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THE SUPREME COURT FILLS A GAPING HOLE: *CIGNA CORP. V. AMARA* CLARIFIES THE SCOPE OF EQUITABLE RELIEF UNDER ERISA

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I. INTRODUCTION

In May 2011, the United States Supreme Court finally addressed the lingering debate regarding the scope of equitable relief under ERISA section 502(a)(3) through its decision in *CIGNA Corp. v. Amara*.[1] This debate resulted from a series of prior Supreme Court decisions that narrowly construed the scope of available relief under that provision,[2] a position that many legal scholars and practitioners questioned as unduly restrictive.[3] *Amara* was ostensibly a decision regarding the scope of recovery under a different remedial provision of ERISA, section 502(a)(1)(B), and it therefore came as a surprise when the Supreme Court turned its attention to section 502(a)(3), particularly since the Court had declined a petition to specifically address this provision exactly three years earlier in the case of *Amschwand v. Spherion*.[4] The recurring remedial issue raised in

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1. CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011).

2. Mertens v. Hewitt Assocs., 508 U.S. 248, 257 (1993); Great-West Life & Annuity Ins. Co. v. Knudsen, 534 U.S. 204, 210 (2002); Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 365 (2006). These cases are discussed in more detail in Discussion, *infra* Part I.

3. *See generally* Colleen Medill, *Resolving the Judicial Paradox of Equitable Relief Under ERISA Section 502(a)(3)*, 39 J. MARSHALL L. REV. 827 (2006) [herineafter Medill, *Judicial Paradox*]; John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317 (2003) [hereinafter Langbein, *Trail of Error*]; Susan Harthill, *A Square Peg in a Round Hole: Make Whole Relief Under ERISA Section 502(a)(3)*, 61 OKLA. L. REV. 721 (2009) [hereinafter Harthill, *Square Peg*] (addressing the issue of make-whole relief as a traditional trust law remedy).

4. Amschwand v. Spherion Corp., 128 S. Ct. 2995 (2008). The Supreme Court simultaneously declined to review another case involving the same issue

Amschwand and many other cases was whether a participant or beneficiary in an employee welfare benefit plan is entitled to individualized monetary relief for losses caused by a fiduciary breach.[5]

In an earlier article, the author explained how this issue arose due to ERISA's detailed remedial scheme, which requires participants and beneficiaries to squeeze their request for relief into one of ERISA's statutorily defined categories.[6] Participants and beneficiaries who cannot squeeze their claims into the detailed remedial provisions are forced to argue that their claims fall within the ambit of a so-called "catch-all" remedial provision that provides that "appropriate equitable relief" may be awarded under ERISA section 502(a)(3).[7] Prior to *Amara*, the Supreme Court interpreted that provision so narrowly as to effectively preclude relief in many instances where a fiduciary breach had clearly caused a loss.[8]

ERISA fiduciaries are subject to strict duties of prudence and loyalty, and participants and beneficiaries aggrieved by a fiduciary's breach of such duties may sue for redress under ERISA's "carefully crafted and detailed enforcement scheme."[9] The Supreme Court has explained that ERISA section 404(a) requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[10] Participating knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense fails to comply with the requirement that a fiduciary act "solely in the interest of the participants and beneficiaries."[11] For example, CIGNA, the defendant in the *Amara* case, breached its fiduciary duties of notice and disclosure of plan changes to participants.[12]

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of the scope of ERISA's remedial relief in *Goeres v. Charles Schwab & Co.*, 554 U.S. 932 (2008).

5. Brief For The United States As Amicus Curiae Supporting Appellants, Amschwand v. Spherion Corp., No. 07-841 (U.S. May 23, 2008), 2008 WL 2185730, at *2, *cert. denied*, 128 S. Ct. 2995 (2008) [hereinafter "DOL *Amschwand* Brief"].

6. *See* Harthill, *Square Peg*, *supra* note 3, at 721 (citing 29 U.S.C. § 132, ERISA § 502). Rather than parallel citing to both the United Sates Code and the ERISA code section, this Article will follow the less cumbersome convention of citing only to the ERISA code section.

7. ERISA § 502(a)(3).

8. *See* Discussion, *infra* Part II.

9. *Mertens*, 508 U.S. at 254 (noting that ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'") (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985)).

10. *Russell*, 473 U.S. at 143.

11. *Id.* (quoting ERISA § 404(a)).

12. *Amara*, 131 S. Ct. at 1866.

The defendant in the *Amschwand* case likely breached its fiduciary duty by communicating false and misleading information to the participant regarding his eligibility for life insurance benefits, thereby violating ERISA.[13]

The Supreme Court has further recognized the participant's right to sue a fiduciary under ERISA section 502(a)(3) for harm to the individual, as opposed to harm to the plan, for such breaches.[14] The problem for ERISA claimants who are harmed by a fiduciary's breach of duty of prudence or loyalty is that, under ERISA, a participant or beneficiary's requested relief must squarely fall within ERISA's prescribed categories of relief, otherwise she has no relief at all. Any state law claims that an aggrieved participant or beneficiary may otherwise assert against the breaching fiduciary are foreclosed by ERISA's preemption provision, which provides that Title I and Title II of ERISA "supersede any and all State laws" so far as the state laws "relate to any employee benefit plan."[15] The Supreme Court has broadly interpreted ERISA's preemption provision, ostensibly to carry out the congressional objective of national uniformity for laws governing employee benefits programs.[16]

More specifically, to determine whether the relief sought constitutes "equitable relief" within the meaning of section

13. *See* Varity Corp. v. Howe, 516 U.S. 489, 512 (1996) (holding that section 502(a)(3) allows participants and beneficiaries to sue for "appropriate equitable relief" for breaches of fiduciary duty that cause them individual harm). *Varity* had shown great promise for participants and beneficiaries in claims against breaching fiduciaries until the Court decided *Great-West Life & Annuity Insurance Company v. Knudsen*, 534 U.S. 204, 210 (2002). In *Varity*, the Court held that reinstatement back into a plan was "appropriate equitable relief" for plan participants that had been misled into transferring out of the plan and forfeited benefits as a result. *Varity*, 516 U.S. at 512. Varity further highlighted that the word "appropriate" in section 502(a)(3) acts as a limitation on remedies available under that section, stating that if a plaintiff's claim could be brought under another, more specific provision of section 502 with a more limited remedy than section 502(a)(3), the catch-all relief under more generous section 502(a)(3) would not be "appropriate." *Id.* This limitation has also been used by courts in a circular argument to deny relief to participants that are not eligible for plan benefits due to a fiduciary breach, as follows: participant claims he should receive benefits under a plan that he was mistakenly told he participated in (due to miscommunication or misinformation from fiduciary), but because participant is not eligible for benefits under section 502(a)(3), no relief under that section, and no relief under section 502(a)(3) because plaintiff's claim is really a claim for benefits under section 502(a)(1)(B), but is not eligible for benefits because is not part of the plan.

14. *Varity*, 516 U.S. at 515.

15. ERISA § 514(a).

16. *See* John R. Kirk & Marguerite J. Slagle, *ERISA Preemption: A Survey of the Kentucky Courts' Interpretation of the Sixth Circuit's Preemption Analysis*, 34 N. KY. L. REV. 575, 577-80 (2007) (summarizing Supreme Court preemption decisions).

502(a)(3), the Supreme Court previously ruled that courts must examine the historical practice of the equity courts in the days of the divided bench and look to whether the relief was "typically available" as an equitable remedy for the type of fiduciary breach at issue.[17] Such relief, the Court held, was only available in a limited set of circumstances—plaintiffs seeking relief under section 502(a)(3) can only obtain "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[18] Professor John Langbein and other trust law and ERISA scholars subsequently debunked this view by pointing to traditional trust law and available equitable remedies that were applied to breaches of trust by equity courts.[19] Professor Langbein pointed out the availability of a monetary award as a form of make-whole relief typically available in equity courts for a beneficiary harmed by a trustee's breach of fiduciary duty.[20]

Similar to Langbein and other ERISA authors, this author—in one of her previous articles—further explored the availability of make-whole relief by deconstructing the antiquated case law and trust law treatises, concluding that make-whole relief in the form of monetary payments was indeed available at common law.[21] The author further anticipated and countered arguments that equity courts imposed restrictive conditions on the availability of make-whole relief, notably the argument that make-whole relief was only awarded where the harm was caused to the plan (as opposed to harm to the participant) and that any relief must run to the plan (as opposed to directly to the participant).[22]

The problem created by the Supreme Court's broad interpretation of the preemption provision, coupled with its narrow interpretation of equitable relief under ERISA section 502(a)(3) using the law-equity distinction, has been variously described as a "vacuum,"[23] "betrayal without a remedy,"[24] "gaping

17. *Mertens*, 508 U.S. at 256; *Great-West*, 534 U.S. at 210; *Sereboff*, 547 U.S. at 361. These cases are discussed in more detail in Discussion, *infra* Part II.

18. *See Mertens*, 508 U.S. at 256 (1993) (emphasis in original) (rejecting plaintiffs' claim for monetary relief because they sought "nothing other than compensatory damages") (emphasis added). Moreover, only "equitable restitution" may be awarded under section 502(a)(3), and not restitution "at law." *See Great-West*, 534 U.S. at 715 (2002) ("[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.").

19. Langbein, *Trail of Error*, *supra* note 3, at 1328-29.

20. *Id.*

21. Harthill, *Square Peg*, *supra* note 3, at 723.

22. *Id.* at 772-73.

23. Cigna Healthcare of Tex., Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (quoting DiFelice v. Aetna U.S. Healthcare, 346

hole,"[25] and a "judicial paradox."[26] Not surprisingly, the existence of a cognizable injury without any remedy has led to a "rising judicial chorus urging that Congress and [the Supreme] Court revisit what is an unjust and increasingly tangled ERISA regime."[27] There the situation seemed to rest, since the likelihood of Congress revising ERISA seemed a distant fantasy since the Supreme Court had already declined to expressly review this issue in the *Amschwand* case, despite Justice Ginsburg's pleas to her colleagues to revisit their ERISA "equitable relief" jurisprudence.[28] Therefore, it was surprising that the Court would take up this issue in *Amara*, a case that did not expressly raise the issue of the scope of ERISA equitable relief under section 502(a)(3).

Part II of this Article will briefly summarize the *Amara* decision, focusing on those portions of the opinion addressing section 502(a)(3), scant as they are. Part III will then explain that while the Court's pronouncements fall within the traditional understanding of trust law and are therefore correct, there are deficiencies in the majority's opinion that could lead to confusion and inconsistent results in the lower courts' applications of the new rule. Part IV will examine pending lower court decisions that have already applied *Amara* and attempt to map out the arguments that counsel for aggrieved participants and beneficiaries can make to bolster their chances of success in future cases. Because the Court's decision has already seen some

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F.3d 442, 456–57 (3d Cir. 2003) (Becker, J., concurring)).

24. Allinder v. Inter-City Prods. Corp. (USA), 152 F.3d 544, 553 (6th Cir. 1998), *cert. denied*, 525 U.S. 1178 (1999) (noting "betrayal without a remedy" left by the *Mertens* decision).

25. Harvard Law Review Association, *The Supreme Court, 2003 Term Leading Cases*, 118 HARV. L. REV. 456, 461 (2004) (reviewing *Davila*).

26. *See* Medill, *Judicial Paradox*, *supra* note 3, at 829 *passim* (2006) (describing how the judicially created paradox of "equitable" relief under section 502(a)(3) operates in a variety of contexts, including breach of fiduciary duty cases but also extends to other types of claims brought under section 502(a)(3)).

27. *Davila*, 542 U.S. at 222 (2004) (Ginsburg, J., concurring) (quoting *DiFelice*, 346 F.3d at 453 (Becker, J., concurring)). *See also* Eichorn v. AT&T Corp., 489 F.3d 590, 593 (3d Cir. 2007) (Ambro, J., concurring) (citations omitted) (providing a collection of judicial and scholarly authorities voicing this concern); Cicio v. Does, 321 F.3d 83, 106-07 (2d Cir. 2003) (Calabresi, J., dissenting in part) (stating that the Supreme Court should "start over" in its analysis of the availability of consequential damages under ERISA), *vacated*, 542 U.S. 933 (2004); Shannon P. Duffy, *Becker Calls on Congress, Justices to Fix ERISA*, THE LEGAL INTELLIGENCER, Oct. 16, 2003, at 1 (noting Judge Becker sent his opinion to the Senate Committee on Health, Education, Labor and Pensions, the House Committee on Education of the Workforce, committee chairs, and the ranking members, chief majority counsel, and the minority counsel of both Houses).

28. *Davila*, 542 U.S. at 222 (Ginsburg, J., concurring) (quoting *DiFelice*, 346 F.3d at 456, 457 (Becker, J., concurring)).

repudiation in the lower courts,[29] this Article is unashamedly a guide for plaintiffs' counsel, a practitioner's piece, and should therefore please the current Chief Justice who has recently criticized legal scholarship on this score.[30]

II. BACKGROUND TO *CIGNA V. AMARA*

Amara involved a CIGNA Corporation defined benefit pension plan.[31] Prior to 1998, the plan provided an annuity to employees with at least five years of service based on the employee's salary and length of service.[32] In 1998, CIGNA converted the defined benefit plan into an "account balance plan," under which retiring employees would receive a lump-sum cash payment calculated based on a specified annual contribution from CIGNA, increased by compound interest.[33]

CIGNA announced the creation of the new plan to its employees in a 1997 newsletter, stating, *inter alia*, that the cash balance plan would "significantly enhance" the "retirement program," and provide "the same benefit security" with "steadier benefit growth."[34] CIGNA also promised to make an initial contribution to each employee's account that would be equal to the value of benefits earned for service prior to 1998, and that CIGNA would not get any cost savings benefit from the program change.[35]

A group of plan participants challenged CIGNA's adoption of the new plan, alleging that the converted plan reduced their benefits and that CIGNA had misrepresented the plan in its communications to participants.[36] The participants sought to have the plan reformed to provide the greater level of benefits to which the participants claimed they were entitled based on CIGNA's descriptions of the plan.[37]

The District of Connecticut found that CIGNA had made

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29. *See* Discussion, *infra* Part III.

30. *Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, ACS BLOG (July 5, 2011), http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99-take-on-academic-scholarship (quoting Chief Justice Roberts's comments to the Fourth Circuit Judicial Conference, that there is a "disconnect between the academy and the profession. . . . Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.").

31. A defined pension benefit plan is a type of plan that typically provides retired employees with a pension based on salary and length of service.

32. *Amara*, 131 S. Ct. at 1871.

33. *Id.*

34. *Id.* at 1873.

35. *Id.*

36. *Id.*

37. *Id.* at 1870.

misrepresentations to its employees because: (1) the plan change in fact saved CIGNA $10 million annually, (2) CIGNA's initial deposit did not represent the full value of earned benefits, and (3) the new plan made some employees worse off.[38] The district court further found that some of CIGNA's communications to employees regarding the new plan were "significantly incomplete and misled its employees."[39] CIGNA's misleading communications violated ERISA's statutory notice and disclosure provisions—ERISA section 204(h), which requires notice of a reduction in future pension benefits, and ERISA sections 102(a) and 104(b), which set forth the fiduciary's disclosure obligations.[40]

The district court awarded relief for CIGNA's fiduciary duty violations under ERISA section 502(a)(1)(B), which authorizes a participant or beneficiary to bring "a civil action" to "recover benefits due to him under the terms of his plan."[41] In this instance, of course, the terms of the new plan did not authorize the level of benefits sought by plaintiffs, so the district court decided it could award the proper relief to the participants by reforming the new plan.[42] The court reformed the plan by changing the accounts from the greater of (A) the amount to which participants would have been entitled as of January 1, 1998, under the old plan, or (B) the amount in their accounts at retirement, to the sum of (A) and (B).[43] The United States Court of Appeals for the Second Circuit affirmed the district court's judgment for the reasons stated by the district court.[44]

The Supreme Court granted certiorari "to decide whether the District Court applied the correct legal standard, namely, a "likely harm" standard in determining that CIGNA's notice violations caused its employees sufficient injury to warrant legal relief."[45]

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38. *Id.* at 1873-74. For example, the old plan offered employees like plaintiff Janice Amara the option to retire early (beginning at age fifty-five) with only somewhat reduced benefits but the new plan only allowed employees to purchase an annuity benefit with CIGNA's initial deposit. *Id.* at 1873. The purchase power of CIGNA's initial deposit into the employees' new plans was significantly less than the benefit under the old plan, as starkly demonstrated by Janice Amara's situation—she was eligible for $1,833 per month under the old plan if she retired at age fifty-five but only able to purchase an annuity benefit of $900 per month under the new plan based on the amount of CIGNA's initial deposit. *Id.*

39. *Id.* at 1872.

40. Amara v. CIGNA Corp., 534 F. Supp. 2d 288, 363 (D. Conn. 2008).

41. *Id.* at 333 (quoting ERISA § 502(a)(1)(B)).

42. Amara v. CIGNA Corp., 559 F. Supp. 2d 192, 222 (D. Conn. 2008). The district court could not restore the plaintiffs into the old plan because benefits under the old plan had been frozen and CIGNA's notices freezing the old plan effective December 31, 1997, were valid. *Id.* at 208.

43. *Id.* at 222.

44. Amara v. CIGNA Corp., 348 F. App'x 627 (2d Cir. 2009).

45. *Amara*, 131 S. Ct. at 1871. The ERISA 204(h) notice violation does not

Because the district court had granted relief under section 502(a)(1)(B), the Court necessarily had to determine the threshold question of whether that section authorized the reformation relief.[46]

The Supreme Court disagreed with the district court and Second Circuit's view that plan reformation is appropriate under section 502(a)(1)(B), holding that ERISA section 502(a)(1)(B) does not authorize the type of reformation relief awarded by the district court.[47] Justice Breyer explained that section 502(a)(1)(B) addresses "'enforc[ing]' the 'terms of the plan,' not of *changing* them."[48] Thus, the Court held that ERISA section 502(a)(1)(B) does not permit a court to reform the terms of the plan, and reversed and remanded in a unanimous opinion.[49] Six of the eight justices went on to consider whether the relief ordered by the district court under section 502(a)(1)(B) might instead be available under section 502(a)(3).[50] The Court remanded the case back to the district court, however, to "revisit its determination of an appropriate remedy for the violations of ERISA it identified."[51] This is the part of Justice Breyer's opinion that, though short, is sweet indeed for proponents of a broader interpretation of ERISA section 502(a)(3).

As previously explained, ERISA section 502(a)(3) allows a participant, beneficiary, or fiduciary "to obtain other appropriate

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appear to have been part of the appeal to the Supreme Court. The district court noted that section 204(h) had been interpreted to permit the invalidation of a plan amendment not preceded by proper notice and, in 2001, that section was amended to explicitly entitle participants to benefits "without regard to [the] amendment" in the case of an "egregious failure." *Id.* at 1875. (citing ERISA § 204(h)(6) (2006)). This remedy would not help the plaintiffs here because the old plan benefits had been frozen. *Id.* (citing *Amara v. CIGNA Corp.*, 559 F. Supp. 2d at 207). Thus, the Supreme Court's opinion regarding disclosure violations may not apply to 204(h) notice violations.

46. *Id.* at 1871.

47. *Id.*

48. *Id.* at 1876-77 (alterations in original) (emphasis in original) (quoting 29 U.S.C. § 1132(a)(1)(B)).

49. *Id.* The Solicitor General had alternatively argued in an amicus brief that the district court was justified to rely on section 502(a)(1)(B) because the "plan" includes the disclosures in the summary plan descriptions. *Id.* In rejecting this argument, the Supreme Court held that even if the district court had viewed the summaries as "plan" terms, the terms of plan summaries cannot be enforced under section 502(a)(1)(B) as the terms of the plan itself. *Id.* This part of the Court's opinion is not discussed in this Article but is certainly a very significant holding and changes the landscape of ERISA law addressing the enforcement of summary plan descriptions.

50. *Id.* at 1878-82. Justice Breyer authored the majority opinion on section 502(a)(3), joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Alito and Kagan. *Id.* at 1870. Justice Sotomayor recused herself and Justices Scalia and Thomas added a concurring opinion. *Id.*

51. *Id.* at 1882.

equitable relief" to redress violations of ERISA "or the terms of the plan."[52] The Court stated that the remedies ordered by the district court each fell within the contours of remedies typically available in equity and were therefore "within the scope of the term 'appropriate equitable relief' in section 502(a)(3)."[53] The Court characterized the potentially available equitable remedies as: (1) *reformation* of the terms of the plan to remedy the disclosure violations, (2) *estoppel* to hold CIGNA to what it had promised, and (3) *an injunction* coupled with *a surcharge* ordering the fiduciary to pay already retired beneficiaries money owed under the plan as reformed.[54]

Most significantly for those commentators (including the author) that have argued for the availability of monetary relief under section 502(a)(3), the Court addressed the fact that the injunction required the plan administrator to pay money to retired beneficiaries.[55] The majority held that the payment of money is an available remedy under section 502(a)(3), due to the traditional practice of equity courts to award the remedy of surcharge, i.e., monetary compensation for a loss resulting from a trustee's breach of duty or to prevent the trustee's unjust enrichment.[56]

Although the majority did not define the exact parameters of the equitable remedies identified by Justice Breyer, the majority did analyze the appropriate legal standard for the lower court to apply in determining whether Janice Amara and her fellow plaintiffs were injured by CIGNA's breaches of its fiduciary duty.[57] ERISA does not specifically address this question, so the Court turned to equity to resolve what standards might apply to determine the scope of "appropriate equitable relief," and whether the plaintiffs suffered harm from CIGNA's deficient disclosures.[58]

Looking at the equitable remedy of estoppel, the Court explained that the plaintiffs must show detrimental reliance on the disclosures in order for the remedy to apply, but need not show detrimental reliance in order for the other equitable remedies,

52. ERISA § 502(a)(3).
53. *Amara*, 131 S. Ct. at 1880.
54. *Id.* at 1879-80 (emphasis added).
55. *Id.* at 1880.
56. *Id.* "Surcharge" is frequently used as a synonym for make-whole relief, and the author has previously posited, Harthill, *Square Peg*, *supra* note 3, at 752–53, that this use of nomenclature has possibly led to confusion about the availability of make-whole monetary relief in equity. *See, e.g.*, Langbein, *Trail of Error*, *supra* note 3, at 1352-53. *Cf.* E. Daniel Robinson, Note, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 MINN. L. REV. 1447, 1469-70 (2006) (arguing that surcharge is distinguishable from make-whole relief).
57. *Amara*, 131 S. Ct. at 1880-82.
58. *Id.*

notably surcharge, to apply since that was not required in equity.[59] Nevertheless, the Court noted that even where detrimental reliance was not required, plaintiffs must always show actual harm, which may "sometimes consist of detrimental reliance, but . . . might also come from the loss of a right protected by ERISA or its trust-law antecedents."[60] Therefore, even for relief from disclosure violations under a theory of surcharge, the Court stated that each plan participant must show actual harm and causation, which may or may not involve a showing of detrimental reliance.[61]

For those readers familiar with the preceding Supreme Court pronouncements on the type of limited remedies available under section 502(a)(3), it should come as no surprise that Justices Antonin Scalia and Clarence Thomas took issue with the part of the majority's opinion dealing with the availability of relief under section 502(a)(3). Although concurring in the judgment, Justice Scalia, the author of *Great-West Life & Annuity Insurance Co. v. Knudsen*,[62] took the majority to task for exceeding the scope of the district court's ruling and addressing a question that the district court had expressly declined to address.[63] Hence, according to Justices Scalia and Thomas, that part of Court's decision addressing the scope of relief under section 502(a)(3) is dicta.[64]

Lower courts are, unfortunately, seizing on Justice Scalia's conclusion and rejecting claims for equitable relief by essentially rejecting *Amara* and continuing to apply prior circuit cases restrictively interpreting *Great-West*.[65] The problem with this line of cases is that they fail to recognize what Justice Breyer made clear when he expressly distinguished *Amara* from *Mertens v.*

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59. *Id.*

60. *Id.*

61. *Id.* This requirement may pose a problem for plaintiffs in a class action lawsuit, like the *Amara* plaintiffs, since a demonstration of individualized showings of injury and causation is obviously problematic on a class-wide scale. Additionally, the Court stated that a participant or beneficiary must demonstrate detrimental reliance in an estoppel case, which may also preclude class action status in estoppel cases. *Id.* The actual harm and causation elements, however, were not strictly imposed in equity cases and the Court did not seem to consider these requirements as an obstacle under the facts of the *Amara* case. *See* Discussion, *infra* Part III (discussing *Amara*'s significance).

62. *Great-West*, 534 U.S. at 210.

63. *Amara*, 131 S. Ct. at 1883 (Scalia, J., concurring).

64. *Id.* at 1884 (Scalia, J., concurring). Justice Scalia characterized the majority's opinion on the availability of relief under section 502(a)(3) and *Mertens* as "purely dicta, binding upon neither us nor the District Court." *Id.*

65. N. Cyprus Med. Ctr. Operating Co. v. Cigna Healthcare, No. 4:09-cv-2556, 2011 U.S. Dist. LEXIS 127526, at *25-26 (S.D. Tex. Nov. 3, 2011); Biglands v. Raytheon Emp. Sav. & Inv. Plan, 801 F. Supp. 2d 781, 786 (N.D. Ind. 2011).

Hewitt Associates[66] and *Great-West*–those cases did not involve traditional equitable trust law remedies because those cases did not involve participant-plaintiffs suing fiduciary-defendants for breach of fiduciary duty:

> The case before us [*Amara*] concerns a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust). It is the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law. With the exception of the relief now provided by § 502(a)(1)(B), the remedies available to those courts of equity were traditionally considered equitable remedies.[67]

This distinguishing feature, long-urged by the Department of Labor, clarifies for the lower courts that these restrictive precedents do not bind their hands with respect to the types of equitable relief available for participants against breaching fiduciaries.[68] *Amara* gave the federal courts the flexibility and discretion to mold the appropriate relief to protect the interests of the participants and beneficiaries, just as equity courts molded the appropriate relief in traditional trust law cases.[69] It is therefore mystifying that any federal court would continue to insist on being tied to its own prior restrictive precedents rejecting equitable relief. Simply put, prior circuit precedents that rely on *Mertens* and *Great-West* to limit equitable relief were incorrectly decided and are no longer good law.[70]

III. THE SIGNIFICANCE OF *AMARA*

The Supreme Court's ruling in *Amara* is significant for several reasons, including, but not limited to, the Court's pronouncements regarding equitable remedies. First, the Supreme Court held that ERISA section 502(a)(1)(B) allows a court to enforce the plan only as written, and this section does not permit a

66. *Mertens*, 508 U.S. at 248.

67. *Amara*, 131 S. Ct. at 1879.

68. Harthill, *Square Peg*, *supra* note 3, at 723.

69. *Amara*, 131 S. Ct. at 1881 (citing GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 861 (3d ed. 2011). "In such instances equity courts would 'mold the relief to protect the rights of the beneficiary according to the situation involved.'" *Amara*, 131 S. Ct. at 1881.

70. Some courts might take a different tack, importing elements of the underlying cause of action into the requirements for relief. An example is *Carr v. International Game Technology*, No. 3:09-cv-00584-ECR-WGC, 2012 U.S. Dist. LEXIS 35688, at *12–18 (D. Nev. Mar 16, 2012), where the court imported the requirement of detrimental reliance from a common law misrepresentation claim into the make-whole remedy, but not the equitable estoppel remedy where it might be expected to appear as an element of the relief.

court to reform the terms of the plan.[71] Most circuits to address this issue had similarly held that the text of ERISA section 502(a)(1)(B) limits claims under the section to claims for benefits "under the terms of the plan," and that participants may not assert claims for statutory violations of ERISA under section 502(a)(1)(B) in the absence of an entitlement to benefits under the terms of the plan as written.[72] The Supreme Court adopted this majority view in *Amara*, holding that section 502(a)(1)(B) does not permit a court to alter the terms of the plan, even where the court has determined that statutory violations have been committed, thereby resolving any residual confusion on this point.[73]

Second, a unanimous Court rejected the argument that a plan sponsor must provide the level of benefits set forth in the summary plan description, even if the summary plan description conflicts with the benefits set forth in the plan document.[74] This holding appears to effectively overrule a line of cases[75] holding that a plan sponsor is obligated to follow an erroneous summary plan document instead of the plan document.[76]

These *Amara* pronouncements addressing the summary plan description and plan reformation under section 502(a)(1)(B) significantly change the landscape of ERISA litigation, and there is no doubt that commentary and analysis on these holdings will follow.[77] The focus of this Article, however, is that part of the Court's holding regarding the scope of relief available under ERISA section 502(a)(3) for claims against plan fiduciaries. Plaintiff participants and beneficiaries should now argue, in fiduciary breach cases, that the alleged injury and corresponding appropriate remedy falls within one of the equitable remedies identified by the Court—injunction, reformation, estoppel, or make-whole relief/surcharge. Defendants will probably counter such arguments by citing Justices Scalia and Thomas in their

71. *Amara*, 131 S. Ct. at 1868.

72. Eichorn v. AT&T Corp., 484 F.3d 644, 652 (3d Cir. 2007); Ross v. Rail Car Am. Grp. Disability Income Plan, 285 F.3d 735, 739-40 (8th Cir. 2002). *But see* West v. AK Steel Corp. Ret. Accumulation Pension Plan, 484 F.3d 395, 405 (6th Cir. 2007) (allowing a statutory violation claim to proceed under section 502(a)(3) because ERISA's statutory requirements are "implied" terms of an employee benefit plan).

73. *Amara*, 131 S. Ct. at 1871.

74. *Id.* at 1877.

75. *See, e.g.*, Burstein v. Ret. Account Plan for Emps. of Allegheny Health Educ. & Research Found., 334 F.3d 365, 378 (3d Cir. 2003) (holding that where the plan's SPD conflicts with the plan's language, the SPD controls).

76. *See Amara*, 131 S. Ct. at 1877 (expressing concern that the allowance of such claims would "bring about complexity that would defeat the fundamental purpose of the summaries").

77. See, e.g., David Pratt, *Summary Plan Descriptions After* Amara, 45 J. MARSHALL L. REV. (forthcoming 2012) (analyzing the impact of *Amara* on available remedies for ERISA's SPD requirements).

concurrence that the majority's discussion of relief under section 502(a)(3) is dicta and therefore not binding on lower courts. The Supreme Court's equitable relief pronouncements are, however, binding and correct, and they overturn the incorrect application of prior Supreme Court precedents by the lower courts, partially filling ERISA's gaping hole and, hopefully, allowing courts to provide recourse to participants and beneficiaries aggrieved by fiduciary breaches.

A. The Supreme Court Majority Correctly Identified the Available Equitable Remedies Under the Traditional Law of Trusts

The Department of Labor has consistently taken the position that monetary relief is available under ERISA section 502(a)(3) because "equitable relief" encompasses a form of relief available under traditional trust law: make-whole relief.[78] In an earlier article, the author deconstructed and assessed both the arguments in favor of the Department of Labor's position and the counter arguments, and concluded that make-whole relief was indeed a form of equitable relief that was traditionally available in trust law for breaches of trust.[79] The Supreme Court's rulings in *Mertens* and *Great-West* did not foreclose that conclusion, but the analysis provided by the Court in those cases sharply narrowed the availability of equitable relief and was interpreted by the majority of lower courts to foreclose any claims for monetary relief for fiduciary breach, whether styled as equitable make-whole, surcharge, or other forms of traditionally available equitable remedies. Thus, the *Amara* Court was obligated to address these precedents in explaining why it now held these forms of relief to be "appropriate equitable relief" under section 502(a)(3).

1. Step One: The Supreme Court Reconciled Precedents that Effectively Straightjacketed the Lower Courts

In 1993, the Supreme Court issued *Mertens*.[80] There, the Court held that plaintiffs seeking relief under section 502(a)(3) can only obtain "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[81] In *Mertens*, the plan participants sued

78. Harthill, *Square Peg*, *supra* note 3, at 723.

79. *Id.* Other commentators have also made the case for the availability for certain types of fiduciary breach cases under the principals of equitable estoppel. *See, e.g.*, Medill, *Judicial Paradox*, *supra* note 3, at 863-66 (discussing statutory analysis that contradicted judicial interpretation of equitable remedies). Again, the focus of this Article is on the equitable remedy of make-whole relief in cases alleging misrepresentation or omission in fiduciary communication.

80. *Mertens*, 508 U.S. at 248.

81. *Mertens*, 508 U.S. at 255-56 (emphasis in original). Moreover, only

a nonfiduciary actuary whom they alleged had knowingly participated in the employer-fiduciary's breach of duty.[82] The alleged fiduciary breach was the employer's underfunding of the plan, resulting in monetary losses to the plan.[83] The plaintiffs sought recovery of the plan losses from the actuary under section 502(a)(3) because they could not proceed under section 502(a)(2).[84]

The Court refused to classify the money sought against the actuary nonfiduciary as "equitable relief" under section 502(a)(3), reasoning that the participants did not seek a remedy "traditionally viewed as 'equitable,' such as injunction or restitution" but were in fact seeking "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."[85] The Court highlighted congressional choice of only "equitable" remedies in section 502(a)(3), and concluded that "equitable relief" must refer to only "those categories of relief that were typically available in equity."[86] The plaintiffs in *Mertens*, and Justice White in dissent, argued that since a court of equity could award monetary relief in a breach of trust case brought in an equity court, then monetary relief was similarly available in this case.[87] The Court, per Justice Scalia, rejected this argument, explaining that courts of equity sometimes granted purely legal remedies, and the money damages sought from the defendant in *Mertens* was just that—legal relief that would have been available in a court of equity under the common law of trusts.[88]

Although the *Mertens* Court held that section 502(a)(3) relief is limited to "those categories of relief that were typically available

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"equitable restitution" may be awarded under section 502(a)(3), and not restitution "at law." *Great-West*, 534 U.S. at 215. "[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214.

82. *Mertens*, 508 U.S. at 250.

83. *Id.*

84. *Id.* By its terms, section 504(a)(2) applies only to fiduciaries and the accountant-defendants in *Mertens* were non-fiduciaries. *Id.* at 252-53.

85. *Id.* at 255 (emphasis in original).

86. *Id.* at 256 (emphasis omitted) (internal quotations omitted).

87. *Id.* at 255-56. Justice White explained that compensatory damages were available as an equitable remedy to a trust beneficiary because "[e]quity 'endeavor[ed] as far as possible to replace the parties in the same situation as they would have been in, if no breach of trust had been committed.'" *Id.* at 266 (internal citations omitted). According to Justice White, this included make-whole relief. *Id.* at 266-67.

88. *Great-West*, 534 U.S. at 210. Professor Langbein has argued that Justice Scalia was incorrect on this point. Justice Scalia's remark was an apparent reference to the clean-up doctrine, which does not apply to equitable remedies. Langbein, *Trail of Error*, *supra* note 3, at 1350.

in equity," it gave little guidance on how to make this determination other than providing examples such as injunction, mandamus, and restitution.[89] The Court did not flesh out this analysis for almost a decade, until its decision in *Great-West*.

In *Great-West*, the Court reaffirmed the *Mertens* Court's holding that ERISA's equitable relief is typically limited to that available in equity.[90] Justice Scalia, the author of *Great-West*, explained that Congress would not have used the modifier "equitable" if it meant to allow all relief a court could provide.[91] Therefore, Justice Scalia concluded that Congress must have intended to revive the obsolete distinctions of law and equity by available relief under ERISA.[92] The Supreme Court held that because money damages are not an equitable remedy, section 502(a)(3) does not authorize suits by a plan to impose personal liability on a beneficiary based on a breach of contractual obligation to pay money.[93]

The Supreme Court applied a two-prong test, examining both the nature of the cause of action and the remedy sought, to determine whether section 502(a)(3) relief was available.[94] While the causes of action under ERISA section 502(a)(3) are breaches of trust, which were typically brought in courts of equity, such claims could be also be brought in courts of law.[95] Hence, the focus of the debate has been the nature of the remedy sought under section 502(a)(3) claims.

Unlike the *Amara* plaintiffs who are participants or beneficiaries suffering a monetary loss due to a fiduciary breach,[96] the plaintiff in *Great-West* was an ERISA fiduciary, a health insurance company, seeking reimbursement of monies from a beneficiary under a health insurance contract.[97] The fiduciary-insurer sought relief under section 502(a)(3), seeking to enforce a provision in the health insurance contract that obligated the beneficiary to reimburse Great-West from her third-party personal injury recovery for health care payments Great-West had made on her behalf.[98] Great-West sought such relief as "equitable restitution."[99]

Although the *Mertens* Court had identified restitution as a category of equitable relief available under section 502(a)(3),

89. *Mertens*, 508 U.S. at 256.
90. *Great-West*, 534 U.S. at 210.
91. *Id.* at 209.
92. *Id.* at 218.
93. *Id.* at 220.
94. *Id.* at 213-14; *Sereboff*, 547 U.S. at 363.
95. Langbein, *Trail of Error*, *supra* note 3, at 1350-51.
96. *Amara*, 131 S. Ct. at 1870.
97. *Great-West*, 534 U.S. at 207.
98. *Id.*
99. *Id.*

Justice Scalia opined that the monies sought by Great-West were in fact a form of legal restitution and therefore not available as "other equitable relief" in that case.[100] Justice Scalia reached this conclusion by examining the historical practice in the "days of the divided bench" to see when particular remedies were available at law and when at equity.[101] Justice Scalia further instructed courts to rely on standard works to determine the availability of a remedy in equity.[102] The Court then reviewed these treatises to distinguish between money damages as the classic form of legal relief and equitable restitution, ultimately concluding that Great-West impermissibly sought to impose personal liability for a contractual obligation to pay money owed, and thus sought legal, and not equitable, relief.[103]

Professor Langbein has explained why the Court's conclusion in *Mertens* was erroneous, and how that decision has led to a "trail of error" up to and including the 2002 decision in *Great-West*.[104] Nevertheless, even within the narrow confines of these existing precedents, Professor Langbein presented the argument for a form of monetary relief called make-whole relief that was available in the courts of equity to redress breach of trust.[105] Following suit, this author took up the baton in her 2010 article, again working within the Court's narrow confines and following Justice Scalia's instructions to consult the "standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear."[106] Although noting that these standard works are anything but clear, the author concluded that, based on the standard treatises and on-point pre-merger trust law cases, make-whole relief was indeed available as an "appropriate equitable relief."[107]

Amara vindicates that conclusion. Of course, in finally recognizing the availability of monetary make-whole relief, the Court necessarily had to reconcile this result with its prior decisions in *Mertens* and *Great-West*.[108] As discussed, *supra*, the *Mertens* Court held that the "compensatory damages" sought by the plaintiff in that case was not "appropriate equitable relief" available under section 502(a)(3).[109]

But Justice Breyer distinguished *Mertens* by essentially

100. *Id.* at 216-17.
101. *Id.* at 210-13.
102. *Id.* at 216. *See generally* Harthill, *Square Peg*, *supra* note 3 (reviewing the *Great-West* decision in detail and consulting the current standard works to delineate the precise contours of make-whole relief).
103. *Great-West*, 534 U.S. at 210.
104. Langbein, *Trail of Error*, *supra* note 3, at 1363.
105. *Id.*
106. *Great-West*, 534 U.S. at 217.
107. Harthill, *Square Peg*, *supra* note 3, at 781.
108. *Amara*, 131 S. Ct. at 1878-79.
109. *Mertens*, 508 U.S. at 253.

adopting the long-held Department of Labor view—that the defendant in *Mertens* was a nonfiduciary third-party actuary, whereas the defendant in *Amara* was a fiduciary plan administrator.[110] In numerous briefs, the Department of Labor has explained that the identity and nature of the defendant is crucial to the availability of a remedy—a fiduciary is analogous to a trustee under the common law of trusts and therefore brings the remedy within the realm of remedies traditionally available in equity.[111] Those remedies, available against a breaching trustee in a court of equity under the common law of trusts, include not just injunction and restitution, but also other forms of relief such as reformation, estoppel, and surcharge.[112]

The majority similarly reconciled *Great-West* by focusing on the identity and nature of the defendant. Like *Mertens*, *Great-West* involved a claim brought against a nonfiduciary.[113] In *Great-West*, the claim involved the fiduciary's claim for reimbursement "against a tort-award-winning beneficiary."[114] The *Amara* majority explained that the *Great-West* opinion "noted" that the fiduciary sought a lien attaching to money that was not the "particular" money that the tort-defendant had paid.[115] Because such a lien was a legal form of restitution, it was not cognizable under section 502(a)(3).[116] The *Amara* majority summarily dispensed with any need for further analysis of the application of its precedents by merely stating that "[t]he case before us concerns a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust)."[117] Without further ado, the Court swiftly moved on to explain how, premerger, this type of lawsuit could be brought only in a court of equity and that the remedies available to those

110. *Amara*, 131 S. Ct. at 1878.

111. *See, e.g.*, Brief for the United States as Amicus Curiae at 13, LaRue v. DeWolff, Boberg & Assoc., Inc., 128 S. Ct 1020 (2008) (No. 06-856) (arguing similarity of fiduciary and trustee in equity). The Department of Labor's position in amicus briefs is entitled to "*Skidmore* deference," i.e., although lacking power to control, the agency's interpretation of a statute is entitled to deference as persuasive authority, depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *See Reigel v. Medtronic, Inc.*, 552 U.S. 312, 338 n.8 (2008) (citing *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)) ("An amicus brief interpreting a statute is entitled, at most, to deference under *Skidmore* . . . .").

112. *Amara*, 131 S. Ct. at 1880. For purposes of this Article, mandamus has been removed as a form of equitable relief because Professor Langbein has explained that it is not equitable. Langbein, *Trail of Error*, *supra* note 3, at 60.

113. *Amara*, 131 S. Ct. at 1878.

114. *Id.*

115. *Id.* at 1880.

116. *Id.* at 1879-80.

117. *Id.* at 1880.

courts of equity were traditionally considered equitable remedies.[118] The Court did not dig any deeper into its own precedents to understand why so many lower courts had misread *Mertens* and *Great-West*, even though some of those courts had decried their own decisions and proclaimed themselves hopelessly bound by this Supreme Court straightjacket.[119] The Court's failure to explicitly address this failure by the lower courts has likely set the stage for more litigation, as courts struggle both with how to handle their own pre-*Amara* circuit precedents that had curtailed the availability of relief, and with the exact parameters of equitable relief under each of the available theories.

2. *Step Two: The Court Recognized Traditional Trust Law as Expounded by "Standard Treatises"*

The *Amara* majority stayed true to Justice Scalia's instruction in *Great-West* to consult the "standard current works"[120] by referencing sources such as Scott on Trusts, the Restatement (Second) of Trusts, Story, and Pomeroy.[121] These sources plot the correct analysis that Professor Langbein, Professor Medill, the author, and many others have been urging in the years since *Mertens*. Namely that: (1) claims by beneficiaries against breaching fiduciaries were brought in courts of equity, not law, (2) courts of equity applied equitable remedies;[122] and (3) equitable remedies applied by courts of equity in these types of cases included injunctions, but also included "a host of other 'distinctively equitable' remedies"[123]—remedies that included the power to reform contracts, equitable estoppel, and surcharge.[124]

The surcharge, or make-whole remedy, is particularly applicable to cases involving misrepresentations in communications or information provided to participants regarding their plan benefits, such as eligibility for coverage, coverage amounts, and eligibility restrictions or requirements. Make-whole

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118. *Id.*

119. *See, e.g.*, *DiFelice*, 346 F.3d at 453, 456-57 (Becker, J., concurring) (voicing concerns about the current state of ERISA law and requesting Congress or the Supreme Court to become involved).

120. *Great-West*, 534 U.S. at 217.

121. *Amara*, 131 S. Ct at 1880.

122. Also interesting is the fact that the *Amara* Court did not address the statements in *Mertens* that equity courts awarding monetary damages did so under the clean-up doctrine, whereby the equity court was applying legal remedies incidental to equitable ones. *Id.* *Amara*'s analysis would seem to beg the question of what happened to the Court's prior clean-up pronouncements. *See Mertens*, 508 U.S. at 256 (citing 1 POMEROY § 181) (determining that at common law, there were situations "in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority'").

123. *Amara*, 131 S. Ct. at 1884.

124. *Id.*

relief is "monetary relief against breaching fiduciaries [which] is equitable when it restores the beneficiary to 'the position [in which] he would have been if the trustee had not committed the breach of trust.'"[125] Participants and beneficiaries rely on fiduciaries to provide accurate and complete information regarding eligibility and coverage—ERISA plans and even summary plan descriptions are complex documents (and are not always provided) and plan participants frequently rely on more informal communications from plan administrators. When fiduciaries omit or misrepresent vital plan information, participants can suffer egregious monetary harm and should therefore be placed back into the position they would have been in, monetarily, had the breach not occurred. Since most claimants in this situation are not eligible for plan benefits, they cannot assert a claim for relief under ERISA section 502(a)(1)(B).[126]

The idea that monetary relief might be available as "equitable relief" under section 502(a)(3) is not new, even to the Supreme Court. Justice Brennan identified the possibility in his concurring opinion in *Massachusetts Mutual Life Insurance Co. v. Russell.*[127] Justice Brennan explained that "a fundamental concept of trust law is that courts 'will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests.'"[128] Thus, Justice Brennan had no difficulty in concluding that ERISA explicitly directed the courts to develop appropriate remedies, including the possibility of awarding extra-contractual damages under section 502(a)(3).[129] In her concurring opinion in *Cigna*

125. Amended Brief of the Secretary at Labor as Amicus Curiae Opposing the Motions to Dismiss at 51, *In re* Enron Corp., No. MDL 1446, 2002 WL 32116900 (S.D. Tex. Mar. 28, 2002) (No. H-01-3913), 2002 WL 34236027 at *51 (citing RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. a (1959)).

126. *See* Bilello v. JPMorgan Chase Ret. Plan, 592 F. Supp. 2d 654, 663 (S.D.N.Y. 2009) (determining that a claim brought pursuant to ERISA must be dismissed if the claimant is not eligible for the plan benefits).

127. Russell, 473 U.S. at 134. "Trust-law remedies are equitable in nature, and include provision of monetary damages." *Id.* at 154 n.10 (Brennan, J., concurring) (citing G. Bogert & G. Bogert, LAW OF TRUSTS AND TRUSTEES § 862 (2d ed. 1982); RESTATEMENT (SECOND) OF TRUSTS §§ 199, 205 (1959)).

128. *Id.* at 156-57 (Brennan, J., concurring).

129. *Id.* at 157-58 (Brennan, J., concurring) (delineating the court's inquiry as: (1) ascertaining the extent to which state and federal law of trusts and pensions allows recovery beyond the withheld benefit; (2) if such a remedy is available under state law, considering whether such relief would conflict with other ERISA provisions; and (3) including the ultimate consideration of whether allowing the relief would effectuate ERISA's underlying purpose, "enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries."). Justice Brennan went so far as to state that the absence of monetary relief in state trust law was not dispositive of the question whether monetary relief is available under ERISA because Congress intended ERISA to have more "'exacting'" fiduciary standards. *Id.* at 158 n.17 (Brennan,

Healthcare of Texas, Inc. v. Davila,[130] Justice Ginsburg also stated that the "Government's suggestion may indicate an effective remedy others similarly circumstanced might fruitfully pursue."[131] Of course, Justice Scalia's textualist approach in *Mertens* and his resurrection of arcane pre-fusion inquiry in *Great-West* effectively side-lined Justice Brennan's suggested analysis, and Justice Ginsburg's call for action, until *Amara*.[132]

IV. *AMARA*'S IMPACT ON FUTURE ERISA FIDUCIARY BREACH LITIGATION

Prior to the *Amara* decision, Professor Colleen Medill identified six categories of defendants and related claims possible under section 502(a)(3), in an effort to demonstrate how the Supreme Court could recognize various forms of equitable relief even under then-existing precedent.[133] Professor Medill categorized claims for breach of fiduciary responsibilities brought by participants as plaintiffs against the breaching fiduciary as defendant, as "Category III" claims.[134] Professor Medill created several subsets of Category III claims, three of which are the focus of this Article.[135] First, Professor Medill identified claims for individual monetary relief for breach of fiduciary responsibility, such as cases where the fiduciary gave false information or failed to act, resulting in an individualized loss of benefits.[136] The *Goeres*

J., concurring) (internal citations omitted).

130. *Davila*, 542 U.S. at 200.

131. *Id.* at 224 (Ginsburg, J., concurring).

132. *Mertens*, 508 U.S. at 256; *Great-West*, 534 U.S. at 210; *Sereboff*, 547 U.S. at 361; *Amara*, 131 S. Ct. at 1886.

133. Medill, *Judicial Paradox*, *supra* note 3, at 867, 884 (citing to Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1989 (1972)). Professor Medill's comprehensive analysis of the types of ERISA claims available, based on statutory claims and the identity of the plaintiff/defendant, was the result of a modeling exercise that she adapted from the Guido Calabresi and A. Douglas Melamed modeling technique. *Id.*

134. Medill, *Judicial Paradox*, *supra* note 3, at 899. Professor Medill included claims for wrongfully denied benefits in this category, despite the *Varity* Court's warning that where denial of benefits claims are brought under ERISA section 502(a)(1)(B), equitable relief under section 502(a)(3) would not be "appropriate." *Varity*, 516 U.S. at 514-15. The reader is directed to Professor Medill's explanation of the circumstances under which she believes a denial of benefits claim could also result in additional equitable relief. Medill, *Judicial Paradox*, *supra* note 3, at 903-04. This argument is certainly open to plaintiffs in the wake of *Amara* but is not the focus of this Article.

135. Medill, *Judicial Paradox*, *supra* note 3, at 902-04, 932-38. The other three subsets of Category III claims are: (1) breach of fiduciary responsibility claims involving other statutory requirements, (2) claims for violation of the prohibited transaction rules by a fiduciary, and (3) claims involving a wrongful denial of plan benefits.

136. *Id.* at 897-99 (citing Griggs v. E.I. Dupont de Nemeurs & Co., 385 F.3d

v. Charles Schwab & Co., Inc.[137] case, which the Supreme Court declined to hear, illustrates this type of claim—the participant lost $500,000 in a three-year period that he would have earned if the fiduciary had not wrongfully withheld his payment.[138]

The second subset of Professor Medill's Category III claims involve claims of breach of the duty to inform.[139] Under traditional trust law principles, a trustee must furnish to the beneficiary "complete and accurate information as to the nature and amount of the trust property."[140] Likewise, ERISA's fiduciary administration functions encompass such activities as communicating plan terms and choices to plan participants and beneficiaries.[141] This is the duty that is often implicated in section 502(a)(3) claims, such as the *Amschwand* situation, where the fiduciary failed to inform the participant of the proper eligibility requirements.[142]

Professor Medill's third subset of Category III claims implicates the *Amara* situation—claims involving the statutory reporting and disclosure requirements.[143] As Professor Medill noted:

> Congress found that inadequate information provided to plan participants often unfairly deprived them of promised plan benefits. The notice, reporting and disclosure requirements found in part of title I of ERISA are based on the premise that if participants have adequate information, they can more effectively enforce their rights under the plan and deter fiduciary misconduct.[144]

Thus, these claims function to protect the benefits of plan participants and the remedy under section 502(a)(3) should reflect

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440 (4th Cir. 2004); Strom v. Goldman Sachs & Co., 202 F. 3d 138 (2d Cir. 1999)).

137. Goeres v. Charles Schwab & Co., No. C 04-01917 CRB, 2004 U.S. Dist. LEXIS 20358, at *16 (N.D. Cal. Sept. 28, 2004), *aff'd*, 220 F. App'x 663 (9th Cir. 2007), *cert. denied*, 554 U.S. 932 (2008).

138. *Goeres*, 2004 U.S. Dist. LEXIS 20358, at *4.

139. Medill, *Judicial Paradox*, *supra* note 3, at 899.

140. RESTATEMENT (SECOND) OF TRUSTS § 173 (1959).

141. *See Varity*, 516 U.S. at 502-03 (1996) (explaining the fiduciary functions which include communicating plan terms and also communicating choices to plan participants and beneficiaries).

142. Amschwand v. Spherion Corp., No. H-02-4836, 2005 U.S. Dist. LEXIS 21007, at *16-17 (S.D. Tex. Aug. 24, 2005), *aff'd*, 505 F.3d 342 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2995 (2008). The gap in remedial relief under the Court's prior precedent was exemplified by the case of *Amschwand*, and was fully explored by the author in a prior article. *See generally* Harthill, *Square Peg*, *supra* note 3 (analyzing the *Amschwand* case).

143. Medill, *Judicial Paradox*, *supra* note 3, at 900-02.

144. *Id.* at 900 n.347 (citing H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646. I have not addressed Professor Medill's subset of claims that include SPD deficiencies because *Amara* obviates the need for further discussion on such claims.

congressional concern. Professor Medill identifies make-whole relief as the most appropriate equitable remedy for Category III claims where the monetary award is calculated to restore the plaintiff's economic losses (distinguishing it from equitable restitution, which is appropriate only where the defendant is unjustly enriched).[145] On the other hand, she rejects reformation and equitable estoppel for these types of claims.[146]

Make-whole relief is indeed a one-size-fits-all remedy for each of the three types of claims above, but its application in all situations is not without hurdles in light of the *Amara* majority pronouncements. Comparison of two cases illustrates a potential difficulty. In the *Amschwand* case, the decedent was not informed about a plan amendment that required him to return to work for one full day in order to obtain or retain life insurance coverage.[147] When he did not return to work for the required period, he lost coverage and his beneficiary was denied plan benefits upon the decedent's death.[148] This type of claim can therefore be generally labeled as a "failure to inform" claim, in broad terms similar to the type of failure to disclose claim in the *Amara* case.

These two failure to inform situations are, however, different. In *Amschwand*, the failure led to the individual failing to take action to ensure his eligibility for life insurance, resulting in loss of the benefit, so actual harm and causation are direct and clear.[149] In *Amara*, the lack of notice regarding the new plan's impact on pension rights arguably has a less clear and direct harm and less direct causation because the plaintiffs would have to show what effect accurate disclosures would have had—would they have had any opportunity to reject the proposed plan and insist upon retention of their old plan or benefits identical to the old plan? CIGNA could argue that the plaintiffs were not actually harmed because the new plan would have gone into effect even if the notices were proper. Luckily, the Supreme Court has given participants the road map to overcome this obstacle by highlighting the route for Janice Amara:

> That actual harm . . . might also come from the loss of a right protected by ERISA or its trust-law antecedents. In the present case, it is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents—which they might not have themselves seen—for they may have thought fellow employees, or informal workplace discussions, would have let them know if, say, plan changes would

145. *Id.* at 925-26.
146. *Id.*
147. *Amschwand*, 2005 U.S. Dist. LEXIS 21007, at *6.
148. *Id.* at *7-9.
149. *Id.* at *2.

> likely prove harmful. We doubt that Congress would have wanted to bar those employees from relief.[150]

With this statement, the Court signaled that the threshold for actual harm and causation is low.

A. Litigating Fiduciary Breach Cases—Reading the Tea Leaves

Plaintiffs who have suffered injury because of a fiduciary breach are well positioned to argue that prior to *Amara*, most federal circuits erred in applying to fiduciaries a body of law—*Mertens*, *Great-West*, etc.—that related to only nonfiduciaries. The threshold point is that *Amara* corrected that error. Consequently, the scope of remedial relief under ERISA is now congruent with ERISA's purposes and with the overwhelming weight of traditional trust law and equitable jurisprudence. Plaintiffs should argue that *Amara* has effectively overruled circuit precedents addressing the unavailability of equitable relief for claims against breaching fiduciaries for monetary relief. In this respect, *Amara* can be considered to have dramatically changed the legal landscape. Nevertheless, hurdles remain for participants and this Article addresses a number of defense arguments and suggested responses below.

In addition to addressing the argument that pre-*Amara* precedent denying make-whole relief is now obsolete and overruled, plaintiffs must turn their attention to the nature of their claims. Plaintiffs must specifically demonstrate that the fiduciary made material misrepresentations or omissions in their communications. In this respect, post-*Amara* plaintiffs are in the same position as pre-*Amara* plaintiffs—claims that can be brought as claims for plan benefits under section 502(a)(1)(B) cannot be shoehorned into section 502(a)(3) claims.[151]

Plaintiffs must also thoroughly research the parameters of the equitable relief under their existing circuit jurisprudence, paying particular attention to the requirements of reliance, if any, but also looking for any additional equitable bases of relief beyond the three mentioned in *Amara*—reformation, estoppel, and surcharge.[152] Finally, plaintiffs may now also face dismissal of their claims if they cannot demonstrate actual harm or

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150. *Amara*, 131 S. Ct. at 1881.

151. *Varity*, 516 U.S. at 512 (explaining that section 502(a)(3) is a "safety net" that only provides protection for claims that are not otherwise covered by section 502).

152. In addition to monitoring the Second Circuit's application on remand of the Court's teachings in the *Amara* case, there is another case to watch in the Eleventh Circuit. *See generally* Del Rosario v. King & Prince Seafood Corp., 432 F. App'x 912 (11th Cir. 2011) (remanding to the district court for consideration of section 502(a)(3) per *Amara* after rejecting the availability of section 502(a)(1)(B) relief).

causation.[153]

To the extent that plaintiffs have so far unsuccessfully relied on *Amara*, they appear to have fallen victim to one of three fundamental errors: (1) the plaintiff's relief fell under another remedial provision, such as section 502(a)(1)(B), (2) the plaintiff failed to allege a fiduciary breach that violated ERISA's statutory terms, or (3) the parties and/or the court failed to acknowledge the potential impact of *Amara*.

1. *The* Amara *Majority Opinion Is Not Dicta and Overrules Circuit Precedents that Previously Denied Equitable Relief Under a Restrictive View of* Mertens *and* Great-West

Justice Scalia's concurrence in *Amara* laid out a road map for litigants attempting to preclude equitable relief under prior precedents, starting with his pronouncement that the majority's opinion is dicta.[154] Not surprisingly, defendants are seizing on Justice Scalia's dicta discussion to continue to deny the availability of the full panoply of equitable relief, and unfortunately some district courts have agreed with that assessment.[155] Defendants in pending cases such as *McCravy v. Metro Life Insurance Co.*,[156] use the dicta defense in two steps: (1) the majority's decision is dicta and nonbinding, and (2) therefore "well-settled" prior Supreme Court and circuit precedent denying monetary relief remains valid.[157] This argument fails for several reasons: (1) the majority decision is not dicta, (2) even if dicta, the majority decision is binding on the lower courts, and (3) *Amara* overrules circuit opinions interpreting *Mertens* and *Great-West* as restricting equitable relief. Plaintiffs must take pains to explain in their briefs why existing precedent holding that make-whole relief was unavailable under ERISA section 502(a)(3) should be overruled and they will need to draw upon existing standards to do so. Plaintiffs should also recognize and address head-on the potential obstacle of the dicta argument.

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153. *See* Younger v. Zurich Am. Ins. Co., No. 11 Civ. 1173 (TPG), 2012 U.S. Dist. LEXIS 42190, at *8 (S.D.N.Y. Mar. 26, 2012) (determining that a plaintiff must prove actual harm and causation in order to prevail on a breach of fiduciary duty claim).

154. *Amara*, 131 S. Ct. at 1883-85.

155. *See, e.g.*, N. Cypress Med. Ctr. Operating Co. v. CIGNA Healthcare, No. 4:09-CV-2556, 2011 WL 5325785 (S.D. Tex. 2011) (finding that the section 502(a)(3) issue discussed by the Court as non-binding authority).

156. McCravy v. Metro. Life Ins. Co., 650 F.3d 414 (4th Cir. 2011), *on rehearing, rev'd and remanded*, 2012 U.S. App. LEXIS 13683 (4th Cir. July 5, 2012).

157. Supplemental Brief of Appellee/Cross-Appellant at 3-4, McCravy v. Metro. Life Ins. Co., 650 F.3d 414 (4th Cir. 2011) (Nos. 10-1074, 10-1131).

a. The Majority Opinion Is Not Dicta

Varying definitions abound for dictum and the definitions are vague and frequently inconsistent. But ERISA participants are concerned only with Supreme Court dicta and the deference that lower courts should and do give to Supreme Court dicta. The Supreme Court's own statements about dicta are not particularly helpful. A very early definition seemed to broadly define dictum as "general expressions" that go beyond the facts of the case decided, a definition that would surely exempt the *Amara* majority's opinion from the dicta definition.[158] More recent opinions, on the other hand, suggest that the Court need not follow its own dicta if the "point now at issue was not fully debated."[159]

It may be argued that the majority's discussion of section 502(a)(3) is not dicta because the section 502(a)(3) point was fully debated and was not a "general expression," but rather was an essential part of the Court's grant of certiorari and oral argument. The Court stated that it granted certiorari to decide "whether a showing of 'likely harm' is sufficient to entitle plan participants to recover benefits based on faulty disclosures," and this question was answered as part and parcel of the Court's discussion of equitable relief.[160] Further, the Court described the case as a dispute regarding "the appropriate legal standard in determining whether members of the relevant employee class were injured."[161] Analyzing whether section 502(a)(1)(B), or some other section, applied was part of the Court's necessary analysis in answering the question presented.

The plaintiffs in the remanded *Amara* case have argued that the Supreme Court's discussion of section 502(a)(3) and *Mertens* in *Amara* is not dicta because the context in which the case was heard was not inexorably linked to the alternative provision, section 502(a)(1)(B).[162] First, one of the issues the lower court had in its original dealings with the matter arose out of the Supreme Court's curtailing of the relief available under 502(a)(3), and the lower court specifically mentioned *Mertens* and *Great-West* in that discussion.[163] Second, the questions presented did not specifically mention either section 502(a)(1)(B) or section 502(a)(3).[164] Finally,

158. *See* Cohens v. Virginia, 19 U.S. 264, 398 (1821) ("If [general expressions] go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

159. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (citing *Cohens*, 19 U.S. at 399-400).

160. *Amara*, 131 S. Ct. at 1876.

161. *Id.* at 1880.

162. Brief of Plaintiffs-Appellants at 40, Amara v. CIGNA Corp., 348 F. App'x 627 (2d Cir. 2009) (Nos. 08-3388-cv(L), 80-3460-cv(XAP)).

163. *Amara*, 559 F. Supp. 2d at 192.

164. Brief of Plaintiffs-Appellants at 1-3, Amara v. CIGNA Corp., 348 F.

CIGNA's argument to the Supreme Court in both its briefs and oral presentation deliberately steered the Court towards an evaluation of section 502(a)(3) because CIGNA hoped that the Court would rest on its laurels and fail to reconsider the ramifications of its prior holdings on that provision.[165] Certainly, this position is sound given the available record of the case and that the *Amara* plaintiffs appear to have made the appropriate argument under the circumstances.

b. Even if Dicta, Supreme Court "Considered Dicta" Is Binding on Lower Courts

Two distinctly recognized levels of dicta exist: obiter dicta and considered dicta (also called judicial dicta).[166] Obiter dicta are statements made "in passing."[167] Charles Alan Wright said that while "[m]ere obiter may be entitled to little weight . . . a carefully considered statement . . . though technically dictum, must carry great weight, and may even . . . be regarded as conclusive."[168] There can be no suggestion that the majority opinion in *Amara* was obiter dicta, made by the majority in passing. If lower courts accept Justice Scalia's claim that the discussion is dicta, it is at worse considered dicta, and plaintiffs' counsel must look to their own circuit precedent for arguments that Supreme Court dicta is still controlling precedent to overrule prior, ill-advised, circuit decisions that denied monetary relief to section 502(a)(3) claimants.[169]

The *Amara* majority's instruction for the lower court on remand to "revisit its determination of an appropriate remedy for the violations of ERISA" is a clear call for all federal courts to revisit their prior precedents in light of the Court's identification of "general principles" on equitable remedies.[170] While these statements were directed to the district court to review and apply on remand, they should be viewed as an advisory opinion for all federal courts on how to determine the scope and availability of equitable relief.[171] As such, the Court's pronouncements on general

App'x 627 (2d Cir. 2009) (Nos. 08-3388-cv(L), 80-3460-cv(XAP)).

165. Brief for Petitioners at 11-14, CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011) (No. 09-804).

166. *See* United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975) (explaining the difference between obiter dictum and considered dictum).

167. Crawford Fitting Co. v. J.T. Gibbons, Inc. 482 U.S. 437, 443 (1987).

168. CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 58, at 374 (4th ed. 1983).

169. *See, e.g.*, Gamble v. Boeing Co. Emp't. Ret. Plan, No. C10-1618, 2012 U.S. Dist. LEXIS 59268, at *17 (W.D. Wash. Apr. 27, 2012) (stating that prior Ninth Circuit precedent limiting the availability of equitable relief has clearly been abrogated by *Amara*).

170. *Amara*, 131 S. Ct. at 1882.

171. *Id.*

principles of equitable remedies under section 502(a)(3) cannot simply be ignored as irrelevant dicta—assuming courts accept the dicta argument, they ignore Supreme Court dicta at their peril or risk reversal by their own appellate courts or by the Supreme Court if the issue once again makes it way to that forum.

Accordingly, in light of common sense and for the sake of jurisprudential uniformity and clarity, lower courts typically defer to Supreme Court dicta, particularly considered dicta.[172] Scholars have recently become concerned that the distinction between dicta and holding has become blurred, such that:

> The Supreme Court and the federal circuits, without erasing the distinction entirely, have moved away from [the] traditional view that only the holding of a case has precedential power. At least with respect to vertical precedent, there is an increasing tendency to hold inferior courts bound not merely by what the higher court did but by what it said.[173]

The weight and deference the lower courts give to Supreme Court considered dicta is fully explored elsewhere, but can be summarized by a statement from the First Circuit that "federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings . . . ."[174] This was particularly the case when the dictum was "of recent vintage and not enfeebled by any subsequent statement."[175]

Illustrative of this approach is a case involving the scope of ERISA preemption, where the First Circuit decided it was bound by Supreme Court dictum.[176] In *McCoy v. Massachusetts Institute of Technology*,[177] the First Circuit looked back at one of its previous opinions imploring courts of appeal to avoid thinking that the Supreme Court "proclaims the law lightly" when it writes considered dictum, and cited to other opinions in the Second, Seventh, and Ninth Circuits to support its position.[178] This

172. *See* Schwab v. Crosby, 451 F.3d 1308, 1325-26 (11th Cir. 2006) (citing cases deferring to precedential value of Supreme Court dicta). *See e.g.*, Reich v. Cont'l Cas. Co., 33 F.3d 754, 757 (7th Cir. 1994) (stating that, in this ERISA case, the court is bound by Supreme Court dicta "that considers all the relevant considerations and adumbrates an unmistakable conclusion . . . ."). *See generally* Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75 (2008) (discussing Supreme Court dicta and level of deference lower courts should give to varying forms of dicta).

173. Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1152 (2006). *See also* Durham Taylor, *supra* note 172, at 129 (explaining how many lower courts are blindly following Supreme Court dictum).

174. McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991).

175. *Id.*

176. *Id.*

177. *Id.* at 13.

178. *Id.*

previous Supreme Court dictum compelled the First Circuit's conclusion about the scope of ERISA preemption.[179] Further, from a jurisprudential common sense perspective, it does not make sense for lower courts to ignore the *Amara* Court's considered analysis—the Court does not issue decisions lightly in full knowledge that lower courts rely on the decisions to guide future cases.[180]

The problem of what constitutes a holding and what is dicta is not just a scholarly concern—the lower courts' rejection of *Amara*'s pronouncements on the scope of equitable relief has egregious substantive implications for participants who are, depending on the jurisdiction, once again left without a remedy. The confusing distinctions between holding, obiter dictum, and considered dictum leaves courts and litigants uncertain as to whether *Amara* will be applied, how it will be applied, and whether prior cases are overruled—all of which flies in the face of Congressional purpose in enacting ERISA to not only protect participants, but to provide uniformity in the law for interpreting and enforcing employee benefit plans. The solution is for courts to simply follow the clear *Amara* instruction and acknowledge that *Amara* effectively clarifies *Mertens* and *Great-West*, but the fear is that the ultimate resolution will not come until the Supreme Court grants certiorari on another case that cannot be assailed, or until Congress steps in.

2. *Plaintiffs' Counsel Should Resist the Urge to Try to Expand* Amara *in Cases Where Relief Is Clearly Available Under ERISA Section 502(a)(1)(B)*

The Supreme Court has held that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'"[181] Thus, a plaintiff cannot recast a garden-variety claim for benefits as a claim for equitable relief.[182] This pre-*Amara* rule applies with equal force to post-*Amara* plaintiffs and has been reiterated in cases where the plaintiffs attempted to recast their benefit claims using *Amara*.[183] Needless to say, the courts have paid these attempts short

179. *See id.* at 19 (following Supreme Court dicta set forth in *Mackey v. Lanier Collection Agency & Services, Inc.*, 486 U.S. 825, 938 n.12 (1988).

180. *See, e.g.*, *Bell*, 524 F.2d at 206 (recognizing a distinction between obiter dictum, "an aside or unnecessary extension of comments," and considered dictum, "where the Court . . . is providing a construction of a statute to guide the future conduct of inferior courts.").

181. *Varity*, 516 U.S. at 515.

182. *Id.*

183. *See, e.g.*, Biomed Pharm., Inc. v. Oxford Health Plans, No. 10 Civ. 7427 (JSR), 2011 U.S. Dist. LEXIS 73623, at *15-16 (S.D.N.Y. July 5, 2011) (finding Biomed's three ERISA section 502(a)(3) claims entirely duplicative of its claim for benefits under ERISA section 502(a)(3)).

shrift.[184]

Illustrative of this type of claim is *Biglands v. Raytheon Employee Savings & Investment Plan*,[185] where the plaintiff argued that *Amara* changed the landscape of section 502(a)(3) claims by expanding the reach of the breach of fiduciary duty claim.[186] The court rejected the argument because the plaintiff could seek relief under section 502(a)(1)(B) and had not suffered any injury beyond the denial of benefits.[187] This type of benefits-claim-in-fiduciary-clothing case would not have fared any better under Supreme Court precedents post-*Varity Corp. v. Howe*,[188] even before *Great-West*, so it is not unduly worrisome unless the courts resort to this line of reasoning to reject otherwise cognizable 502(a)(3) claims. In short, participants must choose the correct remedy for their claim and cannot assert that a simple denial of benefits simultaneously constitutes a fiduciary breach.[189]

3. *Plaintiff Must Demonstrate an Actual ERISA Statutory Breach*

It is self-evident that a remedy cannot lie unless there is a wrong. Hence, plaintiffs must take care to properly allege (and ultimately prove) an actual ERISA statutory violation. Although the district court in *McGuigan v. Local 295/Local 851 I.B.T. Employer Group Pension Trust Fund*[190] acknowledged the possible expansion of equitable relief available after *Amara*, it nevertheless dismissed the plaintiff's claims because he failed to allege a statutory notice/disclosure violation.[191] While this may seem unremarkable, the *McGuigan* court chose to give short shrift to the availability of equitable estoppel or surcharge to allow monetary recovery, harkening back to the restrictive language of *Great-West*,

184. *Id.*

185. Biglands v. Raytheon Emp. Sav. & Inv. Plan, 801 F. Supp. 2d 781 (N.D. Ind. 2011).

186. *Id.* at 786.

187. *Id.* Worryingly, however, the *Biglands* court stated that the equitable remedies discussed in *Amara* are dicta, adding for good measure that Justice Scalia's concurring opinion makes that point clear. *Id.* The court's nonchalant observation is indeed worrying—a federal court should expend more energy in attempting to discern the precedential value of Supreme Court pronouncements on the scope of statutory relief under established jurisprudence, dicta or not.

188. *Varity*, 516 U.S. at 489.

189. Additional acts or omissions on the part of the fiduciary, or injury beyond the denial of benefits, raise an interesting question. But that question is beyond the scope of the current Article. Once again, the reader is directed to Professor Medill, Medill, *Judicial Paradox*, *supra* note 3, for an analysis on why and how these special types of situations might fall within section 502(a)(3)'s scope.

190. McGuigan v. Local 295/Local 851 I.B.T. Emp'r Grp., No. 11-CV-2004, 2011 U.S. Dist. LEXIS 86085 (E.D.N.Y. Aug. 4, 2011).

191. *Id.* at *16-26.

and seizing on a statement in *Amara* as "reiterating" the restrictions announced in *Great-West*.[192] This commentary is troubling and might indicate, at least in that particular district court, an overly restrictive view of *Amara*.

Some parties and courts, on the other hand, may still be unaware of the existence and possible impact of *Amara* on their cases. On the same day that the Supreme Court decided *Amara*, the Fourth Circuit held in *McCravy v. MetLife*,[193] that neither the remedy of surcharge, nor equitable estoppel, was available to a participant who learned, after her daughter's death, that her daughter was not eligible for life insurance plan coverage even though the plan's administrator had breached his fiduciary duty.[194] The alleged breach consisted of "misrepresentations" by accepting premium payments for the dependent's life insurance for six years, despite the unavailability of coverage under the plan's terms.[195] Thus, although the complaint did not allege affirmative misrepresentations, the plaintiff claimed she was misled by the continued acceptance of premiums and the fiduciary's failure to inform the participant that her daughter was ineligible for life insurance coverage due to having reached age nineteen, and to inform her of the right to convert coverage within thirty-one days of turning nineteen.[196]

The district court held that the plaintiff was only entitled to return of premiums and not the life insurance proceeds and, therefore, dismissed the complaint for failure to state a claim that was entitled to cognizable relief.[197] The Fourth Circuit initially affirmed the grant of summary judgment to defendant and was apparently unaware of the *Amara* decision because it was not mentioned in the opinion.[198] The Fourth Circuit first held that surcharge was not one of those remedies typically available in equity as enunciated by the Supreme Court, i.e., injunction, mandamus, or restitution, and explained why the plaintiff was not entitled to surcharge as a form of equitable restitution, relying on *Great-West*.[199] The *McCravy I* court simply did not take account of the make-whole/surcharge remedy that was green-lighted by the Supreme Court that very same day. Further, the Fourth Circuit rejected application of estoppel, as many courts had previously done, because it apparently did not have the *Amara* decision for

192. *Id.* at *14.
193. McCravy v. Metro. Life Ins. Co., 650 F.3d 414 (4th Cir. 2011) ("*McCravy I*").
194. *Id.* at 418.
195. *Id.*
196. *Id.*
197. *Id.* at 417.
198. *See generally McCravy I*, 650 F.3d at 414 (failing to consider *Amara*).
199. *Id.* at 419.

guidance.[200]

The *McCravy I* court followed the same analysis as the *Amschwand* court in rejecting the make-whole remedy, while decrying the result. Fortunately, the Fourth Circuit invited the parties to file supplemental briefing on the issue of equitable relief in light of *Amara* and on rehearing subsequently reversed its earlier decision.[201] On rehearing, the court agreed with plaintiff that, in light of *Amara*, her potential recovery in the case was not limited to a premium refund and included remedies available under a theory of make-whole relief and/or equitable estoppel.[202] The court concluded that the questions of whether defendant breached its fiduciary duty and whether surcharge and equitable estoppel were appropriate remedies under section 502(a)(3) should be resolved in the district court, vacating the grant of summary judgment and remanding for further proceedings.[203] The Department of Labor filed an amicus brief in *McCravy*, detailing all the salient arguments that participants in these types of cases should follow.[204]

The Fourth Circuit's decision on rehearing is significant because the case is of the type where the plaintiff did not allege material misrepresentations, but instead alleged silence regarding lack of coverage while accepting premiums.[205] This marginal type of misrepresentation in the form of silent failure to correct a misunderstanding is probably quite common in the benefits world and a favorable result for the plaintiff could expose more plans and plan administrators to litigation. Indeed, plan fiduciaries should be taking note of all these post-*Amara* developments and taking steps to reduce potential exposure caused by faulty or ineffective communications at all levels of the communication chain. In this respect, perhaps the *Amara* decision will result in less litigation as plans and plan administrators take more care in

200. *Id.* at 421 (internal quotation marks omitted) (citing to circuit precedent that, under ERISA, "[e]quitable estoppel principles, whether denominated as state or federal common law, have not been permitted to vary the written terms of a plan.").

201 McCravy v. Metro. Life Ins. Co., Nos. 10-1074, 10-1131, 2012 U.S. App. LEXIS 13683 (4th Cir. July 5, 2012) ("*McCravy II*").

202 *Id.* at *12-13. The court also rejected the defendant's dicta argument, stating that "[e]ven assuming for the sake of argument that it is [dicta], we cannot simply override a legal pronouncement endorsed just last year by a majority of the Supreme Court." *Id.* at *13 n.2 (citations omitted).

203 *Id.* at *17-18.

204. Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellant, McCravy v. Metro. Life Ins. Co., 650 F.3d 414 (4th Cir. 2011) (Nos. 10-1074, 10-1131), 2010 WL 1900271.

205. *See* Strickland v. AT&T Umbrella Benefit Plan No. 1, No. 3:10-CV-268, 2012 US Dist LEXIS 52029, at *15 (W.D.N.C. Apr. 13, 2012) (staying case pending Fourth Circuit rehearing in *McCravy* because of actual and legal similarities between *Strickland* Plaintiff's case and the *McCravy* case).

ensuring full and proper communication and notices.

Another interesting twist to the *McCravy I* decision is that the district court and Fourth Circuit also rejected the plaintiff's estoppel claim because it did not survive the requirement of reasonable reliance—because the summary plan description contained unambiguous eligibility requirements, plaintiff could not argue that she reasonably relied on the silent misrepresentation via acceptance of premiums.[206] The plaintiff made an additional argument to reverse the dismissal based on another prong of the *Amara* holding, that the summary plan description was not part of the plan. If the SPD is not part of the plan, it therefore could not be considered in lieu of the terms of the plan, which apparently has never been part of the record.[207]

Another case decided shortly after *Amara* is *Moon v. BWX Technologies, Inc.*[208] Like *McCravy*, *Moon* centered around an allegation that the trust administrator continued to accept premium payments after eligibility and coverage had lapsed, for whatever reason. In *Moon*, however, the administrator arguably made misrepresentations by stating that coverage was available.[209] On about January 13, 2006, BWX mailed Mr. Moon an alleged offer to provide certain ongoing benefits in exchange for specified payments.[210] The offer, styled "Your 2006 McDermott Confirmation Statement" [hereinafter Confirmation Statement], confirmed his "selected benefit options effective 01/02/2006 through 12/31/2006."[211] It further contained a table, listing the "Plan Type," "Plan Name," "Coverage Level," and "Annual Employee Cost," pertaining to certain benefits.[212] The alleged offer also indicated that Mr. Moon had selected "Employee Life Insurance" at a coverage level of $200,000, and at an annual employee cost of $804.00.[213] It also showed that the total annual cost of benefits, including long-term disability, vision, and personal accident insurance, was $3,269.76.[214] The plaintiff alleged that the defendants accepted all payments, including the final payment, without objection and without advising the plaintiff that life insurance benefits were unavailable.[215]

Nevertheless, the district court held that relief was not available under section 502(a)(3), relying on pre-*Amara* cases,

206. *McCravy*, 650 F3d. at 422.
207. *Id.* at 421.
208. Moon v. BWX Techs., Inc., No. 6:09-CV-00064, 2011 U.S. Dist. LEXIS 73189 (July 7, 2011).
209. *Id.* at *4
210. *Id.* at *2.
211. *Id.*
212. *Id.* at *2-3.
213. *Id.* at *3
214. *Id.* at *2-3.
215. *Id.* at *4.

including *Great-West*, for the proposition that equitable remedies are severely curtailed under Supreme Court and Fourth Circuit precedent. The *Moon* situation, however, would seem to fall within that category of misrepresentation cases that neatly fit into the surcharge/make-whole camp. The fiduciary expressly confirmed coverage, provided details of coverage, and those miscommunications actually caused harm to the participant; reasonable reliance is not required under the surcharge/make-whole remedy and therefore the question of whether it was reasonable for Mr. Moon to rely on these misrepresentations should not need to be raised and his beneficiary should have been made whole by an award equal to the insurance benefits that he would have been entitled absent the alleged fiduciary breach ($200,000). Perhaps *Moon* can be disregarded as an aberration because it was decided so soon after *Amara*, but it also serves as a cautionary tale to plaintiffs and their counsel.

4. Ensure that All Elements of the Chosen Equitable Remedy Are Fully Addressed

Plaintiffs must be wary of taking the *Amara* case to mean that their claims for equitable relief are standardless. As discussed, *supra*, the Court made it clear that traditional equitable standards apply. In the immediate aftermath of *Amara*, the pivotal question for claimants is how should a district court decide cases such as *Amschwand*, *Goeres*, *McCravy*, and *Moon* in the light of *Amara*? Recall that *Amschwand* involved a fiduciary's clear violation of its ERISA duty of disclosure and involved affirmative misrepresentations of eligibility and coverage.[216] Thus, the case did not suffer from any apparent facial infirmities and application of the make-whole/surcharge remedy should have proceeded. The tragedy for Mrs. Amschwand is that her claim will now never be heard and yet it was ripe for the Supreme Court's review.

In *Amara*, the Supreme Court stated that, beyond the standard of prejudice, it was not asked about the "other prerequisites for relief," but lower courts will look to their own precedents and equity and trust law treatises to determine whether other special conditions attached to reformation, estoppel, or make-whole relief.[217] Further, strict adherence to trust law principles and locating exact equitable analogues is not necessarily required because ERISA plans do not always have an exact trust-equivalent. The Supreme Court has already recognized that federal courts have to look beyond the common law of trust principles in interpreting ERISA and look to the language,

216. Amschwand v. Spherion Corp., 505 F.3d 342, 346 (5th Cir. 2007).
217. *Amara*, 131 S. Ct. at 1886.

structure, and policies behind ERISA.[218] Further, under the traditional trust law treatise cited by the *Amara* Court, "the beneficiaries are plainly entitled to the remedy of their choice."[219] As explored *infra*, make-whole relief would seem to be the catch-all remedy for the catch-all remedial provision of ERISA section 502(a).

a. Make-Whole Relief

As explained *supra*, the appropriate remedy for a plaintiff in Mrs. Amschwand's position (clear affirmative misrepresentation of eligibility) should have been make-whole relief in the form of the life insurance benefits lost as a result of the fiduciary breach.[220] The outcome in *Goeres v. Charles Schwab & Co.* should similarly have been a simple application of the make-whole/surcharge remedy.[221] Recall that the Supreme Court denied certiorari in this case on the same day that it declined to address Mrs. Amschwand's case.[222] Yet, both cases would have served as ideal vehicles for resolution of the section 502(a)(3) issue. Mr. Goeres was the beneficiary of a decedent participant's ERISA-covered retirement plan. Mr. Goeres alleged that the plan fiduciary repeatedly and incorrectly advised him that he was not the beneficiary.[223] Between the time that Mr. Goeres began seeking control of the plan and the time that the fiduciary acknowledged that he was the beneficiary, the value of the plan had dropped from $1.2 million to $700,000.[224] This clear misrepresentation violation caused actual harm and that actual harm can clearly be attributed to the fiduciary breach of misrepresentation; as such, Mr. Goeres's claim fulfilled the causation and actual harm requirements identified by *Amara* and he should have been made whole. Like Mrs. Amschwand, Mr. Goeres will never see his claim reviewed under the *Amara* standard, and equity will not be done in his case.

Other aggrieved participants are waiting for equity to be done. One such plaintiff is awaiting his fate on appeal in *Kenseth v. Dean Health Plans, Inc.*[225] *Kenseth* involved perhaps less egregious misrepresentations than *Amschwand* and *Goeres*, but

218. *Varity*, 516 U.S. at 497.

219. AUSTIN WAKERMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 24.19.1 (4th ed. 2006) [hereinafter "SCOTT & ASCHER"] (citing RESTATEMENT (SECOND) OF TRUSTS § 214(2)(a) & cmt. c (1959)).

220. *Amschwand*, 505 F.3d at 342.

221. Goeres v. Charles Schwab & Co., 2004 U.S. Dist. LEXIS 20358, at *16.

222. *Goeres*, 554 U.S. at 932.

223. *Goeres*, 2004 U.S. Dist. LEXIS 20358, at *16.

224. *Id.* at *4.

225. Kenseth v. Dean Health Plans, Inc., 784 F. Supp. 2d 1081 (W.D. Wis. 2011).

nevertheless the Seventh Circuit held on appeal that the fiduciary had indeed breached its duty when it pre-approved plaintiff for surgery and then denied her claim for benefits, resulting in the plaintiff being liable for $77,000 in medical bills owed to the fiduciary's parent company.[226] The court stated that:

> [The] facts support a finding that Dean breached its fiduciary duty to Kenseth by providing her with a summary of her insurance benefits that was less than clear as to coverage for her surgery, by inviting her to call its customer service representative with questions about coverage but failing to inform her that whatever the customer service representative told her did not bind Dean, and by failing to advise her what alternative channel she could pursue in order to obtain a definitive determination of coverage in advance of her surgery.[227]

On remand, however, the district court granted summary judgment to defendant on the section 520(a)(3) misrepresentation claim on the familiar basis that this section does not allow awards of monetary relief.[228] The *Kenseth* case is now back on appeal on this issue, oral argument was heard in December 2011, and the Department of Labor has weighed in as amicus.[229]

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226. Kenseth v. Dean Health Plans, Inc., 610 F.3d 452 (7th Cir. 2010).

227. *Id.* at 456. In a similar case, a district court has recently relied on *Kenseth* to grant summary judgment against a participant who claimed the fiduciary failed to adequately alert the participant during pre-authorization that gastric bypass surgery might not be a covered benefit. Smith v. Medical Benefit Adm'rs Grp., Inc., No. 09-C-538, 2012 U.S. Dist. LEXIS 54913, at *22–24 (E.D. Wis. Apr. 19, 2012). The *Smith* court found that the plan itself, the pre-certification notice, and oral statements clearly and expressly disclaimed a guarantee of benefits during the pre-certification process, thereby avoiding any claim that the duty to inform was breached. *See id.* at *21-22 (citing *Kenseth*, 610 F.3d at 472) (internal quotations omitted) ("[o]ur decisions have observed generally that an insurer bears no duty to provide an advisory opinion to every beneficiary based on his or her unique circumstances."). The *Smith* court also relied on *Kenseth* to absolve the insurer of "liability for negligent misrepresentations made by an agent of the plan to a plan participant or beneficiary *so long as the plan documents themselves are clear and the fiduciary has taken reasonable steps to avoid such errors.*" *Smith*, 2012 U.S. Dist. LEXIS 54913 at *22 (emphasis in original) (stating that "the plan language is clear, and the undisputed facts demonstrate that Auxiant takes reasonable measures to avoid giving incorrect advice.").

228. *Kenseth*, 610 F.3d at 456.

229. Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Brief in Support of Reversal at 19-21, *Kenseth v. Dean Health Plans*, No. 11-1560 (7th Cir. June 13, 2011), *available at* http://www.dol.gov/sol/media/briefs/kenseth%28A%29-6-13-2011.htm (citation omitted) (explaining that "The Secretary of Labor has primary regulatory and enforcement authority for Title I of ERISA"). The Department of Labor begins by assailing the lower courts for disregarding *Amara* and continues by laying out all the well-reasoned arguments for the availability of relief in the *Kenseth* case, which apply with equal force in numerous other situations: "The Department of Labor has steadfastly maintained its position in numerous

The *Moon*-type plaintiff may also fare well, since the fiduciary allegedly engaged in misrepresentations that went beyond simply accepting the premium payments for coverage that were not available under the terms of the plan—the fiduciary sent confirmation of coverage with coverage amounts.[230] Thus, even applying the elements of an estoppel claim, plaintiff arguably reasonably relied on the fiduciary's coverage misrepresentations to her detriment. On remand, the plaintiff in *McCravy*, however, might not fare as well because the plaintiff did not allege that the fiduciary made the same type of affirmative, material misrepresentations that CIGNA made. Although the complaint did not allege affirmative misrepresentations, the plaintiff claims she was misled by the continued acceptance of premiums and the fiduciary's failure to inform the participant that her daughter was ineligible for life insurance coverage.[231] This claim must ultimately overcome the weakness of the lack of a clear statutory breach that caused the harm. In all cases, the elements of make-whole relief must be addressed, seriatim, but the facts may be the deciding factor.

i. Harm to Trust and Payment of Relief to Trust Are Not Required

Where make-whole relief is requested, defendants may attempt to argue, as they did in the *Amschwand* case, that make-whole relief had certain special conditions attached, notably that make-whole relief was only available when the breach caused harm to the trust corpus and that relief must run back into the

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amici briefs and was finally vindicated by the Supreme Court in *Amara*, and yet lower courts continue to disregard the Department's well-reasoned arguments and make tortured attempts to reject *Amara*." *Id. See, e.g.*, Stocks v. Life Ins. Co. of N. Am., No. 11-C-00581, 2012 U.S. Dist. LEXIS 30737 (E.D. Wis. Mar. 8, 2012) (illustrating an alarming example of a lower court rejecting Amara). The *Stocks* court held that *Amara* did not overrule existing pre-*Amara* precedent that equitable relief does not include monetary relief, citing to the 2010 *Kenseth* decision as precedent, and ignoring the fact that *Kenseth* is on appeal on this very issue (oral argument was heard in December 2011 and the case appears to be awaiting decision). *Id.* at 8, 12-15. Further, *Stocks* distinguished the *Amara* case on its facts and holding as limiting make-whole relief to a "very narrow" set of circumstances where the plaintiff seeks reformation of plan terms, i.e., limiting *Amara* to cases with identical facts. *Id.* at 8. The *Stocks* plaintiff might have fallen victim to his own facts because he seems to have attempted to claim fiduciary breach in the denial of benefits decision, a fatal flaw to be sure, but not deserving of an invitation to write-off *Amara* wholesale. *Id.* The plaintiff appears to have had a claim that the fiduciary failed to advise the participant of the life insurance conversion option, which is a potential breach under ERISA, so perhaps this is also a case where counsel needed to plead the facts more carefully. *Id.*

230. *Moon*, 2011 U.S. Dist. LEXIS 73189 at *4-7.

231. *Id.*

trust corpus. Readers are directed to the author's prior work detailing why this argument is simply wrong—none of the "standard current works" on equity or trust law remedies, or pre-fusion cases, required harm to or payment to the trust corpus.[232] And, even if harm to the trust corpus is required, the trust "income or principle" in an ERISA plan is the plan itself or the plan proceeds, and it therefore follows that the trustee's acts or omissions in an *Amschwand*-type claim have in fact caused a diminution—actually a complete loss—of the "trust income or principal."[233] "Full reparation" would consist of the insurance proceeds that have been lost, but should not extend to other compensatory damages for emotional distress.[234]

ii. Actual Harm and Causation Are Required but Are Easily Met in Most Breach of Fiduciary Duty Cases

Although equity and trust law do not typically list the elements of actual harm and causation, *Amara* engrafted these requirements into ERISA make-whole relief.[235] True, the Scott & Ascher treatise makes the obvious comment that "[t]he trustee is not subject to surcharge for a breach of trust that results in no loss to the trust estate."[236] Hence, the Supreme Court is correct that there must be a loss, but Scott & Ascher continues by pointing out that "loss" is sometimes difficult to quantify and gives examples of situations, such as where an unrealized gain is considered a loss.[237] "Actual harm" is a shorthand way of saying that the trust or beneficiary must suffer a loss resulting from the fiduciary's breach. This should not be difficult to prove or quantify in the vast run of cases and seems to present the greatest difficulty in the class action context.[238] Indeed, as stated earlier, *Amara* has set a

232. *See* Harthill, *Square Peg*, *supra* note 3, at 771-81 (applying pre-fusion trust cases to ERISA plans).

233. *Id.*

234. *See* Medill, *Judicial Paradox*, *supra* note 3, at 935 (confirming Professor Medill's view that make-whole relief is available but compensatory damages for emotional distress are not).

235. *Amara*, 131 S. Ct. at 1881.

236. *Id.* (citing SCOTT & ASCHER, *supra* note 219, at 24.9).

237. *Id.*

238. *But see* DeFazio v. Hollister, Inc., No. 2:04-1358, 2012 U.S. Dist. LEXIS 49063 (E.D. Cal. Apr. 6, 2012) (applying the surcharge remedy to a claim of fiduciary breach after conducting a fifteen-day bench trial, with post-trial briefing). The *DeFazio* court found no loss or actual harm and no material harm because the evidence did not show a loss of value of the assets. *Id.* The court discussed and actually applied the standards, burdens of proof, and made a thoughtful finding after trial. *Id. DeFazio* is an example of how participants must plead and prove their claims with adherence to the *Amara* standards and the strategies outlined in this Article. At the end of the day, participants need the facts and proof to make their case, just like any other lawsuit with merit, and an ERISA lawyer well-versed in the nuances of

very low threshold for demonstrating both harm and causation by stating that actual harm might come from the loss of an ERISA protected right and that failure to provide proper summary information causes actual harm even where participants might have thought others would let them know if the plan changes "would likely prove harmful."[239] What is remarkable, is a lower court's insistence on a higher, stricter standard.[240]

On the requirement of causation, the Scott & Ascher treatise does not identify causation in general terms nor does it expressly define a causation standard. Instead, the treatise tends to simply state that a breach is actionable when it results in loss or gain.[241] Defendants might argue that "but-for" causation should be required, or plaintiffs might argue that proximate causation might be required. I simply did not find any such requirement in my comprehensive review of make-whole relief.[242] Without further elucidation from the Supreme Court, the level of causation will simply have to play out in the lower courts.

In many cases, harm or loss causation by the breach will be evident but problems arise in cases like *Amara*, where the harm consists of a diminution in plan benefits but firm proof of whether the deficient notice and disclosures caused the harm is more elusive—the argument then returning to a reliance-type requirement that the plaintiffs would have objected to and somehow stopped the benefits changes if they had received the requisite notices and disclosures.

The good news for plaintiffs is that after one court applied *Amara* to similar facts, it denied the defendant's motion for summary judgment and allowed the participants' claim for breach

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remedial relief.

239. *Amara*, 131 S. Ct. at 1882.

240. It is intriguing to compare the "actual harm" requirement for make-whole relief with the harm required for Article III standing and ERISA standing. It is beyond the scope of this Article to analyze how the harm requirements might overlap, complement each other, or diverge, but this might prove to be an avenue for litigants to explore in future cases where the harm is alleged to be insufficient. Article III standing requires a minimal allegation of harm (plus a rather minimal causal nexus). *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted) (setting forth as one of the three elements of Article III standing required that a "plaintiff must have suffered an injury in fact—an invasion of a legally protected interest"). Some courts may view ERISA standing just as broadly and only require a showing of a statutory breach which might be appropriate for injunctive relief, but may require an individualized showing of loss for other types of relief. *See, e.g.*, Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 199-200 (2d Cir. 2005) (examining the requirements for standing to bring an ERISA claim).

241. SCOTT & ASCHER, *supra* note 219, § 24.9.

242. *See generally* Harthill, *Square Peg*, *supra* note 3 (examining causation requirements in make-whole relief lawsuits).

of fiduciary duty by summary plan description (SPD) deficiencies to proceed under the theory of surcharge.[243] In *Clark v. Feder, Semo & Bard, P.C.*,[244] the District of Columbia accepted the plaintiff's argument that the misleading information caused the participants to lose the value of their accrued benefits consistent with the representations in the SPD, and that the participants lost "'the leverage to better protect themselves with full disclosure.'"[245] In *Clark*, the District Court for the District of Columbia concluded that the defendants did not demonstrate that the plaintiff was provided information that clearly identified how she might lose benefits, so the plaintiff "[was] in the category of individuals who suffered 'actual harm' and hence may proceed" under *Amara*.[246] This is the argument that the Supreme Court appeared to approve of in *Amara* and that should be applied to allow Janice Amara and the other CIGNA participants to prevail on remand.

b. Equitable Estoppel

Estoppel "essentially hold[s] [an employer] to what it had promised."[247] As the Supreme Court concluded in *Amara*, estoppel in equity may require individualized reliance, but because equity

243. *See* Clark v. Feder, Semo & Bard, P.C., 808 F. Supp. 2d 219, 231 (D.D.C. 2011) (allowing the plaintiff to proceed on her claim for breach of fiduciary duty based on the deficiencies in the SPD). *See also Younger*, 2012 U.S. Dist. LEXIS 42190, at *8–9 (denying motion to dismiss based on *Amara* and rejecting the defendant's arguments that detrimental reliance is required for reformation—versus estoppel—and reiterating that actual harm can be loss of a statutorily protected right).

244. *Clark*, 808 F. Supp. 2d at 219.

245. *See id.* at 231 (quoting an argument made in the Plaintiffs' Opposition Brief). *But see* Skinner v. Northrop Grumman Ret. Plan B, 673 F.3d 1162, 1165–67 (9th Cir. 2012) (holding that claimants were not entitled to equitable relief under *Amara* and identifying onerous requirements that were not traditionally required under the equitable remedies claimed, and were expressly not required by the Court in *Amara*. The Ninth Circuit seemed to hold that actual harm could only be proven by a showing of detrimental reliance, holding that reformation was not warranted because neither mistake nor fraud was shown. *Id.* at 1166—67. The remedy of surcharge was inappropriate, and there was also no showing of unjust enrichment. *Id.* at 1167. Furthermore, the retirees did not establish compensable harm because they did not rely on the inaccurate SPDs. *Id.* at 1167. *See also* Krieger v. Nationwide Mut. Ins. Co., No. CV11-01059-PHX-DGC, 2012 U.S. Dist. LEXIS 42774, at *28 (D. Ariz. Mar. 26, 2012) (granting summary judgment for defendant in participant's claim of insufficient SPD). The obvious lesson from this line of cases is that if the claim involves a deficient SPD, plaintiffs must plead and prove some actual harm, a loss beyond the mere fact that the SPD may be insufficient under ERISA. Although *Amara* stated that a statutory breach in itself can be a loss, it does not dispense with the usual requirement of harm. *See generally* Pratt, *supra* note 77 (providing a full discussion of whether *Amara* results in relief in cases of insufficient SPDs).

246. *Id.*

247. *Amara*, 131 S. Ct. at 1880.

is flexible, reliance can be presumed.[248] Even where a showing of detrimental reliance is not required, however, other prerequisites may need to be met.[249] The Supreme Court expressly declined to address "other prerequisites" for all the forms of equitable relief identified, and so lower courts will be sure to apply their pre-existing standards, not all of which may be plaintiff-friendly.[250]

Pre-*Amara*, several circuits had addressed the remedy of equitable estoppel in the context of ERISA breach of fiduciary duty claims, with courts typically requiring plaintiffs to prove the following elements:

> "1) conduct or language amounting to a representation of material fact; 2) awareness of the true facts by the party to be estopped; 3) an intention on the part of the party to be estopped that the representation be acted on, or conduct toward the party asserting the estoppel such that the latter has a right to believe that the former's conduct is so intended; 4) unawareness of the true facts by the party asserting the estoppel; and 5) detrimental and justifiable reliance by the party asserting estoppel on the representation."[251]

Prior to *Amara*, federal court decisions applying the doctrine of equitable estoppel to breach of fiduciary claims were mixed. With respect to plaintiffs' attempts to enforce fiduciary representations, some circuits rejected attempts at plan reformation via estoppel because the court would not override or rewrite existing plan terms.[252] Other circuits allowed estoppel claims in very limited circumstances, such as "claims for benefits under unfunded single-employer welfare benefit plans under ERISA."[253] Yet other circuits, such as the Second and Third Circuits, accepted estoppel claims in cases of "extraordinary circumstances."[254] The Eleventh Circuit's view also seems to be very restrictive, allowing estoppel claims only to enforce a representation regarding benefit plans in the very narrow circumstance where the representation interprets an ambiguous

248. *See id.* at 1881–82 (explaining that the reliance requirement is flexible because "[i]nformation-related circumstances, violations, and injuries are potentially too various in nature to insist that harm must always meet that more vigorous 'detrimental harm' standard when equity imposes no such strict requirement.").

249. *Id.*

250. *See id.* (establishing that the court would not look into other prerequisites for relief).

251. Armistead v. Vernitron Corp., 944 F.2d 1287, 1298 (6th Cir. 1991).

252. *See generally* Jeffrey A. Brauch, *ERISA at 25-and Its Most Persistent Problem*, 48 U. KAN. L. REV. 285 (2008) (focusing on the federal courts' use of estoppel in the classic case where a plaintiff tries to enforce representations that were inconsistent with the terms of the plan).

253. *Id.* at 306 (citing Black v. TIC Inv. Corp., 900 F.2d 112 (7th Cir. 1990)).

254. *See* Brauch, *supra* note 252, at 308-10 (discussing the Second and Third Circuits' acceptance of estoppel claims in extraordinary circumstances).

plan term and does not modify the plan itself.[255]

The question for litigants and courts is whether and how *Amara* will impact these diverse views of the prerequisites for equitable estoppel. In an early decision applying *Amara* to an equitable estoppel claim, the Third Circuit fired a shot across the plaintiffs' bow on this point in *Engers v. AT&T, Inc.*,[256] stating that, despite *Amara*:

> [The court] sees no reason to depart from its longstanding rule that an equitable estoppel claim under § 502(a)(3) cannot be based merely on simple ERISA reporting errors or disclosure violations, such as a variation between a plan summary and the plan itself, or an omission in the disclosure documents, without a showing of extraordinary circumstances.[257]

The *Engers* court did not elucidate what these "extraordinary circumstances" might look like, but a pre-*Amara* case is illustrative. In *Curcio v. John Hancock Mutual Life Insurance Company*,[258] the Third Circuit found it "extraordinary" that the fiduciary made repeated representations to a beneficiary of the availability of additional death benefits, even repeating assurances after the participant had died, and that the plan sponsor initially sided with the beneficiary against the fiduciary.[259] These facts would just as easily give rise to a cognizable claim for make-whole relief, without the need to debate whether they present extraordinary circumstances. Indeed, due to the lingering uncertainty and lack of uniformity in applying equitable estoppel and the varying circumstances that might give rise to such a claim, plaintiffs might find that make-whole relief is the path of least resistance.[260] Nevertheless, there may be situations where

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255. *See id.* at 311-12 (discussing the Eleventh Circuit's view on estoppel claims). In his article, Brauch further provides a full discussion of circuit decisions on the availability of estoppel and cases delineating narrow or extraordinary circumstances. *Id.* at 305–13. Like Professor Medill, Brauch ultimately rejects the use of equitable estoppel to enforce representations, albeit for a different reason—that the development of estoppel through federal common law has led to inconsistent and non-uniform results. *Id.* at 313.

256. Engers v. AT&T, Inc., No. 10-2752, 2011 WL 2507089, at *4 (3d Cir. June 22, 2011), *cert. denied,* 132 S. Ct. 1101 (U.S. 2012) (synthesizing the court's decision with the decision in *Amara*).

257. *Id.* at *4 n.9.

258. Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226 (3d Cir. 1994).

259. *Id.* at 238. *See generally* Guerra-Delgado v. Popular, Inc., No. 11-1535, 2012 U.S. Dist. LEXIS 44432 (D.P.R. Mar. 29, 2012) (denying defendant's motion to dismiss, recognizing viability of estoppel claim on similar facts to *Amara* and listing elements of estoppel claim as less onerous than the *Engers* decision).

260. Professor Medill rejects equitable estoppel for many of the same reasons she rejects judicial reformation, *infra* Part IV, and asserts that federal courts should reject equitable estoppel in favor of make-whole relief. Medill, *Judicial Paradox*, *supra* note 3, at 929-30.

litigants choose to argue for plan reformation.

c. Reformation and Injunction[261]

In *Amara*, the Supreme Court identified the remedies the district court had entered as a combination of: (1) reformation "in order to remedy the false or misleading information CIGNA provided," and (2) injunctions to "require the plan administrator to pay to already retired beneficiaries money owed them under the plan as reformed."[262] Justice Scalia listed several reasons why reformation cannot be available for plan participants like Janice Amara, centering his arguments on the typical requirements for contract reformation.[263] For example, Justice Scalia stated that reformation "is meant to effectuate mutual intent at the time of contracting" but "SPDs may be furnished months after an employee accepts a pension or benefit plan."[264] Thus, in his view, reformation fails in this instance because there is no mutual mistake.[265] Reformation of an ERISA plan, however, is governed by trust law, not contract law. Under the Restatement (Third) of Trusts, judicial reformation of the terms of a trust agreement may occur where the terms are affected by mistake of law or fact.[266] Thus, the contract law requirement of mutual intent or mutual mistake may not apply to a plan reformation.

Justice Scalia also raised an issue concerning agency, asserting that "reformation might be available if the third party was an agent of a contracting party and its misrepresentations could thus be attributed to it under agency law."[267] In his view, because a plan administrator's duty "arises by statute," the administrator's misrepresentations cannot be attributed to the principal.[268] This simply makes no sense. The plan administrator is the sponsor's agent and mistakes or omissions, negligent or intentional, are attributable to the sponsor.[269]

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261. Injunction, as an appropriate equitable remedy under section 502(a)(3), has not been in dispute since *Great-West*, 534 U.S. at 204, and it is primarily useful for plaintiffs when it is coupled with monetary relief under the make-whole theory. Hence, treatment of the elements of injunction is not my purpose here.

262. *Amara*, 131 S. Ct. at 1879-80 (noting that the district court ordered the terms of the plan reformed so that they provided an "A plus B," rather than a "greater of A or B" guarantee).

263. *Amara*, 131 S. Ct. at 1884.

264. *Id.* at 1885 (stating that "intent [at the time of contracting] is not retroactively revised by subsequent misstatements.").

265. *Id.*

266. RESTATEMENT (THIRD) OF TRUSTS § 62 cmt. b (2003).

267. *Amara*, 131 S. Ct. at 1884.

268. *Id.*

269. *See* Whitfield Constr. Co. v. Commercial Dev. Corp., 392 F. Supp. 982, 998 (D. V.I. 1975) (advising that under agency law, the principal is generally liable for its agent's negligent acts or mistakes).

Rather than delineating all elements for judicial reformation, and attempting to spar back and forth with opposing counsel as to the exact parameters of reformation under trust law, plaintiffs may be better served by recognizing at the outset that trust reformation is problematic in most situations and is probably unnecessary given the availability of make-whole relief, coupled with an injunction, for section 502(a)(3) breach of fiduciary duty claims. The main reason that ERISA scholars seem to dislike reformation is not that the elements of the remedy cannot be met, but because a trust should conform to the settlor's intent, and judicial reformation of a plan would likely not comport with such intent. Reformation could also run afoul of ERISA's complex plan design and amendment requirements.[270]

On this point, Professor Medill has identified judicial reformation as a potential remedy for Category I claims (breach of fiduciary duty of plan design requirements) but ultimately she does not recommend judicial reformation because reformation requires specialized knowledge of ERISA plan requirements that most federal judges lack and would usurp the settlor function in designing and amending plans, which in turn could lead to a chilling effect on the creation and maintenance of employer-sponsored plans.[271] She concludes that judicial reformation is usually not necessary, however, because of the availability of other equitable remedies, i.e., injunction and make-whole relief, that can adequately remedy or restore benefits due under ERISA's plan design requirements.[272]

The fact that the *Amara* Court listed reformation as a potential remedy under section 502(a)(3) means that plaintiffs will likely attempt to apply this remedy to their claims, but reformation is probably unnecessary in the vast majority of Category III claims because of the availability of make-whole relief. Again, this will have to be played out in the lower courts with full briefing on the issue, but the author predicts that equitable estoppel will rarely be necessary.

V. CONCLUSION

Participants and beneficiaries who are injured by a fiduciary's breach can now at least attempt to seek monetary redress under *Amara* for their harm. They must proceed as they would have done pre-*Amara*, by alleging the appropriate violation of ERISA's statutory requirements, and they must align their claim with the correct remedial provision. If a claim falls within the ambit of another section of ERISA section 502, plaintiffs should resist the

270. Medill, *Judicial Paradox*, *supra* note 3, at 929–30.
271. *Id.*
272. *Id.* at 930.

urge to dress that claim in fiduciary-breach clothing under section 502(a)(3). If a claim does not fall within the ambit of ERISA's other remedial provisions, however, plaintiffs are now well positioned to fit their claims within section 502(a)(3), provided they can allege a specific ERISA statutory violation that caused them injury. A simple allegation that the fiduciary did not correct the participant about a misunderstanding of a plan benefit, or a claim that the fiduciary accepted premium payments, without more, will possibly subject the complaint to dismissal, and the claim may never survive on the merits.[273] But, the lower courts should be more sympathetic toward the statutory communication and information-type violations involving misrepresentations and omissions that demonstrably caused the types of injury at issue in the *Amschwand*, *Goeres*, and *Amara* cases. Such violations should fall within the equitable relief provision, most notably under the make-whole doctrine. Even if plaintiffs are able to demonstrate harm in the form of individualized loss, and that the breach caused the harm, they must be prepared to counter any arguments that special conditions attach to make-whole relief. The most likely defense argument will be that harm to the trust corpus and payment back into this trust is required. The roadmap for responding to this defense argument has previously been laid out by the author, by pointing to treatises and pre-fusion case law that did not contain any such special conditions.[274] In this Article, some of the remaining hurdles have been addressed and markers placed for court-watching. While it will be fascinating from a scholarly perspective to watch how the plaintiffs in the *Amara*, *Kenseth*, *Moon*, and *McCravy* appeals fare, these decisions will be monumental, indeed, from a participant's perspective. At the end of it all, however, participants' journeys to the Supreme Court on the scope of equitable relief under ERISA section 502(a)(3) are probably not finished.

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273. Dismissal of the complaint under Fed R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 8(a)(2) is especially likely given the Supreme Court's imposition of heightened pleading standards under the new "plausibility" standard. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (holding that factual allegations in complaints must raise rights above the speculative level and entitlement to relief must be "plausible"); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that complaints must contain sufficient factual matter to state a claim that is plausible). There is now a vast body of scholarly articles addressing the impact of these decisions on a plaintiff's ability to adequately plead a variety of cases and the time is ripe for an analysis of how and whether the plausibility standard is impacting ERISA complaints.

274. *See generally* Harthill, *Square Peg*, *supra* note 3 (providing information concerning pre-fusion cases and treatises that did not contain special provisions).