ERISA and Equity

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I. Introduction

The Employee Retirement Income Security Act of 1974 (“ERISA”) was enacted to protect the economic security of American employees by regulating employer-sponsored pension and welfare plans. To accomplish this, the statute establishes comprehensive rules that govern the design and administration of such plans. And, to ensure that these rules are followed, ERISA authorizes civil litigation to remedy violations.

From the perspective of plan participants and beneficiaries, ERISA’s civil enforcement scheme consists of three key provisions. The first provision, ERISA § 502(a)(1)(B), authorizes a plan participant to bring a civil action for benefits due under the plan. The second provision, ERISA § 502(a)(2), authorizes litigation on behalf of the plan to recover benefits directly from a

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2 See United States Dep’t of Labor, History of EBSA and ERISA, (Jan. 11, 2013), available at, http://www.dol.gov/ebsa/aboutebsa/history.html#.UPEG5aGOhnc (“Plan sponsors must design and administer their plans in accordance with ERISA. Title II of ERISA contains standards that must be met by employee pension benefit plans in order to qualify for favorable tax treatment. Noncompliance with these tax qualification requirements of ERISA may result in disqualification of a plan and/or other penalties.”).

3 ERISA also authorizes criminal enforcement under 29 U.S.C. § 1111 (2009) (criminalizing the act of serving as a fiduciary if the fiduciary has been convicted of certain crimes); id. § 1131 (criminalizing violation of ERISA’s reporting and disclosure requirements); id. § 1141 (criminalizing coercive interference with a participant’s rights). Criminal prosecutions are rare because the government must prove willful or intentional conduct.

4 See 29 U.S.C. § 1132(a)(1)(B) (2009) (authorizing a participant in an ERISA plan to sue “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan”).
fiduciary that has breached one the duties imposed by ERISA.\textsuperscript{5} The third provision, ERISA § 502(a)(3), authorizes a suit “to enjoin any act or practice which violates [ERISA]” or “to obtain other appropriate equitable relief.”\textsuperscript{6}

The precise scope of each private right of action created by these three provisions is extraordinarily important for several reasons. First, ERISA encompasses a wide range of private transactions.\textsuperscript{7} Second, ERISA broadly preempts most state laws that would otherwise govern such private transactions.\textsuperscript{8} Finally, ERISA’s remedies have been deemed exclusive by the Supreme Court.\textsuperscript{9} To put it simply: unless one of ERISA’s civil enforcement provisions provides a remedy, a plaintiff probably has none. And that is the case even if the underlying conduct that gives rise to the plaintiff’s complaint is expressly prohibited by ERISA.

Given the significance of these ERISA provisions, it is not surprising that they have created several interpretative disputes that have required intervention by the United States Supreme Court. These include three controversial decisions involving the mechanics of Section


\textsuperscript{6} See 29 U.S.C. § 1132(a)(3)(B) (authorizing a participant in an ERISA plan to sue “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan”).


\textsuperscript{8} ERISA preempts state laws that “relate to” employee benefit plans. This includes state law remedies, which the statute expressly preempts. 29 U.S.C. § 1144(a) (ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”).

\textsuperscript{9} In other words, a plaintiff cannot assert, in the context of a claim for benefits, for example, that state law creates an additional remedy. The plaintiff is limited to only such remedies as ERISA authorizes. See, e.g., Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52 (1987); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-147 (1985).
They also include two important decisions addressing the scope of Section 502(a)(2). The most controversial and important decisions involving the scope of civil remedies available under ERISA, however, involve the interpretation of what constitutes “appropriate equitable relief” under Section 502(a)(3) of the statute.

The restrictive nature of these Supreme Court decisions – coupled with the Court’s broad conception of ERISA preemption – led many to argue that a regulatory vacuum had been created. In the words of one Supreme Court Justice: “Because the [Supreme] Court has coupled an encompassing interpretation of ERISA’s preemptive force with a cramped construction of the . . . relief[ ] allowable under [ERISA], a “regulatory vacuum” exists: “[V]irtually all state law remedies are preempted but very few federal substitutes are provided.” And the practical effect of this regulatory vacuum did not go unnoticed. As one disability insurance executive wrote in a now-infamous memorandum:

The advantages of ERISA [to a litigation defendant] are enormous: state law is preempted by federal law, there are no jury trials, there are no compensatory or punitive damages, relief is usually limited to the amount of benefit in question, and claims administrators may receive a deferential standard of review. The economic impact . . . from having policies covered by ERISA could be significant. As an example, [we] identified 12 claim situations where we settled for $7.8 million in the aggregate. If these

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11 See LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248 (2008); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985). See also Linda Greenhouse, Top Court Allows Suit Over 401(k), N.Y. TIMES, Feb. 21, 2008, at A2 (“With 70 million people holding about $3 trillion in 401(k) investments, the 9-to-0 decision [in LaRue] was one of the most important rulings in years on the meaning of the federal pension law.”).


12 cases had been covered by ERISA, our liability would have been between zero and $0.5 million.\textsuperscript{14} Many called for congressional action.\textsuperscript{15} But the thorny normative questions animating the debate over what civil remedies should be available under ERISA are not amenable to simplistic legislative or judicial resolution.\textsuperscript{16} As one of us has argued elsewhere, the “central questions inadvertently left open by ERISA cannot be resolved without a comprehensive legislative response.”\textsuperscript{17}

In the absence of such a comprehensive legislative response, the United States Department of Labor (the “DOL”) developed a comprehensive litigation strategy. For many years – spanning both Democratic and Republican administrations – the agency has taken the position that a much broader interpretation of Section 502(a)(3) is warranted and not foreclosed by prior Supreme Court cases.\textsuperscript{18} Lower courts, however, were unwilling to adopt the DOL’s position, believing


\textsuperscript{15} After recognizing the existence of the ERISA regulatory vacuum, Justice Ginsburg went on to join what another well-known jurist described as “the rising judicial chorus urging that Congress . . . revisit what is an unjust and increasingly tangled ERISA regime.” Davila, 542 U.S. at 222 (Ginsburg, J., concurring) (quoting DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 456 (3d Cir. 2003) (Becker, J., concurring)). See also Cicic v. Does, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting) (“[T]he injury that the courts have done to ERISA will not be healed until the Supreme Court reconsiders the existence of consequential damages under the statute, or Congress revisits the law to the same end.”); Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 53 (D. Mass. 1997) (“This case, thus, becomes yet another illustration of the glaring need for Congress to amend ERISA ... [which] has evolved into a shield of immunity that protects health insurers, utilization review providers, and other managed care entities from potential liability for the consequences of their wrongful denial of health benefits.” (footnote omitted)); Kathryn J. Kennedy, \textit{Judicial Standard of Review in ERISA Benefit Claim Cases}, 50 Am. U. L. Rev. 1083, 1091 (2001) (“Although the intent of the preemption clause was to provide uniformity regarding the administration of plan benefits, it is now being used as a shield for plan fiduciaries and insurers to limit their liability under these plans. Such a result is inconsistent with ERISA's overall objective to protect participants' rights.” (footnote omitted)).


that the Supreme Court’s jurisprudence had conclusively narrowed the scope of Section 502(a)(3).\textsuperscript{19}

In a surprise to many (as explained in Section II below), the Supreme Court did what no lower court had been willing to do: it made clear, in \textit{Cigna Corp. v. Amara},\textsuperscript{20} that the DOL’s position is correct. In some areas where ERISA’s regulatory vacuum exists, this decision is unlikely to bring about any change.\textsuperscript{21} But, in many other important areas, \textit{Amara} now permits plaintiffs to seek meaningful relief.

In this paper, we discuss three of the most important areas that are affected and highlight open questions that will be heavily litigated in coming years.

\section{II. The Importance of Section 502(a)(3) of ERISA}

As noted above, ERISA preempts most claims relating to pension plan and health care benefits.\textsuperscript{22} As a result, participants and beneficiaries seeking such benefits are typically limited to the remedies they can obtain under ERISA. Essentially, that means that these individuals must seek a remedy authorized under one of the three civil enforcement provisions discussed above.\textsuperscript{23}

ERISA Section 502(a)(1)(B) permits a participant to “recover benefits due . . . under the terms of [the] plan” or to “enforce . . . rights under the terms of the plan.”\textsuperscript{24} In some

\begin{flushleft}
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} 131 S. Ct. 1866 (2011).
\textsuperscript{22} \textit{See supra.}
\textsuperscript{23} \textit{See supra.}
\textsuperscript{24} 29 U.S.C. § 1132(a)(1)(B).
\end{flushleft}
circumstances, this provision will allow a participant to recover wrongfully withheld benefits that are provided for under the parties’ agreement. But there are many cases in which a participant seeks something other than that which the terms of the plan provide for. In those cases, Section 502(a)(1)(B) has no application.\textsuperscript{25} Similarly, Section 502(a)(2), which effectively authorizes a derivative suit by a participant or beneficiary on behalf of the plan, may result in a remedy to the plan for a fiduciary breach that causes “loss[] to the plan” or a gain to the fiduciary.\textsuperscript{26} This provision is equally unhelpful, however, outside of that narrow circumstance. This leaves Section 502(a)(3) to do the heavy lifting in remediying ERISA violations. As we explain below, a participant or beneficiary must seek relief under Section 502(a)(3) to remedy certain types of misconduct.\textsuperscript{27} That misconduct might include writing an illegal term into a plan,\textsuperscript{28} providing a participant with misleading information,\textsuperscript{29} or retaliating against an employee for exercising rights under a plan.\textsuperscript{30}

Section 502(a)(3) consists of two operative provisions. The first provision permits a participant “to enjoin any act or practice which violates [ERISA].”\textsuperscript{31} The second provision authorizes the court to grant a participant or beneficiary “other appropriate equitable relief.”\textsuperscript{32} Due to the ambiguity of the phrase “appropriate equitable relief” and the wide array of

\textsuperscript{25} See infra Section III.


\textsuperscript{27} See infra Section III.

\textsuperscript{28} See infra Section III.A.

\textsuperscript{29} See infra Section III.B.

\textsuperscript{30} See infra Section III.C.


misconduct that it is the exclusive remedy for, courts have struggled to give Section 502(a)(3)(B) a fair interpretation.

The Supreme Court’s jurisprudence has complicated that task. In Mertens v. Hewitt Associates, the Court interpreted “appropriate equitable relief” as encompassing those remedies that were typically available at historical equity. And in Great-West v. Knudson, the Court suggested that suits seeking to compel a defendant, via equitable doctrines, to pay a sum of money to a plaintiff are suits for “money damages” not authorized under Section 502(a)(3). In light of these rulings, many courts believed that the scope of equitable remedies had been severely limited.

But recently, the Court illustrated, in CIGNA Corp. v. Amara, that the scope of remedies available under Section 502(a)(3) is not as limited as courts once believed. In its opinion, the Court endorsed the application of three additional types of equitable relief: reformation, surcharge, and estoppel. And the Court made clear that relief is not removed from the category of equitable merely because it will result in a defendant paying a plaintiff a sum of money.

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33 508 U.S. 248 (1993). In Mertens, the Supreme Court determined that Congress’s use of the term “equitable” in Section 502(a)(3) was intended to create a distinction between legal and equitable relief. Id. at 256-58. The Court thus held that recovery under Section 502(a)(3) is limited to “those categories of relief that were typically available at equity (such as injunction, mandamus, and restitution, but not compensatory damages).” Id. at 256. Courts have struggled with determining which forms of relief were “typically” available at equity. This has led many courts to give a restrictive understanding to the scope of relief available under Section 502(a)(3). See infra note 66.

34 See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002) (stating that “[a]lmost invariably[,] suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant’s breach of legal duty.”).

35 See, e.g., Amara v. CIGNA Corp., 559 F. Supp. 2d 192, 205 (D. Conn. 2008) (“[T]he Supreme Court has issued several opinions . . . that have severely curtailed the kinds of relief that are available under § 502(a)(3).” (citation omitted)). See also supra note 33.


37 Id. at 1879-81.

38 Id. at 1880.
Many unsettled issues surround the application of these newly acknowledged remedies. Nevertheless, *Amaral* has the potential to greatly increase the efficacy of the substantive rights afforded by ERISA.

**III. Three Evolving Areas of Litigation**

**A. Illegal Plan Terms**

The terms of an employee benefit plan can violate ERISA in many significant ways. When this occurs, an injured participant may need to initiate litigation in order to avoid the adverse consequences of the illegal terms included in the plan.

In such cases, the aggrieved participant will rarely have a viable claim under Section 502(a)(1)(B) of ERISA. The private right of action created by that provision only permits a participant to “recover benefits due . . . under the terms of [the] plan” or to “enforce . . . rights

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39 For example, a pension plan may include provisions that fail to satisfy ERISA’s requirements regarding the vesting or accrual of benefits:

ERISA imposes detailed vesting requirements, which protect participants from forfeiting their pension benefits once they meet certain statutory requirements, such as serving an employer for a minimum number of years. See 29 U.S.C. § 1053 (2009) (enumerating vesting requirements). *See also* Fenwick v. Merrill Lynch & Co., Inc., 570 F. Supp. 2d 366, 373 (D. Conn. 2008) (plaintiffs alleged that defendants wrongfully denied plaintiffs’ vested benefits); Zhu v. Fujitsu Group 401(K) Plan, C-03-1148RMW, 2004 WL 3252573, at *1 (N.D. Cal. Mar. 3, 2004) (plaintiff brought suit alleging that, as an employee with at least three years of service, he was denied his right to elect vesting under ERISA § 203(c) of the amended plan or plan prior to amendment); Page v. Pension Ben. Guar. Corp., 968 F.2d 1310, 1311 (D.C. Cir. 1992) (plaintiffs brought suit to recover pension benefits, alleging that, based on their years of service, they satisfied ERISA’s minimum vesting requirements, though they had not met the unlawful, more restrictive conditions for vesting found in their plans).

ERISA also imposes detailed benefit accrual requirements, which protect participants from age discrimination (ceasing or reducing an employee’s benefit accrual because of the attainment of any age) and backloading ( awarding benefits disproportionately in an employee’s later years of service). 29 U.S.C. § 1054 (2009) ( enumerating benefit accrual requirements). *See also* Sunder v. U.S. Bancorp Pension Plan, 586 F.3d 593, 603 (8th Cir. 2009) (alleging that defendant’s plan violated ERISA’s anti-age discrimination provision because benefits would accrue at a reduced rate on account of age); Cooper v. IBM Personal Pension Plan, 457 F.3d 636, 637-38 (7th Cir. 2006) (alleging that benefit accrual provisions in defendant’s plan resulted in age discrimination because older workers would have less time to earn annual interest credits under the plan); Finley v. Dun & Bradstreet Corp., 471 F. Supp. 2d 485, 489 (D.N.J. 2007) (same); Halbach v. Great-W. Life & Ann. Ins. Co., 4:05CV02399 ERW, 2007 WL 2108454 (E.D. Mo. July 18, 2007) (alleging violation of ERISA’s anti-backloading provisions).
under the terms of the plan." The aggrieved participant will likely fare no better under Section 502(a)(2) of ERISA. The private right of action created by that provision – in conjunction with 29 U.S.C. § 1109 – permits a participant to sue a breaching fiduciary to restore losses to the plan (or gains to the fiduciary) caused by a breach of fiduciary duty. Although the inclusion of illegal plan terms may constitute a breach of fiduciary duty, it is unlikely to cause a “loss[] to the plan” (or gain to the fiduciary). Instead, it merely reduces or eliminates a participants contractual entitlement under the plan. And that type of individualized injury – the Supreme Court has made clear – is not remediable under the provision.  

Accordingly, Section 502(a)(3) of ERISA is the primary vehicle through which an aggrieved participant can attempt to avoid the adverse consequences of illegal terms included in his or her pension or welfare plan. Specifically, the injured participant would request that the court either (1) enjoin enforcement of the illegal plan terms under Section 502(a)(3)(A) or (2) reform the plan under Section 502(a)(3)(B) so that its terms comply with the substantive requirements of ERISA. For many years, however, federal courts have disagreed about the viability of such legal theories.

Some courts have taken the position that a suit to enjoin the enforcement of illegal plan terms or for “other appropriate equitable relief” cannot be maintained where the participant would recover a money payment for unlawfully denied benefits.  

*Crosby v. Bowater Inc.* illustrates

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40 29 U.S.C. § 1132(a)(1)(B) (emphasis added). As discussed *infra*, a claim under Section 502(a)(1)(B) may be available to enforce a plan as reformed. At the outset, however, such a claim appears to be unavailable. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1876 (2011) (rejecting Section 1132(a)(1)(B) as a basis for changing the terms of a plan.).

41 *See, e.g.*, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 138 (1985) (rejecting the argument that a private remedy is available under Section 502(a)(2)).

42 *See, e.g.*, *West v. AK Steel Corp.*, 484 F.3d 395 (6th Cir. 2007) (treating a claim for equitable and injunctive relief under 502(a)(3) to remedy illegal plan terms as a claim for a legal remedy, and thereby denying plaintiffs relief); *Crosby v. Bowater Inc. Ret. Plan for Salaries Employees of Great N. Paper, Inc.*, 382 F.3d 587, 596 (6th Cir.
this approach.\footnote{382 F.3d 587, 596 (6th Cir. 2004).} In \textit{Crosby}, a class of participants in an ERISA plan claimed that its plan administrator had improperly applied a pre-retirement mortality discount factor when calculating lump sum pre-retirement benefits, resulting in a shortfall of benefits.\footnote{Id. at 589.} The plaintiffs initiated suit under Section 502(a)(3) for “equitable and injunctive relief,” requesting recovery of the illegally denied benefits.\footnote{Id.} Finding that the plan’s terms were illegal, the district court granted summary judgment in the plaintiffs’ favor and ordered the defendant to pay the unlawfully withheld benefits.\footnote{Id.} On appeal, the Sixth Circuit reversed.\footnote{Id. at 597.} Relying on the Supreme Court’s holdings in \textit{Merte}ns and \textit{Great-West}, the Sixth Circuit held that the relief requested was not “equitable” because the district court’s remedy would effectively result in a money judgment.\footnote{Id. at 594-95 (citing Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002)).}

Other courts, however, have permitted claims under Section 502(a)(3) to remedy illegal plan terms.\footnote{See England v. Marriott Int’l, Inc., 764 F. Supp. 2d 761, 778 (D. Md. 2011) (granting plan reformation to remedy an unlawful vesting scheme); Laurenzano v. Blue Cross & Blue Shield of Massachusetts, Inc. Retirement Income Trust, 134 F.Supp.2d 189, 198 (D.Mass. 2001) (finding that, where employer’s plan was alleged to contain illegal terms, plaintiff had stated a claim for relief under section 502(a)(3) because that Section requires courts to “redress” violations of ERISA and only money could “redress” the harm alleged); Carrabba v. Randalls Food Markets, Inc., 145 F.Supp.2d 763, 770-71 (N.D. Tex. 2000) (after finding violations of the accrual and vesting provisions of ERISA, court “concluded that equity would be served . . . if the members of the Class were to be placed in basically the same financial position in which they would be if the employer had complied with the minimum requirements necessary for the [plan] to satisfy the accrual and vesting provisions of ERISA.”); DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund, 975 F. Supp. 258, 270 (S.D.N.Y. 1997) (ordering defendants to reform pension plan containing illegal terms to comply with ERISA and inform plaintiff of her benefits under the reformed plan).} \textit{England v. Marriott Int’l, Inc.} illustrates the general approach.\footnote{Id. at 594-95 (same); Fenwick v. Merril Lynch & Co., 570 F.Supp.2d 366, 374–75 (D.Conn. 2008) (treating claims under 502(a)(3) for equitable reformation and injunctive relief prohibiting an employer from enforcing illegal terms of its plan as claims for “[s]pecific performance to pay on a contract or an injunction to compel the payment of money past [which] were not typically available in equity,” and thereby denying plaintiffs relief).} In that case, the
plaintiffs requested injunctive and other equitable relief pursuant to Section 502(a)(3) to remedy an employer’s illegal vesting scheme. The employer brought a motion to dismiss, arguing that the plaintiffs had not requested equitable relief because the remedy sought would result in the payment of additional shares of stock. The court rejected this contention for two reasons: (1) because reformation of the terms of a contract is a traditional form of equitable relief, and (2) because a money payment was the only remedy that would allow the plan to come into compliance with ERISA. Thus, the court held that plaintiffs were entitled to pursue a claim for reformation under Section 502(a)(3).

Amara makes it unmistakably clear that the former approach is erroneous. Amara involved a claim that an employer failed to comply with ERISA’s notice provisions by furnishing a misleading summary plan description (“SPD”). Agreeing with the plaintiffs that the employer had breached its notice obligations under ERISA, the district court reformed the plan pursuant to Section 502(a)(1)(B) and ordered the defendant to pay the plaintiffs benefits accordingly. Reviewing the district court’s decision, the Supreme Court reversed, holding that the relief granted, reformation, was not available under Section 502(a)(1)(B). The Court explained that Section 502(a)(1)(B) does not “grant a court the power to change the terms of the plan as they

51 Id. at 768.
52 Id. at 776.
53 Id. at 778.
54 Id. at 780. The court also noted that plaintiffs would be permitted to pursue a claim under Section 502(a)(1)(B) for recalculation and distribution of the unlawfully denied benefits pursuant to the reformed plan. Id.
56 Id. at 1871-72. ERISA requires that a plain language description of the plan, sufficiently accurate to apprise participants and beneficiaries to their rights under it, be furnished to them. See 29 USC § 1022.
57 Id. at 1871.
58 Id.
previously existed . . .” But the Court went on to recognize that the relief granted by the district court might have been justified under Section 502(a)(3). First, the Court noted that reformation of a plan’s terms to cure false or misleading information provided by a plan administrator is equitable relief. Second, it identified estoppel as another equitable remedy for fraudulent misrepresentation. And, finally, it expressly rejected the notion that relief is removed from the category of equitable relief merely because it takes the form of a money payment, noting that the equitable doctrine of surcharge could justify make-whole monetary relief. Because the district court had not considered awarding relief under Section 502(a)(3), the Court remanded the case for further proceedings consistent with its opinion.

_Amara_ invalidates the central reasoning of courts that have taken the former approach described above. These courts have relied on the idea that a remedy for illegal plan terms is not equitable if relief would take the form of a money judgment. _Amara_ expressly rejects that position. Moreover, these courts have given no indication that they have considered any equitable remedies other than injunctive, mandamus, and restitutionary relief. _Amara makes_

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59 Id. at 1876.
60 Id. at 1871.
61 Id. at 1879.
62 Id. at 1880.
63 Id. at 1880 (“[T]he fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief.”). Although the Court expressly noted that surcharge could form the basis of make-whole relief under Section 502(a)(3), it also recognized that relief in the form of an order under Section 502(a)(1)(B) to furnish benefits according to a plan as reformed would be permissible so long as the initial reformation was statutorily authorized. Id. at 1876. In other words, the Court endorsed a two-step process to accomplish an award of money: the first step being reformation or estoppel under Section 502(a)(3), and the second step being surcharge under Section 502(a)(3) or an order to furnish benefits under Section 502(a)(1)(B). The Court did not say such a process is _required_, but it made clear that it should be permitted. Id. at 1877.
64 Id. at 1882.
65 Id.
66 See West v. AK Steel Corp., 484 F.3d 395, 403-04 (6th Cir. 2007) (“The plaintiffs in the present case have already “cashed out” of their participation in the Plan, so traditional forms of equitable relief – injunction,
clear that reformation, estoppel, and surcharge are among the forms of equitable relief that courts must consider.

We know of no post-Amara federal court that has considered the application of the equitable remedies recognized in Amara to a claim involving illegal plan terms. And although the Court’s endorsement of reformation as an available equitable remedy under Section 502(a)(3) supports the approach taken by several pre-Amara courts, many important issues still must be resolved. Those issues include the following:

- *Amara* acknowledged reformation, estoppel, and surcharge in the context of a misleading SPD. Under which of these theories may a litigant seek a remedy for illegal plan terms?\(^{67}\)

\(^{67}\) As discussed supra, several pre-Amara courts identified reformation as a form of equitable relief available under Section 502(a)(3). These courts, however, may not have fully explored the specific showings necessary to obtain reformation. *Amara* defined reformation as “[t]he power to reform contracts . . . to prevent fraud.” *Amara*, 131 S.Ct. at 1879. The post-Amara Ninth Circuit wrote, in the context of a claim that a plan administrator had furnished a defective SPD, that this means reformation can only be used to remedy fraud or mistake. See Skinner v. Northrop Grumman Retirement Plan B, 673 F.3d 1162 (9th Cir. 2012); accord Osberg v. Foot Locker, Inc., 07 CIV. 1358 KEF, 2012 WL 6062542 (S.D.N.Y. Dec. 6, 2012) (“For reformation of a contract to be proper, the plaintiff must show a material error in the contract related to fraud or mistake.”). If that is the case, in what sense must a plaintiff, seeking a remedy for a denial of benefits under a plan’s illegal terms, make that showing? A plaintiff might prevail by arguing that the agreement involved a mutual mistake of law. See Philippine Sugar Estates Dev. Co. v. Gov’t of Philippine Islands, 247 U.S. 385, 389 (1918) (mistake of law is not a bar to equitable relief in the form of reformation); Snell v. Atl. Fire & Marine Ins. Co. of Providence, Ill., 98 U.S. 85, 90-91 (1878) (describing Chief Justice Marshall’s acknowledgement that he had found no case to show that a mistake of law was beyond the reach of equity, and another authority’s acknowledgment that mistake of law might even compel a court of equity to grant relief. (citing 1 Story, Eq., Jr., sect. 138 e and f (Redf. ed.)). Alternatively, a plaintiff might prevail in establishing that limiting reformation to fraud and mistake takes a more restrictive view of reformation than equity requires. In other contexts, federal courts have stated that reformation could be justified under the more flexible concept of “inequitable conduct.” See, e.g., Am. Annuity Group, Inc. v. Guar. Reassurance Corp., 140 F. Supp. 2d 859, 867 (S.D. Ohio 2001) (“Unless the evidence demonstrates proof of fraud or inequitable conduct by the other party to the transaction, the reforming of a contract by a court of equity is improper.”). And at least one post-Amara court has granted reformation based simply on a breach of fiduciary duty where the fiduciary provided “false or misleading information.” Z.D. ex rel. J.D. v. Group Health Co-op., C11-1119RSL, 2012 WL 5033422, at *9 (W.D. Wash. Oct. 17, 2012).

*Amara* also endorsed application of the equitable doctrine of estoppel to remedy a misleading SPD. *Id.* at 1880. The *Amara* court described estoppel as “operate[ing] to place the person entitled to its benefit in the same position he
• If reformation applies, which form of reformation (contract or trust) is applicable to remedy illegal plan terms? 68

• If reformation applies, how does a plaintiff enforce a plan once reformed? 69

• Amara made it clear that the scope of equitable remedies available under Section 502(a)(3) is broader than many courts imagined. What other equitable remedies might a court recognize now that Amara has opened the door to a more robust inquiry? 70

would have been in had the representations been true.” Id. This doctrine seems less likely than reformation to work to remedy illegal plan terms simply because, in such cases, the plaintiff is seeking to avoid, as opposed to enforce, the terms as they were represented.

Finally, Amara endorsed the application of the equitable doctrine of surcharge. As the Amara court put it: “[At equity, t]he surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary.” Id. at 1880. The fiduciary duties imposed by ERISA are enumerated in Section 404. Section 404(a)(1)(D) provides that “a fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan inssofar as such documents and instruments are consistent with the provisions of this subchapter [i.e., subchapter I] and subchapter III of this chapter.” 29 U.S.C. § 1104 (emphasis added). Subchapter I sets forth, among other things, ERISA’s vesting requirements, benefit accrual requirements, and reporting and disclosure requirements. Thus, one argument for surcharge in the illegal plan context is that by administering a plan according to its illegal terms, a fiduciary breaches his duties imposed by ERISA. If courts accept this argument, plaintiffs may be able to use surcharge to directly obtain make-whole monetary relief as a remedy for wrongful denial of benefits pursuant to unlawful plan terms. See Amara, 131 S.Ct. at 1880 (“Inssofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in Mertens, is analogous to a trustee makes a critical difference.”). At least one post-Amara court, however, has rejected this position. See, e.g., Stocks v. Life Ins. Co. of N. Am., 861 F. Supp. 2d 948 (E.D. Wis. 2012) (holding, in line with one line of pre-Amara decisions, that surcharge was unavailable because what plaintiffs really sought was compensatory damages).

68 Amara leaves open the question of which form of equitable reformation courts may apply. See Amara, 131 S.Ct. at 1880 (describing the power of equity courts to reform “contracts” but not addressing that power’s interplay with the power of equity courts to reform “trusts.”) As the Ninth Circuit put it in a post-Amara decision: “In the law of trust, a court may reform a trust to the extent that it was procured by wrongful conduct, such as undue influence, duress, or fraud. . . . In the law of contract, a court may reform a contract when (1) one party seeks reformation, (2) that party’s assent was induced by the other party’s misrepresentations as to the terms or effect of the contract, and (3) the party seeking reformation was justified in relying on the other party’s misrepresentations.” Because the form that applies affects the showing that a plaintiff must make, this issue is more than academic.

69 As discussed above, see supra note 63, the Court in Amara seemed to suggest that Section 502(a)(1)(B) and the equitable remedy of surcharge could serve as alternative bases for ordering a money payment pursuant to a reformed plan. Whether that is the case, however, is still an open question.

70 For many pre-Amara courts, the inquiry was as simple as this: Is the remedy sought an injunction, mandamus, or restitution? If not, then the remedy is unavailable under Section 502(a)(3). See supra note 66 and accompanying text. The ALI identified a “laundry list” of equitable remedies that might be available after Amara, including affirmative and negative injunctions, mandamus, equitable restitution, equitable liens, constructive trusts, disgorgement of profits, restoration of ill-gotten assets, contract reformation, equitable estoppel, surcharge, accounting, specific performance, unjust enrichment, partitioning of property, contract rescission, reinstatement, front-pay, removal of fiduciary, clean-up doctrine, pre and post judgment interest, alienation of pension benefits where fiduciary breached duty to plan, equitable defenses, unclean hands, waiver, and laches. Marry Ellen Signorille & Raven Merlau, Cigna Corporation v. Amara: A Whole New World, ST001 ALI-ABA 159, 163-64 (2011).
In our view, *Amara* has the potential to significantly improve the efficacy of ERISA’s substantive protections by providing a remedy when illegal terms are included in an ERISA plan. Previously, many courts had simply denied relief on the basis that ERISA offered no remedy. This should no longer be the case, but litigators must still approach the issues involved in extending *Amara* to this context thoughtfully.

**B. Misrepresentations or Omissions**

Another common type of ERISA suit involves a claim that a fiduciary has made damaging misrepresentations or omissions to a plan participant or beneficiary. There are many types of misrepresentations and omissions that can cause injury. For example, a person might be held liable for a medical treatment that he was told would be covered but for which he was not actually eligible.\(^{71}\) A person might be denied life insurance benefits because he was misinformed about eligibility requirements.\(^{72}\) A person might receive a pension amount much lower than what he was told he would receive.\(^{73}\) A person might fail to make an election that affects his benefits because a fiduciary failed to inform him of the election’s existence.\(^{74}\) Or a person might suffer adverse tax consequences because he is misled about his options.\(^{75}\)

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71 See, e.g., Smith v. Medical Benefit Administrators Group, Inc., 639 F.3d 277, 279 (7th Cir. 2011) (participant sued for reimbursement for surgery that claims administrator had pre-authorized but subsequently refused to cover on the grounds that the terms of the plan excluded the surgery from coverage).

72 See, e.g., Bicknell v. Lockheed Martin Group Benefits Plan, 410 Fed. Appx. 570, 50 EBC 2028 (3d Cir. 2011) (alleging denial of insurance coverage based on defendant’s employees’ misrepresentations about the requirements for eligibility).

73 See, e.g., CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1870 (2011) (alleging plan administrator’s failure to provide notice of changes to plaintiffs’ benefits resulting in reduced pension benefits).

74 See, e.g., In Del Rosario v. King & Prince Seafood Corp., 432 Fed. Appx. 912, 914 (11th Cir. 2011) (alleging plan administrator’s failure to notify participants that they had a right to elect not to participate in a new form of distribution that resulted in a reduction in benefits).

75 See, e.g., Gaynor v. Ephrata Cmty. Hosp., 690 F. Supp. 373, 376 (E.D. Pa. 1988) (asserting claim that plan administrator had incorrectly informed plaintiff that he was ineligible to participate in and receive tax-deferred benefits associated with annuity contracts).
Under such circumstances, courts have uniformly held that Section 502(a)(1)(B) and Section 502(a)(2) do not afford a remedy for the same reasons these Sections do not supply a remedy for illegal plan terms.\textsuperscript{76} As a result, plaintiffs must proceed under Section 502(a)(3) or not at all.\textsuperscript{77}

Prior to \textit{Amara} there had been much conflict in the lower courts about the nature and scope of remedies for misrepresentations under Section 502(a)(3). Some courts applied theories of breach of fiduciary duty, estoppel, or restitution to supply a money remedy, though courts that recognized these remedies often disagreed about the elements they required.\textsuperscript{78} One critical issue

\textsuperscript{76} See supra Section III.A. See also Smith v. Medical Benefit Administrators Group, Inc., 639 F.3d 277, 279, 282 (7th Cir. 2011) (affirming dismissal of participant’s Section 502(a)(1)(B) claim for reimbursement for his surgery, which claims administrator had pre-authorized but subsequently refused to cover on the grounds that the terms of the plan excluded the surgery from coverage, because the plaintiff “cannot obtain relief for a denial of benefits pursuant to section (a)(1), as there are no benefits owed to him under the plan.”); Bicknell v. Lockheed Martin Group Benefits Plan, 410 Fed. Appx. 570, 50 EBC 2028 (3d Cir. 2011) (affirming dismissal of plaintiff’s Section 502(a)(1)(B) claim for life insurance proceeds, where Plaintiff believed the requirements for coverage had been met due to misrepresentations by defendant’s employees, on the basis that the “Plan plainly did not provide” the benefits the plaintiff was seeking); In Del Rosario v. King & Prince Seafood Corp., 432 Fed. Appx. 912, 914 (11th Cir. 2011) (affirming dismissal of plaintiffs’ Section 502(a)(1)(B) claim, where plan administrator failed to notify participants that they had a right to elect not to participate in a new form of distribution that resulted in a reduction in benefits, on the basis that any such violations are not actionable under Section 502(a)(1)(B)).

\textsuperscript{77} See Varity Corp. v. Howe, 516 U.S. 489, 515 (1996) (in claim involving intentionally misleading conduct by a plan fiduciary resulting in injury to participants, participants would have to “rely on [Section 502(a)(3)] or . . . have no remedy at all.”).

\textsuperscript{78} Compare Howell v. Motorola, Inc., 633 F.3d 552, 50 Empl. Benefits Cas. (BNA) 1865 (7th Cir. 2011) (requiring showing of “intentionally misleading statement, or a material omission where the fiduciary’s silence can be construed as misleading to state claim for misrepresentation.” (internal quotation marks omitted)), and In re Polaroid ERISA Litig., 362 F. Supp. 2d 461, 478 (S.D.N.Y. 2005) (“[A]n ERISA fiduciary has both a duty not to make misrepresentations to plan participants, and an affirmative duty to inform when the [fiduciary] knows that silence might be harmful.” (alteration in original) (internal quotation marks omitted)), \textit{with} In re Citigroup ERISA Litig., 662 F.3d 128, 51 Empl. Benefits Cas. (BNA) 1737 (2d Cir. 2011) (“A fiduciary may only be held liable for misstatements when the fiduciary knows those statements are false or lack a reasonable basis in fact.” (internal quotation marks omitted)). \textit{Compare also} Brosted v. Unum Life Ins. Co. of Am., 421 F.3d 459, 465 (7th Cir. 2005) (“To state a claim for breach of fiduciary duty under ERISA, the plaintiff must establish: (1) that the defendants are plan fiduciaries; (2) that the defendants breached their fiduciary duties; and (3) that the breach caused harm to the plaintiff.”), \textit{with} Araujo v. Kraft Foods Global, Inc., 387 F. App’x 212, 215 (3d Cir. 2010) (requiring that plaintiff “establish (1) a material representation, (2) reasonable and detrimental reliance upon the representation and (3) extraordinary circumstances.”), \textit{and} George v. Duke Energy Ret. Cash Balance Plan, 259 F.R.D. 225, 238 (D.S.C. 2009) (“The elements to prove an ERISA breach of fiduciary duty based on a misrepresentation are: 1) the defendant was acting as an ERISA fiduciary; 2) a misrepresentation on the part of the defendant; 3) the materiality of that misrepresentation; and 4) detrimental reliance by the plaintiff on the misrepresentation.”). \textit{See also} Trustees of Nw. Laborers-Employers Health & Sec. Trust v. Malone, 09-05399 RBL, 2010 WL 4923123 (W.D. Wash. Nov. 29, 2010) (“The Ninth Circuit has recognized the remedy of restitution under ERISA § 502(a)(3) in situations involving ill-gotten gains, such as money obtained through fraud or wrongdoing.”)
had been whether a plaintiff must prove detrimental reliance to prevail on a misrepresentation claim. Other courts treated claims for misrepresentation that requested monetary relief as claims for compensatory damages and barred them entirely.

*Amara* resolved some of these issues. First, *Amara* makes clear that estoppel as well as reformation and surcharge are equitable remedies available to remedy fiduciary misrepresentation. Second, *Amara* clarifies that claims for misrepresentation are not claims for compensatory damages merely because the plaintiff seeks money as a remedy. Third, the

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80 See, e.g., Carr v. Int’l Game Tech., 3:09-CV-00584-ECR, 2012 WL 909437 (D. Nev. Mar. 16, 2012) (requirement of showing detrimental reliance defeats commonality required for class certification); George, 259 F.R.D. at 239 (“Having concluded that detrimental reliance is required for Plaintiffs to prevail on their . . . misrepresentation claim, it is apparent that their misrepresentation claim is not appropriate for class resolution.”).

81 Hutcherson v. Krispy Kreme Doughnut Corp., 803 F. Supp. 2d 952, 958 (S.D. Ind. 2011) (finding, where plaintiff sought money remedy for fiduciary’s misrepresentation resulting in complete denial of his long-term disability coverage, that “Plaintiff fails to state a claim under Section 502(a)(3) because he does not seek equitable relief . . . he only specifically seeks to recover monetary damages . . . .”); Asgaard v. Adm’r, Pension Plan for the Employees of Cleveland-Cliffs, Inc., 2:06-CV-00063, 2007 WL 2076446 (W.D. Mich. July 17, 2007) (in action alleging misrepresentation, court explained that "[if plaintiffs] seek monetary relief they must proceed under [Section 502(a)(1)(B)]. . . . If they seek individual relief for breach of fiduciary duty under [Section 502(a)(3)], they may only seek equitable relief, and it is not clear to this Court what equitable remedy is available to make Plaintiffs whole.”); Kishther v. Principal Life Ins. Co., 186 F. Supp. 2d 438, 446 (S.D.N.Y. 2002) (where plaintiff sought money recovery under 502(a)(3) for reliance on fiduciaries misstatements that resulted in harm, court dismissed claims on basis that plaintiff sought compensatory damages and not an equitable remedy).


83 *Id.* at 1880 (recognizing the equitable remedy of surcharge for breach of trust committed by a fiduciary and
Amara Court determined that detrimental reliance is required to obtain an estoppel-type remedy. But it also expressly rejected detrimental reliance as a required element for reformation and surcharge. Finally, the Amara Court noted that to obtain surcharge, a plaintiff must show actual harm, which it explained “may sometimes consist of detrimental reliance, but . . . might also come from the loss of a right protected by ERISA or its trust-law antecedents.”

Though Amara resolved several questions, it also raises new, important issues that must now be resolved by lower courts, such as:

- What must a plaintiff show to obtain plan reformation in cases of misrepresentation or omission?

explaining that “the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief.”

84 Id. at 1881 (“[W]hen a court exercises its authority under § 502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made.”)

85 Id. (“Equity courts . . . would reform contracts to reflect the mutual understanding of the contracting parties where ‘fraudulent suppression[s], omission[s], or insertion[s],’ 1 Story § 154, at 149, ‘material[ly] . . . affect[ed]’ the ‘substance’ of the contract, even if the ‘complaining part[ies]’ was negligent in not realizing its mistake, as long as its negligence did not fall below a standard of ‘reasonable prudence’ and violate a legal duty.” “Nor did equity courts insist upon a showing of detrimental reliance in cases where they ordered ‘surcharge.’” (alterations in original)).

86 Id.

87 As discussed above, see supra note 67, the Amara Court may not have fully described the elements for obtaining plan reformation in cases of misrepresentation. Several post-Amara courts have taken up the issue in the context of a defective SPD, including one federal circuit court. For example, in Skinner v. Northrop Grumman Retirement Plan B, 673 F.3d 1162 (9th Cir. 2012), the Ninth Circuit considered a claim for equitable remedies under Section 502(a)(3) to remedy a defective SPD. Id. at 1165. Although the court’s opinion is not a model of clarity, it raises important questions about what a plaintiff must prove to obtain reformation for misrepresentation. In that case, the plaintiffs could not show reliance on the inaccurate SPD, so they did not claim estoppel. Id. Instead, the plaintiffs sought reformation of the plans terms in accord with the defective SPD and surcharge of the unlawfully withheld benefits. Id. at 1166. The Ninth Circuit first identified the two reformation theories exist: trust and contract. Id. The court described those theories as follows: “In the law of trust, a court may reform a trust to the extent that it was procured by wrongful conduct, such as undue influence, duress, or fraud. . . . In the law of contract, a court may reform a contract when (1) one party seeks reformation, (2) that party’s assent was induced by the other party’s misrepresentations as to the terms or effect of the contract, and (3) the party seeking reformation was justified in relying on the other party’s misrepresentations.” Id. The court then determined that reformation was unavailable on the facts before it under either theory. Id. at 1167. First, it noted that the plaintiffs had failed to prove fraud, duress, or undue influence. Id. Next, it characterized the Supreme Court’s endorsement of reformation as due to “the district court [having] already found that the employer had ‘intentionally misled its employees.’” Id. (citing Amara, 131 S.Ct. at 1874). Finally, it distinguished Amara because the plaintiffs had failed to produce evidence that the defendant had materially misled its employees or that any plaintiffs had relied on the misleading information. Id. The court lumped the two equitable reformation tests together, so it is impossible to tell whether it meant that a plaintiff must prove intent under both theories. At minimum, however, Skinner suggests that a party
• What must a plaintiff show to obtain surcharge in cases of misrepresentation or omission?  

88 In many circumstances, it is a plan fiduciary making the damaging misrepresentation. But what remedy, if any, is available when someone else (e.g., an employee’s manager) is the source of the misconduct?  

• Who must be named as a defendant to seek plan reformation in such a case?  

• Where do the reformed terms of a plan come from, particularly in omission cases?  

• When, if ever, is a plaintiff required to litigate a misrepresentation claim under Section 502(a)(2)?  

• How does the plaintiff enforce the terms of the reformed plan?  

• The Amara Court said that a plaintiff must at least show actual harm to obtain surcharge. When is class treatment appropriate in such cases?  

• Does the Court’s determination that estoppel requires a showing of detrimental reliance mean estoppel claims are never suitable for class treatment?  

must prove several elements to obtain reformation. In contrast, at least one court has granted reformation to remedy “false or misleading information” without requiring any additional elements, such as fraud, mistake, actual harm, or unjust enrichment. Z.D. ex rel. J.D. v. Group Health Co-op., C11-1119RSL, 2012 WL 5033422 (W.D. Wash. Oct. 17, 2012).  

88 In Stocks v. Life Ins. Co. of N. Am., 861 F. Supp. 2d 948 (E.D. Wis. 2012) a district court considered a claim for surcharge under Section 502(a)(3) to remedy a fiduciary’s omission that resulted in the decedent failing to make an important election, which caused the plaintiff to be denied life insurance benefits. See id. at 950-51. The Court distinguished Amara for two reasons. First, it reasoned that because Amara involved a claim for reformation of a benefits plan, it was not controlling with regard to a claim directly for surcharge. Id. at 952. Second, it held that the relief requested was legal, not equitable, because it sought “damages” for the defendant’s “breach of fiduciary duty . . . in an amount not less than the death benefit that would have been payable pursuant to the Policy,” despite the claim being brought under Section 502(a)(3). Id. The court opined that the remedy sought was “not the type of equitable monetary compensation envisioned by the Supreme Court in [Amara].” Id. This begs the question, under what circumstances can surcharge be pursued in the first instance to remedy breach of fiduciary duty.  


90 Would the the terms based on the actual understanding of the plaintiff or the understanding of the hypothetical “reasonable” plaintiff, or determined using some other standard?  

91 As discussed above, see supra note 63, the Court in Amara seemed to endorse Section 502(a)(1)(B) as an alternative basis to surcharge for enforcing a plan as reformed. See also Amara, 131 S.Ct. at 1876 (“[I)n step 2: [the district court] ordered the plan administrator . . . to enforce the plan as reformed. One can fairly describe step 2 as consistent with § 502(a)(1)(B), for that provision grants a participant the right to bring a civil action to ‘recover benefits due . . . under the terms of his plan.’ 29 U.S.C. § 1132(a)(1)(B). And step 2 orders recovery of the benefits provided by the ‘terms of [the] plan’ as reformed.”). If Section 502(a)(1)(B) is available to enforce the terms of a reformed plan, why would a plaintiff ever bring a claim for surcharge? As noted above, the Court stated that surcharge requires a showing of actual harm. Since Section 502(a)(1)(B) does not require such a showing, it would seem to always be the better theory to pursue.
The answers to these – and other – questions will undoubtedly affect plaintiffs’ ability to obtain meaningful relief under the Court’s expanded view of Section 502(a)(3) remedies.

C. Retaliation and Interference

ERISA prohibits retaliation against a participant or beneficiary for exercising rights under an ERISA plan. For example, an employer may not fire an employee for making a benefits claim or challenging a benefits denial. Similarly, an employer cannot terminate an employee for the purpose of keeping an employee’s rights from vesting. ERISA § 510 makes these sorts of actions illegal. The Section prohibits “any person” from discriminating against a participant for exercising her rights under ERISA and from interfering with the attainment of any right under ERISA.

Claims under Section 510 are exceptionally rare. To begin with, a participant or beneficiary must show that the employer, in fact, violated Section 510. This involves navigating a knotty proof structure and proving difficult-to-establish elements, such as specific intent to violate ERISA. If the plaintiff prevails, her remedies are limited to those available under Section


93 See Dana M. Muir, ERISA Remedies: Chimera or Congressional Compromise?, 81 IOWA L. REV. 1, 8 (1995) (citing See Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 825 (7th Cir. 1984) (stating that if employer had fired employee in retaliation for seeking relief under ERISA, the employer might be liable under Section 510)).

94 See 29 U.S.C. § 1140 (forbidding discrimination against a participant or beneficiary for the purpose of interfering with the attainment of any right under ERISA).

95 ERISA broadly defines person. As a result, while most suits under Section 510 are brought against an employer, they could also be brought against another entity, such as an insurance carrier. See Muir, supra note 93 at 6. Hereinafter, we shall limit our discussion to the most common class of suits: those against employers.

96 29 U.S.C. § 1140 (“It shall be unlawful for any person to . . . discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . ”).

97 The proof structure and elements of a claim for retaliation or interference has been treated at length elsewhere. For a thorough description, see generally Muir, supra note 93 at 6-19. See also Apsley v. Boeing Co., 691 F.3d 1184, 1207 (10th Cir. 2012) (describing the proof structure for discrimination claims under Title VII as applied in Section 510 cases); Bleil v. Williams Prod. RMT Co., LLC, No. 11-CV-997-LTB-GPG, 2012 WL 5989453 (D. Colo. Nov. 30, 2012) (same); Bailey v. U.S. Enrichment Corp., 2:11-CV-0554, 2012 WL 4848877.
502(a)(3). And courts have taken a conservative view of the equitable remedies that Section 502(a)(3) authorizes in this context (just as they have in the others discussed above).

Courts have primarily considered the remedies of back pay, front pay, rescission, and reinstatement. Rescission and reinstatement are generally viewed as equitable remedies. But, as non-monetary remedies, they get an aggrieved only so much. As for the monetary remedies of back pay and front pay, many courts have limited their availability. For example, front pay may be available where reinstatement is infeasible, but the amount recovered is offset by the (S.D. Ohio Oct. 11, 2012) (noting that one element of a Section 510 claim requires that a plaintiff “show that an employer had a specific intent to violate ERISA.”).

98 See Eichorn v. AT&T Corp., 484 F.3d 644, 653 (3d Cir. 2007) (holding Section (a)(1)(B) is not an appropriate vehicle for enforcing a claim of interference with the benefits of a plan); Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1134 (7th Cir. 1993) (same); Strom v. Goldman, Sachs & Co., 202 F.3d 138, 142 (2d Cir. 1999) (same). See also Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1247 (10th Cir. 2004) (“Section 502(a)(3) of ERISA provides the plan participant with his exclusive remedies for a § 510 violation.”); Spinelli v. Gaughan, 12 F.3d 853, 856 (9th Cir. 1993) (quoting § 502(a)(3) as the enforcement mechanism for rights under § 510); Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 421 (4th Cir. 1993) (Section 510, “enforced through § 1132(a)(3) [i.e., § 502(a)(3)] , provides a companion to § 1132(a)(1), which provides actions to recover benefits or clarify rights.”); Held v. Mfrs. Hanover Leasing Corp., 912 F.2d 1197, 1203 (10th Cir. 1990) (“If discharging [the plaintiff] was ‘unlawful’ under § 1140 [i.e., § 510], plaintiff was entitled to bring (and did bring) an action for declaratory and injunctive relief under 29 U.S.C. § 1132, which authorizes [the relief set forth in ERISA § 502(a)(3) ].”); cf. Dana M. Muir, ERISA Remedies: Chimera or Congressional Compromise?, 81 IOWA L. REV. 1, 39 & fn. 321-22 (1995) (“Many commentators and courts agree that Section 502(a)(3) . . . provides the sole basis for suits alleging a violation of Section 510.”).

99 See supra. See also infra.


101 For example, reinstatement is limited to receiving one’s job back, such as where an employer engages in a discriminatory firing. See, e.g., Alexander v. Bosch Auto. Sys., Inc., 232 F. App’x 491, 497 (6th Cir. 2007) (“Reinstatement is a remedy that arises in the context of unlawful terminations from employment.”) (citing 1 D. Dobbs, LAW OF REMEDIES § 2.9(1), p. 223 (2d ed. 1993)). Rescission typically has the same effect, though it generally arises in instances where an employer makes a misrepresentation for the purpose of discriminating against the plaintiff, resulting in the plaintiff quitting or retiring. See, e.g., Swanson v. U.A. Local 13 Pension Plan, 779 F. Supp. 690, 694 (W.D.N.Y. 1991) (seeking rescission of retirement decision where employer failed to provide an SPD and encouraged plaintiff to retire on behalf of his age, which resulted in decreased benefits).

amount the employee could earn by taking other work.\textsuperscript{103} And back pay may be available if it is “incidental to or intertwined with” an order for reinstatement,\textsuperscript{104} though not where it would be the equivalent of “compensatory damages.”\textsuperscript{105} As a result, obtaining these remedies is exceedingly uncommon.\textsuperscript{106} The narrow application of these remedies has resulted in most plaintiffs being deprived of any meaningful recovery.

Although the \textit{Amara} Court did not expressly discuss the equitable remedies commonly considered by courts in this context, its decision suggests that lower courts must, at minimum, reevaluate whether their positions on the availability of these remedies are correct. No longer can courts simply deny a remedy because it would equate to granting “compensatory” relief.\textsuperscript{107}


\textsuperscript{104} See Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1255 (10th Cir. 2004) (back pay must be “incidental to or intertwined with” an order for reinstatement to be equitable); Millar v. The Lakin Law Firm PC, 09-CV-101-JPG, 2010 WL 1325182 (S.D. Ill. Mar. 30, 2010) (holding request for back pay constituted request for compensatory damages because plaintiff “hopes to recover the money or compensatory damages that he was owed under his employment contract with Defendants”); Michaelis v. Deluxe Fin. Services, Inc., 446 F. Supp. 2d 1227, 1231 (D. Kan. 2006) (back pay must be “incidental to or intertwined with” an order for reinstatement to be equitable). To determine whether relief is “incidental,” courts compare the amount of back pay requested to the value of the equitable relief. \textit{See Millsap}, 368 F.3d at 1257 (holding that the plaintiffs’ back pay claim, which potentially exceeded ninety million dollars, was not incidental to their request for reinstatement); \textit{Michaelis}, 446 F.Supp.2d 1230-31 (concluding that the amount of back pay and lost benefits that the plaintiff requested were not incidental because they accounted for greater than twenty-five percent of the employment reinstatement value). As an additional barrier, courts have also indicated that back pay is not incidental when there is no dependent relationship between it and the reinstatement. \textit{See Michaelis}, 446 F.Supp.2d at 1231; Talkin v. Deluxe Corp., CIV.A. 05-2305-CM, 2007 WL 1469648, at *12 (D. Kan. May 18, 2007).

\textsuperscript{105} See \textit{Millsap}, 368 F.3d at 1253 (“Backpay is compensatory because the award is measured by an employee’s loss rather than an employer’s gain.”); \textit{Eichorn}, 484 F.3d at 656 (citing \textit{Millsap}, 368 F.3d at 1253) (same).

\textsuperscript{106} Indeed, we were unable to find a single case that applied this rule and found that back pay should be awarded.

\textsuperscript{107} \textit{CIGNA Corp. v. Amara}, 131 S. Ct. 1866, 1880 (2011) (identifying that the equitable doctrine of surcharge could warrant make-whole monetary relief in the context of a claim of fiduciary misrepresentation).
Instead, these courts must ask whether an equitable doctrine, like surcharge in the context of fiduciary misrepresentation, would justify a monetary award.\textsuperscript{108}

**IV. Conclusion**

*Amara* does important work in developing and clarifying the role of Section 502(a)(3) in protecting the substantive rights afforded by ERISA. Nevertheless, many important questions remained to be resolved. Until such time that Congress turns its attention to ERISA’s remedial scheme and enacts comprehensive legislation to account for the disparate circumstances that ERISA governs, the task of giving meaning to Section 502(a)(3) will continue to fall on courts, commentators, and advocates. That task must be approached thoughtfully since the economic security of millions of Americans depends upon the interpretation of that solitary provision.

\textsuperscript{108} See *id.*