No. 12-526

IN THE

Supreme Court of the United States

FIRST UNUM LIFE INSURANCE COMPANY,

Petitioner

v.

LEAH BILYEU, *et al.*,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SUN LIFE ASSURANCE COMPANY OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

WARREN VON SCHLEICHER*
JACQUELINE J. HERRING
SMITH | VON SCHLEICHER + ASSOCIATES
180 N. LaSalle St. Suite 3130
Chicago, Illinois 60601
(312) 541-0300
warren.vonschleicher@svs-law.com

**Counsel of Record*

RULE 29.6 DISCLOSURE STATEMENT

Sun Life Assurance Company of Canada is a wholly owned indirect subsidiary of Sun Life Financial Inc., which is a publicly traded entity. No other publicly owned entity owns ten percent or more of Sun Life Assurance Company of Canada's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

ADDITIONAL AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, Sun Life Assurance Company of Canada (Sun Life), is one of the nation's leading providers of group disability insurance to employers and their employees. Sun Life maintains a substantial United States headquarters in Massachusetts and has numerous offices throughout the United States. Sun Life funds disability benefits by issuing group insurance policies to employers who voluntarily provide disability coverage to their employees through employee welfare benefit plans. These benefits plans are governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq*. (ERISA).[1]

Sun Life is committed to ensuring that disability benefit plans remain a cost-effective and affordable option for employers to provide to their employees, who are "participants" in the benefit plan. The Court has long emphasized "the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its officers or members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

Pursuant to Rule 37.3 of the Rules of this Court, counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief, and their letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

work force." *Boggs v. Boggs*, 520 U.S. 833, 839 (1997).

Crucial to the ongoing viability of disability benefit plans is the legal remedy given to plan fiduciaries like Sun Life to recover overpaid disability benefits through ERISA's promise of equitable relief under §502(a)(3), 29 U.S.C. §1132(a)(3). The nationally uniform enforcement of plan fiduciaries' rights to recover overpaid benefits through appropriate "equitable relief" under ERISA §502(a)(3) is critical to the ongoing vitality of disability benefit plans.

Yet the Ninth Circuit grafted an unyielding asset tracing requirement onto §502(a)(3) that turns ERISA's remedy of equitable relief into an empty promise for plan fiduciaries who seek to recover overpaid benefits. The tracing requirement redounds to the disadvantage of employers, employees, and insurers like Sun Life who fund disability benefit plans, by increasing the costs of coverage, forcing reductions in plan benefits, and discouraging employers from offering these completely voluntary benefit plans to their employees.

Because these consequences injure the disability benefits industry nationwide by discouraging plan formation, and impeding national uniformity and predictability in plan administration, Sun Life as *amicus curiae* has a vital interest in this case.

SUMMARY OF THE ARGUMENT

Disability plans provide disabled workers with monthly disability benefits calculated as a percentage of the employee's predisability work earnings, typically 60% of monthly earnings. This level of benefits provides sufficient income replacement to employees during periods of disability, prevents perverse financial inducements that would reduce the incentives for employees to return to work, and ensures that disability plans remain affordable.[2]

To maintain this carefully balanced level of benefits, disability plans contain offset provisions. Offsets include benefits employees are entitled to receive from sources such as Social Security Disability Insurance (SSDI), worker's compensation, and state sponsored disability programs. ERISA plans combine these offsets, and then make up the difference to ensure that employees receive 60% of their predisability work earnings. Without offsets, premiums for coverage would increase, and employees might receive as much or more money while on disability status than they earned while working, which would discourage employers from establishing disability plans.

Disability plans also contain overpayment reimbursement provisions, which obligate employees to repay any overpaid benefits resulting from the em-

[2] Disability benefits come with tax advantages, so in practical application the 60% benefit level replaces a larger percentage of workers' actual predisability net take-home pay.

ployee's receipt of SSDI benefits and other offsets. Plan fiduciaries give employees the option of receiving full disability benefits—unreduced by potential offsets—until their applications for SSDI benefits are approved and paid.

Plan fiduciaries, therefore, serve an important social utility by bridging the financial gap until Social Security benefits are granted. Because Social Security benefits often are paid retroactively in a large lump sum, the resulting overpayment of ERISA plan benefits can be substantial.

Plan fiduciaries advance unreduced full disability payments relying on employees' promise and obligation under the plan's terms to repay any overpaid benefits. If an employee reneges on her promise to repay, plan fiduciaries rely on the federal judiciary to provide equitable relief and order repayment under ERISA §502(a)(3).

This Court has held that an agreement and obligation to repay benefits under the terms of an ERISA plan creates an "equitable lien by agreement" that is enforceable under §502(a)(3). *Sereboff v. Mid-Atl. Med. Serv's, Inc.*, 547 U.S. 356, 363-365 (2006). Decisions of the First, Third, Sixth, and Seventh Circuits enforce plan reimbursement provisions as equitable liens by agreement under §502(a)(3).

But the Ninth Circuit in this case, followed by the Eighth Circuit in *Treasurer, Trs. of Drury Indus., Inc. Health Care Plan & Trust v. Goding*, 692 F.3d 888, 897 (8th Cir. 2012), grafted a stringent asset tracing requirement onto §502(a)(3) that renders plan reimbursement provisions essentially unenforceable and conflicts with well-established principles of equity. In these two circuits, plan participants now can evade their repayment obligation simply by spending the overpayments.

And in *Goding*, the court went one step further and foreclosed plan fiduciaries from recovering overpayments under state law too, based on ERISA preemption. As a result, plan fiduciaries are left without any avenue to enforce plan reimbursement provisions.

This circuit split creates a cascade of deleterious consequences for plans, plan fiduciaries, employers, and employees. Plan fiduciaries will refuse to pay unreduced benefits while employees' Social Security claims are pending, resulting in lower benefits during the time of greatest financial need, and creating a financial gap in the social welfare safety net.

Welfare benefit plans are crucial to "the financial security of the Nation's work force." *Boggs*, 520 U.S. at 839. The circuit split creates immediate problems of national importance that directly affect the financial security of American workers and their families every day. This Court should resolve the circuit split.

ARGUMENT

I. The Importance Of National Uniformity In The Enforcement Of Plan Reimbursement Provisions Necessitates This Court's Immediate Review.

Judicial enforcement of plan reimbursement provisions—through the mechanism of equitable relief under ERISA §502(a)(3)—serves an important social utility and advances ERISA's goals. Congress, in enacting ERISA, sought to encourage employers to offer voluntary disability benefit plans. Congress sought to ensure that disability benefit plans are administered equitably and that no party, not even plan participants, should be unjustly enriched. Congress sought to promote the financial security of disability plans by reducing administrative costs and permitting flexibility in plan design, which keeps premiums affordable. By requiring participants to repay overpaid disability benefits, plan reimbursement provisions achieve these congressional goals so that voluntary benefit plans remain a sustainable safety net for millions of American workers and their families.

A. Enforcement Of Plan Reimbursement Provisions Promotes A Financially Secure Social Welfare System.

Plan fiduciaries provide a critical financial safety net by giving plan participants the option of receiving higher benefits up front, when money is needed most, while they navigate the gridlock of Social Security.

Given ERISA's curtailed timetable for deciding disability claims, ERISA disability benefit approvals frequently outpace Social Security disability decisions, sometimes by years. To bridge the gap, plan fiduciaries give participants the option of receiving monthly benefits unreduced by estimated Social Security disability income, relying on the participant's promise to repay any resulting overpayment.[3] If a participant receives a retroactive award of Social Security disability income that results in an overpayment, disability plans typically require that the participant repay the overpayment. If participants refuse to repay, plan fiduciaries rely on the federal judiciary to enforce the plan's reimbursement provisions by providing equitable relief under §502(a)(3).

Plan fiduciaries should be encouraged to provide unreduced monthly disability payments while a participant's application for Social Security disability benefits is pending, secure that a participant's promise to repay will be enforced in court under ERISA.

Under *Sereboff v. Mid Atl. Med. Serv's, Inc.*, 547 U.S. 356 (2006), plan reimbursement provisions cre-

---

[3] The Social Security Administration publishes a formula for estimating monthly Social Security disability income based on earnings, work credits, and other information. See http://www.socialsecurity.gov/planners/benefitcalculators.htm (viewed Nov. 20, 2012). Plan fiduciaries utilize this information to obtain a reasonably accurate estimate of a participant's anticipated monthly Social Security disability income.

ate an equitable lien by agreement on the amount of overpaid benefits received by the participant. A lien imposed by agreement cannot be defeated by dissipating or spending the funds, because strict tracing rules do not apply. The First, Third, Sixth, and Seventh Circuits enforce the participant's promise to repay by enforcing an equitable lien by agreement on the amount of the overpayment, without imposing anachronistic asset tracing and other rigid requirements that are nearly impossible to satisfy in contemporary society. See *Cusson v. Liberty Life Ins. Co.*, 592 F.3d 215 (1st Cir. 2010); *Funk v. Cigna Group Ins.*, 648 F.3d 182 (3rd Cir. 2011); *Gilchrest v. Unum Life Ins. Co. of Am.*, 255 Fed. Appx. 38 (6th Cir. 2007); *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614 (7th Cir. 2008).

The Ninth Circuit's decision dramatically alters the rights of plan fiduciaries by foreclosing equitable relief in most cases. By requiring strict tracing principles rejected by *Sereboff* and the First, Third, Sixth, and Seventh Circuits, the Ninth Circuit's decision renders plan reimbursement provisions virtually meaningless, deprives plan fiduciaries of a remedy to recover overpaid disability benefits, and creates a circuit split. The Ninth Circuit purported to apply principles of equity, only to hold that plan participants can defeat equitable liens by agreement and circumvent *Sereboff* simply by spending the overpayments.

The Ninth Circuit's decision ultimately dissuades plans from offering unreduced disability benefits to participants during the gridlock of Social Security, thereby tilting the careful balance of interests that serves as a cornerstone of ERISA. The Ninth Circuit's decision rewards participants who dissipate and spend overpaid disability benefits by releasing them from their obligations and promises to repay. But the Ninth Circuit punishes participants who save all or part of the overpaid benefits by judicially enforcing their obligations and promises to repay. The Ninth Circuit's holding creates a "rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405 (1970).

B. The Circuit Split Makes Uniformity And Predictability In Plan Administration Impossible.

A paramount congressional goal in enacting ERISA is to encourage employers to offer voluntary benefit plans by ensuring that plan administrators would be subject to a uniform body of laws, reduced administrative costs, and predictable liabilities. *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010).

Predictability and uniformity in the enforcement of plan reimbursement provisions will be impossible to achieve with the current circuit split.

Many plans are national and cover employees across the country. Results cannot be predictable, and plan administration uniform, if employees in one circuit must fulfill their obligations to repay while employees under the same plan in a different circuit can avoid their obligations simply by spending the overpayment. ERISA plans must be subject to a uniform body of laws to minimize the financial burden of complying with conflicting directives. "Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (citing *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990)) (additional citations omitted).

The decision of the Ninth Circuit, therefore, adversely impacts the administration of plans in all circuits. Plans cannot be administered uniformly, and plan liabilities will not be predictable, if plan reimbursement provisions are enforced in some circuits but not others. To ensure that participants are treated consistently while their Social Security claims are pending, plan fiduciaries will refuse to pay full unreduced benefits to participants in all circuits. Or if full benefits are fronted and overpayments cannot be recovered from participants in some circuits, the financial loss will need to be spread to participants in all circuits by increasing premiums, or decreasing the level of benefits below 60% so that all participants nationally must absorb the loss uniformly. And employers will be dissuaded from establishing disability benefit plans across the country.

Supreme Court review is necessary to achieve the congressional goals of uniformity, predictability, and encouragement of plan formation that the Ninth Circuit's decision subverts.

II. The Ninth Circuit's Decision Deviates From Well Established Principles of Equity.

The Ninth Circuit's decision warrants Supreme Court review because the decision conflicts with *Sereboff* and well settled principles of equity applied by the Court in fashioning the scope of appropriate equitable relief under ERISA §502(a)(3).

This Court established that the equitable relief available under §502(a)(3) encompasses the type of relief "typically available in equity." *Mertens v. Hewitt Assoc's*, 508 U.S. 248, 256 (1993). To determine whether relief lies in equity, *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204 (2002) directs courts to look for guidance to "the days of the divided bench." *Id.* at 212. *Knudson* denominates restitution as equitable when it seeks "to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214 (citation omitted). *Knudson* interpreted §502(a)(3) as authorizing equitable restitution only when particular funds properly belonging to the plan can be traced to specific funds in the participant's possession.

This Court clarified *Knudson's* holding in *Sereboff*. The Court in *Sereboff* emphasized that the scope of equitable relief available under §502(a)(3) is broader than the narrow species of equitable restitution addressed by the Court in *Knudson*. The ERISA plan in *Sereboff* contained an Acts of Third Parties provision that required participants to reimburse the plan for payment of medical expenses that are subsequently obtained from third parties. That provision prevented unjust enrichment by precluding participants from retaining a double recovery for the same medical expenses. The Court held that the plan's reimbursement provision imposed an equitable lien by agreement on money received by the Sereboffs from a third-party tort recovery. The Court recited "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." *Sereboff*, 547 U.S. at 363-364 (quoting *Barnes v. Alexander*, 232 U.S. 117, 121 (1914)).

Applying *Sereboff*, when a participant agrees to reimburse funds upon the occurrence of an event, an equitable lien by agreement attaches to the funds and becomes enforceable upon the event's occurrence.

Petitioner, First Unum Life Insurance Company, paid unreduced monthly disability benefits to respondent, Leah Bilyeu, subject to her agreement to reimburse petitioner for any overpaid disability benefits resulting from an award of Social Security benefits. Respondent obtained an additional sum of money from petitioner with each disability payment subject to her agreement to repay, and then refused to repay when she received a retroactive lump sum award of Social Security benefits. As a result, respondent obtained greater benefits than she was entitled to receive under the terms of the ERISA plan. Respondent's obligation to reimburse created an equitable lien by agreement that attached to the plan benefits she received the moment she received them. Under *Sereboff*, the equitable lien became enforceable upon her receipt of Social Security disability benefits.

The Ninth Circuit grafted a tracing requirement onto equitable liens by agreement that is incompatible with *Sereboff,* deviates from fundamental principles of equity, and undermines ERISA's goals. The tracing requirement limits the enforcement of an equitable lien by agreement only to specific funds in the possession or control of the participant. Pet. App. 18a. Because the respondent claimed she spent the unreduced disability benefits that constituted the overpayment, the Ninth Circuit found that the overpayment could not be traced to a fund in the respondent's possession.[4]

The ERISA cases in which a distinct fund was intact and traceable involved subrogation claims to recover money obtained by participants from third-party tort recoveries. The Ninth Circuit's decision limits the universe of equitable restitution available under ERISA §502(a)(3) to only equitable subrogation claims, and even then only when the fiduciary is notified and acts promptly before the funds are dissipated.

Section 502(a)(3) is ERISA's statutory "safety net, offering appropriate equitable relief" when ERISA affords no other remedy. *Varity Corp. v.*

---

[4] The SSDI benefits themselves are exempt from lien or attachment. 42 U.S.C. §407(a).

Howe, 516 U.S. 489, 512 (1996). The tracing requirement grafted by the Ninth Circuit onto §502(a)(3) deprives plan fiduciaries of any remedy under ERISA for recovering overpaid benefits through litigation.

The Ninth Circuit's creation of a tracing requirement conflicts with the flexible principles of equity that promote recovery of overpayments. Tracing requirements that apply to claims based on equitable restitution do not apply to claims based on equitable liens by agreement.

Principles of equity should be applied to promote ERISA's goals and enforce plan terms, not to thwart them. "[T]here is inherent in the Courts of Equity a jurisdiction to … give effect to the policy of the legislature." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (quoting *Clark v. Smith*, 13 Pet. 195, 203, 10 L.Ed. 123 (1839)).

Money is fungible, and if the dollars representing the overpaid benefits have been depleted, a fiduciary still can enforce an equitable lien by agreement and the participant must pay with substitute dollars:

> Currency paid over the counter and deposited in a vault is a thing that can be identified and so subjected to a trust whenever in equity and conscience a trust should be implied. Not only that, but a trust so created will not fail though other dollars may have taken the place of those originally received,

> *for dollars are fungibles and any one of them will be accepted as a substitute for another.*

Jennings v. U.S. Fidelity & Guaranty Co., 294 U.S. 216, 223-224 (1935) (emphasis added).

If a participant commingles money subject to an equitable lien with her general assets, equity deems all the money to be subject to the lien. "[E]quity will follow the money, even if put into a bag or an undistinguishable mass, by taking out the same quantity." *Central Nat. Bank v. Conn. Mut. Life Ins. Co.*, 104 U.S. 54, 69 (1881).

If a participant spends the money, as respondent claimed, equity deems the money spent to be taken from personal assets and not from money that is subject to the lien. *Id.* at 68 (noting that the rule "attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money.") (citing *Knatchbull v. Hallett, In re Hallett's Estate*, 13 Ch. D. 696).

The ERISA Plan's reimbursement provision, in addition to the respondent's express agreement to repay overpaid benefits, created an equitable lien by agreement on the overpayments received by the respondent every month. Tracing rules do not apply to equitable liens by agreement, so plan participants like the respondent cannot defeat the lien by spending the overpaid benefits. See, e.g., *Sereboff*, 547 U.S. at 364-365; *Jennings*, 294 U.S. at 223-224.

Money is mobile in modern society. And as the decisions of the First, Third, Sixth, and Seventh Circuits applying *Sereboff* reflect, principles of equity are inherently adaptive. "Equity eschews mechanical rules; it depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). Rarely will a participant hold a distinct fund containing only money that can be traced to the plan fiduciary. The practical effect of the Ninth Circuit's interpretation of *Sereboff* is to defeat equitable liens by agreement in all but the rarest cases, leaving plan fiduciaries without any remedy to recover overpaid benefits.

ERISA was enacted to promote plan formation, under a uniform system of predictable results and reduced administrative costs. The Ninth Circuit's decision prevents the equitable administration of disability plans by allowing participants to retain an unjust enrichment simply by agreeing to repay and then spending the overpaid plan benefits. The Ninth Circuit's decision discourages disability plans from providing unreduced benefits while participants' Social Security claims are pending. As a consequence, the Ninth Circuit's decision ultimately places a greater burden the on state and federal government to fill the void and to provide a suitable and expedient social safety net for American workers.

Welfare benefit plans are crucial to the financial security of the nation's workforce. The circuit split creates immediate problems of national importance, warranting this Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WARREN VON SCHLEICHER
Counsel of Record
JACQUELINE J. HERRING
SMITH | VON SCHLEICHER + ASSOCIATES
180 N. LaSalle St. Suite 3130
Chicago, Illinois 60601
(312) 541-0300
warren.vonschleicher@svs-law.com