The Evolving State of New Remedies & Equitable Relief Under ERISA § 502(a)(3)

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• Overview of ERISA’s remedial scheme
• Review of CIGNA v. Amara, Rochow, McCutchen, and Montanile
• What constitutes “appropriate equitable relief” under § 502(a)(3)
• Miscellaneous issues affecting ability to obtain, perfect, and collect judgments under § 502(a)
Overview & Pathmarking Cases

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ERISA’s Remedial Scheme

• ERISA § 502 generally
  • § 502(a)(1)(B): Standard remedy for denials of benefits and clarification of rights to benefits
  • § 502(a)(2): Remedy for breaches of fiduciary duty brought on behalf of the plan itself
  • § 502(a)(3): “Catch-all” remedy allowing for appropriate equitable relief for violations of, or to enforce the terms of, ERISA or an ERISA plan

• ERISA § 502(a)(3) specifically
  • “A civil action may be brought … by a participant, beneficiary, or fiduciary (a) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan”
ERISA’s Remedial Scheme

• ERISA § 502(a)(3) historically
  • *Mertens*: “Equitable relief” means relief generally only available in a court of equity at the time of the divided bench and excludes damages, both compensatory and punitive
  • *Varity*: § 502(a)(3) is a “catch-all” provision that provides *individualized* relief for violations of ERISA and plan terms when another ERISA remedy does not offer relief
  • *Great-West* and *Sereboff*: Not all restitution constitutes equitable relief
    • There is “equitable” restitution and “legal” restitution
  • *LaRue* (Chief Justice Roberts’ concurrence): Cannot use § 502(a)(3) if the grievance otherwise fits another ERISA remedy
    • Maybe not so ironclad anymore
• **CIGNA v. Amara**
  
  • Far-reaching opinion with many “musings”
  
  • Clear holding: An SPD is not a plan document
  
  • Dicta:
    
    • Suggests various remedies may be available under § 502(a)(3), including estoppel, surcharge, and reformation
    
    • Court states that, while monetary relief might not be available against non-fiduciaries, “appropriate equitable relief” under § 502(a)(3) may include monetary relief against fiduciaries
    
    • Dissent: Don’t accept the majority’s statements on remedies, since the issues weren’t briefed and therefore are not well-considered and are also *dicta*
Background on *CIGNA v. Amara*

- Long-running dispute among the Justices regarding the scope of ERISA’s remedies
  - *Great-West* case in 2002 was a 5-4 decision, with the minority finding the focus on ancient equitable remedies to be misguided and outmoded
  - In a preemption case in 2004 – *Aetna v. Davila* – Justice Ginsburg, joined by Justice Breyer, indicated dissatisfaction with broad preemption of state law remedies and the accompanying narrow scope of federal remedies
    - She invited Congress to expand the remedies in ERISA or, she warned, the Court will
  - DOL dissatisfied with a narrow reading of equitable relief
- Against that backdrop, Justice Breyer “reaches” to address the scope of ERISA’s remedies in *Amara*
• Overarching ramifications of ERISA’s remedies including money
  
  • ERISA now a more appealing statute for plaintiffs lawyers
    
    • Plaintiffs are now more frequently seeking affirmatively to sue under ERISA rather than force their cases into a state law mold
  
  • Appeal of ERISA is also augmented by the Supreme Court’s *Hardt* decision that allows the payment of attorney fees where there is “some success on the merits”
Rochow

• Original Opinion: *Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415 (6th Cir. 2013)


• En Banc Decision: 780 F.3d 364 (6th Cir. 2015)

• Cert Denied: 136 S. Ct. 480 (2015)
Rochow

• Central Question: Does a denial of benefits claim under ERISA § 502(a)(1)(B) support a disgorgement of profits award otherwise allowable under ERISA § 502(a)(3)?

• According to the original Sixth Circuit opinion the answer was YES

• En banc Sixth Circuit reverses, finding no disgorgement allowable in a benefits dispute
Facts and Procedural History

- Plaintiff, insurance CEO, began exhibiting unexplained symptoms in 2001 (short term memory loss, chills, anxiety, sweating)
- Following symptoms, was demoted from his CEO position to a less demanding position; however, was ultimately fired for performance-related reasons in January 2002
- Ultimately diagnosed with HSV encephalitis
- In December 2002 (almost a year after termination), applied for disability benefits through LINA
- Benefits denied; then three appeals – all three affirmed decision
- Filed suit in E.D. of Michigan in September 2004 alleging two counts under 502(a)(3)
- Damages sought: disability benefits with interest and disgorgement of any profits LINA obtained as a result of wrongful conduct
Rochow

• Facts and Procedural History (cont’d)

  • District court ruled there was an arbitrary and capricious denial of benefits.
  
  • LINA appealed, and Sixth Circuit initially affirmed
  
  • On remand, plaintiff (now estate) moved for equitable accounting on profits LINA earned on the nearly $1 million in disability benefits it had denied plaintiff
  
  • Claims were treated as one for benefits under §502(a)(1)(B) and an equitable accounting under § 502(a)(3)
  
  • District court entered $4.8 million judgment for plaintiff
  
  • LINA appealed, with initially another affirrmance ensuing
Sixth Circuit En Banc Decision

• Allowing the estate to recover disgorged profits in addition to the benefits recovery under § 502(a)(1)(B) would, absent a showing that the remedy received was inadequate, result in an impermissible duplicative recovery.

• There was no showing that the benefits received, plus the attorney fee award, plus prejudgment interest, was inadequate to make the estate whole.

• The withholding of benefits was ancillary to the denial of benefits and did not inflict a second, distinct injury.

• The firewall holds!
McCutchten

• **US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013)**

  • **Facts**: Car accident. The plan required reimbursement for benefits for which the participant later received a third-party settlement. Plan administrator requested reimbursement for all benefits paid without allowance for defendant’s legal costs, which had reduced his net recovery to less than the amount of benefits paid.

  • **Issue**: Question left open by *Sereboff* – whether “appropriate” in “appropriate equitable relief” in ERISA § 502(a)(3) limits recovery by a plan that otherwise states a claim for a constructive trust
Before the Supreme Court:

Familiar approach under ERISA: suit under ERISA §502(a)(3) for “appropriate equitable relief”

Plan seeks constructive trust over segregated settlement funds

Paradigm sanctioned by *Sereboff*

Main Holding:

The plan terms govern, and general equitable defenses cannot override the contract’s terms. Thus, principles of unjust enrichment cannot prevent a full recovery.
McCutchen

• Secondary Holding:
  • Ambiguous contract terms should be interpreted in light of “background principles”
  • Contract was not ambiguous in rejecting “make whole” doctrine / double recovery
  • But contract was silent, and thus ambiguous, in addressing the common fund doctrine

• End Result:
  • US Airways collects some, but not all, of its lien
  • The common fund doctrine now becomes part of every ERISA plan’s reimbursement terms, where it is silent on attorney fees
Montanile


• Question presented: “Whether, under [ERISA], a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seeks ‘equitable relief’ within the meaning of ERISA § 502(a)(3) if the fiduciary has not identified a particular fund that is in the participant's possession and control at the time the fiduciary asserts its claim”
Montanile

• Tracing/dissipation issue
  • Constructive trust attached at the moment participant received the third-party funds, and spending them does not allow the participant to escape liability
    • Equity sees that as done what ought to be done

• SPD/plan terms issue
  • *CIGNA v. Amara* indicates that SPD is not the plan, and § 502(a)(3) authorizes only enforcement of the plan terms
  • Eleventh Circuit says SPD is the plan when it is the only document outlining benefit terms
Montanile

• Participant wins, ERISA plan loses; Eleventh Circuit reversed

• Supreme Court holds that any suit by a fiduciary for reimbursement must seek money that is held in a segregated fund

• If the segregated fund has been dissipated, then tracing is required, or else no relief is available

• Plan should have sought an injunction to preserve the status quo

• Remanded to the lower courts to determine the extent to which the fund was dissipated, with its proceeds untraceable

• Implications for suits to recover overpayments

• Interesting dicta on scope of relief in benefits cases
Remedies under (a)(3)

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Remedies Under (a)(3)

- Equitable Tracing
- Surcharge
- Reformation
- Equitable Estoppel
- Disgorgement
**Surcharge**

- **Silva v. Met Life and Savis, 763 F. 3d 1167 (8th Cir. 2014)**
  - Background – Life insurance, failure to provide proof of good health on late filed application. Employer administered. Pleadings case on 12(b)(6) motion
  - Held - Complaint could be amended to add claim of Surcharge.
    - Amara – the Amara musings are holdings and law changed to allow a make whole remedy.
    - Relies on *McCray* (4th Cir.) reasoning – prevents fiduciary abuse.
    - Not required to elect remedy at the pleading stage.
Surcharge

• *Moyle v. Liberty Mutual Retirement Plan* --- F.3d ----2016 WL 4394583 (May 20, August 16, 2016)

  • Background - Retirement plan SPD insufficient description of plan benefits and changes. Employees of acquired company denied service credit – pre acquisition employment not credited service. Class action. Motion to Dismiss.

  • Held – Even though (a)(1)(B) claim was not improperly denied under arbitrary and capricious standard, equitable claims of Surcharge, reformation and estoppel.

  • Also see *Gabriel v. Alaska Elec. Pension Fund*, 773 F. 3d 945 (9th Cir. 2014)
Surcharge

• Circuits recognize it as a theoretical remedy, but what does it mean –

• Moyle - Thus, applying Amara to this case, if Appellants are unable to recover benefits based on an interpretation and enforcement of the Retirement Plan under § 1132(a)(1)(B), they can, however, receive reformation of the Retirement Plan as an equitable remedy under § 1132(a)(3). Additionally, Amara makes it very clear that remedies such as reformation, surcharge, estoppel, and restitution are traditionally equitable remedies, and the fact that they take a monetary form does not alter this classification. 131 S.Ct. at 1879–80.

• Who knows?
Reformation

• Probably the most powerful remedy in the retirement plan context, but not in claim for benefits cases --

• Works hand in hand with estoppel claims in pension and buy up benefit cases

• Consistently recognized by circuits in the list of other equitable relief.
Reformation

• Moyle - Court allowed Plaintiffs to amend to add a reformation claim on remand.
Reformation

- Reformation recognized and traditional elements – correct mistake or prevent fraud required.
- No proof of mistake or fraud
Reformation

• Proof of fraud or mistake

  • *Pearce v. Chrysler Group, LLC Pension Plan*, 615 Fed.Appx. 342 (6th Cir. 2015)

    • SPD conflicted with Plan. Even though (a)(1)(B) claim did not lie, court reversed denial of motion to amend to assert (a)(3) reformation claim. Court discusses differences in SPD and Plan but does not opine as to scope of reformation remedy.

  • *Osberg v. Foot Locker, Inc.*, 555 Fed.Appx. 77 (2nd Cir. 2014)

    • Failure to give proper notice of conversion of cash balance retirement plan.

    • Found that reformation necessary to prevent fraud and no proof of actual harm required prior to reformation. Remanded to District Court.
Reformation

• Circuit court decisions – pleadings cases.

• District Courts – primarily the same. Recognizing the right to plead a claim of reformation
Estoppel

• Historic claim – previously preempted under (a)(1)(B) now part of the (a)(3) playbook –
  • Part of reformation claims
  • Applicable in retirement and welfare benefit claims

• Traditional elements apply
  • Fiduciary act
  • Statement or failure to make a statement
  • Reliance
  • Reasonable Reliance
Estoppel

• Fiduciary Act
    • Employer accepted premium for group life after deceased was no longer eligible. Fully insured plan. Insurer not sued.
    • This appeal followed a prior remand to address equitable relief claim.
    • Held – Employer acceptance of premium and failure to advise as to participation in plan were not fiduciary acts.
Estoppel

• Ambiguous Provision

  • *Haviland v. Metropolitan Life*, 730 F.3d 563 (6th Cir. 2013)
    • Estoppel as to statement regarding plan provision only applies if the provision is ambiguous.

  • *Guenther v. Lockheed Martin Corporation*, 646 Fed.Appx. 567 (9th Cir. 2016)
    • Although (a)(3) claim for estoppel was properly pleaded, MSJ on that claim was proper, because plan provision subject of alleged statement was not ambiguous.

  • *Deschamps v. Bridgestone*, 169 F. Supp. 3d 735 (M.D. Tenn. 2015)

  • *Guerra-Delgado v. Popular, Inc.*, 774 F.3d 776 (1st Cir. 2014)
    • Although estoppel may be available under (a)(3) claim could not lie because plan provision at issue was not ambiguous
Estoppel

• Misrepresentation or similar statement required – reliance?
    • SPD varied from plan document with respect to calculation of LTD benefit amount.
    • A(3) claim stated.
    • Blurs the remedies of surcharge, estoppel and reformation, but waiving reliance and merging it with “make whole” relief.
Disgorgement

• District Courts and Circuit Courts appear to primarily follow *Rochow II* and do not allow disgorgement claims where (a)(1)(B) claims lie. In the absence of an (a)(1)(B) claim disgorgement appears to be available.
Disgorgement and other equitable remedies

• Claim did not survive 12(b)(6) or 12(c) motion
  • *Talbot v. Reliance Standard Life*, 2015 WL 4134548 (D. AZ 2015) (a)(1)(B) claim provided full remedy because only injury was denial of benefits.
  • *Davis v. Hartford*, 2016 WL 1574151 (D. W.D. KY, 2016) – (a)(1)(B) claim provided full remedy because only injury was denial of benefits.
  • *Hackney v. Lincoln National* 2014 WL 3940123 (D. W.D. KY, 2016 ) (a)(1)(B) claim provided full remedy because only injury was denial of benefits and fiduciary duty claim was essentially the same claim.
  • *Potts v. Hartford*, Slip Copy, 2016 WL 4218384 (W.D. PA, August 9, 2016) (reasoning the same as those above.)
Disgorgement and other equitable remedies

• Claim for disgorgement survived 12(b)(6) or 12(c) motion.


  • Jensen v. Wheaton Franciscan Services LTD Plan 2014 WL 1686778 (N.D. Iowa, 2014) case treats interest claim as species of disgorgement and allows it to remain in the case.

  • Kenseth v. Dean Health Plan, Inc., 722 F. 3d 869 (7th Cir. 2013) Make whole remedy available if proof mistake and causation. Issue of fact as to mistake and mitigation.
THE MONEY’S GONE. NOW WHAT? Possible Post-Montanile Remedies

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I. FIDUCIARY LIABILITY
Fiduciary Status Is Not Optional

• Fiduciary status is automatic. See, e.g., Coldesina v. Simper, 407 F.3d 1126, 1132 (10th Cir. 2005).

• It cannot be disclaimed or avoided. 29 U.S.C. §1110(a) (“any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy”).
Non-Discretionary Fiduciary Status Regarding Plan Assets

• “A person is a fiduciary with respect to a plan to the extent (i) he ... exercises any ... authority or ... control respecting management or disposition of its assets....” 29 U.S.C. §1002(21)(A).

• “Several courts gloss over this distinction applying the discretionary language to control over assets as well as management and administration.... However, this approach is unpersuasive as it cannot be reconciled with the clear statutory language.” Coldesina v. Simper, 407 F.3d 1126, 1132 n.1 (10th Cir. 2005).
Plan “Assets” Include Intangibles

• “Apart from participant contributions, applying ordinary notions of property rights, the assets of a welfare plan generally include any property, tangible or intangible, in which the plan has a beneficial ownership interest. The identification of plan assets therefore requires consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved.” ERISA Opinion Letter 92-24A, p.2, Nov. 6, 1992.

• Hint: Include Plan language confirming that claims against and recovery from tortfeasors are plan assets.
Subrogation Claims, and Participant-Recovered Funds, are Plan “Assets”

• Subrogation “is a right pursuant to which a portion of the injured plaintiff’s rights against rights against the tortfeasor responsible for the injuries are assigned to the subrogee.” 73 Am.Jur.2d Subrogation §30 (1970).

Unwitting Fiduciary Breaches Can Occur

• Fiduciary breaches under ERISA can be unintentional. See, e.g., Mathews v. Chevron Corp., 362 F.3d 1172, 1183 (9th Cir.2004); James v. Pirelli Armstrong Tire Corp., 305 F.3d 439, 449 (6th Cir.2002); Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 135 (3d Cir.1993).
Possible Fiduciary Breaches: Exclusive Benefit Rule

• “[T]he assets of a plan … shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.” 29 U.S.C. §1103(c)(1).
Possible Fiduciary Breaches: Fiduciary Standards

• “[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... in accordance with the documents and instruments governing the plan....” 29 U.S.C. §1104(a)(1)(D).
Possible Fiduciary Breaches: Prohibited Transactions

• **A fiduciary** cannot “deal with the assets of the plan in his own interest or for his own account….” 29 U.S.C. §1106(b)(1).
Fiduciary Liability, §1109(a)

• “Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.” 29 U.S.C. §1109(a).
Remedial BOFD Claim: Section 1132(a)(2)

• “A civil action may be brought … by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title…. ” 29 U.S.C. §1132(a)(2).
Remedial BOFD Claim: Equitable Decree v. Money Judgment Under §1132(a)(2) (cont’d)

• “A legal remedy would result in a money judgment enforceable only by execution, or other conventional common law process such as ejectment or replevin. An equitable remedy would result in a judgment enforceable in personam and by contempt.

    ….

• Section 502(a)(2) simply refers to “appropriate relief under section 1109”, and there is no reason to attribute to Congress an intention, inconsistent with the rest of section 502(a), to authorize legal rather than equitable relief.” Pane v. RCA Corp., 868 F. 2d 631, 635-36 (3d Cir. 1989).
Remedial Equitable Relief Claim: Section 1132(a)(3)

“A civil action may be brought … by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan….” 29 U.S.C. §1132(a)(3).
Remedial Equitable Relief Claim: Cause of Action

- Section 1132(a)(3) action to redress violations of ERISA, Sections 1103(c)(1), 1104(a), and 1106(b)(1), as contemplated under *DeWolff, Boberg, & Assocs., Inc.*, 552 U.S. 248 (2008); and *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

- Section 1132(a)(3) action to enforce the personal liability provisions of Section 1109(a).

- The remedy is an equitable decree imposing personal liability on the fiduciary for causing a loss to the Plan.
Remedial BOFD Claim: Cases Imposing Liability for Dissipation Under Section 1132(a)(2)

- *Pioneer Tel. Coop. v. Terry*, Case NO. CIV-07-37-D, 2009 WL 3837302 (W.D. Okla. Nov. 16, 2009) (holding a plan participant and his attorney were liable under §1104(a) and §1109(a) as fiduciaries who exercised control over dissipated funds recovered from third-party tortfeasor, which were an “asset” of the plan)

- *Trustees of Teamsters Local Union No. 443 v. Papero*, 485 F. Supp. 2d 67, 71 (D. Conn. 2007) (holding that an attorney can be an ERISA “fiduciary” by exercising control over settlement funds).
Remedial BOFD Claim: Attorney Fiduciary Status (General Position)

• Courts have held that a plan participant’s lawyer is not a fiduciary, even where the attorney exercised control over settlement proceeds in which the plan claims a subrogation interest. S. Council of Indus. Workers v. Ford, 83 F.3d 966, 968 (8th Cir. 1996); Hotel Employees & Restaurant Employees Int'l Union Welfare Fund v. Gentner, 50 F.3d 719 (9th Cir. 1995); Chapman v. Klemick, 3 F.3d 1508 (11th Cir. 1993); Rhodes, Inc. v. Morrow, 937 F.Supp. 1202 (M.D.N.C. 1996); Vest v. Gleason & Fritzsliall, 832 F.Supp. 1216 (N.D. Ill. 1993).
Remedial BOFD Claim: Attorney Fiduciary Status (Drilling Down)

• Dismissive, cursory language: “Thompson [the attorney] did not become a plan fiduciary merely by representing Ford [the participant] or by related control over the settlement proceeds. ‘An attorney has an ethical obligation to his or her client that does not admit of competing allegiances.’ …. Accordingly, to impose fiduciary liability on Thompson would be to subject him to ‘unacceptable conflicts of interest.’ …. Moreover, the subrogation agreement did not by its terms purport to make Thompson a fiduciary of the plan.” Ford, 83 F.3d at 968 (quoting Chapman, 3 F.3d at 1511).
Remedial BOFD Claim: Attorney Fiduciary Status (Broad v. Narrow Status)

• Automatic fiduciary status: “a person is a fiduciary with respect to a plan to the extent … he exercises … any authority or control respecting management or disposition of its assets.” 29 U.S.C. §1002(21)(A).

• Rule 1.15(d), ABA Model Rules of Professional Conduct (“Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person”).
Remedial BOFD Claim: Attorney Fiduciary Status (Broad v. Narrow Status) (cont’d)

• Rule 1.15(e), ABA Model Rules of Professional Conduct (“When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved”).

• 29 U.S. Code § 1105(c) (permitting allocation of fiduciary responsibility).

• Better reasoning: a person (including an attorney) can be a fiduciary in controlling a specific plan asset without becoming a fiduciary in other respects. See, e.g., Terry, Papero, supra.
Remedial BOFD Claim: Equitable Decree v. Money Judgment Under §1132(a)(2)

“The Court notes further that the overwhelming weight of authority in the federal courts holds that actions under … 29 U.S.C. §1132(a)(2), by participant-beneficiaries and fiduciaries to remedy, as in this instance, alleged violations of … 29 U.S.C. §1109(a), are equitable in nature for purposes of the Seventh Amendment jury trial right.” Spano v. Boeing Co., Case No. 06-cv-743-DRH, 2007 WL 1149192, *8 (S.D. Ill., Apr. 18, 2007) (collecting cases).
II. SECTION 1132(a)(3) SUBROGATION AND REVIVAL
Subrogation Historically Exists Beyond the Insurer-Insured Context

• “Subrogation, a legal fiction, is broadly defined as the substitution of one person in the place of another with reference to a lawful claim or right.” 73 Am.Jur.2d Subrogation §1 (2007).
“Where property of one person is used in discharging an obligation owed by another of a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien holder.” Restatement (First) of Restitution, §162 (1936).
“A court of equity may give restitution to the plaintiff and prevent the unjust enrichment of the defendant, where the plaintiff’s property has been used in discharging an obligation owed by the defendant … by creating in the plaintiff rights similar to those which the obligee or lien-holder had before the obligation or lien was discharged. In such a case the procedure is called subrogation, and the plaintiff is said to be subrogated to the position of the obligee or lien-holder. Although the obligation or lien has been discharged, the plaintiff can maintain a proceeding in equity to revive it for his benefit; in such a proceeding the court will create for the benefit of the plaintiff an equitable obligation or lien similar to that which was discharged.”
• “Just as the establishment and enforcement of a constructive trust is a method of giving the plaintiff restitution where the defendant has acquired property from the plaintiff or through the disposition of the plaintiff’s property, so where property of the plaintiff is used in discharging an obligation or lien [Ze] obtains restitution through subrogation.”
“Where the plaintiff is not officious, and [Ze] uses his property or [Hir’s] property is used in discharging the obligation of another or a lien upon another’s property, [Ze] is entitled to reimbursement and is entitled to the remedy of subrogation to obtain reimbursement. The plaintiff is not officious where …. [Ze] was under a duty to make the payment, as for example where [Ze] was a surety.”
Payor Subrogation

• “The doctrine of subrogation is not confined to the relation of principal and surety. **It has been expanded so that it is now broad enough to include every instance in which one person, not acting voluntarily, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter.**”  *N.Y. Cas. Co. v. Sinclair Refining Co.*, 108 F.2d 65 (10th Cir. 1939).
• “Subrogation is founded on the principle that one cannot enrich himself by getting free of debt at the expense of another, not so fundamentally or primarily bound, by permitting him to pay the debt. …. The remedy is broad enough to include every instance in which one person, not a mere volunteer, pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter.” *U.S. Fid. & Guar. Co. v. Md. Cas. Co.*, 186 Kan. 637 352 P.2d 70, 75-6 (1960).
Wendy's Int’l, Inc. v. Karsko, 94 F.3d 1010 (6th Cir. 1996)

- UM Carrier paid participant (Karsko) following an automobile accident.
- Plan sponsor (Wendy’s) sued participant and UM carrier (Nationwide) to recover the equivalent of the UM payment.
- Plan sponsor settled with the participant.
- Sixth Circuit held the UM carrier could not be liable because it paid and satisfied its obligation.
- Citing Section 162, the Court held “The equitable doctrine of subrogation would thus apply to Wendy’s action against the Karsko’s, but not their claim against Nationwide, as Nationwide has not been unjustly enriched in any way.”
- See also Community Health Plan of Ohio v. Mosser, 347 F.3d 619, 623–24 (6th Cir. 2003).
III. FRAUDULENT CONDUCT DOCTRINE
Fraudulent Conduct Doctrine


• Overpayment case: Met Life was entitled to offset Socia’s Social Security benefits from her disability benefits under the plan. Socia received Social Security benefits without advising Met Life, and as a result, Met Life overpaid Socia.

• Met Life sued to recover the overpayments under Section 1132(a)(3).
• The court first held that “Met Life could not pursue a federal common law remedy of unjust enrichment to recover [the] overpayments.” *Id.* at 71.

• The court held that Met Life could not obtain an order for reimbursement under a restitution theory based on Socia’s contractual obligations via plan provisions and her subrogation agreement. 16 F.Supp.2d at 71-72.
Fraudulent Conduct Doctrine (cont’d)

• The court next considered whether Met Life could seek restitution on an equitable basis “distinct from Socia’s contractual obligation to pay money.” 16 F.Supp.2d at 73.

• The court held that although Met Life could not obtain reimbursement based on Socia’s contractual obligation to repay the benefits, it could recover for payments made under a mistake of fact as a result of misrepresentation or concealment. Id.