NOTES

ERISA SUBROGATION AND THE CONTROVERSY OVER *SEREBOFF*: SILENCING THE CRITICS, THE DIVIDED BENCH IS A LEGITIMATE STANDARD

TABLE OF CONTENTS

I. INTRODUCTION

Much legal debate surrounds the conflict between insurance companies seeking subrogation and individuals seeking full recovery for their injuries. Even when injured parties receive damages from third parties, they claim they have not received adequate compensation and, thus, should not have to reimburse their health insurer for monies paid on their behalf. In contrast, insurance companies contend they should not bear the brunt of harms caused and compensated by third parties. Not only emotional appeal and sympathetic concern, but also contractual provisions and the solvency of insurers play critical roles in this controversy. Enter ERISA: The Employee Retirement Income Security Act of 1974.[1]

"[P]ersistent turbulence in the [United States'] economy will drive ERISA litigation [between beneficiaries and fiduciaries] because when the economy suffers, people prioritise and rely more heavily on their benefits. As plan participants scrutinise their benefits and question their security, lawsuits may follow."[2] A beneficiary's desire for full or "make whole" compensation drives much ERISA litigation.[3] In juxtaposition, an insurer's fiduciary "ability to seek reimbursement of benefits from plan participants who have recovered funds from third parties is important to plans' continued financial stability."[4] Accordingly, ERISA lawsuits will inevitably include fiduciary subrogation suits under 29 U.S.C. § 1132(a)(3), part of ERISA's civil enforcement provision.[5] Fiduciaries will bring claims against injured ERISA plan

---

[1] 29 U.S.C. §§ 1001–1461 (2006).

[2] Muazzin Mehrban, *Employee Retirement Income Security Act (ERISA) Litigation*, FINANCIER WORLDWIDE (Nov. 2009), http://www.financierworldwide.com/article.php?id=5228.

[3] *See, e.g.*, LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 251 (2008) (addressing a complaint seeking "make-whole" relief).

[4] Brief of the Secretary of Labor as Amicus Curiae in Support of Mid Atlantic Medical Services, Inc.'s Reply at 1, Mid Atl. Med. Servs., Inc. v. Sereboff, 407 F.3d 212 (4th Cir. 2005) (No. 04-1336); *see also* JOHN F. BUCKLEY IV, ERISA LAW ANSWER BOOK, at ix (5th ed. 2006) ("The ultimate problem facing any employee benefit plan administrator, fiduciary, or sponsor is litigation.").

[5] ERISA § 502(a)(3) (corresponding to 29 U.S.C. § 1132(a)(3) (2006)). This civil enforcement provision enables fiduciaries to sue beneficiaries for reimbursement based on plan reimbursement provisions. *See* discussion *infra* Part II.C.*2*. This Note will refer to 29 U.S.C. § 1132 as "§ 1132" for purposes of brevity.

beneficiaries who have been compensated by third parties for their injuries in addition to the benefits paid out by the fiduciary to the beneficiary or to medical and other providers on behalf of the beneficiary.

Setting the stage for the current controversy, in 2006 the Supreme Court decided its most significant case involving a plan fiduciary's rights to ERISA subrogation in *Sereboff v. Mid Atlantic Medical Services, Inc.*[6] Joel and Marlene Sereboff were returning a rental car when another vehicle struck their rented car.[7] The Sereboffs both suffered injuries that were exacerbated by the other vehicle forcing their car into a concrete barrier.[8] Ms. Sereboff's medical benefits of $73,778.26 paid on her behalf by the insurance plan far exceeded Mr. Sereboff's medical benefits of $1,091.11 paid on his behalf by the insurance plan.[9]

At all relevant times, the Sereboffs were covered by an ERISA health insurance benefits plan sponsored by Ms. Sereboff's employer.[10] The plan fiduciary and insurer, Mid Atlantic Medical Services, Inc. (Mid Atlantic), paid $74,869.37 in benefits to the Sereboffs.[11] The insurer paid under an ERISA plan containing an "Acts of Third Parties" provision requiring an injured beneficiary recovering in tort from a third party to reimburse the fiduciary for benefits paid.[12] The Sereboffs recovered $750,000 in a settlement against the third-party tortfeasors, including the other driver.[13] Despite the "Acts of Third Parties" provision, the Sereboffs did not reimburse Mid Atlantic from the settlement funds.[14]

Mid Atlantic sued the Sereboffs seeking reimbursement of the $74,869.37 in benefits it paid the couple from their $750,000 tort

---

[6] 547 U.S. 356 (2006).

[7] Mid Atl. Med. Servs., Inc. v. Sereboff (*Sereboff Dist. Ct.*), 303 F. Supp. 2d 691, 697 (D. Md. 2004), *aff'd in relevant part*, 407 F.3d 212 (4th Cir. 2005), *aff'd*, 547 U.S. 356 (2006).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Sereboff*, 547 U.S. at 359–60; *Sereboff Dist. Ct.*, 303 F. Supp. 2d at 697.

[12] *Sereboff*, 547 U.S. at 360. The "Acts of Third Parties" provision entitled Mid Atlantic to full reimbursement regardless of whether the beneficiary received full recovery from the third party. *Id.* at 359.

[13] *Id.* at 360; *Sereboff Dist. Ct.*, 303 F. Supp. 2d at 700–01.

[14] *Sereboff*, 547 U.S. at 359–60.

recovery.[15] The parties stipulated at the district court phase that the Sereboffs would " 'preserve $74,869.37 of the settlement funds' in an investment account" pending the district court's ruling.[16] The Supreme Court ruled in Mid Atlantic's favor determining it properly asserted "equitable relief."[17] The Court held that Mid Atlantic sought funds which could "specifically [be] identif[ied]"[18] and remained in the beneficiaries' "possession and control."[19] Significant to the Court, Mid Atlantic did not seek funds directly from the Sereboffs' assets, but rather it sought relief pursuant to the plan's "Acts of Third Parties" provision "through a constructive trust or equitable lien on a specifically identified fund."[20] To fully determine the availability of these forms of equitable relief, the Court relied on cases from "the days of the divided bench."[21]

The Court held that Mid Atlantic's claim for relief under the "Acts of Third Parties" provision was equitable based on its similarity to "an action to enforce an equitable lien . . . by agreement" as in *Barnes v. Alexander*.[22] The Court analogized the contractual creation of a right to reimbursement from a third-party recovery in *Sereboff* to the contractual right to payment of a portion of a contingent attorney fee.[23] The Court applied "the familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing."[24] The Court analogized *Barnes*

---

[15] *Id.*

[16] *Id.*

[17] *Id.* at 369.

[18] *Id.* at 362–63 (quoting Mid Atl. Med. Servs., Inc. v. Sereboff, 407 F.3d 212, 218 (4th Cir. 2005)) (internal quotation marks omitted).

[19] *Id.* (quoting *Sereboff*, 407 F.3d at 218).

[20] *Id.* at 363–64.

[21] *Id.* at 363–69. "[T]he days of the divided bench" refers to the time when courts were divided into courts of law and courts of equity. Richard H.W. Maloy, *Expansive Equity Jurisprudence: A Court Divided*, 40 SUFFOLK U. L. REV. 641, 680–81 (2007). After the Federal Constitution and the Judiciary Act of 1789, "federal trial courts were responsible for trying [both] 'equity cases' and 'law cases,' " but the distinction has been eliminated by merging equity and law cases into "civil actions." *Id.* The promulgation of the Federal Rules of Civil Procedure in 1937 "merged law and equity procedure," and circuit courts have since reduced their use of the term "equity cases." *Id.* at 681.

[22] *Sereboff*, 547 U.S. at 368.

[23] *Id.* at 363–64.

[24] *Id.* (quoting Barnes v. Alexander, 232 U.S. 117, 121 (1914)) (internal quotation marks omitted).

to the facts of *Sereboff*. In *Barnes*, an agreement to pay the contingent fee to the attorney created a lien on the portion of the settlement funds paid to the client by a third party that the attorney would receive as a fee. Likewise, in *Sereboff*, the insurance contract agreement to reimburse the insurer for benefits paid for injuries caused by third-party tortfeasors created an equitable right to a portion of the settlement funds received by the client from a third party in the amount of benefits Mid Atlantic had paid on behalf of the Sereboffs.[25] Thus, the Court concluded that Mid Atlantic contractually created "a constructive trust or equitable lien" on the portion of the settlement funds due to Mid Atlantic.[26]

The Court held that "[u]nder the teaching of *Barnes* and similar cases, Mid Atlantic[ ] . . . properly sought 'equitable relief' under [§ 1132(a)(3)]."[27] The Court pointedly stated that "case law from the days of the divided bench confirms that Mid Atlantic's claim is equitable."[28] This statement has sparked much criticism and disagreement over its application.[29] In the wake of the *Sereboff* decision, critics have argued that the ERISA subrogation equity versus law standard is too narrow and unworkable, and they have called for the Supreme Court to revisit ERISA subrogation to establish a different standard.[30]

This Note focuses on the legitimacy of the Supreme Court's standard defining what constitutes "equitable relief" under § 1132(a)(3) to achieve subrogation after *Sereboff*. Although the language of § 1132(a)(3)(B), permitting "appropriate equitable relief," clearly requires appropriateness, this inquiry should be conducted separately and the Court did not address it in *Sereboff*. Accordingly, this Note does not address the appropriate nature of equitable relief.

---

[25] *Id.* at 364, 368.

[26] *Id.* at 364.

[27] *Id.* at 369.

[28] *Id.* at 363. The Court cited *Barnes v. Alexander*, 232 U.S. 117 (1914), as illustrative of this assertion and noted that Mid Atlantic's "inability to satisfy the 'strict tracing rules' for 'equitable restitution' is of no consequence." *Sereboff*, 547 U.S. at 365. As such, the fiduciary can assert a proper equitable lien over a nonexistent fund by contractual provision. *Id.* at 366.

[29] *See infra* Part II.E.

[30] *See infra* Part II.E.

This Note asserts that the Supreme Court's standard established in *Sereboff* that all relief available under courts of equity at the time of the divided bench qualifies as properly asserted equitable relief for a subrogation claim should remain unchanged, and critics should accept the Court's analysis. The *Sereboff* Court unequivocally chose to apply "case law from the days of the divided bench."[31] This ruling makes clear that the proper analysis to determine whether the basis for relief is equitable requires looking back to the equitable remedies available during the time of the divided bench. This standard finds support in decisions preceding *Sereboff*, the language of the ERISA provision permitting such relief, and the fact that equity prevails in the application of the standard.[32] Critics should concede the correctness of *Sereboff*, and the Supreme Court should stand by *Sereboff* as its final answer regarding when and how fiduciaries may assert subrogation claims.[33]

Before undertaking the task of scrutinizing and justifying the Court's decision in *Sereboff*, this Note sets forth the basic tenets and relevant portions of ERISA. Building upon this foundation, this Note discusses civil enforcement and subrogation under ERISA to provide a comprehensive overview of the current state of an ERISA fiduciary's right to subrogation. This Note then identifies and explicates the significant cases which set the stage for *Sereboff* and the Court's decision in that case. Finally, this Note presents the resulting standard, the renewed relevance of historically equitable relief, and the basis for perpetuating the standard and silencing the critics.

---

[31] *Sereboff*, 547 U.S. at 363.

[32] *See infra* Part III.A–C.

[33] This Note does not imply that all assertions of equitable relief would be successful as the courts must also undertake an appropriateness inquiry. § 1132(a)(3)(B).

II. BACKGROUND

A. ERISA BASICS

1. Purpose and History of ERISA. ERISA governs all employer-provided private health benefit plans,[34] which supply the majority of Americans' private health insurance.[35] Congress enacted ERISA in reaction to the significant increase in employee benefit plans, the plans' "substantial impact on interstate commerce," and the plans' effects on the "well-being and [benefit] security of millions of employees."[36] ERISA represented the first federal legislation to protect employees earning pension benefits.[37] Congress passed ERISA primarily to protect interstate commerce, resolve problems that discourage pension plans, safeguard the interests of participants in and beneficiaries of employee benefit plans, and counteract adverse effects caused by employers withdrawing from plans.[38] Hence, ERISA's regulatory structure assures that individuals covered by the terms of a private benefit plan receive the benefits promised according to each participant's terms of employment.[39]

Prior to the promulgation of ERISA, employee benefit plans received some protection, but not to the extent of congressional intent underlying ERISA.[40] Pre-ERISA protections included, but were not limited to, the Internal Revenue Code and the National Labor Relations Act, which both provide safeguards only under limited circumstances.[41] These inadequate protections left a gap

---

[34] *See* 29 U.S.C. § 1003(a) (2006) (covering employee benefit plans held by employers and employees "engaged in commerce").

[35] Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 LOY. U. CHI. L.J. 49, 77 (2008).

[36] 29 U.S.C. § 1001a(a) (2006).

[37] Thomas W. Jennings, *Introduction* to ERISA: A COMPREHENSIVE GUIDE § 1.1 (Martin Wald & David E. Kenty eds., 1991). The Welfare and Pension Plans Disclosure Act of 1958 sought to regulate pension plans but did not do so effectively. S. REP. NO. 93-127, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4840.

[38] 29 U.S.C. § 1001a(c).

[39] RONALD J. COOKE, ERISA PRACTICE AND PROCEDURE § 1.02 (1989).

[40] S. REP. NO. 93-127, at 3; COOKE, *supra* note 39, § 1.03.

[41] *See* COOKE, *supra* note 39, §§ 1.04–.05 (explaining the relevant benefit protections under federal tax and labor law). The Internal Revenue Code (IRC) was designed to ensure favorable tax treatment for benefit plans. *Id.* § 1.04. Under the IRC, wronged employees

where employers could avoid providing promised benefits without accountability.[42] To close this gap, legislators saw ERISA protections as the means necessary to regulate these "virtually unregulated assets" and to guarantee that employers would actually provide the benefits promised to employees.[43]

ERISA employs enforcement mechanisms via statutory causes of action to ensure that participants and beneficiaries receive promised benefits from their plans.[44] These statutory causes of action and "enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of the [Act]."[45] Equally important, Congress intended for ERISA "to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement."[46]

2. Coverage. ERISA broadly covers private benefit plans created and maintained by employers for the purpose of providing benefits to employees.[47] Covered employee benefit plans include

---

could only seek adverse tax consequences against the employer for failure to comply with the Code; an employee had no right to a civil action. *Id.* Likewise, the National Labor Relations Act applies only to employee benefit plans instituted by collective labor agreements. *Id.* § 1.05.

[42] *See* Jennings, *supra* note 37, § 1.2 (illustrating pension plan abuses, including plan termination, prior to ERISA).

[43] *Id.* § 1.1 (internal quotation marks omitted).

[44] *See infra* Part II.B (discussing permissive civil actions and remedies available under ERISA). Federal preemption applies to ERISA claims. *See* 29 U.S.C. § 1144(a) (2006) ("[T]he provisions of this subchapter [including § 1132] . . . shall supersede any and all State laws insofar as they may . . . relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."); 29 U.S.C. § 1132 (limiting civil actions). ERISA's express preemption provision, 29 U.S.C. § 1144(a), represents "1. A defense to a plaintiff's claims that are based on state law; and 2. A bar to state regulation of employee benefit plans." BUCKLEY, *supra* note 4, at 20:1. ERISA's other preemption provision, 29 U.S.C. § 1132, enumerates and limits available civil actions under ERISA and serves as the source of federal question jurisdiction. *Id.* In conjunction, these sections work toward "Congress's goal of complete federal jurisdiction over . . . employee benefit plans." *Id.* This Note addresses only ERISA claims in the federal courts and, thus, will not explicitly address ERISA preemption.

[45] S. REP. NO. 93-127, at 35.

[46] *Id.*

[47] 29 U.S.C. §§ 1002, 1003(a) (2006); *see* COOKE, *supra* note 39, §§ 2.01–.02 (discussing plans covered under ERISA); Jennifer E. Johnsen et al., *ERISA Litigation: Back to Basics*, FED. LAW., Jan. 2009, at 26, 26 (explaining ERISA coverage). However, § 1003(b) exempts

pension benefit plans, welfare benefit plans, and combination plans.[48] Covered plans may provide for the purchase of insurance or benefits including medical, illness, accident, death, disability, unemployment, and vacation benefits.[49] Subject to limitations, retirement income or deferred income may also be available through a covered plan.[50]

3. Who Is Covered and Eligible to Receive Benefits. Under ERISA, certain categories of individuals qualify for coverage and benefits. Participants, beneficiaries, and employees are eligible to receive benefits under a qualifying ERISA plan.[51] The statute defines the term "employee" according to its common meaning: "any individual employed by the employer" sponsoring the plan.[52] ERISA defines "participant" as a current or former employee actually or potentially eligible for any covered benefit.[53] The statute identifies a "beneficiary" as an individual who, according to the benefit plan's terms, is entitled to a benefit.[54] A beneficiary "must be designated as a beneficiary by a participant or by the terms of the employee benefit plan."[55]

Beneficiaries form the most expansive category of persons eligible to receive benefits under an ERISA plan because employees, participants, and designated family members can all qualify as beneficiaries.[56] This scheme illustrates that in lawsuits

---

church, governmental, and excess benefit plans, among others from coverage. *See* Robert J. Drapikoski, *Reporting and Disclosure Requirements for Plans Covered by ERISA*, *in* ERISA: A COMPREHENSIVE GUIDE, *supra* note 37, § 2.1 (specifying plans not covered by ERISA).

[48] § 1002(3); COOKE, *supra* note 39, § 2.03.

[49] § 1002(1) (defining "employee welfare benefit plan" and "welfare plan"); *see also* David P. Martin, *Taking Benefits Back: Reimbursement Under ERISA*, 69 ALA. LAW. 44, 45 (2008) (listing benefits that employers provide under qualified ERISA plans).

[50] § 1002(2)(A) (defining "employee pension benefit plan" and "pension plan"). This Note only addresses plans that qualify for ERISA coverage and does not address qualification.

[51] *See* § 1003(a) (stating that ERISA coverage applies to employee benefit plans established by employers and employee organizations); § 1002(1) (defining an "employee welfare benefit plan" as a plan established or maintained by employers or employee organizations to "provid[e] for its participants or their beneficiaries").

[52] § 1002(6).

[53] § 1002(7).

[54] § 1002(8).

[55] BUCKLEY, *supra* note 4, at 19:6.

[56] § 1002(6)–(8).

by and against beneficiaries, a large category of individuals may file or be subject to suit.

4. Fiduciaries. Fiduciaries form another key category of ERISA parties. An entity or individual qualifies as a fiduciary either by being a "named fiduciary" or a fiduciary by function.[57] A "named fiduciary" must be named in the plan or "identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly."[58] Designation of a named fiduciary as having the "authority to control and manage the operation and administration of the plan" will suffice even without the term "named fiduciary."[59]

A person or entity otherwise qualifies as a plan fiduciary based on performance of the following functions or controls: discretionary control over management and administration of the plan, authority over plan asset dispersion, or providing investment advice for compensation regarding plan funds or other property.[60] Courts more often identify a fiduciary by its function than by its named status.[61] A qualifying fiduciary must exercise some discretionary authority to manage or dispose of plan assets.[62]

An insurance company can be a fiduciary and will qualify as a fiduciary to the extent that it determines or manages the

---

[57] § 1002(21); 29 U.S.C. § 1102(a)(2) (2006).

[58] § 1102(a)(2).

[59] 29 C.F.R. § 2509.75-5 (2009).

[60] Susan P. Serota, *Overview of ERISA Fiduciary Law*, *in* ERISA FIDUCIARY LAW 9, 9–10 (Susan P. Serota ed., 1995) (citing 29 U.S.C. § 1002(21)(A)). A named fiduciary can be a "plan sponsor, trustee, plan administrator, [or] investment manager." *Id.* at 9 n.3. An employer can also qualify as a fiduciary. *See* LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 250 (2008) (providing an example of a case in which the employer acted as a fiduciary for its employees' retirement savings plan).

[61] The definition of fiduciary "includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title." H.R. REP. NO. 93-1280, at 323 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5103; *accord* S. REP. NO. 93-127, at 28–29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4864–65 (describing a fiduciary as one who "exercises any power of control, management or disposition with respect to monies or other property of an employee benefit fund"); *see, e.g.*, Donovan v. Mercer, 747 F.2d 304, 308 (5th Cir. 1984) (defining a fiduciary based on the individual's title and authority including management and control over the plan).

[62] 29 C.F.R. § 2509.75-8 (2009).

dispensation of benefits or the review of claims.[63] Generally insofar as insurers pay out benefits and handle claims adjustment, insurers will qualify.[64] The designation of fiduciaries is significant when determining who has the right under ERISA's civil enforcement scheme to bring a civil action.[65]

B. CIVIL ENFORCEMENT

1. Permissible Civil Actions. ERISA limits the individuals who can bring suit under the Act.[66] Participants and beneficiaries have the greatest rights to bring suits.[67] Other individuals, including fiduciaries and employers, can also bring actions for civil enforcement.[68]

The principal civil actions under ERISA include actions for benefits, breach of fiduciary duty, and injunctions to halt practices noncompliant with ERISA or a plan.[69] Beneficiaries may sue to recover benefits due, to clarify their entitlement to benefits, and to establish the nature of future benefits.[70] ERISA also permits enumerated individuals, significantly fiduciaries, to bring actions seeking appropriate equitable relief.[71]

---

[63] *See, e.g.*, John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 106 (1993) (holding that an insurer must be adjudged as a fiduciary regarding the benefits it manages); Libbey-Owens-Ford Co. v. Blue Cross & Blue Shield Mut. of Ohio, 982 F.2d 1031, 1035–36 (6th Cir. 1993) (concluding that an insurance company qualified as a fiduciary because it "had discretionary authority regarding claims"); *see also* Robert M. Goldich & Jonathan D. Wetchler, *Civil Enforcement, in* ERISA: A COMPREHENSIVE GUIDE, *supra* note 37, §§ 7.18–.19 (explaining that "ERISA specifically provides standing to maintain civil actions to plan fiduciaries," which include insurance companies acting or authorized to act as fiduciaries).

[64] Martin, *supra* note 49, at 46.

[65] 29 U.S.C. § 1132(a)(3) (2006). The Act also subsumes fiduciaries under the category of a "party in interest." 29 U.S.C. § 1002(14)(A) (2006). However, the status of fiduciary, and not party in interest, gives the entity or individual a right to initiate a civil action. § 1132(a)(3).

[66] § 1132(a); COOKE, *supra* note 39, § 8.03.

[67] § 1132(a)(1); COOKE, *supra* note 39, § 8.03.

[68] § 1132(a)(2)–(9); COOKE, *supra* note 39, § 8.03.

[69] § 1132(a)(l); *see also* COOKE, *supra* note 39, § 8.03 (discussing available causes of action under § 1132).

[70] § 1132(a); COOKE, *supra* note 39, § 8.03; Goldich & Wetchler, *supra* note 63, § 7.2.

[71] § 1132(a)(2)–(3), (5), (8); *see also* COOKE, *supra* note 39, § 8.03 (discussing appropriate equitable relief suits allowed under § 1132(a)); Johnsen et al., *supra* note 47, at 27 (quoting § 1132(a)(3) regarding the availability of equitable relief).

2. Exhaustion of Administrative Remedies. The requirement that a plaintiff exhaust administrative remedies prior to filing a civil action to recover benefits under a plan "is not expressly stated within ERISA's enforcement scheme but, if it is not satisfied, a plaintiff's case may be dismissed."[72] However, beyond beneficiary actions for benefits, courts have not uniformly imposed the administrative exhaustion requirement.[73] Importantly, the policies behind the exhaustion requirement[74] do not apply to mandate exhaustion in all subrogation lawsuits.[75] Thus, courts permit reimbursement and subrogation claims brought by fiduciaries for equitable relief under § 1132(a)(3) to proceed despite the plaintiff's failure to exhaust administrative remedies.[76]

---

[72] Johnsen et al., *supra* note 47, at 27; *see also* Gregory C. Braden et al., *What's New in Employee Benefits in 2008: A Summary of Current Case Law Developments*, *in* PENSION, PROFIT-SHARING, WELFARE, AND OTHER COMPENSATION PLANS 1, 108 (ALI-ABA COURSE OF STUDY, 2009) (enumerating cases requiring plaintiffs to exhaust administrative remedies before filing suits for benefits). *See, e.g.*, Midgett v. Wash. Grp. Int'l Long Term Disability Plan, 561 F.3d 887, 898–99 (8th Cir. 2009) (upholding the district court's dismissal of the appellant's disability claim "for failure to exhaust administrative remedies").

[73] Braden et al., *supra* note 72, at 108.

[74] *See* Johnsen et al., *supra* note 47, at 27 (discussing the pertinent policy justifications for the exhaustion requirement cited by courts that include reducing frivolous lawsuits and promoting uniform treatment of benefit claims).

[75] *See, e.g.*, Gutta v. Standard Select Trust Ins. Plans, 530 F.3d 614, 621–22 (7th Cir. 2008) (refusing to interfere with the district court's adjudication of a claim without requiring fiduciary to exhaust administrative remedies since the insured showed no abuse of discretion by the district court). *But see* Goldich & Wetchler, *supra* note 63, § 7.9 (asserting that a requirement for exhaustion of "contractually provided dispute resolution procedures" may infrequently arise and apply "in suits to recover plan benefits"). This Note accepts the premise that exhaustion of administrative relief is not mandated for subrogation and reimbursement claims.

[76] *See, e.g.*, Metal Techs., Inc. v. Ramirez, No. 07-C-0577, 2008 WL 153534, at *4 (E.D. Wis. Jan. 11, 2008) (relying on the policy that administrative exhaustion is not required where no such remedies exist or "pursuing them would be futile," the court dismissed the beneficiaries' counterclaim for failure to exhaust but permitted the fiduciary of the welfare benefit plan to maintain its suit for equitable relief as permitted by ERISA). Furthermore, it would be illogical to mandate that fiduciaries seeking subrogation exhaust administrative remedies because the fiduciary would be appealing to itself in seeking administrative relief.

C. ERISA SUBROGATION

1. Subrogation Generally. Subrogation allows "a loss-insurer to collect money from either the loss-causer or the loss-victim."[77] Simply put, the insurer will be able to recover based on the debt created when it paid benefits to a beneficiary to cover damages and medical costs for which a third party was primarily liable.[78] As far back as the late 1800s, federal courts have permitted insurance companies to bring subrogation suits in other contexts.[79] Most often, subrogation takes the form of an insurer seeking to recover a portion or the entirety of an injured party's third-party tort recovery.[80] An insurance company's actual recovery against the beneficiary after a third-party payment to the beneficiary is referred to as "reimbursement."[81]

Subrogation seeks to resolve issues regarding all three parties involved: the injured party, the third-party tortfeasor, and the injured party's insurer.[82] Accordingly, subrogation aims "to prevent unjust enrichment of the loss-causer; to deter future loss-causing conduct; and to prevent unjust enrichment of the loss-victim vis-à-vis the loss-insurer."[83] These policies stem from subrogation's foundation in equity.[84]

While maintaining these policy objectives, modern subrogation derives from contract principles and adheres to limits imposed by

---

[77] Maher & Pathak, *supra* note 35, at 50 n.8. Another characteristic of modern subrogation is the extensively concentrated control that federal law has over subrogation. *Id.* at 77. ERISA subrogation exemplifies this trend. *See supra* note 51.

[78] *See* Am. Family Ins. Grp. v. Cleveland, 827 N.E.2d 490, 494 (Ill. App. Ct. 2005) ("Under the doctrine of subrogation, a person who has paid a debt for which another is primarily liable succeeds to the rights of the person whose debt has been paid in relation to the debt or claim.").

[79] *See, e.g.*, The Montana, 22 F. 715, 729 (C.C.E.D.N.Y. 1884), *aff'd sub nom* Liverpool & Great W. Steam Co. v. Ins. Co. of N. Am., 129 U.S. 464 (1889) (finding that an insurer paying losses for shipping cargo is subrogated to the claims the insured has against a third party).

[80] Maher & Pathak, *supra* note 35, at 50 & n.3. This Note addresses this form of subrogation.

[81] *Id.* at 50 n.8.

[82] *Id.* at 50.

[83] *Id.* at 51.

[84] *Id.*

equitable principles.[85] The make whole doctrine constitutes the most advocated equitable principle among participants.[86] The make whole doctrine safeguards an insured's third-party recovery against an insurer's right of subrogation up to the monetary amount that would make the insured wholly compensated for injuries.[87] If this doctrine applies, an insurer does not have the right to recover in subrogation until the insured receives full compensation for all of his losses in tort.[88] Notably, not all circuits have adopted the make whole doctrine in the context of ERISA subrogation under § 1132(a)(3).[89]

The common fund doctrine also limits subrogation actions. This doctrine requires the subrogated insurer to pay a portion of the insured's attorney's fees and costs based on the rationale that both the insured and the insurer have benefited from the insured's third-party recovery.[90]

---

[85] *See id.* at 74–75 (identifying the make whole rule and common fund principle as limiting equitable principles).

[86] *See* Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D. L. REV. 237, 249–50 (1996) ("Perhaps the most attractive of the intermediate doctrines is the 'make whole' doctrine.").

[87] *Id.*

[88] 16 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 223:134 (3d ed. 2010) ("It is only after the insured has been fully compensated for all of the loss that the insurer acquires a right to subrogation . . . ."). However, this general default rule can be altered by contract. *Id.*

[89] For a discussion of the Sixth Circuit's application of the make whole rule in contrast with the Eighth Circuit's denial to apply the rule, see James E. Beal, *The "Make Whole Doctrine" and an ERISA Fiduciary's Right to Subrogation*, 63 J. Mo. B. 122, 123 (2007). The Sixth Circuit applied the make whole doctrine in *Copeland Oaks v. Haupt* to deny an insurer the right to subrogate unless the district court found the insured made whole by her total recovery. 209 F.3d 811, 815 (6th Cir. 2000). The Ninth and Eleventh Circuits also "have adopted the make whole doctrine as the [federal common law] default in the absence of a specific contract provision to the contrary." Beal, *supra*, at 124. In contrast, the Eighth Circuit in *Waller v. Hormel Foods Corp.* maintained that the make whole doctrine does not extend to ERISA. 120 F.3d 138, 139–40 (8th Cir. 1997). The Fourth and Fifth Circuits also have not adopted the make whole doctrine as federal common law. Beal, *supra*, at 124 n.23. For a recent argument against the make whole doctrine, see generally J. Thomas Allen, Comment, *ERISA Subrogation and Reimbursement Claims: A Vote to Reject Federal Common Law Adoption of a Default "Make Whole" Rule*, 41 ARIZ. ST. L.J. 223 (2009). In contrast to federal law, some states have codified the doctrine. *See, e.g.*, O.C.G.A. § 33-24-56.1(b) (2005) (requiring full and complete compensation of the injured beneficiary before the fiduciary can receive reimbursement).

[90] Baron, *supra* note 86, at 255–56. For a discussion of Supreme Court cases that formed the common fund doctrine, see E. Farish Percy, *Applying the Common Fund Doctrine to an*

2. Uncodified Subrogation Under ERISA. ERISA does not contain a statutory provision explicitly permitting, prohibiting, or controlling subrogation, or allowing for a right of reimbursement.[91] Although the House version of what became the Pension Protection Act of 2006 proposed an amendment expressly authorizing a fiduciary's subrogation or reimbursement right,[92] the final Act did not include the provision.[93] Accordingly, "ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content."[94]

Courts permit insurers to bring subrogation and reimbursement actions against beneficiaries under § 1132(a)(3).[95] Under this subsection, a fiduciary may bring a civil action by asserting its right "to obtain other appropriate equitable relief" to enforce a plan's terms.[96] Courts have permitted equitable relief in the forms of a constructive trust, injunction, restitution, reinstatement, and specific performance among others.[97]

The right to subrogation requires the existence of an express plan term giving the insurer that right against a tortfeasor or the

---

ERISA-Governed Employee Benefit Plan's Claim for Subrogation or Reimbursement, 61 FLA. L. REV. 55, 63–65 (2009).

[91] *See* Maher & Pathak, *supra* note 35, at 79 ("No other section permits subrogation type remedies; thus an asserted subrogation right must qualify as 'appropriate equitable' relief under [§ 1132(a)(3)] or it is not permitted."); James T. Nyeste, *Health Plans' Claims for Reimbursement from Personal Injury Recovery: Recent ERISA Rulings, Unanswered Questions*, 95 ILL. B.J. 244, 244 (2007) ("The ERISA statute itself does not say whether a plan has a right of reimbursement . . . .").

[92] The House bill included the following provision amending § 1132(a): "Actions described under paragraph (3) include an action by a fiduciary for recovery of amounts on behalf of the plan enforcing terms of the plan that provide a right of recovery by reimbursement or subrogation with respect to benefits provided to or for a participant or beneficiary." Pension Protection Act of 2006, H.R. 4, 109th Cong. § 307 (2006). The Senate version of the Act did not contain a similar provision. Pension Benefits Protection Act of 2005, S. 1304, 109th Cong. (2005).

[93] 29 U.S.C. § 1132(a) (2006); Pension Protection Act of 2006, Pub. L. No. 109-280, § 1, 120 Stat. 780, 780 (2006).

[94] Capria-Ryan *ex rel.* Ryan v. Fed. Express Corp., 78 F.3d 123, 127 (3d Cir. 1996).

[95] *See* Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 359, 369 (2006) (permitting an insurer to bring a subrogation type action against a beneficiary by asserting relief under § 1132(a)(3)).

[96] § 1132(a)(3)(B); *see also* Maher & Pathak, *supra* note 35, at 79 (quoting and discussing the relevant ERISA provision permitting subrogation).

[97] *See* BUCKLEY, *supra* note 4, at 18:6 (enumerating these and other forms of equitable relief and providing illustrative cases that granted such relief).

right to reimbursement from the beneficiary's tort recovery.[98] When such clauses exist, courts will enforce them as written as long as they also satisfy § 1132(a).[99] Generally, when plans include subrogation provisions, the insurer must be reimbursed for benefits already paid to the beneficiary once the beneficiary receives payment from third parties.[100]

3. Seeking Relief. ERISA explicitly enumerates certain available civil remedies.[101] Some courts permit an insurer to seek a portion of the funds from a tort settlement paid to the beneficiary to reimburse the amount that the insurer, acting as a fiduciary, previously paid in benefits.[102] First, the insurer must seek equitable relief under the appropriate civil enforcement provision, § 1132(a)(3)(B), with the purpose of enforcing a plan subrogation provision.[103] Although courts may dispute what constitutes "appropriate equitable relief," they have generally held that § 1132 does not permit recovery of consequential or punitive damages.[104]

---

[98] *See* § 1132(a)(3) (providing civil enforcement for acts that violate "the terms of the plan"); Nyeste, *supra* note 91, at 245 (stating the requirement that "the policy must have an express provision allowing the insurer to subrogate" and adding that such a requirement "must be in writing").

[99] *See, e.g.*, Janssen v. Minneapolis Auto Dealers Benefit Fund, 447 F.3d 1109, 1114–15 (8th Cir. 2006) (applying the principle that an insurer's right to subrogate is limited to situations permitted by the plan's subrogation clause); *Capria-Ryan*, 78 F.3d at 127–28 (holding that the plan did not conflict with ERISA policies and enforcing the plan subrogation provision as written).

[100] Martin, *supra* note 49, at 45.

[101] *See* 29 U.S.C. § 1132(a)–(c), (g), (i), (l), (m) (enumerating available remedies); *see also* Brooks Magratten, *Lienholder Rights Under ERISA or Why You Might Not Pay Blue Cross*, R.I.B.J. Mar./Apr. 2007, at 15, 15 ("The remedies recognized by ERISA are generally those explicitly provided by statute . . . . Because that statute does not address liens specifically, lienholders look to a provision authorizing equitable relief generally: [29 U.S.C. § 1132(a)].").

[102] *See* discussion *supra* Part II.C.*2*.

[103] *See* § 1132(a)(3)(B) (applying to the enforcement of plan terms and impliedly requiring a plan term relevant to the fiduciary's right to equitable relief).

[104] *See* Varity Corp. v. Howe, 516 U.S. 489, 509–10 (1996) (explaining that a plaintiff in another case "disavowed reliance on the third subsection perhaps because she was seeking compensatory and punitive damages and [§ 1132(a)'s] subsection (3) authorizes only 'equitable' relief" (citations omitted)); Mertens v. Hewitt Assocs., 508 U.S. 248, 255, 256–58, 258 n.8 (1992) (determining that equitable relief under § 1132(a)(3) does not include compensatory and punitive damages); Bishop v. Osborn Transp., Inc., 838 F.2d 1173, 1174 (11th Cir. 1988) ("The restriction of section 1132(a)(3)(B) to equitable relief shows Congress did not intend the recovery of punitive damages under section 1132(a). . . . [T]he Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have all held that section 1132(a)(3) does

The Supreme Court has consistently hesitated to alter ERISA's statutory civil enforcement scheme and has refused to enlarge the scope of available remedies enumerated in the statute.[105] The Court noted in *Massachusetts Mutual Life Insurance Co. v. Russell* that "the six carefully integrated civil enforcement provisions found in [§ 1132] provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."[106] The Court sought to clarify the methods by which fiduciaries can seek equitable remedies through reimbursement and subrogation in *Sereboff v. Mid Atlantic Medical Services, Inc.*[107] and other decisions.

D. *SEREBOFF V. MID ATLANTIC*

1. Cases Paving the Way for Sereboff. The most significant cases bearing on ERISA's civil enforcement mechanisms and the relief under § 1132(a)(3) prior to *Sereboff*[108] are *Mertens v. Hewitt Associates*[109] and *Great-West Life & Annuity Insurance Co. v. Knudson.*[110] In both cases the Court adhered to Congress's limitation on available ERISA relief to that which is "equitable" in nature.[111] The Court also distinguished equitable and legal remedies by relying on standards that existed during the time of the divided bench.[112]

In *Mertens*, the Supreme Court addressed "whether ERISA authorizes suits for money damages against nonfiduciaries who

---

not authorize the recovery of punitive or extra-contractual damages. The citations to cases so holding are listed in *Varhola v. Doe*, 820 F.2d 809[, 817] (6th Cir. 1987)."); *see also* JAMES F. JORDEN, WALDEMAR J. PFLEPSEN, JR. & STEPHEN H. GOLDBERG, HANDBOOK ON ERISA LITIGATION § 4.04[D][2] (Supp. 1994) (explaining that after Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985), denied punitive damages under § 1132(a)(2), "most courts have held that consequential and punitive damages are not available under [§ 1132(a)(3)] as 'other appropriate equitable relief' ").

105 *See, e.g.*, *Mertens*, 508 U.S. at 254 (upholding Congress's intent by not creating additional remedies beyond those statutorily specified).

106 473 U.S. 134, 146 (1985).

107 547 U.S. 356 (2006) (unanimous decision).

108 *Id.* at 358.

109 508 U.S. 248, 249 (1993) (5–4 decision).

110 534 U.S. 204, 221 (2002) (5–4 decision).

111 *Id.* at 218; *Mertens*, 508 U.S. at 258.

112 *Knudson*, 534 U.S. at 212–18; *Mertens*, 508 U.S. at 255–59.

knowingly participate in a fiduciary's breach of fiduciary duty."[113] The Court held that under § 1132(a)(3), no such suit can be maintained against a nonfiduciary.[114] The Court interpreted the statute as providing "whatever relief a court of equity is empowered to provide," and stated in dicta that "categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)" qualify as equitable relief.[115] In construing the statute this way, the Court found that Congress employed the term "equitable" to distinguish available relief from general legal relief.[116]

The Court next decided *Knudson* and addressed whether the same subsection, § 1132(a)(3), authorized an action to enforce a plan reimbursement provision.[117] The plan at issue included a reimbursement provision requiring a "beneficiary [who] recovers from a third party . . . to reimburse the Plan" or risk liability under a lien provided for by the plan.[118] The Court held that the form of restitution sought by Great-West under § 1132(a)(3) was not "equitable" and, thus, unavailable under ERISA.[119]

The Court reached this decision because Great-West sought proceeds retained in trust accounts and no longer in the beneficiary's possession.[120] The Court indicated that a beneficiary must possess the claimed funds for an insurer's assertion of equitable relief to succeed.[121] The Court stated that restitution "in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession," would qualify as restitution in equity.[122]

---

[113] 508 U.S. at 251.

[114] *Id.* at 253–55, 262–63.

[115] *Id.* at 256.

[116] *Id.* at 258–59.

[117] 534 U.S. at 206.

[118] *Id.* at 207.

[119] *Id.* at 221.

[120] *Id.* at 214.

[121] *See id.* ("[F]or restitution to lie in equity, the action generally must seek . . . to restore to the plaintiff particular funds or property in the defendant's possession.").

[122] *Id.* at 213.

2. Sereboff: The Case and the Outcome. After the Sereboffs' tort recovery from an automobile accident, Mid Atlantic sued the Sereboffs pursuant to § 1132(a)(3) for reimbursement of the benefits paid on behalf of the Sereboffs.[123] Mid Atlantic specifically requested "a temporary restraining order and preliminary injunction requiring the [Sereboffs] to retain and set aside at least [the amount of benefits paid] from the proceeds."[124] The Sereboffs set aside this amount in an account pending resolution of the case by the district court.[125]

The Sereboffs received these benefits from Mid Atlantic under an ERISA-covered health insurance plan "contain[ing] an 'Acts of Third Parties' provision."[126] The provision permitted the fiduciary to recover payments made by the insurer after a third party pays for causing illness or injury to the beneficiary.[127] Applying this provision, the district court ordered the Sereboffs to reimburse Mid Atlantic in the amount of the benefits paid on their behalf plus interest.[128]

The Fourth Circuit affirmed the district court's reimbursement ruling,[129] noting that its determination that the "reimbursement proceeding lies in equity" was in line with the Fifth, Seventh, and Tenth Circuits, but in conflict with the Sixth and Ninth Circuits.[130] The Fourth Circuit's finding aligned with the Fifth, Seventh, and Tenth Circuit's determinations that an assertion of equitable relief exists "if the plan is seeking to recover funds that are specifically identifiable, belong in good conscience to the fiduciary, and are within the possession and control of the beneficiary."[131] In contrast, the Sixth and Ninth Circuits held that a fiduciary's subrogation or reimbursement assertion made after a plan

---

[123] Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 360 (2006). For additional facts of the case, see *supra* notes 6–16 and accompanying text.

[124] *Sereboff*, 547 U.S. at 360.

[125] *Id.*

[126] *Id.* at 359.

[127] Mid Atl. Med. Servs., Inc. v. Sereboff, 303 F. Supp. 2d 691, 697–98 (D. Md. 2004), *aff'd in relevant part*, 407 F.3d 212 (4th Cir. 2005), *aff'd*, 547 U.S. 356.

[128] *Id.* at 701.

[129] *Sereboff*, 407 F.3d at 222, *aff'd* 547 U.S. 356.

[130] *Id.* at 219 & n.7.

[131] *Id.* at 219 (citing Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard, 393 F.3d 1119, 1122 (10th Cir. 2004)).

beneficiary received money from a third party always constitutes a legal remedy.[132] The Supreme Court granted certiorari to resolve this division among the circuits.[133]

In *Sereboff*, the Supreme Court affirmed the Fourth Circuit's decision finding Mid Atlantic appropriately sought "equitable relief" under § 1132(a)(3).[134] In doing so, the Court analyzed equitable relief as it existed at the time of the divided bench as it had done in *Mertens* and *Knudson*.[135] The Court distinguished *Knudson* by explaining the impediment to recovery in that case, that the beneficiary no longer possessed the funds, was not present in *Sereboff* because the Sereboffs "possess[ed] and control[led]" the funds sought by Mid Atlantic.[136]

The *Sereboff* Court noted that ERISA's equitable remedies function "to enforce plan terms."[137] The Court affirmatively stated that "case law from the days of the divided bench confirms that Mid Atlantic's claim is equitable"[138] because Mid Atlantic asserted its right to relief by means of a constructive trust or equitable lien on a specific fund.[139] In sum, *Sereboff* set forth a standard that the basis for relief must be equitable based on case law under the divided bench, and relief must be sought from particular identifiable funds in a defendant's possession.[140]

E. THE AFTERMATH: APPLYING THE DIVIDED BENCH STANDARD

1. Relevant Again: Equity and the Divided Bench. Many states' constitutions during the 1700s and 1800s created separate courts of equity and courts of law resembling the British courts at that

---

[132] *Id.* at 219 n.7.

[133] *Sereboff*, 547 U.S. at 361.

[134] *Id.* at 369. The Court did not recognize a traditional subrogation right, but rather concluded that the fiduciary sought an equitable remedy, which is more akin to "modern subrogation by contract." Maher & Pathak, *supra* note 35, at 81.

[135] *Sereboff*, 547 U.S. at 361–68.

[136] *Id.* at 361–63.

[137] *Id.* at 363 (emphasis omitted).

[138] *Id. See also supra* note 28.

[139] *Sereboff*, 547 U.S. at 363. The Court found this significant because a recovery sought against the Sereboffs' assets in general and instead of a specific fund would have been in the nature of a contract action at law, not equity. *Id.*

[140] *Id.* at 361–68.

time.[141] Courts of equity dealt with specifically sought remedies, including but not limited to, injunctions, restitution,[142] equitable liens, restraining orders, subrogation, and prayers to annul sales of real property.[143] In equity, the judge has the power "to order *preventive* measures—and under some circumstances even *remedial* ones—usually in the form of a writ, such as an *injunction*, or restraining order, designed to afford a remedy not otherwise obtainable, and traditionally given upon a showing of peril."[144] Such enforcement is highly discretionary because equitable remedies were traditionally a series of precedents established by courts.[145]

The Court in *Sereboff* revitalized the importance of the law versus equity dichotomy. The Court stated that prior jurisprudence authorized fiduciaries to seek subrogation or reimbursement only through equitable relief, which the Court defined as relief "*typically* available in equity."[146] In evaluating the *Sereboff* case, the Court declared that a fiduciary must establish its claim as equitable both for the basis for the claim and the relief sought.[147] Case law from the divided bench will confirm whether the claim is equitable.[148] Accordingly, in determining

---

[141] *See* GEO. TUCKER BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY 21–24 (5th ed. 1893) (discussing the post-colonization adoption of separate courts of equity and chancery by the American states and some states' later abolition of the divided courts). Federal courts were never divided into two separate courts because the Constitution granted the federal judiciary jurisdiction over both cases of law and equity. U.S. CONST. art. III, § 2; *see also* HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 13 (6th ed. 1993) ("The United States of America never had *separate* courts of equity on the federal level. Yet several states retain such separate courts. . . . In still others, no separate equity courts exist at all . . . ."); *supra* note 21 (discussing the "divided bench").

[142] Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).

[143] *See* BISPHAM, *supra* note 141, at 32 (explaining the subdivisions comprising equitable jurisdiction).

[144] ABRAHAM, *supra* note 141, at 13.

[145] *Id.* at 12–13.

[146] Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 361 (2006) (quoting *Mertens*, 508 U.S. at 255–56) (internal quotation mark omitted).

[147] *Id.* at 361–68.

[148] *See id.* at 363. The *Sereboff* Court granted certiorari to resolve the dispute between the Sixth Circuit's case, *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004), and the Ninth Circuit case, *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002). *See Sereboff*, 547 U.S. at 361 & n.1 (acknowledging the division among the circuits). By holding contrary

whether a fiduciary asserts equitable relief, the Court directed lower courts to look to the days of the divided bench and the equitable relief available.

Many of the circuit courts have not yet addressed the implications of *Sereboff* with respect to ERISA subrogation.[149] Some of those courts, however, have addressed *Sereboff* in the context of suits for reimbursement of overpaid benefits.[150] Some

---

to those cases, the Supreme Court decision in *Sereboff* abrogated *Qualchoice* and overruled *Arce*. *See* Gilcrest v. Unum Life Ins. Co. of Am., No. 05 CV 923, 2006 WL 1582437, at *3–4 (S.D. Ohio June 6, 2006) (noting that *Sereboff* applies and *Qualchoice* is "essentially overrul[ed]"); Robert D. Anderle & S. Russell Headrick, *Sixth Circuit*, *in* ERISA SURVEY OF FEDERAL CIRCUITS, *supra*, at 209, 235 ("The Supreme Court expressly abrogated *Qualchoice* in *Sereboff v. Mid Atlantic Medical Services, Inc.*" (citation omitted)); Frederic Esrailian et al., *Ninth Circuit*, *in* ERISA SURVEY OF FEDERAL CIRCUITS, *supra*, at 285, 325–26 (stating *Sereboff* "impliedly overruled" the Ninth Circuit's position as represented in *Arce*).

[149] The Fourth Circuit, which decided *Sereboff*, has not heard another fiduciary subrogation case, but several district courts in the Fourth Circuit have heard such cases. Bryan D. Bolton et al., *Fourth Circuit*, *in* ERISA SURVEY OF FEDERAL CIRCUITS 109, 171 (Brooks Magratten ed., 2010). Further, no Second Circuit cases have addressed *Sereboff* in the subrogation context although district courts in the Second Circuit have "granted or denied plan fiduciaries' claims for reimbursement." Vaughan Finn et al., *Second Circuit*, *in* ERISA SURVEY OF FEDERAL CIRCUITS, *supra*, at 39, 70. The First Circuit has not addressed *Sereboff*, or even *Knudson*, regarding ERISA subrogation. Kristina H. Allaire et al., *First Circuit*, *in* ERISA SURVEY OF FEDERAL CIRCUITS, *supra*, at 1, 36. Although the Third Circuit has yet to address *Sereboff*, lower courts within the circuit have permitted insurer's to adjudicate reimbursement actions. Joshua Bachrach et al., *Third Circuit*, *in* ERISA SURVEY OF FEDERAL CIRCUITS, *supra*, at 73, 106. Neither the Seventh nor the Tenth Circuits have addressed fiduciary subrogation since *Sereboff*. *See* Michael Brown et al., *Seventh Circuit*, *in* ERISA SURVEY OF FEDERAL CIRCUITS, *supra*, at 237, 256 (discussing only cases pre-*Sereboff*); Robert M. Ferm et al., *Tenth Circuit*, *in* ERISA SURVEY OF FEDERAL CIRCUITS, *supra*, at 329, 357 (discussing a case applying *Knudson* but preceding *Sereboff*).

[150] *See, e.g.*, Gutta v. Standard Select Trust Ins. Plans, 530 F.3d 614, 616, 621 (7th Cir. 2008) (finding that the plan acting as a fiduciary sought an equitable lien by agreement between the fiduciary and the beneficiary where the plan filed a counterclaim for benefits paid exceeding the amount required by the policy); Dillard's Inc. v. Liberty Life Assurance Co. of Boston, 456 F.3d 894, 901 (8th Cir. 2006) (holding that a suit for reimbursement of overpayment of benefits may meet the "equitable" requirements of *Sereboff*); Holmstrom v. Metro. Life Ins., Co., 615 F. Supp. 2d 722, 752 (N.D. Ill. 2009) (finding that an action for the reimbursement of overpaid benefits could proceed based on *Sereboff*); Unum Life Ins. Co. of Am. v. Harper, No. 5:07-CV-317, 2008 WL 1990338, at *2–3 (M.D. Ga. May 2, 2008) (concluding that *Sereboff* entitles the fiduciary to restitution of overpayments, citing other district courts permitting the same).

circuits have now addressed equitable relief in subrogation suits after *Sereboff*.[151]

2. Scholars Criticize the Sereboff *Standard.* Scholars generally critique *Sereboff*'s interpretation of § 1132(a)(3) by arguing that the Supreme Court has set forth and applied "a very narrow view of 'equitable relief' based on historical equity practice that was not intended by ERISA's drafters."[152] Critics assert that this narrow view "hamper[s] plan reimbursement efforts" and compromises ERISA's primary purpose of protecting plan beneficiaries and participants.[153] One critic posits that the law–equity paradigm creates unfair and unjust results.[154] Likewise, certain critics contend that the Court created an unworkable standard.[155] In effect, these critics argue that an "equitable remedy" as clarified by

---

[151] For a detailed analysis of significant circuit decisions, see discussion *infra* Part III.D.*1*. The Sixth Circuit has applied *Sereboff* to find plans entitled to subrogation under § 1132(a)(3). *See, e.g.*, Longaberger Co. v. Kolt, 586 F.3d 459, 462, 469 (6th Cir. 2009) (holding that "under *Sereboff*... the Plan sought and was awarded 'appropriate equitable relief' " in the form of equitable restitution). The Ninth Circuit addressed *Sereboff* in an unpublished opinion. *See* AC Houston Lumber Co. Emp. Health Plan v. Berg, No. 10-15170, 2010 WL 5439786 (9th Cir. Dec. 29, 2010) (holding that an attorney's lien had priority over the plan's lien because *Sereboff* did not overrule a prior case that held "an ERISA plan's lien cannot be enforced against an attorney who did not sign the reimbursement agreement or expressly honor the plan's lien"). The Circuit has not otherwise readdressed the issue after *Sereboff*. Esrailian, *supra*, at 326.

[152] Nyeste, *supra* note 91, at 248; *see also* 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, 1320 (2003) (criticizing the Supreme Court's deference to courts of equity to provide meaning to ERISA's "equitable relief" in cases prior to *Sereboff* and arguing that "equitable relief" under ERISA includes money damages).

[153] *See* Langbein, *supra* note 152, at 1320 (discussing scholars' critiques of *Knudson* and *Sereboff*).

[154] *See* Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(A)(3)*, 39 J. MARSHALL L. REV. 827, 856 (2006) (stating that the law–equity distinction "in application frequently offends judicial notions of fairness and justice").

[155] *See, e.g.*, Langbein, *supra* note 152, at 1321 (describing "the three Supreme Court decisions" that preceded *Sereboff* as "contort[ing] ERISA remedy law"); Holly Ludwig, Note, *Restoring Sanity to Subrogation After* Sereboff, 9 NEV. L.J. 431, 431, 448 (2009) (arguing that *Sereboff* poses devastating consequences for ERISA subrogation and advocating for alternative equitable mechanisms); Robert C. Sheres, *The Need for an Equitable Revolution to "Appropriately" Remedy Wrongfully Denied Benefits Under ERISA*, 34 NOVA L. REV. 679, 704 (2010) (arguing that the method for relief articulated in *Sereboff* is difficult to "take advantage of").

Sereboff denies both beneficiaries and fiduciaries much needed remedies under ERISA.[156]

These criticisms fail under scrutiny. The Supreme Court's standard should prevail and the Court need not take further action. The Court was precise in its directive setting forth the proper grounds for determining "equitable relief" under § 1132(a)(3): look to the "case law from the days of the divided bench"[157] and "rely on a 'familiar rul[e] of equity.' "[158]

III. ANALYSIS

The Court clarified the ability to assert "equitable relief" and set forth a manageable, logical, and predictable standard in *Sereboff*. The resulting law–equity standard from *Sereboff* has produced much dissent among scholars,[159] but such criticism overlooks the pragmatic concerns behind the standard and the equitable result it achieves. This Note seeks to rebut the critics and explain the justified basis for the Court's holding in *Sereboff*.

The critics cannot escape the paramount fact that the Supreme Court clearly set forth the grounds for determining "equitable relief" based on case law from courts of equity.[160] Yet, scholars argue in direct contravention to the Court and its jurisprudence by seeking the abrogation of the strict law–equity paradigm used to determine equitable relief under § 1132(a)(3).[161] Critics aim to rewrite *Sereboff* and remove all references to the divided court and the law–equity distinction.[162]

---

[156] *See* Medill, *supra* note 154, at 852–56 (outlining criticism of the law–equity paradigm and the need for a better theory); Nyeste, *supra* note 91, at 248 ("[T]he narrow construction of 'equitable relief' has left participants and beneficiaries with legitimate grievances without any remedy under ERISA . . . .").

[157] Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 363 (2006).

[158] *Id.* at 364 (quoting Barnes v. Alexander, 232 U.S. 117, 121 (1914)).

[159] *See supra* Part II.E.*2*.

[160] *Sereboff*, 547 U.S. at 363–64.

[161] *See* Langbein, *supra* note 152, at 1320–21 (contending that the Court misconstrued Congress's intent by excluding money damages); Medill, *supra* note 154, at 865 (calling on the Court to reevaluate the efficacy of the law–equity paradigm).

[162] For example, one scholar argues this application of "historical equity practice . . . was not intended by ERISA's drafters." Nyeste, *supra* note 91, at 248 (citing Medill, *supra* note 154; Langbein, *supra* note 152); *see also* Ludwig, *supra* note 155, at 431 (arguing that other equitable mechanisms would achieve better results than *Sereboff*).

Criticism that the Court created an unworkable standard by misconstruing the relief sought in *Sereboff* finds no basis in law or fact. The circuit courts that have applied the standard post-*Sereboff* have done so without difficulty and have found it a workable standard.[163] Further, the Court has developed this standard since *Mertens* without violating its jurisprudence, the intention of ERISA's drafters, or ERISA's purpose. The language of the ERISA statute itself, the cases leading up to *Sereboff*, and the equitable results achieved by applying the standard reveal that the *Sereboff* Court was fully justified in employing the divided court standard for determining "equitable relief."

A. 29 U.S.C. § 1132(a)(3) SUPPORTS THE COURT'S STANDARD

The *Sereboff* Court acted within the statutory scope of § 1132 in creating the standard for equitable relief under ERISA. In reaching its holding, the Court recognized the statute's limitation, as it previously acknowledged in *Mertens*, that § 1132(a)(3) does not authorize equitable relief *"at large."*[164] The Court created workable limitations on ERISA's equitable relief to fit within the statute's parameters.[165] These limitations ensure the protections promised by ERISA while permitting enforcement of plan subrogation and reimbursement terms.

1. The Statutory Language Permits the Court's Interpretation of "Equitable Relief." Congress's explicit inclusion of the term "equitable relief" indicates the clear limitation of § 1132(a)(3) to equitable relief, exclusive of legal or monetary relief.[166] The unambiguous wording of the statute requires the suing fiduciary to assert "equitable relief." As shown below, "equitable relief" does not include monetary relief. The Supreme Court explained in *Knudson* that if the drafters intended to include legal relief under § 1132(a)(3), they would not have used the term "equitable":

---

[163] *See* discussion *supra* Part II.E.*2* (addressing courts' applications of equitable relief after *Sereboff*).

[164] Mertens v. Hewitt Assocs., 508 U.S. 248, 253 (1993).

[165] *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 212, 221 (2001) (stating "that Congress has adopted" the parameters of relief according to § 1132(a)(3)).

[166] *See Mertens*, 508 U.S. at 258–59 (acknowledging "the distinction Congress drew between . . . 'equitable' and 'legal' relief [throughout ERISA]").

> It is easy to disparage the law–equity dichotomy as "an ancient classification" and an "obsolete distinctio[n]." Like it or not, however, that classification and distinction has been specified by the statute; and there is no way to give the specification meaning—indeed, there is no way to render the unmistakable limitation of the statue a limitation *at all*—except by adverting to the differences between law and equity to which the statute refers.... Congress felt comfortable referring to equitable relief in this statute—as it has in many others—precisely because the basic contours of the term are well known.... What *will* introduce a high degree of confusion into congressional use (and lawyers' understanding) of the statutory term "equity" is the rolling revision of its content contemplated by the dissents.
>
> ... [I]t *is* our job to avoid rendering what Congress has plainly done (here, limit the available relief) devoid of reason and effect. If... Congress meant to rule out nothing more than "compensatory and punitive damages," it could simply have said that....
>
> Respecting Congress's choice to limit the relief available under [§ 1132(a)(3)] to "equitable relief" requires us to recognize the difference between legal and equitable forms of restitution.[167]

Scholarly argument to the contrary, that " 'equitable relief ' should be correctly interpreted to include money damages,"[168] does not pass muster as it directly contravenes the statutory language which provides for equitable but not legal relief.[169] Further, such an argument proves self-defeating when it cites Justice Scalia's

---

[167] *Knudson*, 534 U.S. at 216–18 (footnote omitted) (citations omitted).

[168] Langbein, *supra* note 152, at 1320; Sheres, *supra* note 155, at 703–04. Langbein raised this argument prior to *Sereboff*, but its prevalence throughout discussions of post-*Sereboff* scholarly work renders it pertinent to this Note. *See, e.g.*, Medill, *supra* note 154, at 830–31, 833, 853–55 (discussing and in part relying on Langbein's theory in light of recent legal developments regarding equitable relief); Nyeste, *supra* note 91, at 248 (citing to Langbein's article).

[169] 29 U.S.C. § 1132(a)(3) (2006).

opinion for the *Mertens* Court which concluded that "equitable" "refer[red] to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[170] Compensatory damages constitute legal relief, not "equitable relief" specified in § 1132(a)(3), as Justice Scalia explained had been excluded by the wording of the statute. This argument also conflates the monetary measurement of equitable relief with the equitable relief itself.[171]

Instead of conflating monetary measurement with relief, the Court in *Sereboff* focused on the return of benefits paid as the equitable relief in the form of restitution by an equitable lien or constructive trust.[172] The Court quantified these benefits in terms of a set monetary amount.[173] Effectively, the beneficiary acts as a trustee of the plan's money by holding the money in the form of benefits until the plan requires the beneficiary to return all or part of the money to the plan based on receipt of settlement funds from a third party.[174] Therefore, the relief sought by the fiduciary is equitable even though the Court quantified the relief monetarily.

The Court appropriately interpreted the plain wording of the statute by defining "equitable relief" as equity available under the divided court.[175] The statute specifies only "appropriate equitable relief" rather than specific categories of equitable relief, such as constructive trusts and equitable liens.[176] In determining the

---

[170] Langbein, *supra* note 152, at 1321 (citing *Mertens*, 508 U.S. at 256).

[171] *See id.* at 1353 ("[E]quity's ancient practice of awarding money damages to remedy breach of trust and other equitable causes of action abides.").

[172] Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 364 (2006).

[173] The Court held that Mid Atlantic could "collect for the medical bills it had paid on the Sereboffs' behalf." *Id.*

[174] For further explication of this analogy, see Rhodia, Inc. v. Bollinger, No. 07-2677, 2008 WL 800502, at *4 (D.N.J. Mar. 20, 2008) ("[When a] beneficiary . . . recovers money for medical benefits representing money that [the fiduciary] spent on the beneficiary's medical care, that money would be [the fiduciary's] money, which the beneficiary merely holds as a trustee for [the fiduciary] and which it must transfer to [the fiduciary] as soon as the beneficiary receives those funds, pursuant to the Plan.").

[175] *Sereboff*, 547 U.S. at 363.

[176] 29 U.S.C. § 1132(a)(3) (2006). Pre-*Sereboff*, Professor Langbein argued that if Congress intended only constructive trusts to be covered by the term "equitable relief," then Congress would have so specified in the statute. Langbein, *supra* note 152, at 1360. After *Knudson* and *Sereboff*, the term "equitable relief" clearly covers equitable liens by agreement. *Sereboff*, 547 U.S. at 358; Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 212, 213–14 (2001).

specific relief that parties could properly seek under § 1132(a)(3), the Supreme Court exercised its authority to interpret the term "equitable relief" as implicitly delegated to it by Congress.[177] Congress's refusal to alter or codify a more specific subrogation right after *Sereboff* confirmed the Court's right to interpret the statutory term "equitable relief."[178] The Court relied on jurisprudence from the days of the divided bench when equitable remedies were more distinct from those at law to interpret the statute.[179]

2. Use of the Term "Equitable Relief" Harkens Back to the Days of the Divided Bench. The common legal definition of equitable relief, taking the statute at face value, does not contradict the Court's reference to the days of the courts of equity under the divided bench. "Equitable relief" commonly refers to a nonmonetary remedy, "such as an injunction or specific performance, obtained when available legal remedies, [usually] monetary damages, cannot adequately redress the injury."[180] Even applying common English vernacular or nonlegal definitions to interpret the statute leads to the same result and explains the Court's decision to refer to the courts of equity to determine what relief can properly be asserted under the statute.[181]

B. CASES LEADING TO *SEREBOFF* PAVED THE WAY TO EMPLOYING THE DIVIDED COURT STANDARD

The Supreme Court's directive that "equitable relief" constitutes relief typically available in courts of equity at the time of the divided court should not have come as a surprise in *Sereboff*. The *Sereboff* Court recognized that "[t]his is not the first time we

---

[177] *See* Medill, *supra* note 154, at 880 ("[W]hat Congress did in drafting [§ 1132(a)(3)] was effectively to delegate this task to the federal judiciary."). Regarding the Court's interpretation of this statute, Justice Scalia previously stated in *Knudson* that it was "not [the Supreme Court's] job to find reasons for what Congress has plainly done." *Knudson*, 534 U.S. at 217.

[178] *See supra* note 92 and accompanying text (discussing the Pension Protection Act of 2006).

[179] *Sereboff*, 547 U.S. at 363.

[180] BLACK'S LAW DICTIONARY 1408 (9th ed. 2009).

[181] *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 423 (11th ed. 2003) (defining "equitable" as "existing or valid in equity as distinguished from law."); *see also id.* (defining "equity" as "a right, claim, or interest existing or valid in equity").

have had occasion to clarify the scope of the remedial power conferred on district courts by § [1132(a)(3)(B)]."[182] The Supreme Court's case law evidences a direct path to the divided court equity standard set forth in *Sereboff*. *Sereboff* represents a culmination of the Court's prior efforts to establish a workable and clear interpretation of what constitutes "equitable relief" that a fiduciary must assert in an ERISA subrogation action.

The Court began to consult the remedies available in courts of equity in the days of the divided bench to determine what qualified as equitable relief under § 1132(a)(3) in *Mertens v. Hewitt Associates*.[183] The *Mertens* Court refused to "revise the text of the statute" and "render the modifier ['equitable'] superfluous" by implementing no limitation on the relief that could be sought.[184] This refusal to permit just any relief demonstrates the Court's determination that Congress intended narrow statutory relief.[185] The Court further established that the proper relief was that "*typically* available in equity."[186] The Court also stated that "[t]he term 'equitable relief' can assuredly mean . . . whatever relief a court of equity is empowered to provide in the particular case at issue."[187] The cases that followed *Mertens* further limited this articulation.[188] The distinction in *Mertens* between monetary relief, "the classic form of *legal* relief," and relief "typically available in equity" supports the law–equity distinction made in *Sereboff*.[189]

The Court reinforced and further clarified the divided bench standard in *Great-West Life & Annuity Insurance Co. v. Knudson*.[190] In this case, the Court more precisely resolved that "equitable relief" does not include all restitution available in equity, but specifically equitable restitution in the form of a

---

[182] *Sereboff*, 547 U.S. at 361.

[183] 508 U.S. 248, 256–57 (1993).

[184] *Id.* at 258–59. In a footnote, the Court stated that, for the purposes of the statute, " 'Equitable' relief must mean *something* less than *all* relief." *Id.* at 258 n.8.

[185] *Id.* at 253–54.

[186] *Id.* at 256.

[187] *Id.*

[188] *See supra* Part II.D.*1–2*, II.E.*2*.

[189] PETER J. WIEDENBECK, ERISA IN THE COURTS 205 (2008) (quoting *Mertens*, 508 U.S. at 255–56).

[190] 534 U.S. 204, 214, 217–18 (2002).

constructive trust or an equitable lien.[191] The Court also introduced the requirement that the equitable relief be sought against a specific fund in the defendant's possession.[192] Moreover, *Knudson* concluded that an action for restitution does not "lie in equity" if the action seeks to impose personal liability on the defendant.[193]

These holdings, while misapplied and unclear to lower courts pre-*Sereboff*,[194] formed a significant portion of *Sereboff*'s foundation. *Knudson*'s holding that the petitioners did not seek equitable relief confused the circuits regarding whether subrogation actions could assert legal relief.[195] Fortunately, *Sereboff* did not possess the same impediment and the Court was able to find equitable relief.[196]

Sereboff affirmed and clarified the Court's earlier reliance on the equitable relief available under the divided bench as the basis for the relief fiduciaries must assert in ERISA subrogation suits brought under § 1132(a)(3).[197] By permitting the fiduciary to subrogate, *Sereboff* eliminated the misconception in some courts that subrogation sought only legal relief.[198] The holdings in the Supreme Court cases preceding *Sereboff* confirm that *Sereboff*'s equity–law distinction and divided court standard are not unfounded pronouncements, but rather constitute products of well-developed judicial reasoning and understanding. The result is an interpretation of Congress's limitation in § 1132(a)(3) of "appropriate equitable relief" that takes into consideration both

---

[191] *Id.* at 213–14.

[192] *Id.* at 213.

[193] *Id.* at 214.

[194] *See* Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 361 n.1 (2006) (citing the division among circuit courts regarding the application of equitable relief recovery under ERISA).

[195] *Id. See* Moore v. CapitalCare, Inc., 461 F.3d 1, 7 n.7 (D.C. Cir. 2006) ("After *Knudson*, the circuits split over whether a fiduciary could enforce a subrogation provision under [§ 1132(a)(3)]."); *see also supra* notes 129–33 (describing circuit confusion prior to *Sereboff*).

[196] *Sereboff*, 547 U.S. at 362.

[197] *See Moore*, 461 F.3d at 6 n.7 ("The United States Supreme Court has thrice interpreted the meaning of 'appropriate equitable relief' as used in [§ 1132(a)(3)] . . . .").

[198] *See id.* at 7 n.7 ("The Sixth and Ninth Circuits . . . found that any attempt by an insurer to enforce a subrogation clause was a request for reimbursement which constituted legal relief." (citations omitted)).

the need for plan enforcement and the need to protect beneficiaries.

C. A NARROWLY DEFINED STANDARD OF "EQUITABLE RELIEF" BENEFITS ALL PARTIES

The Court narrowly defined "equitable relief" by limiting it to relief available under the divided bench, specifically constructive trusts and equitable liens by agreement.[199] The Court applied its standard by looking to cases of equity for verification that Mid Atlantic had asserted proper relief under § 1132(a)(3).[200] This definition does not serve as a death knell for recovery as some critics claim.[201] Critics assert that this constricted view "hamper[s] plan reimbursement efforts [and] undermine[s] ERISA's main purpose of . . . protect[ing] the interests of participants and beneficiaries."[202] Instead, this narrow definition of "equitable relief" furthers the purpose of ERISA by maintaining the protection of beneficiaries and plan participants.[203] The definition of an "equitable remedy" after *Sereboff* does not deny but rather safeguards and streamlines the attainment of remedies for beneficiaries and fiduciaries by limiting the bases by which fiduciaries can seek subrogation.

Moreover, the Court created a workable standard by including only historically equitable relief, such as constructive liens and equitable agreements, as proper grounds for an insurer to seek ERISA subrogation.[204] The Court further qualified available "equitable relief" by requiring that the insurer seek funds specifically identifiable and in the beneficiary's possession.[205]

The Court could have created a much broader standard of "equitable relief," which would have further harmed beneficiaries' rights to benefits and recovery for their injuries by allowing

---

[199] *Sereboff*, 547 U.S. at 362–64, 368.

[200] *Id.* at 361–69.

[201] *See* Nyeste, *supra* note 91, at 248 (stating that the narrow definition of "equitable relief" leaves beneficiaries often "without any remedy").

[202] *Id.*

[203] *See* Boggs v. Boggs, 520 U.S. 833, 845 (1997) ("The principal object of [ERISA] is to protect plan participants and beneficiaries."); *see also* discussion *supra* Part II.A.*1*.

[204] *Sereboff*, 547 U.S. at 362–64.

[205] *Id.* at 357.

fiduciaries to pursue subrogation claims. Alternatively, the Court could have denied fiduciary rights and concurred with the Sixth and Ninth Circuits that reimbursement by a fiduciary under § 1132(a)(3) solely constitutes legal relief,[206] which the statute prohibits. Instead, upholding the stated goal of § 1132(a)(3) to enforce plan terms, the Court wisely chose to narrowly construe "equitable relief" successfully balancing fiduciary and beneficiary interests.

1. Fiduciaries Benefit from the Carefully Construed Right to Seek Equitable Relief. In furtherance of fiduciaries' interests, "*Sereboff* will have broad effect [sic] because it gives plan drafters a bright-line test and the language that they have been seeking to make plan terms enforceable."[207] The narrow limitations of properly asserted "equitable relief" act as exceptions to the overarching concern for protecting beneficiaries and permit an equitable outcome for fiduciaries.

When a beneficiary accepts an ERISA benefit plan, the beneficiary will be and expects to be bound by the terms of the plan, including any subrogation provisions.[208] Enforcement of plan terms follows from one of the "great concern[s] of the ERISA statute: to ensure the integrity of written plans, and to enforce them as written."[209] ERISA protects "contractually defined benefits."[210] The *Sereboff* standard permits this protection by allowing a fiduciary to assert its contractual right to reimbursement when ERISA and the specific plan provision allow.[211] Enforcing plan subrogation provisions even under

---

[206] *See* Moore v. CapitalCare, Inc., 461 F.3d 1, 6 n.7 (D.C. Cir. 2006) (discussing the Sixth and Ninth Circuit's interpretation of ERISA).

[207] Charles M. Cork, III, *Where Do We Stand After* Sereboff?, SIDEBAR (Ass'n of Trial Law. of Am.), Fall 2006, at 3.

[208] *See* Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Shank, 500 F.3d 834, 838 (8th Cir. 2007) (stating that courts will enforce an ERISA plan's plain language).

[209] Northcutt v. Gen. Motors Hourly-Rate Emps. Pension Plan, 467 F.3d 1031, 1038 (7th Cir. 2006) (citing Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680, 691–92 (7th Cir. 2003)).

[210] *Shank*, 500 F.3d at 838–39 (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985)).

[211] Sereboff v. Mid Atl. Med. Servs., 547 U.S. 356, 361 (2006) (quoting § 1132 to explain when a fiduciary may bring a civil action).

Sereboff's constraints enables fiduciaries to maintain workable ERISA plans.[212]

Permitting reimbursement also follows from "the important role that reimbursement of overpaid [or otherwise compensated] plan benefits plays in the continuing viability of plans for all other beneficiaries."[213] Subrogation and reimbursement claims can potentially recover between 1% and 3% of all health care spending under ERISA plans.[214] Additionally, each year health plans recover approximately $1 billion in medical claims after accident and third-party settlements.[215] As previously discussed, *Sereboff* permits "equitable relief" as defined by the divided court to include constructive trusts and equitable liens by agreement.[216] These permitted means of relief provide avenues for fiduciaries to attain relief rightfully due to them while also protecting beneficiaries from unrestricted subrogation.

2. A Narrow Construction of "Equitable Relief" Maintains the Protection of Beneficiaries. Concurrently with the promotion of fiduciary interests, the Court's narrow standard will maintain the limited nature of § 1132(a)(3). This subsection of ERISA permits appropriate equitable relief only to enforce ERISA provisions and the terms of the relevant plan.[217]

Limiting "appropriate equitable relief" to equitable relief under the divided bench effectuates the protection of beneficiaries and plan participants, which is at the heart of ERISA.[218] By employing the equity–law distinction, *Sereboff* assures that fiduciaries cannot seek reimbursement arbitrarily or without restraint. By excluding legal relief as a basis for subrogation under ERISA,[219] Congress and the Court inherently limited a fiduciary's claims for

---

[212] *See Shank*, 500 F.3d at 838 ("Reimbursement and subrogation provisions are crucial to the financial viability of self-funded ERISA plans . . . .").

[213] *Northcutt*, 467 F.3d at 1038.

[214] Vanessa Fuhrmans, *Accident Victims Face Grab for Legal Winnings*, WALL ST. J., Nov. 20, 2007, at A1 (referencing an estimate made by The American Benefits Council and America's Health Insurance Plans, which compromise the health-insurer lobby).

[215] *Id.*

[216] *See supra* note 17 and accompanying text.

[217] 29 U.S.C. § 1132(a)(3) (2006).

[218] Boggs v. Boggs, 520 U.S. 833, 845 (1997) (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983)).

[219] § 1132(a)(3); Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 363, 369 (2006).

reimbursement. Thus, the ERISA drafters successfully protected the benefits due to participants and beneficiaries under ERISA plans by using the term "equitable relief" in § 1132(a)(3) to only provide a limited class of properly pled relief to enforce plan provisions.

Significantly, this limited relief permitted by fiduciaries against beneficiaries under § 1132(a)(3) finds reason in the fact that while ERISA seeks to promote plan beneficiaries' interests, "ERISA does not mandate that employers provide any particular benefits."[220] An ERISA plan can incorporate provisions, such as reimbursement or subrogation provisions, to protect the plan's assets, which include benefits. The narrow *Sereboff* standard effectively balances the plan's right to protect itself and not favor the beneficiary to the detriment of the plan with ERISA's purpose to protect beneficiaries of ERISA plans.

The narrowness of "equitable relief" and the exclusion of legal relief after *Sereboff* protect beneficiaries from personal liability. This exclusion in *Sereboff* reinforced the requirement in *Knudson*, that "for 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."[221] Preventing personal liability ensures that the beneficiary required to reimburse the plan will not be making those payments from his or her own general assets.[222] Restitution seeking to impose personal liability would be legal restitution and would thus, be excluded by the "equitable relief" language of § 1132(a)(3). Such restitution is further excluded by *Knudson*, which stated that "not all relief falling under the rubric of restitution is available in equity."[223]

Narrow construction of "equitable relief" protects beneficiaries more than a complete denial of subrogation rights. Denying fiduciaries any means of subrogation pursuant to ERISA plan contracts would do more harm to beneficiaries than following *Sereboff* or permitting some forms of subrogation under

---

[220] *Shaw*, 463 U.S. at 90–91.

[221] Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 (2002).

[222] *Id.* at 213–14.

[223] *Id.* at 212.

§ 1132(a)(3). Permitting fiduciaries to recover benefits paid on behalf of a beneficiary enables insurers and employers to affordably provide ERISA qualifying plans for employees.[224] Accordingly, following the Court's guidance on ERISA subrogation will help maintain quality coverage for beneficiaries of ERSIA plans. The Supreme Court's articulated standard furthers ERISA's goals of safeguarding beneficiaries' benefits and maintaining ERISA-covered plans by protecting fiduciaries' rights to reimbursement.[225]

D. CONTROVERSY UNNECESSARY

1. The Standard Is Workable. Critics concerns with the functionality of the standard are misplaced. The few lower courts that have taken on the task of applying *Sereboff* have adhered to the standard without difficulty. After *Sereboff*, the Fifth, Eighth, Eleventh, and D.C. Circuits have demonstrated that the equity standard based on relief available in the days of the divided bench is a workable standard.

The Fifth Circuit applied *Sereboff* in *AT&T, Inc. v. Flores* to determine whether the petitioners sought "equitable relief."[226] The court found that the plan's "unambiguous subrogation/reimbursement provision" was equitable because it clearly "entitled" the plan to reimbursement from a tortfeasor's payments to the beneficiary.[227] While this represents a simple understanding of *Sereboff*, the holding adheres to the law–equity standard illustrating the ease of application.

The Eighth Circuit in *Wal-Mart v. Shank* addressed a case factually similar to *Sereboff*.[228] The court easily articulated and followed the *Sereboff* standard:

---

[224] *See* Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 379 (2002) (ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities"); *see also supra* note 4 and accompanying text.

[225] *See* Conkright v. Frommert, 130 S. Ct. 1640, 1649 (2010) (reaffirming that the Court "recognize[s] that ERISA represents a ' "careful balancing" between ensuring fair and prompt enforcement rights under a plan and the encouragement of the creation of such plans' ") (citations omitted); *see also supra* Part II.A.*1*.

[226] 322 F. App'x 391, 393–94 (5th Cir. 2009).

[227] *Id.* at 394.

[228] Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Shank, 500 F.3d 834, 835–36 (8th Cir. 2007). *Shank* involved a car accident that caused an injured

> The Committee's claim meets *Sereboff*'s requirements for equitable restitution: it seeks (1) the specific funds it is owed under the terms of the plan—i.e., the money it paid to cover Shank's medical expenses; (2) from a specifically identifiable fund that is distinct from the Shank's general assets—i.e., the special needs trust; and (3) that is controlled by defendant James Shank, the trustee.[229]

This reiteration of the standard for equitable relief exemplifies the clarity of *Sereboff*'s directive and its workability in lower courts. The Eighth Circuit applied *Sereboff* to the plan's subrogation and reimbursement clause, which required the beneficiary to repay the plan fiduciary "100 percent of the benefits paid by the Plan on [the beneficiary's behalf]" up to the full amount recovered from a third-party judgment or settlement.[230] The court held that the fiduciary's claim constituted "equitable relief."[231]

The Eleventh Circuit also successfully applied *Sereboff*'s definition of "equitable relief" to a post-tort settlement of plan reimbursement claims in *Popowski v. Parrott*.[232] For the first plan, the court held that the fiduciary asserted a proper claim for equitable relief where the plan's subrogation provision created a lien on the third-party recovery and specified the fund from which reimbursement was to be paid and the portion to which the plan was entitled.[233] The first plan specified that the insured "must repay to the Plan the benefits paid on his or behalf *out of* the

---

employee and beneficiary under Wal-Mart's plan to accrue $469,216 in covered medical bills. *Id.* at 835. Shank recovered $700,000 from the tortfeasors, but the trial court placed $417,477 in a special needs trust. *Id.* For a mainstream media report on this case, see Fuhrmans, *supra* note 214, at A1, which discusses Wal-Mart's right to sue for reimbursement and recoup medical expenses paid on behalf of the Shanks and the Shanks' reactions to losing part of their settlement funds.

[229] *Shank*, 500 F.3d at 836 (citations omitted).

[230] *Id.* at 835–39.

[231] *Id.* at 836.

[232] 461 F.3d 1367, 1372–74 (11th Cir. 2006).

[233] *Id.* at 1373. Further, the plan stated that the amount of reimbursement was for all the benefits paid by the plan on behalf of the beneficiary. *Id.*

recovery made from the third party or insurer."[234] The funds under this plan were properly in the beneficiary's possession as they were held in his bank account.[235]

Regarding the second plan, the court concluded that the plan fiduciary's claim "fail[ed] to meet the requirements outlined in *Sereboff* for the assertion of an equitable lien for the purposes of 29 U.S.C. § 1132(a)(3)."[236] The court reasoned that the plan did not "specify that recovery come from any identifiable fund or . . . limit that recovery to any portion [of the fund]."[237] Instead, the plan used a third-party recovery to prompt a reimbursement without limits.[238] The distinct holdings regarding the two plans in *Popowski* clearly indicate that *Sereboff* creates a workable standard by which a court can determine "equitable relief" based on the type of relief sought.

In *Wal-Mart v. Horton*, the Eleventh Circuit also addressed *Sereboff*'s application to a direct suit against a third-party trustee holding settlement funds a tortfeasor paid to a beneficiary.[239] The court concluded that a third party's possession of the funds did not defeat the equitable nature of the claim.[240] The plan sought "equitable restitution of a specifically identifiable fund in possession of a defendant."[241] This second application of *Sereboff* by the Eleventh Circuit demonstrates that the standard produces uniform results.

Although the D.C. Circuit did not have to directly rule on the beneficiary's equitable relief challenge, the court applied *Sereboff* to reach its decision in *Moore v. CapitalCare, Inc.*[242] The plan

---

234 *Id.* (citation omitted) (internal quotation mark omitted).

235 *Id.* at 1373.

236 *Id.* at 1374.

237 *Id.*

238 *Id.* at 1375.

239 Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Horton, 513 F.3d 1223, 1224–25, 1227 (11th Cir. 2008).

240 *Id.* at 1229.

241 *Id.* at 1228.

242 461 F.3d 1, 6–8 (D.C. Cir. 2006) ("[T]he Moores dropped their [§ 1132(a)(3)] challenge to [the fiduciary's] subrogation claim . . . ."). The court's finding primarily relied on principles surrounding the make whole doctrine which is properly addressed under the appropriateness prong of the "appropriate equitable relief" inquiry, rather than the "equitable relief" determination addressed in this Note. *Id.* at 10. *See also* Katherine Polak, Column, *ERISA: Subrogation,* Sereboff, *and the "Make Whole" Doctrine: The D.C.*

fiduciary succeeded on its claim that the plan's subrogation clause entitled it to reimbursement of benefits after the beneficiary received third-party compensation.[243] The court held that the fiduciary was entitled to reimbursement because the plan terms so specified.[244] These circuit court cases establish that courts can effectively and appropriately apply the "equitable relief" standard promulgated in *Sereboff*.

2. The Result Is Equitable. Interpreting § 1132(a)(3) to include only relief available in courts of equity, *Sereboff* effectuates an equitable result that balances the interests of fiduciaries and beneficiaries.[245] Subrogation purposes to prevent unjust enrichment and avoid injustice.[246] The Court's provision of remedies to both fiduciaries and beneficiaries with the *Sereboff* standard[247] achieves the purposes of subrogation. The lower courts addressing *Sereboff* in the context of ERISA fiduciary subrogation have followed the Court and its equity standard,[248] and the critics should follow suit.

Traditionally, "Equity suffers not a Right to be without a Remedy."[249] In ERISA subrogation, this historical maxim may be difficult to fulfill because both beneficiaries and fiduciaries have ascertainable rights to a remedy. Yet, *Sereboff*'s narrow permission allowing fiduciaries to recover within equitable limits defined by the divided bench provides fiduciaries with a remedy to their right to subrogate or to be reimbursed benefits compensated by a third party. Additionally, under the *Sereboff* standard, the beneficiary will only be required to reimburse these benefits after receiving their equivalent or a portion thereof from a third-party tortfeasor. The beneficiary will not be left with debt after such

---

Circuit Defines Ambiguity in ERISA Subrogation Clauses—Moore v. Capital Care [sic], Inc., 34 J.L. MED. & ETHICS 828, 829 (2006) (discussing the court's reasons for refusing to adhere to the make whole rule and apply the language of the plan's subrogation provision).

[243] *Moore*, 461 F.3d at 4.

[244] *Id.* at 4, 10.

[245] *See* Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 362–68 (2006) (protecting both fiduciary and beneficiaries' interests by allowing limited recovery).

[246] *See* discussion *supra* Part II.C.*1*.

[247] *See* discussion *supra* Part III.C.

[248] *See* discussion *supra* Part II.E.*2*.

[249] Langbein, *supra* note 152, at 1321 (quoting RICHARD FRANCIS, MAXIMS OF EQUITY 24 (London, Bernard Lintot 1728)) (internal quotation marks omitted).

reimbursement because personal liability in the form of legal relief cannot be properly asserted against the beneficiary.[250]

Beneficiaries must keep in mind that the *Sereboff* Court refused to address equitable controls on relief, including the make whole doctrine, asserted by the Sereboffs on appeal because they failed to assert those claims in the lower court.[251] Thus, such equitable controls may be available to constrain a fiduciary's right to reimbursement when the fiduciary properly asserts a § 1132(a)(3) claim to enforce an ERISA plan's subrogation or reimbursement provision.[252]

Evaluating equitable remedies under the divided bench fulfills the statute's terms, furthers the purpose of ERISA, and provides fiduciaries and beneficiaries with equitable rights to enforce the terms of an ERISA plan. Instead of arguing for a new standard and elimination of the law–equity distinction, the critics should concede that the standard logically emanates from the language of the statute.

If courts uniformly follow *Sereboff*, such a standard will provide carefully circumscribed opportunities for insurance companies acting as fiduciaries to seek reimbursement and assert subrogation claims against beneficiaries under ERISA. The fiduciary's ability to subrogate benefits paid will accordingly enable ERISA plans to remain financially viable and able to protect beneficiaries by providing benefits. The critics should cease their cries for alternatives. The Supreme Court provided a clear and workable standard of "equitable relief" in *Sereboff*.

IV. CONCLUSION

The controversy surrounding *Sereboff*'s directive to determine § 1132(a)(3) "equitable relief" based on equitable remedies available under the days of the divided bench lacks foundation in fact and law. The equity–law distinction upheld by the *Sereboff*

---

[250] *See supra* notes 221–23 and accompanying text.

[251] Sereboff v. Mid Atl. Med. Servs., Inc, 547 U.S. 356, 368 n.2 (2006).

[252] This matter is unresolved in the circuits. *See supra* notes 85–89 and accompanying text. Beneficiary defendants "may now choose to focus on the appropriateness of [§ 1132(a)(3)] relief" in conjunction with the make whole doctrine. Polak, *supra* note 242, at 830.

Court creates a workable standard and a sufficiently and necessarily narrow category of relief available for a fiduciary to assert in a subrogation action against a beneficiary.

The Court's narrowly worded standard directing fiduciaries to look to the days of the divided court and equitable relief available thereunder belies the confusion critics have espoused. The Court articulated simply that to determine "equitable relief" under § 1132(a)(3) fiduciaries and courts must look to the "case law from the days of the divided bench" and "rely on a 'familiar rul[e] of equity.' "[253] With this clear direction guiding litigants to a very limited category of remedies, no confusion should arise as to how to apply this directive. In fact, the lower courts which have taken on the task of applying *Sereboff* to ERISA subrogation actions have done so with ease and demonstrated that the standard works. The Supreme Court should ignore the critics because it has provided proper interpretation and guidance in *Sereboff* which circuits have successfully followed.

The ERISA statute, stare decisis, and the functionality of the Court's interpretation of "equitable relief" justify the Court's carefully crafted standard. Application of the divided bench equity standard by the courts that have yet to address the issue and acceptance of the standard by the critics will enforce the statutory language that began this controversy. Further, the standard upholds the Supreme Court's prior decisions that created a logical path to the divided court equity standard that now governs.

Critics' suggestions to broaden the language of the statute from "equitable relief" to include monetary relief violate the purpose of limiting properly asserted relief to merely "equitable relief" under § 1132(a)(3). The Supreme Court looked to its decisions in *Mertens* and *Knudson* to provide a plainly delineated definition of "equitable relief" that comports with the plan language of the statute. Arguments to the contrary merely seek to rewrite not only *Sereboff* but also ERISA.

The ultimate legitimacy of the *Sereboff* equity standard lies in the equitable balance it achieves between protection of beneficiaries and fiduciary rights to enforce ERISA plan

---

[253] *Sereboff*, 547 U.S. at 363–64.

provisions. This narrow standard enables fiduciaries to subrogate to third-party tort settlements and achieve reimbursement of benefits due to them under their ERISA plans without denying any protection to beneficiaries. The limited forms of equitable relief, specifically constructive trusts and equitable liens by agreement, ensure that ERISA fulfills its promise to protect beneficiaries and their right to benefits. Moreover, permitting subrogation on these terms prevents the courts from creating ERISA protections that the statute does not provide. This permission further safeguards fiduciaries' ability to maintain plans.

Sereboff established a well-justified and clearly articulated standard for determining § 1132(a)(3) "equitable relief." Amidst the controversy surrounding this decision and perpetuated by critics, the circuits have not veered from the standard. The critics should take another look at *Sereboff* and ERISA and accept the Court's most equitable solution: equitable relief under the divided bench.

Ashley Aunita Prebula Frazier