To obtain the equitable remedy of restitution, the Court held that the funds sought to be recovered must: (i) be specific and identifiable; (ii) belong in good conscience to the plan; and (iii) be in the defendant's possession.

In *Sereboff*, the Court confirmed that § 502(a)(3) authorizes only traditional forms of equitable relief. Just as in *Great-West*, the participant was involved in a car accident, and the plan expended money to cover medical costs; a settlement was eventually reached with the tortfeasors; and relying on the plan's subrogation provision, the fiduciaries sought to be reimbursed for the medical benefits already paid to the participant. Unlike in *Great-West,* however, the settlement funds were not placed in trust, but were paid directly to the participant, and the participant agreed to hold the funds in a special, separate account to avoid commingling of assets until the litigation resolved. Thus, the fiduciaries were seeking recovery of particularly identifiable funds in the defendant's possession, and the impediment to recovery in *Great-West* did not exist. Further, the plan included subrogation and reimbursement provisions that created an "equitable lien by agreement" on any future recovery by the participant for the same injury; in this case, the settlement funds. Under this theory of recovery, the Court stated, a fiduciary seeking reimbursement pursuant to a plan's subrogation and reimbursement provisions states a cognizable claim if it relies on plan language that identifies both the fund from which reimbursement is sought and the portion of the fund to which the plan claims entitlement.

Recovery Based on the Plan's Subrogation and Reimbursement Provisions

In post-*Sereboff* cases involving the enforcement of subrogation and reimbursement provisions to recover benefit payments, the courts have uniformly held that plans have viable claims for equitable relief under ERISA § 502(a)(3) when they seek to recover particular, identifiable funds in the hands of a participant or a third-party. In *Administrative Committee for the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Horton*, 513 F.3d 1223 (11th Cir. 2008), the court held that the plan had a viable equitable remedy under § 502(a)(3) to enforce a subrogation provision to recover overpayments from a special needs trust. *See also Administrative Committee for the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Shank*, 500 F.3d 834 (8th Cir. 2007) (same); *AT&T Inc. v. Flores,* 322 F. App'x 391 (5th Cir. 2009) (ruling that plan could enforce clear subrogation clause against specifically identifiable funds, belonging in good conscience to the Plan, held in trust by the participant's lawyer). A recent case applied *Sereboff's* equitable lien principle to allow recovery even though the funds at issue were not held in a separate account. In *Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. 2009), the court held that a plan could enforce its subrogation provision against a lawyer when settlement funds were distributed to him as attorney's fees. In so ruling, the court determined that the plan's subrogation rights superseded the attorney's fee claim, even when the settlement funds were commingled with the attorney's other assets.

Recovery Based on the Plan's Social Security Offset Provision

Before *Sereboff*, several courts ruled that plans could not recover retroactively awarded Social Security benefits pursuant to a Social Security offset provision. Post-*Sereboff*, courts have been willing to apply equitable lien principles to allow recovery of retroactively awarded Social Security benefits pursuant to a Social Security offset provision. In so doing, some courts have extended *Sereboff's* reasoning by finding that the equitable lien theory does not require a plan to demonstrate that the funds at issue are in a separate, specifically identifiable fund.

In *Cooperative Benefit Administrators, Inc. v. Ogden*, 367 F.3d 323 (5th Cir. 2004), the court ruled that, after a participant received a retroactive Social Security award, the plan could not recover benefits already paid. The plan conceded that its recoupment claim sought to impose personal liability on the participant in violation of *Great-West's* prohibition on "legal" relief under § 502(a)(3), but argued that it could recover under federal common law. The court rejected the plan's federal common law claim because there was no "gap" in ERISA's remedial provisions, *i.e.,* ERISA § 502(a)(3) provided a cause of action, even if no relief was available.

In a case decided two weeks before *Sereboff*, *Buchanan v. Aetna Life Insurance Co*., No. 05-CV-3380, 2006 BL 150054 (6th Cir. 2006), the Sixth Circuit held that Aetna could not recover overpaid disability benefits from a participant. The plan's terms clearly provided that the participant was obligated to reimburse Aetna due to the participant's receipt of plan and Social Security benefits to compensate for the same injury. Yet Aetna failed to satisfy *Great-West's* three-part test for relief under § 502(a)(3) because the funds it sought to recover were no longer clearly in the participant's possession.

Since *Sereboff*, the trend has reversed, and courts have generally permitted claims seeking recovery of retroactively awarded benefits. In *Dillard's Inc. v. Liberty Life Assurance Co. of Boston*, 456 F.3d 894 (8th Cir. 2006), the court held that the plan had a viable equitable claim against the participant to recover overpayments based on the fact that overlapping Social Security payments were received. The court determined that the plan satisfied the "possession" requirement because the Social Security payments constituted a particular fund that belonged in good faith to the plan and was separate from the participant's general assets. More recently, in *Cusson v. Liberty Life Insurance Co.,* 592 F.3d 215 (1st Cir. 2010), the court relied on *Sereboff* to hold that a plan could recover overpayments from a participant, even though the participant dissipated the plan's funds. Applying *Sereboff's* reasoning that ERISA plans are like contracts, the First Circuit allowed the plan to impose an equitable lien on the participant's Social Security award. In *DeBenedictis v. Hartford Life and Accident Insurance Co*., 701 F. Supp. 2d 1113 (D. Ariz. 2010), the court relied on *Sereboff* and *Cusson* to allow recovery from a participant, even when the funds at issue were commingled with other assets.

Reducing Future Benefits to Offset Past Overpayments.

Some courts have allowed plans to recover disability overpayments without the equitable relief constraints of *Great-West* and *Sereboff*, by allowing plans to offset future benefit payments against previous overpayments. In *Northcutt v. General Motors Hourly-Rate Employees Pension Plan*, 467 F.3d 1031 (7th Cir. 2006), the court ruled that the equitable relief limitations discussed in *Great-West* and *Sereboff* did not apply to the reduction of monthly benefits on a going-forward basis because the plan contained a clear offset provision. In this case, the plan suspended future benefit payments when plaintiffs refused to repay the plan after receiving retroactive Social Security awards. The Seventh Circuit noted that judicial remedies under § 502(a)(3) were extremely limited, but that these constraints did not apply here because the plan had not filed a civil action, nor had the plan sought judicial relief to recover the overpayments. Similarly, in *White v. Coca-Cola Co*., 542 F.3d 848 (11th Cir. 2008), the court held that the plan could enforce its own terms by reducing future benefit payments as a setoff for overpayments to participants. The court rejected the participants' argument that withholding benefits was akin to impermissible legal relief. The court held that because the plan did not use ERISA's remedial provisions as the vehicle to cut the participants' benefit stream, § 502(a)(3)'s restrictions did not apply.

Mistaken Overpayments

There are a variety of circumstances in which plans mistakenly overpay benefits that they subsequently seek to recover, including, for example: benefit calculation errors; payments to the wrong beneficiary; and misrepresentations by participants to establish or maintain eligibility for benefit payments. Because of the variety of circumstances in these cases, it is difficult to discern a formula for a successful claim under § 502(a)(3). If *Great-West's* "possession" requirement is not satisfied, the viability of these claims depends on whether a clear overpayment recovery provision exists so that courts have a basis to apply *Sereboff'*s contractual lien principles.

Cases Denying Recovery Under Section 502(a)(3). In *Honolulu Joint Apprenticeship and Training Committee of United Association Local Union No. 675 v. Foster*, 332 F.3d 1234 (9th Cir. 2003), the Ninth Circuit held that a union plan could not recover monetary relief from a participant after he breached the terms of a scholarship agreement by working for a non-union employer. The plan sought the monetary relief to cover the costs of training the participant as a plumber. The plan argued that recovery was authorized because the apprenticeship training constituted unjust enrichment after the agreement was violated, and *Great-West* authorized restitution as a traditional equitable remedy. The Ninth Circuit denied recovery because the participant-defendant had no money in his possession identified as belonging in good conscience to the plaintiff. Training and/or knowledge was not an identifiable *res* of funds. Thus, the plan could not rely on § 502(a)(3) to impose personal liability on the participant to pay for his training.

In *Kroop v. Rivlin*, No. 04-CV-1401 (S.D.N.Y. Sept. 27, 2004), the plan sought recovery of nearly $100,000 in pension payments that were mistakenly made because a pensioner's son misrepresented to the plan that the pensioner was alive for eight years following his death. Without the benefit of *Sereboff*, the court relied solely on *Great-West* to deny relief. Because the son spent the pension check funds as they arrived each month, the court held that the plan was pursuing an impermissible claim for legal relief because the money at issue was no longer in a defendant's possession and thus "equitable" restitution was not available.

In *Phillips v. Brink's Co.*, 632 F. Supp. 2d 563 (W.D. Va. 2009), the plan sought to recover mistakenly paid benefits resulting from its failure to offset the participant's union pension from his disability benefits for seven years. The plan lacked a clear overpayment recovery provision. Without discussing *Sereboff* or *Great-West*, the court enjoined the plan from offsetting future benefits against the previous overpayments. Without a clear offset or overpayment provision, the participant had no notice of the claimed overpayments. Based on a balance of equities, the court held that the proposed monthly reduction of $163.29 would be too much of a hardship to enforce against the elderly and disabled participant.

Cases Allowing Recovery Under Section 502(a)(3). *In Gutta v. Standard Select Trust Insurance Plans*, 530 F.3d 614 (7th Cir. 2008), the plan sought to recover benefits that it paid while it investigated a disability claim that it ultimately determined to be without merit. The plan also discovered that the participant had received disability payments from multiple disability policies, triggering the plan's offset provision. The Seventh Circuit affirmed the district court's ruling that recovery was allowed "even if the benefits it paid to Gutta [were] not specifically traceable to Gutta's current assets because of commingling or dissipation."

In *North American Coal Corp. Retirement Savings Plan v. Roth*, 395 F.3d 916 (8th Cir. 2005), the plan filed a suit for a participant to whom it mistakenly paid the full account balance from a 401(k) account, when a Qualified Domestic Relations Order (QDRO) provided that the balance of a the account was to be split with the participant's ex-spouse. The plan sued for unjust enrichment, as well as an injunction to block dissipation of the funds that had already been transferred to a third party. The district granted the injunction and ruled in favor of the plan, allowing the recovery of the entire sum transferred to the third-party. *North American Coal Corp. Retirement Savings Plan v. Roth*, No. 03-CV-124 (D. N.D. Mar. 5, 2004). The Eighth Circuit affirmed the district court's ruling, but held that the plan could only recover funds within the participant's possession or any portion of the funds that remained clearly identifiable in the hands of a third-party. Citing *Great-West*, the court refused to allow "personal liability" against the defendants.

Proskauer's Perspective

The conflicting case law in suits to recover overpayments, mistakenly made payments, and the like, is a direct consequence of a fundamental flaw in the design of ERISA, namely its failure to provide an explicit right of action for plans to recover benefits that do not in good conscience belong to participants. To the extent that the plan document and/or summary plan descriptions contain a clear overpayment recovery or offset provision, the opportunity for relief under § 502(a)(3) will clearly be enhanced because this may support a contractual lien theory, and thereby remove the need to satisfy the requirements that the assets being pursued are in the participant's possession and are specifically identifiable. Similarly, plan offset provisions may provide an avenue for prospective relief without having to resort to ERISA's civil enforcement provisions altogether. Nevertheless, there will remain circumstances where, depending on the plan document or the applicable jurisdiction, the pursuit of claims for recovery of plan overpayments may become an exercise of "throwing good money after bad."

Mr. Neulander is an associate in Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center, resident in the New Orleans Office.