No. 13-130

IN THE
Supreme Court of the United States

SHARON THURBER,

Petitioner,

v.

AETNA LIFE INSURANCE CO., ET AL.,

Respondents.

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

PETITIONER'S REPLY BRIEF

ANDREW P. FLEMING
CHRISTEN ARCHER PIERROT
CHIACCHIA & FLEMING, LLP
5113 South Park Ave.
Hamburg, NY 14075

LESLIE A. BRUECKNER
SARAH E. BELTON
PUBLIC JUSTICE, P.C.
555 12th Street
Ste. 1230
Oakland, CA 94607

MATTHEW W.H. WESSLER
(*Counsel of Record*)
LEAH M. NICHOLLS
PUBLIC JUSTICE, P.C.
1825 K Street NW
Ste. 200
Washington, DC 20006
mwessler@publicjustice.net
(202) 797-8600

Counsel for Petitioner

September 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

PETITIONER'S REPLY

This case raises an issue that, in the last year alone, has produced four divergent courts of appeals opinions: Whether a plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, can enforce an equitable lien by agreement to recover a fund from a plan beneficiary when the fund at issue has been dissipated and is no longer in the possession of the defendant. Indeed, in adding its opinion to this fray, the Second Circuit in this case observed that the question "continues to perplex courts despite efforts by the Supreme Court during the past decade to shed some light on the matter." Pet. App. 15.

Respondents provide no compelling reason why this Court should stay its hand. They fully acknowledge the existence of a split; they do not doubt the importance of the issue to employers and employees alike; and, through their response, they demonstrate why this issue has perplexed and confused the lower courts ever since this Court decided *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006).

Unable to convincingly deny the split of authority, Respondents spend most of their opposition arguing why the lower court was right. That is fine (though wrong), but it is beside the point. The split on this question is deep, well-defined, and crucial for all players in ERISA.

The second question presented is equally worthy of this Court's attention. Here too, the federal courts of appeal disagree, this time as to whether an ERISA beneficiary must be given notice of a discretionary clause that, if enforced, would trigger a highly deferential, "abuse-of-discretion" standard of review on appeal. Although Respondents attempt (unsuccessfully) to dispute the existence of a circuit split, they do not even attempt to deny the importance of this issue, which affects the rights of every ERISA beneficiary in the country. The undisputed reality is that the applicable standard of review—de novo or abuse-of-discretion—is the single most important factor affecting an ERISA beneficiary's likelihood of success on appeal. In light the disagreement between two courts of appeals on this issue of importance, this Court should grant the petition in its entirety.

I. Respondents' Brief Confirms that this Court Should Decide Whether Plans May Enforce an Equitable Lien Over a Fund that No Longer Exists.

A. As Respondents Acknowledge, There Is a Circuit Split on this Question.

Respondents fully acknowledge that there is a sharp split on this question. In their words, the Ninth Circuit held in *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012), *cert denied*, 133 S. Ct. 1242, that "an equitable lien" could not "attach" if "the overpayment had been dissipated." Br. in Opp'n (BIO) 17. Contrast that rule with the one embraced by the Second Circuit in this case, which, according to Respondents, permits "plan fiduciaries to enforce an equitable lien by agreement . . . even if those funds have been dissipated." *Id.* at 11.

Faced with this explicit disagreement, Respondents attempt to narrow its scope, calling the Ninth Circuit an "outlier" and in conflict "with all other circuits that have considered the issue." *Id.* at 17, 23. That is wrong. In *Treasurer, Trustees of Drury Industries, Inc. Health Care Plan & Trust v. Goding*, the Eighth Circuit made clear that it agrees with the Ninth Circuit. 692 F.3d 888 (8th Cir. 2012). In that case, a plan fiduciary sought to enforce an equitable lien by agreement to recover a fund that was no longer in the defendant's possession. *Id.* at 897 ("Casey thus no longer has any money to which Drury claims an interest."). Like the Ninth Circuit in *Bilyeu*, the Eighth Circuit looked to this Court's precedents—*Knudson* and *Sereboff*—and determined that dissipation defeated a plan fiduciary's claim for an equitable lien by agreement. *Id.* It concluded: "[W]here the wrongdoer no longer has the property at issue in its possession, the claim against that party is legal, not equitable." *Id.* at 896. That language could have come right out of *Bilyeu*. *See* 683 F.3d at 1094 (holding that Unum's claim, because it seeks a fund not "in Bilyeu's possession," is "quintessentially legal, rather than equitable, relief").

In an effort to undermine *Goding*, Respondents point to an earlier case out of the Eighth Circuit, *Dillard's Inc. v. Liberty Life Assurance Co.*, 456 F.3d 894 (8th Cir. 2006), as evidence that the Eighth Circuit is "aligned, and not in conflict, with the Second Circuit." BIO 20. That effort fails. All Respondents say about *Dillard's* is that it involved a "materially analogous" reimbursement provision and held that, under those facts, "an equitable lien by agreement was enforceable under ERISA

§ 502(a)(3)." BIO 19. But that is not controversial—we all know that equitable liens by agreement are enforceable under the right set of facts—*Sereboff* and *U.S. Airways, Inc. v. McCutchen*, __ U.S. __, 133 S. Ct. 1537 (2013), both establish this.

What *is* at stake in this case, and the question that has triggered a massive amount of confusion among the lower courts, is *under what set of facts* can a plan fiduciary enforce the lien: Specifically, whether a plan fiduciary can meet the equitable requirements for this type of relief where the *res*, or fund, is not in the defendant's possession. *Dillard's* says nothing about that question because—and Respondents do not even contest this—there was no allegation that the sought-after funds had been dissipated. *Dillard's* is therefore wholly irrelevant.

Respondents' confusion over the relevance of *Dillard's* spills over into its understanding of why *ACS Recovery Servs., Inc. v. Griffin*, __ F.3d __, 2013 WL 1890258 (5th Cir. May 7, 2013) is important. For Respondents, *ACS Recovery* proves that the Fifth Circuit is "entirely consistent" with the Second because it ruled that a plan administrator "could recover specifically identifiable funds held in a participant's special needs trust." BIO 20-21. But again, that conclusion is uncontroversial; where the sought-after fund has not been dissipated, a lien may very well be enforceable.

Respondents go wrong, however, in thinking that this is the only part of the decision that matters. In fact, it is the *least* relevant part. For this issue, *ACS Recovery* is relevant for the question the majority discussed but did not decide: Whether dissipation of a fund defeats an equitable lien. In our petition, we explained that *ACS Recovery* is as an example of how tricky this issue has been for the lower courts precisely *because* the *en banc* majority was asked to decide how dissipation affects the enforceability of an equitable lien but chose to duck it. *See* Pet. 13 ("[T]he majority declined to decide whether a defendant's dissipation of the at-issue property could defeat an . . . equitable claim for reimbursement."). Writing for the majority, Judge Jones explained that the "situation is less clear" where the defendant has "dissipated" the sought-after fund. *ACS Recovery*, 2013 WL 1890258, at *8. That was so, she said, because it was uncertain whether *Knudson* or *Sereboff* controlled. On the one hand (in her view), *Sereboff* could be read to establish that "a remedial trust could be imposed notwithstanding [a defendant's] dissipation or commingling of the fund." *Id.* On the other, "the facts in *Knudson* so closely parallel those of the instant case as to render a different outcome, even an outcome predicated on *Sereboff*, arguable." *Id.* Because the majority found a different way to reach their preferred result, it did not resolve this quandary.

Respondents stress that the discussion in the majority's opinion is "*dicta*" and therefore somehow "irrelevant to the issue presented here." BIO 21. We agree that it is dicta, but that only makes our point: The Fifth Circuit could not reach consensus on this question, and so, at the moment, parties in that circuit have very little to go on—though what pre-*ACS Recovery* authority does exist in the Fifth Circuit tilts strongly in favor of the Eighth and Ninth Circuit's view (and was cited with approval in *Bilyeu*). *See Bilyeu*, 683 F.3d at 1095 (citing and quoting *Amschwand v. Spherion Corp.*, 505 F.3d 342, 346-47 (5th Cir. 2007) for two propositions: (1) that this "*sine qua non* of restitutionary recovery available under § 502(a)(3) is a defendant's possession of the disputed res;" and (2) that "possession is the key to awarding equitable restitution in the form of a constructive trust or equitable lien").

* * *

After all the brush is cleared, the courts have lined up as follows on the first question presented in this case: Two circuits, the Eighth and Ninth, have held that where a defendant is no longer in possession of the *res*, *Knudson* controls and a plan fiduciary cannot enforce an equitable lien by agreement. Faced with the same issue, five circuits have held that, in light of *Sereboff*, actual possession is immaterial. One circuit—the Fifth Circuit—has been unable to reach consensus on the issue, though an earlier decision from that court would align itself with the Eighth and Ninth Circuits. And, in those circuits that have yet to weigh in, the district courts are almost evenly split. *Compare Epolito v. Prudential Ins. Co. of Am.*, 737 F. Supp. 2d 1364, 1382-83 (M.D. Fla. 2010) (holding that dissipation defeats plan's effort to enforce its equitable lien by agreement) *with Anderson v. Reliance Standard Life Ins. Co.*, Civil No. WDQ-11-1188, 2013 WL 1190782, at *13 (D. Md. Mar. 21, 2013) (opting to allow a plan's equitable claim to proceed even though the fund was "no longer in the claimant's possession"). That landscape warrants this Court's review.

B. The Second Circuit's Decision Is Contrary to this Court's Precedent and the Governing Rules of Equity.

Respondents spend the bulk of their opposition explaining why the Ninth Circuit's decision was "in error," and the Second Circuit's was correct. *See* BIO 17-18; 24-29. For instance, they quote lengthy sections of the Second Circuit's decision that, they say, show how it "is consistent with the well-established rules and maxims of equity." BIO 24-26 (citing to the maxim that "[e]quity suffers not a right to be without a remedy"). But generalizations aside, Respondents—just like the lower court—have failed to explain *at all* why the specific *rules* that applied in equity to these sorts of claims support their view. *See* Pet. 15-20.

As we explained, in equity, a defendant's actual possession of the *res* was key to a plaintiff's ability to obtain a remedy. *See* Pet. 18 n.6. This Court made the point in *Knudson*, where it explained that an equitable remedy, unlike a legal one, seeks the return of "money or property [that is] identified as belonging in good conscience to the plaintiff [and can] clearly be traced to particular funds or property *in the defendant's possession*." 534 U.S. at 213 (emphasis added). The reason was simple: Equitable remedies could only "restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214; *see also Restatement (Third) of Restitution and Unjust Enrichment* § 55 cmt. h (2011) ("If the claimant cannot show an equitable entitlement to specific property in the hands of the defendant, the underlying basis of the remedy is lost.").

Respondents suggest (albeit obliquely) that this rule somehow falls away where an equitable lien "attaches as soon as the participant receives" the fund—here, insurance payments that later became "overpayments." BIO 24, 26. Whatever the validity of that theory (and it is dubious), *see, e.g.*, *Sereboff*, 547 U.S. at 362-63, it fails to help Respondents because, unlike the reimbursement provisions in *Sereboff* or *Knudson*, Respondents' plan documents foreclose asserting a lien over the fund (overpayments) they seek. *See* Pet. App. 67 (placing a lien only "on the proceeds of any other income," not disability benefits that later become overpayments).

II. Respondents' Brief also Confirms that this Court Should Decide Whether Participants Must Be Given Notice of a Change in the Standard of Judicial Review.

Review is also warranted as to the second question presented in this case: Whether a deferential abuse-of-discretion standard of review may be applied in a case where a plan beneficiary was never given notice of the ERISA Plan's reservation of discretion. As previously explained, the lower courts are split on this issue, which has immensely important consequences for ERISA beneficiaries. *See* Pet. 22-26. Respondents' arguments to the contrary are unavailing.

1. First, there is a clear split between the Second and Seventh Circuits. In this case, the Second Circuit "[saw] no reason why a plan administrator must actually notify a participant of its reservation of discretion." Pet. App. 10-11. The lower court recognized that plan participants *do* have the right to be notified of "plan provisions that affect the basic terms of the plan." *Id.* at 11. It concluded, however—without the benefit of any analysis or reasoning—that plan participants have no need to be notified of a reservation of discretion because, in the lower court's view, such a provision does not "affect the basic terms of the plan." *Id.*

In *Herzberger v. Standard Insurance Co.*, 205 F.3d 327 (7th Cir. 2000), in contrast, the Seventh Circuit refused to enforce an ERISA plan provision that did not give a participant clear notice of a reservation of discretion. *Id.* at 332-33 (recognizing that the standard of review is directly relevant to what "rights" an employee has under an ERISA plan). Contrary to the Second Circuit's conclusion that ERISA beneficiaries have no reason to know or care about a reservation of discretion clause, the Seventh Circuit understood that a deferential standard of review substantially weakens an employee's entitlement to benefits under the plan—a fact that may make it "more important" for an employee "to supplement his ERISA plan with other forms of insurance." *Id.* at 331. In light of this fact, *Herzberger* held, "employees are entitled to know what they're getting into, and so if the employer is going to reserve a broad, unchanneled discretion to deny claims, *the employees should be told about this, and told clearly*." *Id.* at 333 (emphasis added).

That *Herzberger* and this case involved different facts is irrelevant. Respondent makes much of the fact that the Seventh Circuit's "actual" holding was limited to a finding that the language in the plan document under consideration was insufficient to warrant a deferential review." BIO 36. But this is a distinction without a difference. In *Herzberger*, the lack of notice was due to the fact that the reservation of discretion clause was, at best, vaguely worded. In this case, the lack of notice was due to the fact that Petitioner never received any of the plan documents that purported to contain a reservation of discretion. In both cases, however, the issue boiled down to the exact same question: Whether an ERISA beneficiary who is not given clear notice of a reservation of discretion clause is bound by that clause.

Second, Respondents' reliance on *Raybourne v. Cigna Life Insurance Co. of New York*, 576 F.3d 444, 448 (7th Cir. 2009), to discredit *Herzberger* is equally misplaced. According to Respondents, *Raybourne* departs from *Herzberger* by applying a discretionary standard even though "the plan's grant of discretionary authority was not included in a document [the beneficiary] received until after the litigation incepted." BIO 37-38. This argument ignores that, in *Raybourne*, the clear grant of discretionary authority was also included in the plan's SPD, which the beneficiary had received before instituting a civil action. *See* 576 F.3d at 449. *Raybourne* thus confirms that *Herzberger* is no outlier; to the contrary, together, these cases underscore the Seventh Circuit's view that deference is only warranted where it was adequately disclosed to the claimant.

2. Respondents' proffered policy reasons as to why this Court should not grant review on the notice question are equally unconvincing. Respondents' principal argument is that requiring clear notice of a discretionary clause would create "upheaval" and "undermine ERISA's laudable goals" of "uniformity, predictability and efficiency" by requiring courts to "first resolve a factual dispute" about whether "participants received actual notice of such plan provisions." BIO 31. What Respondents fail to recognize is that requiring ERISA participants to be notified of a discretionary clause would be a simple matter for ERISA plans: Just include the clause in the SPD and make sure that document reaches participants.

Equally unrealistic is Respondents' contention that requiring notice of discretionary clauses would "unravel nearly thirty-five years of ERISA jurisprudence approving of the use of the plan language delegating discretionary authority." *Id.* Using discretionary clauses is both well-established and common. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). All Petitioner asks is that ERISA beneficiaries be notified of such clauses in advance, so that they can make an informed decision about their rights before it is too late. *See Herzberger*, 205 F.3d at 333.

3. Finally, Respondent errs in suggesting that, because the applicable Department of Labor regulations do not specifically require disclosure of discretionary clauses in SPDs, ERISA beneficiaries have no right to be notified of such clauses. This argument improperly assumes that the DOL regulations are intended to be exhaustive and exclusive, yet they contain no such statement.

* * *

Because a change in the standard of review from *de novo* to abuse-of-discretion represents a seismic shift in the actual benefits a participant or employee has under a plan, *see* Pet. 28-30, a clause triggering discretionary review must be included in an ERISA plan document and disclosed to beneficiaries. Any other conclusion would transform ERISA's disclosure requirements into an empty promise.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew P. Fleming
Christen Archer Pierrot
Chiacchia & Fleming, LLP
5113 South Park Ave.
Hamburg, NY 14075

Leslie A. Brueckner
Sarah E. Belton
Public Justice, P.C.
555 12th Street
Ste. 1230
Oakland, CA 94607

Matthew W.H. Wessler
(*Counsel of Record*)
Leah M. Nicholls
Public Justice, P.C.
1825 K Street NW
Ste. 200
Washington, DC 20006
mwessler@
publicjustice.net
(202) 797-8600