No. 99-1403

In the Supreme Court of the United States

CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL., PETITIONERS

v.

RAYMOND STONE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a civil action under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(a)(3), to obtain "appropriate equitable relief" may be brought by a plan fiduciary against a plan participant "to redress" a violation of, or "to enforce" a term of, the plan, where the plan term requires the participant to reimburse the plan for medical expenses that the participant recovers from a third-party tortfeasor.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. Petitioner Cement Masons Health and Welfare Trust Fund for Northern California (Fund) is an employee benefit trust fund subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1101 *et seq.* Pet. 3. The Fund is established pursuant to a declaration of trust executed by certain associations of employers in the construction industry

and representatives of various employee unions. *Ibid*. The Fund is governed by petitioner Board of Trustees, which consists of an equal number of employer and union representatives. The Board has adopted a health and welfare plan that provides, *inter alia*, medical, hospitalization, and other benefits to plan participants and their eligible dependents. *Ibid*.

Respondent, Raymond Stone, is a cement mason and a plan participant. Pet App. B2. On December 19, 1995, respondent's wife was injured by a passing automobile. She was hospitalized and underwent multiple surgical procedures. *Ibid*. On January 23, 1996, she was moved to a rehabilitation hospital to continue her recovery. On January 29, her "gastrostomy tube became dislodged causing a massive infection that eventually led to cardiorespiratory arrest and her death on January 30, 1996." *Id*. at B2-B3.

Respondent's wife was an eligible dependent covered by the plan. Pursuant to its obligations under the plan, the Fund paid $572,325.80 on her behalf for medical expenses from the time of the accident until her death. Pet. App. A3. Pursuant to the express terms of the plan, respondent signed an agreement with the Fund providing that, in the event of an injury for which a third party may be liable, he would diligently pursue any claims for payment of medical expenses against third parties, and that reimbursement would be made to the Fund out of any proceeds received against the third party. *Id*. at A3 & n.2, B3.[1]

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[1] The plan requires that,

> [i]f an eligible individual has an * * * injury * * * for which a third party may be liable or legally responsible * * * the Fund *shall have an automatic lien* upon any recovery against the third party for benefits paid by the Fund * * * and such Eligible Individual *and his Dependents* * * * as a condition

b. The two minor children of respondent witnessed the automobile accident involving their mother. On December 18, 1996, they filed suit, through a guardian ad litem, against the driver of the automobile, seeking damages for negligent infliction of emotional distress caused by witnessing the accident. Pet. App. A4, B3. They settled the suit for $50,000, which was the coverage limit under the driver's insurance policy. *Ibid.*

On January 28, 1997, respondent and his two children filed a wrongful death action against the rehabilitation hospital and certain hospital staff members, among others. The action included a claim of medical negligence by the hospital and staff who allegedly failed to protect respondent's wife against the dislodging of her feeding tube and incorrectly reinstalled the tube, resulting in the fatal infection. Pet. App. A4, B3. On January 21, 1998, respondent dismissed his own claims from the suit. *Ibid.* The children ultimately settled the suit against the hospital for $194,999.99. Br. in Opp. 3.[2]

2. Petitioners brought the instant action against respondent under Section 502(a)(3) of ERISA, 29

> precedent to the entitlement to benefits *shall agree in writing* to reimburse the Fund for any payments made by the Fund * * * such reimbursement to be made out of any proceeds received by way of judgment, settlement or otherwise in connection with or arising out of any claim for or right to damages by such Eligible Individual against the third party, his insurance carrier * * * or any other source of third party recovery.

Pet. 3-4 (emphasis in original) (quoting Article IX, Section 9 of the plan).

[2] Respondent states that "[t]here is no dispute that the law applicable to medical malpractice actions in the State of California limits wrongful death plaintiffs to a total recovery of $250,000 in general damages for loss of love, affection, society, comfort, and solace (Civil Code §3333.2(b))." Br. in Opp. 3.

U.S.C. 1132(a)(3), seeking restitution to the Fund of the medical expenses paid by the Fund for the hospitalization and surgeries, pursuant to the terms of the plan and the reimbursement agreement. Pet. App. A4. Petitioners also sought a judgment declaring the Fund's lien against any recovery from third parties, and an injunction requiring respondent to advise the Fund of the nature and status of any claims against third parties relating to the injuries and death of his wife and preventing him from obstructing the Fund's right to enforce its lien against proceeds recovered by his wife's dependents. *Id.* at A5. Petitioners alleged that respondent attempted to circumvent his obligation under the plan to give priority to claims to recover the medical expenses by allowing his children's claims to exhaust the funds available under the limits in the driver's insurance policy and by dismissing his own claim in the wrongful death suit. *Id.* at A4.

The district court entered summary judgment for respondent. Pet. App. B1-B5. The court ruled that petitioners' claim was for "reimbursement, and such monetary relief is not available under § 1132(a)(3)." *Id.* at B4 (citing *FMC Med. Plan* v. *Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997)). In *Owens*, the district court explained, the Ninth Circuit held that "absent an allegation that plan assets were wrongfully acquired, a claim for monetary relief is a claim for reimbursement" that cannot be brought under Section 502(a)(3). *Ibid.* Because petitioners did not allege that respondent wrongfully procured the payment of benefits at the outset, the court found that it lacked subject matter jurisdiction and dismissed the claim. *Id.* at B5.

3. The court of appeals affirmed. Pet. App. A1-A11. The court acknowledged that injunctive and "other appropriate equitable relief" is available in a suit under

Section 502(a)(3) of ERISA and that such relief includes restitution. Pet. App. A5 (citing *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248 (1993)). The court held, however, that this case does not involve restitution or other equitable relief such as subrogation. *Id.* at A5-A7 & n.5. Rather, the court held that, as in *Owens*, the relief sought here is contract damages or reimbursement pursuant to contract, which, in its view, are not available under Section 502(a)(3). *Id.* at A5-A7. The court noted, but rejected, petitioners' assertion that *Owens* was wrongly decided. *Id.* at A7.

The court of appeals found unpersuasive petitioners' arguments distinguishing *Mertens* and *Owens*. The court rejected petitioners' contention that they are seeking restitution, which this Court recognized as appropriate equitable relief in *Mertens*. See 508 U.S. at 256. The court of appeals was of the view that, under *Mertens*, "restitution, as used in § 1132(a)(3), means 'ill-gotten gains,'" which it construed in *Owens* to mean "money obtained through 'fraud or wrongdoing.'" Pet. App. A7. The court found it undisputed that the medical expenses paid by the Fund in this case were not obtained through fraud or wrongdoing, even if respondent was thereafter obliged to pursue claims against third parties or to reimburse the Fund. *Ibid.*

The court of appeals also declined to distinguish *Owens* on the ground that petitioners sought declaratory and injunctive relief, which, unlike reimbursement, it acknowledged to be appropriate equitable relief under 29 U.S.C. 1132(a)(3). Pet. App. A8-A9. The court dismissed petitioners' request for a declaration of the Fund's lien as "nothing more than a mechanism to enforce, or to obtain the equivalent of, a damage remedy." *Id.* at A8. The court also emphasized that, in this case, "the only existing fund is the $50,000 received

by the two minor children, who have not been made defendants and, in any event, have no obligation whatsoever under the Plan [petitioners] are seeking to enforce." *Ibid.* The court rejected petitioners' request for injunctive relief requiring respondent to apprise the Fund of claims against third parties, because "it is undisputed that [respondent] has not recovered on third-party claims and is not asserting any new third-party claims." *Id.* at A8-A9.

The court of appeals therefore held that the district court correctly applied the substantive holding of *Owens*. The court ruled, however, that rather than dismissing for lack of subject matter jurisdiction, the case should have been dismissed on the merits. The court remanded for entry of such a judgment. Pet. App. A9-A11.

DISCUSSION

The court of appeals erred in holding that a cause of action does not lie under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), to enforce a term of an ERISA plan that requires reimbursement of medical expenses to the plan out of funds recovered by a plan participant from a third-party tortfeasor. Section 502(a)(3) authorizes a plan fiduciary to bring a civil action to enjoin any act that violates the terms of a plan and "to obtain other appropriate equitable relief * * * to redress such violations or * * * to enforce * * * the terms of the plan." 29 U.S.C. 1132(a)(3). Appropriate "equitable relief" as used in Section 502(a)(3) means "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993). A plan fiduciary's action for reimbursement of the plan's payment of medical expenses out of a tort recovery obtained by a participant

or beneficiary from a third party constitutes an equitable action to prevent the participant or beneficiary from being unjustly enriched, contrary to the express terms of the plan. The various remedies to prevent unjust enrichment and effectuate reimbursement—*e.g.*, restitution, equitable lien, constructive trust, subrogation, specific performance—are equitable in nature and fall within the scope of relief available under Section 502(a)(3).

The Ninth Circuit's contrary ruling conflicts with decisions of the Seventh, Eighth, and Eleventh Circuits. The Ninth Circuit has reaffirmed the ruling below in two subsequent decisions and declined to consider the issue en banc, thereby demonstrating that the circuit conflict will persist. Petitions for a writ of certiorari to review those two Ninth Circuit decisions are currently pending before this Court as well. *Reynolds Metals Co.* v. *Ellis*, 202 F.3d 1246 (9th Cir. 2000) (affirming district court judgment in light of controlling circuit precedent of *FMC Medical Plan* v. *Owens*, 122 F.3d 1258 (9th Cir. 1997), and also rejecting call for initial hearing en banc), petition for cert. pending, No. 99-1787; *Great-West Life & Annuity Ins. Co.* v. *Knudson*, No. 98-56472, 2000 WL 145374 (9th Cir. Feb. 7, 2000), 208 F.3d 221 (Table), petition for cert. pending, No. 99-1786. The question presented by this case is of substantial importance to the proper enforcement of ERISA because it affects the ability of plan fiduciaries to recoup significant amounts of money on behalf of employee benefit trust funds. Accordingly, review of the issue by this Court is warranted.

We do not believe, however, that the instant case presents the most suitable vehicle for the Court's consideration of the issue, because of several underlying facts that are not typical of this type of suit under

Section 502(a)(3) of ERISA and that may otherwise affect the appropriateness of the equitable relief sought here.[3] In our view, the *Ellis* case presents the best vehicle for addressing the issue presented because it does not appear to involve the sort of complicating factual or procedural issues that may render the instant case a less-than-ideal vehicle for consideration of the issue.[4] Thus, we believe that the Court should grant

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[3] The fact that respondent himself did not recover from any third-party tortfeasor, the failure of petitioners to make respondent's minor children defendants in this action (Pet. App. A8), and the apparent status of the children's tort recoveries (blocked trust accounts and annuities, see Br. in Opp. 3, 14-15), raise issues about the scope of appropriate equitable relief not present in a typical action to enforce a plan reimbursement term. Also, the two recoveries obtained by respondent's children appear to have been for injuries caused to them through negligent infliction of emotional distress based on their witnessing of the accident in which their mother was injured (Pet. App. A4) and through the wrongful death of their mother from medical malpractice, rather than for any medical expenses (most of which were incurred before the alleged malpractice occurred) (*ibid*.). It is unclear to what extent the theory of recovery from the third-party tortfeasor would affect the reimbursement obligation under the plan or the appropriateness of equitable relief. Finally, the scope of the children's reimbursement obligation under the plan even as a general matter is unclear. Compare *id.* at A8 (declaring children have no obligations under the plan) with Pet. 10 n.4 (arguing that children do have certain obligations, as dependents, relating to reimbursement under the plan and the related agreement), Pet. 3-4 (quoting plan document requiring eligible individual's dependents to agree to reimbursement, but specifying that reimbursement is to be made out of proceeds arising out of any "claim for or right to damages by such 'Eligible Individual'"), and Pet. App. A3 n.2 (quoting reimbursement agreement signed by respondent requiring reimbursement to be made out of proceeds arising out of any "claim for or right to damages by the undersigned or his Dependent").

[4] In *Knudson*, the third of the Ninth Circuit cases pending before the Court, the panel decision is unpublished and relies en-

the petition for a writ of certiorari in *Reynolds Metals Co.* v. *Ellis*, No. 99-1787, hold the petition in the instant case pending the decision in *Ellis*, and then dispose of this petition as appropriate in light of the resolution of that case.

1. a. Section 502(a)(3) of ERISA provides, *inter alia*, that a fiduciary of an ERISA-regulated plan may bring a civil action "to enjoin any act or practice which violates * * * the terms of the plan," or "to obtain other appropriate equitable relief * * * to redress such violations or * * * to enforce any * * * terms of the plan." 29 U.S.C. 1132(a)(3). In *Mertens*, 508 U.S. at 256, the Court held that money damages arising from a nonfiduciary's participation in a breach of fiduciary

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tirely on the Ninth Circuit's decisions in *Ellis* and in *FMC Medical Plan* v. *Owens*, 122 F.3d 1258 (1997). See No. 98-56472, 2000 WL 145374 at *1 (208 F.3d 221 (9th Cir. 2000) (Table)). Moreover, the district court in *Knudson* relied on wholly different grounds related to the fact that the status of the plan's lien against the participant's third-party recovery had been determined in a pending state court suit in which the plan had not participated. See 99-1786 Pet. App. at C1-C12; see also 99-1786 Br. in Opp. at 9-10 (noting procedural and factual uniqueness of case).

The petition in *Knudson* also presents an additional question related to the authority of a court to award attorney's fees in the unique situation in which the district court rules on the merits of the case and the court of appeals indicates that dismissal of the case could be based on the merits or on the lack of subject matter jurisdiction, see 99-1786 Pet. at 22-25—a question that is not presented in the instant case or in *Ellis*. Moreover, as the petitioner in *Knudson* points out (99-1786 Pet. at 22-25), the panel ruling in that case on the attorney's fees issue is inconsistent with another recent decision by the Ninth Circuit. Unlike the *Knudson* decision, which is unpublished, that other decision is published, stands as governing circuit precedent on the attorney's fees issue, and is consistent with the other fee decisions cited by the *Knudson* petitioner.

duty are not included within the meaning of "appropriate equitable relief" under Section 502(a)(3) because compensatory money damages are "the classic form of *legal* relief." *Id.* at 255. The Court reasoned that, for purposes of Section 502(a)(3), "equitable relief" means "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256.

A claim to enforce an express term of a plan requiring reimbursement of medical expenses out of a tort recovery obtained by a plan participant from a third party constitutes an action to obtain "appropriate equitable relief" within the meaning of Section 502(a)(3). Such an action is not one for contract damages, as the court of appeals believed. See Pet. App. A5-A7. When a term of a plan expressly provides that the plan's payment of a participant's medical expenses is conditioned on the participant's reimbursement to the plan out of funds recovered from third-party tortfeasors, a participant is unjustly enriched when he retains the amount recovered from a third party and does not reimburse the plan. An action to enforce such a reimbursement term and to prevent unjust enrichment is properly brought as an equitable action to seek restitution. Restitution is an appropriate equitable remedy to prevent unjust enrichment. Restatement of Restitution § 1, at 19-22 (1936); 1 D. Dobbs, *Law of Remedies* § 4.1(1), at 552, 556 (2d ed. 1993).

The court of appeals' contrary holding—that an action will not lie under Section 502(a)(3) to enforce a term of a plan requiring reimbursement of medical expenses to the plan out of a recovery from a third-party tortfeasor—is inconsistent with the common law of trusts and common-law remedial principles, which this Court has recognized to be incorporated in Section

502(a)(3) of ERISA. See *Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 120 S. Ct. 2180, 2189-2190 (2000). Under established common-law trust principles, trust beneficiaries owe various duties to the trust and to each other. G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 191, at 478 (rev. 2d ed. 1979) ("Co-beneficiaries are owners of equitable interests in the same res * * * . They are in a fiduciary relation to each other in the sense that one beneficiary may not secretly secure for himself a special advantage in the trust administration."); Restatement (Second) of Trusts §§ 251-255, at 633-642 (1959) (describing duties and liabilities of beneficiary to trust); 3A A. Scott & W. Fratcher, *The Law of Trusts* §§ 250-254, at 358-378 (4th ed. 1988) (same). Thus, at common law, actions could typically be brought in equity to enforce an agreement by a beneficiary to pay money into the trust, *id.* § 252; Restatement (Second) of Trusts, *supra*, § 252, at 635-636; or against a beneficiary for instigating a breach of trust or failing to perform a contract obligation to the trust; or to restore payments improperly made from the trust, G. Bogert & G. Bogert, *supra*, § 191, at 478-485; 3A A. Scott & W. Fratcher, *supra*, §§ 253-254.2, at 368-378; Restatement (Second) of Trusts, *supra*, §§ 253-254, at 636-640; or against a beneficiary for repayment of an advance made from the trust, *id.* § 255, at 640-642. An action for restitution to enforce a term of a plan for reimbursement of medical expenses and to prevent unjust enrichment to a plan participant at the expense of the Fund falls comfortably among such typical equitable claims.[5]

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[5] The fact that enforcement of a reimbursement term would take the form of a judgment requiring the payment of money does not remove such an action from coverage under Section 502(a)(3). An award of monetary relief is not necessarily "legal" relief, as op-

b. The court of appeals erred in holding that, under *Mertens* an action for restitution under Section 502(a)(3) is limited to recovery of "ill-gotten gains," *i.e.* "money obtained through fraud or wrongdoing." Pet. App. A7 (internal quotation marks omitted).[6] The *Mertens* Court referred to the availability of "restitution of ill-gotten plan assets or profits" under Section 502(a)(5) (the provision that authorizes civil actions by the Secretary of Labor to redress statutory violations and that is worded and interpreted similarly to Section 502(a)(3)) as an example of "appropriate equitable relief," but did not purport to limit restitution to such circumstances. 508 U.S. at 260. Indeed, elsewhere in *Mertens* the Court explained, without further limitation, that "equitable relief" under Section 502(a)(3) means "those categories of relief that were typically available in equity (such as injunction, mandamus, and

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posed to equitable relief. For example, the Court has "characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits,'" *Chauffeurs Local No. 391* v. *Terry*, 494 U.S. 558, 570 (1990) (quoting *Tull* v. *United States*, 481 U.S. 412, 424 (1987)), and has recognized that a monetary award that is "'incidental to or intertwined with injunctive relief' may be equitable," *id.* at 571 (quoting *Tull*, 481 U.S. at 424); see also *Curtis* v. *Loether*, 415 U.S. 189, 197 (1974); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946); cf. *Harris Trust & Sav. Bank*, *supra*.

[6] The court of appeals emphasized that "[i]t is undisputed in this case that payment of [respondent's] medical bills by [petitioners] was not obtained through fraud or wrongdoing" because petitioners were required under the terms of the plan to make those payments and petitioners are not "challenging their correctness." Pet. App. A7-A8. But the court of appeals did not consider whether a plan participant's retention of payments, in contravention of an express term of a plan requiring the participant to restore the payments to the plan, would mean that the participant is properly considered to be a wrongdoer in the relevant sense.

restitution, but not compensatory damages)." *Id.* at 256 (emphasis omitted).

Under background principles of equity, which the Court in *Mertens* invoked in interpreting ERISA, wrongdoing is not an essential element of a restitution claim. 1 D. Dobbs, *supra*, § 4.1(2), at 559; Restatement (Second) of Contracts § 373, at 209 (1981). The Court recently confirmed in *Harris Trust*, 120 S. Ct. at 2189-2190, that restitution under Section 502(a)(3) is governed by common-law remedial principles, not notions of wrongdoing.[7] The Court there held that the fact that a third party "was not 'the original wrongdoer' does not insulate him from liability for restitution" to a plan of trust property transferred to him in breach of a trustee's fiduciary duty. 120 S. Ct. at 2189-2190. The Court also noted that "the common law of trusts" sets "limits on restitution actions against defendants other than the principal 'wrongdoer,'" allowing restitution from such a third party only if he had actual or constructive knowledge of the circumstances that rendered the transfer unlawful. *Id.* at 2190.[8]

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[7] In *Harris Trust*, the Court held that an action may be brought under Section 502(a)(3) of ERISA to obtain "appropriate equitable relief," including restitution of plan assets, from a nonfiduciary party in interest that participated in a transaction prohibited by Section 406(a) of ERISA, 29 U.S.C. 1106(a).

[8] The Court also noted in *Harris Trust* that another equitable remedy designed to prevent unjust enrichment, *i.e.* a constructive trust, "is based on property, not wrongs." 120 S. Ct. at 2189-2190 (quoting 1 D. Dobbs, *supra*, § 4.3(2), at 597). See note 11, *infra*. In *Owens*, however, the Ninth Circuit erroneously held that a constructive-trust remedy is appropriate only where there is a breach of fiduciary duty and "some form of ill-gotten gain of another's property," such as by "fraud, duress, or unconscionable behavior." 122 F.3d at 1261; see also *Ellis*, 202 F.3d at 1248.

2. In contrast to the Ninth Circuit, several other courts of appeals have recognized that an action to enforce a term of a plan requiring reimbursement of medical expenses out of a recovery from a third-party tortfeasor is properly brought under Section 502(a)(3). Although the courts have applied somewhat different analyses, they have reached the same result.

In *Administrative Committee* v. *Gauf*, 188 F.3d 767 (1999), the Seventh Circuit held that, although the complaint for relief in that case "employ[ed] a variety of terms to express the relief requested," it was clear that the plan fiduciary was "seeking an equitable remedy against [the participant] to ensure her compliance with the terms of the Plan." *Id.* at 770 (citing as examples the complaint's request for "'specific performance and enforcement' of the contract and an 'order enjoining [the participant] from continuing to violate the terms of the plan'"). The court emphasized that it had "consistently * * * held that a complaint purporting to state a claim for equitable relief under a reimbursement clause in a benefits contract is an equitable claim for purposes of ERISA § 502(a)(3)," and the court saw no reason to depart from that precedent. *Id.* at 771 (citing *Harris Trust & Sav. Bank* v. *Provident Life & Accident Ins. Co.*, 57 F.3d 608, 615 (7th Cir. 1995); *Central States, S.E. & S.W. Areas Health & Welfare Fund* v. *Neurobehavioral Assocs.*, 53 F.3d 172, 173-174 (7th Cir. 1995); and *Health Cost Controls* v. *Skinner*, 44 F.3d 535 (7th Cir. 1995)). The court expressly recognized the Ninth Circuit's contrary ruling in *Owens*, but rejected that ruling as inconsistent with its prior case law as well as with decisions of the Eleventh and Eighth Circuits. 188 F.3d at 770-771 (citing *Blue Cross & Blue Shield of Ala.* v. *Sanders*, 138 F.3d 1347 (11th Cir. 1998), and *Southern*

Council of Indus. Workers v. *Ford*, 83 F.3d 966, 969 (8th Cir. 1996) (per curiam)).

In an opinion issued contemporaneously by a different panel of the Seventh Circuit, that court again held that an action by a plan administrator against a plan participant for reimbursement of medical benefits under a term of the plan constitutes an action for appropriate equitable relief under Section 502(a)(3), although in that panel's view the action was best described as an action seeking to impose a constructive trust on the participant's claim to the money, not as an action for restitution, as earlier decisions of that court had suggested. *Health Cost Controls of Ill., Inc.* v. *Washington*, 187 F.3d 703, 710 (7th Cir. 1999) (Posner, C.J.) (discussing, *inter alia*, *Provident Life & Accident Ins. Co.*, 57 F.3d at 615-616, and *Skinner*, 44 F.3d at 537 n.5), cert. denied, 120 S. Ct. 979 (2000).[9] The panel in *Washington*, like the panel in *Gauf*, expressly rejected the Ninth Circuit's holding in *Owens*, specifically disagreeing with the Ninth Circuit's apparent belief "that the imposition of a constructive trust in an ERISA case is permissible only when there has been a breach of trust." *Id.* at 711 (citing *Owens*, 122 F.3d at 1261). The Seventh Circuit panel in *Washington* found no basis for that view "either in ERISA or in the principles of equity." *Ibid.* (noting that, even under ordinary trust law, the historical limitation of a constructive trust as a remedy against only fiduciaries has been abandoned); accord *Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan* v. *Wells*, 213 F.3d 398, 401 (7th Cir. 2000), petition

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[9] The Seventh Circuit reasoned that restitution may be a legal remedy or an equitable remedy, depending on whether it is sought in an action at law or a suit in equity. *Washington*, 187 F.3d at 710.

for cert. pending, No. 00-386.[10] Finally, the Seventh Circuit emphasized in *Washington* that "[a]lternative characterizations of [the plan administrator's] claim (alternative to both restitution and constructive trust)—as seeking to impose an equitable lien on the escrow amount or seeking a mandatory injunction directing [the participant] to sign over her claim to the money—are also permissible, * * * and they reinforce [the] conclusion that [the plan administrator's] claim is securely equitable and so within the jurisdiction conferred on the district court by ERISA." 187 F.3d at 711.

As noted in *Gauf*, the Eleventh Circuit reached the same result in *Sanders*, although based on a somewhat different analysis. The Eleventh Circuit characterized a suit by a plan fiduciary to enforce a reimbursement term as a suit for specific performance, which it found to be an appropriate equitable remedy under Section 502(a)(3). The Eleventh Circuit specifically rejected the Ninth Circuit's ruling in *Owens*, explaining that that decision "appears to be based on an unduly narrow reading of *Mertens*" as limiting "appropriate equitable relief" under Section 502(a)(3) to include *only* an injunction, mandamus, or restitution. *Sanders*, 138 F.3d at 1352 n.5. The Eleventh Circuit concluded that *Mertens* is not so limited and that, because specific performance is a traditional form of equitable relief, it too is available

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[10] The petition filed by the plan in *Wells* does not raise the question presented here. It presents the question whether the common-fund doctrine requires that reimbursement obtained in an action under Section 502(a)(3) be reduced by a proportionate amount of attorney's fees. 00-386 Pet. at i. That attorney's fee issue is different from the one presented in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, petition for cert. pending, No. 99-1786, discussed in note 4, *supra*.

under Section 502(a)(3). *Ibid.* Similarly, in *Ford*, 83 F.3d at 969, the Eighth Circuit held that an action will lie under Section 502(a)(3) for specific performance of a participant's obligation to reimburse a plan under a subrogation clause of a plan.[11]

Thus, other courts of appeals have recognized the validity of actions under Section 502(a)(3) to enforce a reimbursement term of an ERISA plan through a variety of equitable remedies, including restitution, a constructive trust, an equitable lien, and specific performance. In the instant case, the complaint sought restitution as well as injunctive relief and an equitable lien against the third-party recovery. See Pet. App. A4-A5, B2, B4.[12] As noted above (p. 10), restitution is an appropriate remedy sought by petitioners to prevent unjust enrichment. Moreover, in *Harris Trust*, this Court recently recognized that imposition of a constructive trust is an appropriate equitable remedy in an action seeking restitution under Section 502(a)(3).

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[11] In some instances, a term of a plan provides for subrogation instead of, or in addition to, a claim for reimbursement. See *Ford*, 83 F.3d at 969; *Sanders*, 138 F.3d at 1355; 99-1787 (*Ellis*) Pet. at 6-7; see also *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990) (diversity action seeking judgment declaring self-insured plan's subrogation right; Court reversed summary judgment entered for participant, holding that ERISA preempted application of state antisubrogation statute on which lower courts relied). A claim for reimbursement closely resembles subrogation, which is another means to prevent unjust enrichment. 1 D. Dobbs, *supra*, § 4.3(4), at 605-606. In *Owens*, in addition to rejecting restitution and constructive-trust arguments, the Ninth Circuit rejected a subrogation argument, relying on an unduly narrow view of that remedy as well. See 122 F.3d at 1260.

[12] In *Ellis*, the complaint apparently sought specific performance and restitution. See 99-1787 Pet. at 2; 99-1787 Pet. App. at 13a.

The Court noted that, "[w]henever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein.'" 120 S. Ct. at 2189 (quoting *Moore* v. *Crawford*, 130 U.S. 122, 128 (1889), and 2 J. Pomeroy, *Equity Jurisprudence* § 1053, at 628-629 (1886)). A constructive trust is imposed on a particular asset, including a fund of money. 1 D. Dobbs, *supra*, § 4.3(2), at 591. A showing of wrongdoing or dishonorable conduct by the person having legal title to the asset is not required. 5 A. Scott, *supra*, § 462.2, at 313-314; 1 D. Dobbs, *supra*, § 4.3(2), at 597.

Petitioners also properly sought an equitable lien, which is another equitable remedy intended to prevent unjust enrichment. An equitable lien may arise out of an express agreement or may be judicially implied. 1 D. Dobbs, *supra*, § 4.3(3), at 601; G. Bogert & G. Bogert, *supra*, § 32, at 395-401. In the latter situation, it is imposed and operates like a constructive trust—the difference being that the equitable lien provides a security interest in, rather than complete title to, the property in question. 1 D. Dobbs, *supra*, § 4.3(3), at 601; G. Bogert & G. Bogert, *supra*, § 32, at 395-401; Restatement of Restitution, *supra*, § 161, at 18. Like a constructive trust, an equitable lien is not limited to cases of wrongdoing or dishonorable conduct. 1 D. Dobbs, *supra*, § 4.3(3), at 602-603.

3. The question presented by this case is of substantial importance to the proper enforcement of ERISA because it affects the ability of plan fiduciaries to bring actions under Section 502(a)(3) of ERISA to

enforce a term of a plan that allows recoupment of significant amounts of money on behalf of employee benefit trust funds. Indeed, trust law imposes on fiduciaries a duty to preserve trust assets to satisfy future claims, and impartially to account for the interests of all beneficiaries. *Varity Corp.* v. *Howe*, 516 U.S. 489, 514 (1996). Similarly, ERISA requires a fiduciary to discharge his duties with respect to the plan in the interest of all participants and beneficiaries, "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with" Parts I and IV of Title I of the Act. 29 U.S.C. 1104(a)(1)(D). Where a single participant is unjustly enriched at the expense of the plan as a whole by receiving a windfall—through the simultaneous recovery from a third-party tortfeasor and retention of plan payments in violation of a term of the plan requiring reimbursement to the plan in the event of a recovery from a third-party tortfeasor—an action to enforce the reimbursement term does not create "tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing * * * costs." *Mertens*, 508 U.S. at 262-263 (citing *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981)). To the contrary, it is consistent with both of those purposes.

Accordingly, in view of the conflict among the circuits and the important and recurring nature of the question presented, further review of this important question is warranted. In light of the atypical facts underlying the instant case (see note 3, *supra*), however, we do not believe that it presents the most suitable vehicle for the Court's consideration of the issue. In our view, *Reynolds Metals Co.* v. *Ellis* presents a better vehicle for addressing the issue presented because it does not

appear to involve the sort of complicating factual or procedural issues that may render the instant case a less-than-ideal vehicle for consideration of the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending action on the petition for a writ of certiorari in *Reynolds Metals Co.* v. *Ellis*, No. 99-1787, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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