No. 05-260

IN THE

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The district court properly decided Mid Atlantic's equitable claims for constructive trust or equitable lien under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), because they seek to enforce the plan's subrogation rights through a remedy that has been traditionally available in equity. The Court in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), observed that a plan fiduciary could state a valid claim for equitable restitution under §502(a)(3) if the disputed funds are specifically identifiable, belong in good conscience to the plan, and are within the possession of the defendant. See *Great-West*, 534 U.S., at 213. Courts have regularly enforced subrogation rights under a variety of equitable theories, including constructive trust and equitable lien.

The Court's determination in *Great-West* that the plan's suit sought personal liability and not equitable restitution—because there was no identifiable *res* in Knudson's hands—resulted from a traditional limitation on the exercise of equity jurisdiction, not an intention to declare the universal unenforceability of reimbursement provisions in ERISA plans, as petitioners appear to assert. Most courts that have subsequently addressed the issue, including the Fourth Circuit in this case, have correctly recognized that a plan fiduciary's reimbursement action comfortably fits within the narrow confines of traditional equity jurisprudence recognized in *Great-West* when the plan document embodies the plan's right to subrogation and the disputed funds are both specifically identifiable and within the defendant's possession. See, *e.g.*, *Mid Atl. Med. Servs., LLC* v. *Sereboff*, 407 F.3d 212, 218-219 (CA4), *cert. granted*, 126 S.Ct. 735 (2005); *Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1122 (CA10 2004); *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan* v. *Varco*, 338 F.3d 680, 687-688 (CA7 2003), *cert. denied*, 542 U.S. 945 (2004); *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer*, 354 F.3d 348, 355 (CA5 2003), *cert. denied*, 541 U.S. 1072 (2004); *Scholastic Corp.* v. *Kassem*, 389 F.Supp.2d 402, 411-413 (D Conn. 2005).

Petitioners' position, grounded in large measure on the erroneous position adopted by the Sixth and Ninth Circuits, rests on a fundamentally unsound premise—that actions "to enforce the terms of the plan," where those terms provide a right to subrogation and reimbursement, are merely actions to enforce contractual obligations for the payment of a sum of money, and are therefore inherently legal actions seeking legal relief, rather than equitable actions seeking equitable relief. See, *e.g.*, *Qualchoice, Inc.* v. *Rowland*, 367 F.3d 638, 649-650 (CA6 2004), *cert. denied*, 125 S.Ct. 1639 (2005); *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, 384 F.3d 667, 672-673 (CA9 2004), *cert. denied*, 126 S.Ct.

729 (2005). That proposition is contrary to *Great-West*, cannot be reconciled with the explicit language or purposes of the statute, and is contrary to more than two hundred years of jurisprudence.

For these reasons, the Court should affirm the decision of the court of appeals.

STATEMENT OF FACTS

The Sereboffs were beneficiaries under a self-funded health plan sponsored and maintained by the Katzen Eye Group, Marlene Sereboff's employer. Mid Atlantic serves as claims fiduciary of the plan. The plan contains an "ACTS OF THIRD PARTIES" subrogation and reimbursement provision that subrogates the plan to a participant's right to recover damages from a third party and gives the plan the "right to recover any payments" made to beneficiaries by third parties for injuries caused by the acts of "another person or organization." Joint App. 35. The plan agreement provides: "If you or your dependents receive[] benefits and have a right to recover damages from a third party, the Company is subrogated to this right." *Id.*, at 35-36. Further, "[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company . . . to reflect that portion of the total recovery which is due the Company for benefits paid." *Id.*, at 36.

The provision explains that "[a]ny remainder" will be the participant's and that the plan's share of the recovery will not be reduced because the participant "has not received the full damages claimed, unless the Company agrees in writing to a reduction." *Ibid.* The subrogation provision also obligates beneficiaries to "promptly advise the Company whenever a claim is made against a third party" and requires them to execute any assignments or liens and "provide information" that Mid Atlantic requests. *Ibid.*

On June 22, 2000, the Sereboffs were visiting California and were in the process of returning a vehicle to a rental-car facility at San Jose International Airport when another vehicle struck them. The plan paid the Sereboffs' medical expenses, which totaled $74,869.37. The Sereboffs initiated a state-court action in California in August 2000 against the joint tortfeasors for personal injury. *Id.*, at 81. The Sereboffs complained that they had suffered "wage loss, *hospital and medical expenses*, general damages, loss of earning capacity, [and] other damage" in the form of prejudgment interest. *Id.*, at 82 (emphasis added). In late 2000 and early 2001, the plan reminded the Sereboffs and their lawyer that the plan was entitled to reimbursement should the California litigation be successful, asserted a subrogation lien against each of the Sereboffs for the amount of benefits paid, and asked the Sereboffs to execute subrogation-lien agreements acknowledging their obligations under the plan. *Id.*, at 87-106. The Sereboffs did not endorse the lien acknowledgments. Instead, responding to Mid Atlantic's "formal demand" in April 2001 for endorsement of the liens, the Sereboffs' lawyer indicated that "insurance carriers are not permitted to recover subrogation liens" under Ninth Circuit case law. *Id.*, at 104-110. Nevertheless, the plan paid additional benefits throughout 2001 and 2002, and it repeatedly reasserted its subrogation liens and sent updates to the Sereboffs and their lawyer about the current value of the liens. *Id.*, at 121-128.

In its letters, the plan also continually asked the Sereboffs and their lawyer to "advise [Mid Atlantic] when there is a change in the status of the case which could affect our subrogation lien[s]"; and those same letters requested that the Sereboffs send checks for the lien balances to Mid Atlantic if the case settled. *Id.*, at 121, 123; see also *id.*, at 124, 125, 127, 128. Without notifying Mid Atlantic or seeking its consent, the Sereboffs settled the California litigation in January 2003, and the defendants paid the Sereboffs $750,000.

Mid Atlantic did not know that the case had settled and continued sending the Sereboffs and their lawyer letters updating the lien amounts and asking to be advised of the case's status in order to protect its liens. *Id.*, at 129-136. The Sereboffs never discharged the amount of the plan's asserted liens. Instead, their lawyer disbursed the funds to the Sereboffs and to his law firm, and the Sereboffs placed the funds into their investment accounts. Without telling Mid Atlantic that the case had settled, the Sereboffs' lawyer responded to Mid Atlantic's March 2003 letters by asserting that the liens were not collectable, citing *Great-West* and *Westaff (USA) Inc.* v. *Arce*, 298 F.3d 1164 (CA9 2002). Joint App. 136-138.

After learning that the case had settled, Mid Atlantic instituted this action in August 2003 in the District of Maryland, where the Sereboffs live, under §502(a)(3) of ERISA, which authorizes ERISA participants or fiduciaries to enjoin any act violating the terms of an ERISA plan or to "obtain other appropriate equitable relief" to enforce a plan's provisions. §502(a)(3). Mid Atlantic asserted the plan's subrogation rights and requested, among other forms of relief, restitution of, and a constructive trust or equitable lien over, the disputed funds held by the Sereboffs in their investment accounts. Mid Atlantic also sought emergency relief to prevent dissipation of the disputed funds, and the Sereboffs agreed to "preserve $74,869.37 of the settlement funds" until the district court ruled on the merits of the dispute and any appeals were exhausted. *Id.*, at 39, 41-42, 69.

Mid Atlantic moved for summary judgment, asserting that the claim to "recover the disputed proceeds" sought "appropriate equitable relief" under §502(a)(3) of ERISA. Pet. App. 6a. The Sereboffs responded that Mid Atlantic's claim sought "monetary damages [that are] not permissible" under ERISA. *Ibid.* The district court granted in part Mid Atlantic's summary judgment motion, holding that Mid Atlantic's

claim was cognizable under §502(a)(3) and that the plan was entitled to reimbursement of $74,869.37, plus interest. *Ibid.* The district court reduced the reimbursement award to account for the plan's prorated share of the reasonable attorneys' fees and court costs from the California litigation. *Id.*, at 7a.

The Fourth Circuit affirmed, agreeing that the basis of Mid Atlantic's claim and the remedy sought were equitable in nature. The court of appeals explained that Mid Atlantic's action was for equitable restitution because the disputed funds "have not been dissipated and . . . are specifically identifiable," "belong in good conscience" to Mid Atlantic, and "are within the possession and control of the Sereboffs." Pet. App. 11a, *Sereboff*, 407 F.3d, at 218-219. The court of appeals noted that "[r]ecent decisions by the Fifth, Seventh, and Tenth Circuits support our determination" that the plan's claim lies in equity. *Id*., at 12a. The court of appeals also recognized that its ruling "appears to be at variance with recent decisions by the Sixth and Ninth Circuits." *Id.*, at 13a n.7. The Sereboffs' petition for panel rehearing and rehearing en banc was denied. This Court granted the Sereboffs' petition for a writ of certiorari on November 28, 2005.

SUMMARY OF THE ARGUMENT

Section 502(a)(3) of ERISA allows a plan fiduciary to obtain "appropriate equitable relief" to enforce the terms of an ERISA plan. The Court in *Great-West* suggested that a plan fiduciary could, consistent with certain traditional requirements of equity, enforce a subrogation-based reimbursement provision under §502(a)(3), explaining that a claimant seeking equitable restitution could properly impose a constructive trust or equitable lien on particular property in the defendant's possession belonging in good conscience to the claimant. 534 U.S., at 213-214.

Mid Atlantic sought relief that was "*typically* available in equity." *Id.*, at 210 (quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). Under long-established equity jurisprudence in the subrogation context, an insurer who indemnifies a loss has an equitable interest in any compensation that the insured later receives for that loss from a third-party tortfeasor. Indeed, the insured holds that recovery in trust for the insurer, who may recover it in a suit in equity. The remedies sought by Mid Atlantic—a constructive trust or an equitable lien—were quintessential equitable responses, and Mid Atlantic appropriately claimed entitlement to that relief under §502(a)(3). Given the equitable basis of Mid Atlantic's claims and the plain terms of the plan, the disputed funds belong in good conscience to the plan. The disputed funds are specifically identifiable proceeds from the tort settlement, and, unlike in *Great-West*, those funds are in the plan participants' possession.

Because the relief sought by Mid Atlantic was traditionally available in equity, the district court acted squarely within the jurisdiction authorized by §502(a)(3) in hearing and correctly deciding Mid Atlantic's claims.

ARGUMENT

I. SECTION 502(A)(3) AUTHORIZES SUITS SEEKING RELIEF THAT WAS TYPICALLY AVAILABLE IN EQUITY.

Section 502(a)(3) of ERISA authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates . . . 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 . . . the terms of the plan." §502(a)(3) (emphasis added). The Court explored the meaning of "appropriate equitable relief" in some detail in *Mertens* v. *Hewitt Associates*, which involved plan participants who sued an ERISA plan's actuary, a nonfiduciary, for damages resulting from an actuarial mistake that eventually

caused the plan's assets to be insufficient to cover the plan's benefit obligations. The Court held that Congress intended in §502(a)(3) to authorize only "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S., at 256. Accordingly, the Court categorically denied the type of relief—compensatory damages—sought against the plan actuary.[1]

Four years ago, the Court in *Great-West* revisited its comments in *Mertens* regarding restitution. The ERISA plan participant in the case, Knudson, was injured in a car accident, and the plan paid for her medical expenses, which totaled over $400,000. Later, Knudson filed a state-court tort action and settled with the third-party wrongdoer for $650,000. Unlike the Sereboffs, Knudson did not have possession of the tort settlement, which was instead placed in a special-needs trust. *Great-West*, 534 U.S., at 207-208.

In evaluating the plan's restitution claim, the Court reaffirmed that "the term 'equitable relief' in §502(a)(3) must refer to 'those categories of relief that were *typically* available in equity.'" *Id.*, at 210 (quoting *Mertens*, 508 U.S., at 256). The Court further noted that "whether [restitution] is legal or equitable in a particular case (and hence whether it is authorized by §502(a)(3)) remains dependent on the nature of the relief sought." *Id.*, at 215. A restitution claim is considered legal when the plaintiff "could *not* assert title or right to possession of particular property" but nevertheless "might be

[1] Consistent with *Mertens*'s framework, the Court subsequently allowed "restitution against a transferee of tainted plan assets," holding that a fiduciary's action for restitution of plan assets or their proceeds in the hands of the transferee constitutes "appropriate equitable relief." *Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc*., 530 U.S. 238, 250-253 (2000).

able to show just grounds for recovering money to pay for some benefit the defendant had received from him." *Id.*, at 213. A plaintiff seeks legal restitution when, in reality, it seeks "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Ibid.*

The Court suggested, however, that §502(a)(3) recognizes claims for *equitable* restitution. "[A] plaintiff could seek restitution *in equity* . . . where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Ibid.* The Court observed that equitable restitution generally comes "in the form of a constructive trust or an equitable lien." *Id.*, at 212-213. A constructive trust is used when the defendant has a legally recognized right in a particular asset, which may be a fund of money like a bank account in the defendant's possession that can be identified as belonging in good conscience to the plaintiff in spite of the defendant's legal right to it. See *ibid.* (citing 1 G. Palmer, Law of Restitution §§1.4, 3.7, at 17, 262 (1978)). Similarly, an equitable lien can be imposed to prevent or reverse an unjust enrichment and gives the plaintiff a security interest (unlike a constructive trust, which gives complete title) in the disputed property that can be executed to satisfy a money claim. See *ibid.*; 1 D. Dobbs, Law of Remedies §4.3(3), at 601 (2d ed. 1993).

Great-West's claim failed in that case because "the funds to which petitioners claim[ed] an entitlement under the Plan's reimbursement provision—the proceeds from the settlement of respondents' tort action—[were] not in respondents' possession." *Great-West*, 534 U.S., at 214. Unlike the claimed portion of the Sereboffs' settlement proceeds, which by stipulation remains in their investment accounts, Knudson's settlement proceeds were located in a special-needs trust that she did not possess. *Ibid.* In other words, the claim in *Great-West* was for legal restitution, reasoned the Court, because the

plan sought personal liability against Knudson rather than a right to possession of identifiable proceeds of the settlement in Knudson's possession. *Ibid.*

Because *Great-West* dealt narrowly with circumstances in which the plaintiff sought only legal restitution, the Court did not comprehensively prescribe the circumstances in which a claim for equitable restitution would fit within the confines of "appropriate equitable relief." Nonetheless, the Court indicated that a plan can obtain equitable relief to enforce the terms of a plan's subrogation provisions by establishing that it has a superior claim in equity and good conscience to specifically identifiable property in the hands of the defendant. *Id.*, at 213-214. Under those circumstances, "[a] court of equity [can] then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner." *Id.*, at 213.

Employers are under no obligation to provide medical benefit plans to their employees, and if they choose to do so, they have great latitude in the design of a plan of benefits. *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 833 (2003); *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995). Employers are therefore free to condition the payment of medical benefits on the plan's right to reimbursement in prescribed circumstances, as is the general practice outside the ERISA context. The only requirements imposed by ERISA for such provisions are that they be set forth in a "written instrument," ERISA §402(a), 29 U.S.C. §1102(a), and that participants be advised periodically of the terms of that instrument. ERISA §104(b), 29 U.S.C. §1024(b).

By authorizing both injunctive and "other appropriate equitable relief . . . to enforce any provisions of this subchapter or the terms of the plan," §502(a)(3) provides remedies for

violations of either the statute itself or the terms of a particular plan. Petitioners' assertion that any attempt to enforce the plan is a legal claim for breach of contract, rather than an equitable claim to enforce the terms of the plan, is both wrong as a matter of historical fact (as will be shown below) and produces a result that is at odds with the language of §502(a)(3) and with the overall structure of ERISA. In essence, petitioners argue that Congress held out the mere illusion of being able to enforce plan terms through equitable relief, because those attempts will always be inherently contractual, and hence legal and not equitable. But there is no reason to believe that Congress would have enacted a provision that expressly and unambiguously grants remedial relief that does not actually exist, rendering superfluous a key term of the statute.

If §502(a)(3) categorically bars the enforcement of plan subrogation and reimbursement terms because actions to enforce them inherently seek legal relief, then the phrase "enforce . . . the terms of the plan" is effectively read out of the statute, an outcome directly at odds with the Court's long-expressed "duty to give effect, if possible, to every clause and word of a statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citations and internal quotation marks omitted).[2] The Court should not adopt an interpretation of a statute that produces an incongruous result. *United States* v. *Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 542-543 (1940).

The Fourth Circuit correctly concluded that the circumstances in which *Great-West* recognized that an equitable claim would lie under §502(a)(3) are precisely the circumstances of this case. Pet. App. 11a-12a. The plan paid the

[2] The Court has recognized that the enforcement scheme embodied in §502 of ERISA is "one of the essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 52 (1987).

Sereboffs' medical-expense claims and, consistent with the terms of the plan, became equitably subrogated to any third-party recovery. When the Sereboffs in fact recovered a sizeable settlement from the third-party tortfeasors, Mid Atlantic became entitled to a constructive trust or equitable lien on a portion of the proceeds from the Sereboffs' tort settlement, and that *res* both remains in the Sereboffs' hands and is identifiable as the proceeds of the settlement. Consequently, the funds sought by Mid Atlantic both belong to it "in equity and good conscience" and are in the Sereboffs' possession, bringing this case precisely within the scope of the equitable actions authorized by §502(a)(3).

II. THE BASIS OF MID ATLANTIC'S RESTITUTION CLAIM IS EQUITABLE IN NATURE.

Without expressly deciding the issue, the Court in *Great-West* was undoubtedly correct in suggesting that a plan's claims for reimbursement in this context would be equitable in nature if the plan sought to recover clearly traceable settlement funds in the defendant's possession. See *Great-West*, 534 U.S., at 213. Under well-settled equity jurisprudence in the insurance context, when an insurer has indemnified a loss and the insured subsequently receives compensation for that loss from a third-party tortfeasor, the insurer may assert equitable subrogation rights over that recovery. Because the plan's position is directly analogous to that of an indemnity insurer in the subrogation context, the plan's claim, too, is grounded in equity.[3]

[3] As the Court noted in *Great-West*, the categorization of the plan's claims as legal or equitable "depends on 'the basis for the plaintiff's claim' and the nature of the underlying remedies sought." 534 U.S., at 213 (quoting *Reich* v. *Cont'l Cas. Co.*, 33 F.3d 754, 756 (CA7 1994)). This analysis is similar to that used by the Court to determine the right to a jury trial. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 42 (1989) ("First, we compare the statutory action to 18th-century actions

Subrogation-based rights are equitable. Their fundamental purposes are to prevent the unjust enrichment of the insured by a double recovery (once from the insurer and again by the third party) and to ensure that the wrongdoer is held ultimately responsible for the loss. See, *e.g.*, *Allstate Ins. Co.* v. *Ivie*, 606 P.2d 1197, 1202 (Utah 1980) ("Subrogation has a dual basis. . . . '[W]hen the insurer has made payment for the loss caused by a third party, it is only equitable and just that the insurer should be reimbursed for his payment to the insured, because otherwise either the insured would be unjustly enriched by virtue of a recovery from both the insurer and the third party, or in the absence of such double recovery by the insured, the third party would go free notwithstanding the fact that he has a legal obligation in connection with the damage.'" (quoting 16 G. Couch, Cyclopedia of Insurance Law §61.18, at 248-249 (R. Anderson ed., 2d ed. 1960))).[4]

When an insurer pays an insured's claim, the insurer acquires a subrogation right to reimbursement, and when the insured obtains a recovery for which the insurer is entitled to be reimbursed, usually in the form of settlement or judgment proceeds of a third-party suit, the insured holds that money in trust for the insurer,[5] who may recover the funds in a suit in

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brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.").

[4] See also *Great West Cas. Co.* v. *Manning*, 687 So.2d 416, 419 (La. App. 1996) (noting the equitable nature of reimbursement as "prevent[ing] the insured from obtaining double or multiple recovery by collecting from the insured the same damages or expenses it has recovered from the tortfeasor").

[5] *Comegys* v. *Vasse*, 1 Pet. 193, 215 (1828) (citing *Gracie* v. *New-York Ins. Co.*, 8 Johns. 237, 245 (NY 1811), and holding that, after the insurers have paid the loss, "any indemnity, however arising, is a trust for the underwriters"); *Randal* v. *Cockran*, 1 Ves. Sen. 98, 98, 27 Eng. Rep. 916, 916 (Ch. 1748) (Hardwicke, L.C.) (holding that insurer had "the plainest

equity.[6] A subrogation-based claim for reimbursement, unlike

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equity that could be" and explaining that, once the insurer provides indemnification, "the assured stands as a trustee for the insurer, in proportion for what he paid" for any losses "restored in specie, or compensation made for them"); *Blaauwpot* v. *Da Costa*, 1 Eden 130, 131, 28 Eng. Rep. 633, 634 (Ch. 1758) (ordering ship owner's executors to pay £1636 from compensation received from a third party for already-indemnified losses because "it was received by the executors . . . in trust for [the insurers]"); *Gracie*, 8 Johns., at 245 (explaining that insurer who pays indemnification has equitable interest on any compensation subsequently made for the loss, that whoever possessed that recovery would "become trustee for the party having the equitable title to the reimbursement," and that "[t]here would be no doubt of [insurer's] claim in equity"); *Leonard* v. *Nye*, 125 Mass. 455, 461-462, 466-467 (Mass. 1878) (recognizing that, once an insured receives indemnity for a loss, the insured will hold any subsequent compensation from a third party for that loss "in trust for" the insurer); 2 W. Phillips, Treatise on the Law of Insurance §1723, at 397 (5th ed. 1867) (maintaining that the payment of an insured's loss "gives the insurers an equitable title to what might be afterwards recovered from other parties on account of the loss"); *Ridenour* v. *Nationwide Mut. Ins. Co.*, 541 P.2d 1377, 1378 (Or. 1975) ("[F]unds coming to the insured for the insurer are regarded as trust funds."); *Regent Coop. Equity Exch.* v. *Johnston's Fuel Liners, Inc.*, 122 N.W.2d 151, 154 (ND 1963) (explaining that settled law "has in effect made the insured a trustee for the insurer to the extent of the insurer's interest").

[6] *Health Cost Controls of Ill., Inc.* v. *Washington*, 187 F.3d 703, 710-711 (CA7 1999) (describing an insurer's claim for reimbursement of medical expenses paid for its insured as "securely equitable and so within the jurisdiction conferred . . . by ERISA" and imposing a constructive trust on identifiable escrowed insurance payments); *Monmouth County Mut. Fire Ins. Co.* v. *Hutchinson*, 21 N.J. Eq. 107, 116-117 (NJ 1870) (explaining that "it is settled" that an insured who receives insurance indemnity and afterwards receives "the amount from the [wrongdoer] in satisfaction of his damages . . . *holds it in trust for the insurers, and they may recover it from him by a suit in equity*" (emphasis added)); 8 G. Couch, Cyclopedia of Insurance Law §2002, at 6606 (1931) (explaining that when an insurance company has paid the insured for losses caused by a third party "and the insured afterwards receives that amount from the tortfeasor in satisfaction of his damages, he holds that amount in trust for the insurer, *who may recover it in a suit in equity*" (emphasis added)).

a breach-of-contract claim, limits recovery to the amount received for the particular loss that the insurer has already indemnified, and the insurer must assert its equitable claim on particular assets that are clearly traceable to the compensation received from a third party for that loss. The equitable, substantive right to subrogation has prevailed in every period in the history of equity jurisprudence and therefore was, without doubt, "*typically* available in equity." *Great-West*, 534 U.S., at 210 (quoting *Mertens*, 508 U.S., at 256).

In one of the "standard current works" on equitable remedies, *Great-West*, 534 U.S., at 217, Professor Palmer confirms that an insurer's subrogation-based rights are driven by the fundamentally equitable concern to prevent or reverse unjust enrichment, rather than to make the insurer whole through breach-of-contract damages:

> "When the insurer's case is based upon the subrogation right . . . several cases have taken the position that the insurer has a lien on the proceeds of the insured's recovery. . . . This is not an express lien based on agreement, but instead is an equitable lien impressed on moneys on the ground that they ought to go to the insurer. They ought to go to the insurer only because of its subrogation right, and that right is to recover medical expense from the tortfeasor to the extent that the insurer has paid such expense. *If the insured has recovered from the tortfeasor for such expense, the net amount of such recovery, after subtracting the cost of collection, ought to go to the insurer, and this is the extent of its lien.*" 4 Palmer, *supra*, §23.18(d), at 470 (emphasis added).

That passage, in addition to describing the equitable concern with unjust enrichment, makes clear that there is no merit in petitioners' suggestion that a plan cannot assert an equitable right to tort recoveries in the beneficiary's possession. Pet. Br. 28-29.

Petitioners' bald assertion that equity would have permitted the plan to pursue its subrogation rights against the third-party tortfeasors, presumably by intervening in petitioners' state-court suit, but does not permit an equitable action against the insured, *ibid.*, is particularly significant because it constitutes a concession that the plan had equitable subrogation rights that it could have enforced against the third-party tortfeasors. With that concession, petitioners' argument is reduced to the assertion that equity jurisdiction would govern a direct action against the third-party wrongdoer, but somehow could not reach an insured who holds identifiable proceeds that in good conscience belong to the insurer. But, as has been seen, the entire doctrine of equitable subrogation was built around the concept that the insured held any recovery in trust for the subrogated insurer, and even the earliest cases recognizing an insurer's equitable subrogation rights arose in the context of an equitable claim to money or property that had come to or was claimed by the insured. *Comegys*, 1 Pet., at 214-219; *Gracie*, 8 Johns., at 245; *Da Costa*, 1 Eden, at 131. Petitioners simply ignore the numerous cases permitting an insurer to seek equitable recovery from an insured who held identifiable proceeds subject to the insurer's subrogation rights. See, *e.g.*, cases cited *supra* notes 5 & 6.

Petitioners quibble with terminology in asserting that the plan's claim "is *not* a subrogation claim" but is instead a claim for reimbursement. Pet. Br. 28-29. Petitioners' semantic distinctions do not in the least affect the equitable nature of the substantive remedies that the plan claims, and neither Dobbs nor Black's Law Dictionary in describing the most common form of subrogation could reasonably be read to so cabin the limits of equity jurisdiction. Early cases do not even make the distinction, describing the insurer's action against its insured as part of the insurer's subrogation rights or simply holding that the insured held the third party's payment in trust for the insurer. See, *e.g.*, *Comegys*, 1 Pet., at

214-219; *Gracie*, 8 Johns., at 245; *Hutchinson*, 21 N.J. Eq., at 116-117; *Da Costa*, 1 Eden, at 131.[7] Although some modern cases draw a formal distinction between "subrogation" (claiming against the third party) and "reimbursement" (claiming against the insured for a portion of the compensation received from the third-party wrongdoer), they still recognize that the substantive reimbursement right against the insured is equitable in nature.[8] See, *e.g.*, *Swartzendruber*, 570 N.W.2d, at 712; *Manning*, 687 So.2d, at 419; *Provident Life & Accident Ins. Co.* v. *Williams*, 858 F.Supp. 906, 912 (WD Ark. 1994). Whether the right to reimbursement is securely encompassed in the definition of subrogation or is instead a parallel, equitable sibling springing from the right to subrogation, the outcome is the same: after providing indemnification

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[7] See also *Cont'l W. Ins. Co.* v. *Swartzendruber*, 570 N.W.2d 708, 712 (Neb. 1997) (explaining that reimbursement is "encompassed within the concept of subrogation"); *Newcomb* v. *Cincinnati Ins. Co.*, 22 Ohio St. 382, 387-388 (Ohio 1872) (explaining that if, after receiving indemnity from the insurer, the insured obtains from the wrongdoer "any sum for which, in equity and good conscience, he ought to account to the underwriter, reimbursement will, to that extent, be compelled in an action by the latter, *based on his right in equity to subrogation*" (emphasis added)); 4 Palmer, *supra*, §23.16(b), at 444 (observing that subrogation may be "asserted *against the tort victim*, by reason of the fact that he has recovered money from the alleged tortfeasor, whether through settlement or judgment" (emphasis added)); R. Goff & G. Jones, The Law of Restitution 391 (1966) (noting that although subrogation "is normally exercised by the insurer taking action against a third party" in the assured's name, it may also be that "the insurer wishes to recover from the assured money which has already come into the assured's hands" and that "[i]t is settled that money received by the assured to which the insurer is entitled to be subrogated is held by the assured as trustee for the insurer").

[8] The Court has not treated the distinction, if there is one, as being important. See *FMC Corp.* v. *Holliday*, 498 U.S. 52, 54-56 (1990) (describing a reimbursement agreement and demands for reimbursement as dealing with rights to subrogation); *Memphis & L.R.R. Co.* v. *Dow*, 120 U.S. 287, 301-302 (1887) (using "reimbursement" to mean the payment made to the subrogated party to satisfy its right to equitable subrogation).

for a loss, an insurer has a substantive equitable right to recover a share of the compensation paid by a tortfeasor to the insured for that loss, and the insured holds that recovery in trust for the insurer.[9] See cases cited *supra* notes 5 & 6. Thus, by obvious analogy, the reimbursement right that the plan asserts over a portion of the plan participants' settlement proceeds is equitable in nature.[10]

Seemingly oblivious to the long history of equitable restitution in similar circumstances, the Sixth and Ninth Circuits have misperceived the nature of the claimed rights and remedies in concluding that subrogation claims under §502(a)(3) are legal rather than equitable because they seek to give effect *to a contract* and ultimately *seek money*. See *Qualchoice*, 367 F.3d, at 649-650; *Vonderharr*, 384 F.3d, at 672-673. Equity jurisprudence has historically recognized insurers' equitable rights over funds paid to compensate the insured for already-indemnified losses precisely *because of* the nature of the indemnity contract, and the concern that a plan's reimbursement rights may arise from contract ignores that

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[9] Moreover, petitioners cannot justly insist that the plan's failure to intervene caused a forfeiture, because petitioners failed to notify Mid Atlantic of the pending settlement, ignoring Mid Atlantic's repeated requests for changes in the status of the litigation that could prejudice its "subrogation lien[s]." Joint App. 87-106, 121-128. Petitioners' decision to breach their obligations to "provide information" requested by the plan makes working a forfeiture against the plan inequitable. Joint App. 36.

[10] Some jurisdictions have statutorily or administratively limited remedies that were typically available in equity, but that does not change the fact that the enforcement of subrogation rights was typically available in equity. Compare *Ivie*, 606 P.2d, at 1201-1203 (interpreting Utah's no-fault insurance act as preserving some "subrogation-like rights of reimbursement among no-fault insurers" but limiting an insurer's traditional subrogation rights against the tortfeasor and the insured), with *id.*, at 1204-1205 (Hall, J., dissenting) (criticizing the majority's statutory interpretation as an unwarranted "departure from long-established principles of subrogation").

§502(a)(3) clearly contemplates the provision of "equitable relief" to "redress such violations or . . . to enforce any provisions of . . . the terms of" employee-benefit contracts. §502(a)(3).[11] Stripped to its essentials, petitioners' argument means that a plan fiduciary would never be able to assert an equitable claim to enforce the terms of a plan under §502(a)(3) because the asserted right will spring from the plan itself. A plan fiduciary's route into federal court, after all, is by suing to enforce (or to redress violations of) the terms of an ERISA plan. The fact that a plan's claim might be, in this trivial sense, "contractual" does not prevent the claim from being equitable in nature.[12] *Scholastic Corp.*, 389 F.Supp.2d, at 411-413.

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[11] "The right of subrogation is not founded on contract. *It is a creature of equity*; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." *Dow*, 120 U.S., at 301-302 (emphasis added); see also *United States* v. *California*, 507 U.S. 746, 759 (1993) ("[T]he doctrine of subrogation is one of equity."); *Garrison* v. *Memphis Ins. Co.*, 19 How. 312, 317 (1856); *Standard Accident Ins. Co.* v. *Pellecchia*, 104 A.2d 288, 293 (NJ 1954) (holding that subrogation rights do not arise out of contract but exist even without the consent of the insured, although the assured and the insurer may waive or limit the rights by agreement); *Ill. Sur. Co.* v. *Mitchell*, 197 S.W. 844, 845 (Ky. 1917) ("The right of subrogation rests not upon contract, but upon the principles of natural justice.").

An equitable right to subrogation may exist whether or not there is an explicit subrogation clause in the indemnity agreement. See, *e.g.*, *Liverpool & G.W. Steam Co.* v. *Phenix Ins. Co. (THE MONTANA)*, 129 U.S. 397, 462 (1889) (holding that the insurer's subrogation right arises without regard to whether the insurance contract contains a subrogation provision); *Williams*, 858 F.Supp., at 912 (holding that an equitable right to reimbursement exists even when the written ERISA plan lacks an explicit reimbursement provision).

[12] To disqualify every §502(a)(3) claim that derives from contract would also prevent even injunctive awards, since they, too, seek to enforce and protect the parties' rights under the plan.

Moreover, the equitable basis of the plan's reimbursement action allows the plan to assert proprietary rights in a portion of petitioners' settlement proceeds without first demonstrating the inadequacy of legal remedies. *Garrison*, 19 How., at 317 (rejecting argument that the insurer's subrogation suit "should have been at law, in the name of the assured—the remedy being adequate and complete" and explaining that "'the plaintiff had the plainest equity that could be'" (quoting *Randal*, 1 Ves. Sen., at 98)); *Hutchinson*, 21 N.J. Eq., at 116-118 (rejecting argument (identical to petitioners') that indemnity insurers claiming reimbursement against an insured must first seek a remedy at law); see also *Wylie* v. *Coxe*, 15 How. 415, 420 (1853) ("There may be a legal remedy, and yet if a more complete remedy can be had in chancery, it is a sufficient ground for jurisdiction.").[13] In other words, when subrogation claimants have an equitable substantive right to a constructive trust, as in this case, their claims are not subject to an adequate-remedy rule.[14] Thus, petitioners' assertion that the plan may have a claim for money had and received (for legal restitution), even if true,

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[13] Even if it had been proper to argue the adequacy of a legal remedy in this context, petitioners waived that issue by failing to raise it in the district court, in the court of appeals, or in their petition for certiorari. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."); *Brown, Bonnell & Co.* v. *Lake Superior Iron Co.*, 134 U.S. 530, 536 (1890) (holding that defendant waived adequate-remedy objection, which should have been taken "at the earliest opportunity"); *Wylie*, 15 How., at 420 (holding that "[i]t is too late to raise [an adequate-remedy] objection on the hearing in the appellate court").

[14] 1 Dobbs, *supra*, §2.5(1), at 129; *Heckmann* v. *Ahmanson*, 214 Cal. Rptr. 177, 187 (Cal. App. 1985) ("In California, as in most jurisdictions, an action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy. . . . Only where the constructive trustee has dissipated the fund that would constitute the res of the constructive trust is it proper to award a judgment for money damages.").

does not defeat its right to assert the equitable remedies of constructive trust or equitable lien (for equitable restitution).[15]

Even if there were a significant adequate-remedy requirement for subrogated plans, a court must be convinced that the legal remedy is at least equal to the remedy that could be obtained in equity before denying equitable relief. *Terrace* v. *Thompson*, 263 U.S. 197, 214 (1923). Section 502(a)(3)'s limitations on legal relief constitute a sufficient impediment to the exercise of any legal remedy otherwise available to the plan, thus overcoming any adequate-remedy limitation on equitable relief. See *Garrison*, 19 How., at 317 (holding that "an insurer may apply to equity *whenever* an impediment exists to the exercise of his legal remedy" (emphasis added)). Indeed, there is no small irony in petitioners' assertion that the plan's equitable rights are barred by the so-called adequacy of a legal remedy whose absence from the statutory scheme requires the plan to look to equity in the first place. In any event, the legal remedy that petitioners characterize as adequate is clearly not as practical and efficient as an equitable remedy. *Terrace*, 263 U.S., at 214; *Wylie*, 15 How., at 420. In addition to the fact that petitioners' asserted legal remedy, if not preempted,[16] would be against different parties

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[15] Contrary to petitioners' suggestion, Pet. Br. 21-22, *Gaines* v. *Miller*, 111 U.S. 395 (1884), does not limit the availability of equitable relief to insurers exercising their subrogation rights over specifically identifiable funds. Unlike this case, the claimant in *Gaines* had not averred "any ground of equity jurisdiction" and had not alleged a trust or lien on the decedent's estate, there was no property remaining that was traceable to the wrongly obtained funds, and the claimant had ratified the transaction and was therefore bound by an earlier judgment involving the decedent. *Id.*, at 398-399.

[16] The Court did not reach preemption issues in *Great-West.* 534 U.S., at 220. Given that the adequate-remedy principle does not apply in the insurance-subrogation context (and, independently, that the plan's legal remedy, if it even has one, is not as practical and efficient as an equitable one), the Court need not address preemption issues in this case, either.

in different venues, petitioners would nonsensically require health plans to intervene in every single case involving a claim by a plan participant against a third party.[17] Even if they could, in most instances there is never a lawsuit in which the plan could intervene because the plan participant settles with the third party (who is usually insured) without filing suit, preventing the plan from having any third-party remedy at all. It is better to permit plans to reserve legal action only for those who choose to disregard their reimbursement obligations. The remedial alternative proposed by petitioners is clearly not plain, adequate, and complete.

Rather than seeking personal financial liability from the participants, Mid Atlantic asserts an equitable right to a limited portion of a settlement paid to the participants from a third-party tortfeasor—an extant enrichment in petitioners' possession that belongs in good conscience to the plan. As already described, that right is firmly rooted in equity. The plan's memorialization of historical subrogation rights in the documents governing the plan, consistent with ERISA's written-instrument requirements, §402(a), is not properly classified as creating a purely contractual right to reimbursement, but rather as an expression of venerable equitable principles that, in this case, entitle the plan to a constructive trust or an equitable lien. Far from relying on the formalism of labels, the plan's claims substantively sound in equity.

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[17] In addition to being legally wrong, it would be bad policy to require plans to intervene, if they even could, in every third-party suit in which they claim a subrogation right. Most plan participants honor their obligations to reimburse their plans for medical benefits paid on their behalf without the need for filing a lawsuit. Allowing participants the opportunity to honor their plan obligations without requiring legal action by the plan for fear of losing its subrogation rights not only is supported by a long history of equity jurisprudence but also makes more economic sense than requiring plans to needlessly file thousands of unnecessary lawsuits every year.

III. MID ATLANTIC APPROPRIATELY ASSERTED THE EQUITABLE REMEDIES OF CONSTRUCTIVE TRUST AND EQUITABLE LIEN.

The remedies sought by Mid Atlantic—a constructive trust or, alternatively, an equitable lien—are quintessential equitable remedies, see, *e.g.*, Restatement of Restitution §4(c), (d) (1937); *Great-West*, 534 U.S., at 213, and Mid Atlantic appropriately claimed entitlement to that relief under §502(a)(3). As the Court noted in *Great-West*, constructive trust is a traditionally equitable remedy that may lie for "money or property" that (1) is "identified as belonging in good conscience to the plaintiff," (2) can "clearly be traced to particular funds or property," and (3) is "in the defendant's possession." 534 U.S., at 213.

The Court indicated that the requirements for obtaining an equitable lien are essentially identical to those for constructive trust. *Ibid.* There are, however, cases from the Court tending to favor the award of an equitable lien when, as in this case, the equitable basis of the obligation is an agreement "aimed" at a particular "fund." See *Barnes* v. *Alexander*, 232 U.S. 117, 121-122 (1914); see also *Wylie*, 15 How., at 420; 4 Palmer, *supra*, §23.18(d), at 470. Like the contingency-fee arrangement in *Barnes*, the plan agreement obligated the Sereboffs to pay Mid Atlantic its portion of the settlement proceeds "if, when, and as soon as [they] should receive an identified fund." 232 U.S., at 121. Contrary to petitioners' assertion, Pet. Br. 25-26, it is "not necessary to consider whether the lien attached to what we have called the *res* . . . before the fund was received," because it "is enough that it attached not later than that moment." *Id.*, at 122. Justice Holmes, writing for the Court, held that the attorney, like Mid Atlantic in this case, had "a lien upon the fund, as

soon as it was identified [and] could follow it into the hands" of the party to be charged. *Id.*, at 123.[18]

Thus, because the disputed funds belong in good conscience to the plan, are specifically identifiable, and are in petitioners' possession, Mid Atlantic properly sought and obtained an equitable lien over the funds. In any event, Mid Atlantic's claims satisfy the equitable remedial requirements for both a constructive trust and an equitable lien.

A. The Disputed Portion of the Settlement Proceeds Belongs in Good Conscience to the Plan.

Petitioners do not seriously dispute that the escrowed funds belong in good conscience to the plan, Pet. Br. 21, both because the plan provision establishing the plan's right to reimbursement provides a source of the plan's right to the settlement proceeds and because, as described previously, that right was typically available in equity. See *supra* notes 5 & 6 (citing cases establishing that beneficiary holds recovery in trust for the plan).

B. The Money Sought by Mid Atlantic Is Clearly Identifiable and Traceable to the Settlement Funds.

The money the plan seeks, $74,869.37 (minus a pro rata allowance for reasonable attorneys' fees), is specifically identifiable as proceeds from the tort settlement. Joint App. 39, 41-42, 69; see Pet. Br. 23 (conceding that the funds are "specifically identifiable"). That portion of the fund represents the amount that the plan paid the Sereboffs' health-care providers for past medical expenses. The plan provides that when a participant "receives benefits and [has] a right to

[18] Justice Holmes suggested that a constructive trust might also be proper. See *Barnes*, 232 U.S., at 121 ("And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing.").

recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party . . . *must be used* to reimburse the Company." Joint App. 35-36 (emphasis added). Thus, the plan document itself specifically identifies the property ("[a]ll recoveries from a third party") to which the plan has a superior equitable interest arising from the plan's payment of benefits and the petitioners' obligation to reimburse the plan. *Great-West*, 534 U.S., at 213; *Barnes*, 232 U.S., at 122. The plan's payment of petitioners' medical expenses gave it a right to subrogation from the property specifically identified by the plan document—the potential proceeds from claims against third-party tortfeasors—and reimbursement from the proceeds held by petitioners. The district court found, based on stipulated facts, that the "plaintiff (an ERISA fiduciary) seeks to recover funds that . . . are 'specifically identifiable' . . . because they were paid to the Sereboffs and their attorney on behalf of the tortfeasors . . . [and] 'are within the possession and control of the defendant beneficiary' (because the Sereboffs . . . have segregated the claimed monies in an investment account to abide the result of this lawsuit)." Pet. App. 31a. Those factual findings, ultimately affirmed by the court of appeals, *Sereboff*, 407 F.3d, at 218-219, are not reviewable in this Court, *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996), and independently justify Mid Atlantic's right to pursue its claims in federal court under §502(a)(3).

Petitioners' contention that the settlement with the tortfeasors did not designate which portion of the settlement was attributable to their past medical expenses, Pet. Br. 34, is not properly before the Court because it is relevant, if at all, only to the quantum of the recovery, not to whether Mid Atlantic was entitled to bring its suit in federal court. Petitioners had ample opportunity to convince the district court to restrict the plan's recovery and failed to do so. Petitioners sought to recover their "hospital and medical expenses" in their state-court suit, Joint App. 82, and the subrogation recovery

represents less than one-tenth of petitioners' total recovery. Petitioners were fully aware of the amount of Mid Atlantic's asserted liens for their past medical expenses, which were the particular losses against which they were indemnified.[19]

Further, petitioners never provided Mid Atlantic with a copy or explanation of their settlement. And, lacking Mid Atlantic's consent, petitioners would have contravened equitable principles (which are expressly embodied in the plan agreement) if they had accepted a settlement amount that was insufficient to satisfy Mid Atlantic's subrogation liens, of which petitioners had multiple notices. Joint App. 36, 87-106, 121-128. For these reasons, and because petitioners concede that it is true that the funds in question belong in good conscience to the plan "as a matter of fairness," Pet. Br. 21, petitioners cannot reasonably argue that their unjust enrichment is not specifically identifiable.[20]

Likewise, petitioners cannot show that Mid Atlantic failed to satisfy any applicable "tracing" requirement for constructive trusts. Contrary to petitioners' arguments, Mid Atlantic does not have to show that petitioners possess the "particular

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[19] Petitioners cannot resist a constructive trust by arguing that the $750,000 settlement did not compensate them for all of their losses. The terms of the plan make clear that the plan has a "right to recover any payments" made to a plan participant by a third party" and that "[a]ll recoveries from a third party (whether by lawsuit, settlement or otherwise) must be used to reimburse the Company." Joint App. 35-36. Moreover, the plan makes clear that the plan's share of the recovery will not be reduced because the participant "has not received the full damages claimed, unless [the plan] agree[s] in writing to a reduction." *Id.*, at 36. At minimum, the settlement compensated petitioners for the loss for which they had been indemnified. See 4 Palmer, *supra*, §23.16(b), at 444.

[20] The risk of gamesmanship by insureds in settling cases and then arguing that the settlement was attributable to only those categories of damages not subject to subrogation rights is precisely what created the need for plan or policy language requiring first-dollar reimbursement.

money that the Plan paid to the Sereboffs." Pet. Br. 20.[21] Petitioners' irrational full-circle theory of tracing, if adopted in the subrogation context, would instantaneously destroy the entire doctrine of equitable subrogation because, by definition, the recovery from the third-party wrongdoer is never the same *res* or funds used to satisfy the claim.[22] Although that different form of tracing may be appropriate in other circumstances, *i.e.*, when a defendant has taken the plaintiff's property and later sold or exchanged it, that theory is not, and never has been, the relevant tracing rule when analyzing subrogation-based rights.[23] Petitioners do not cite a single case suggesting that full-circle tracing is required in the subrogation context, and the reason is that two hundred years of equity jurisprudence say otherwise. See, *e.g.*, *Comegys*, 1 Pet., at 214-219; *Da Costa*, 1 Eden, at 131 (ordering the executors to pay £1636 from their prize money because "it

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[21] Rather than requiring claimants to *trace* the proceeds strictly from assets once belonging to them into the specific fund they seek (as petitioners inaccurately argue), a constructive trust in the insurance-subrogation context requires the insurer to specifically *identify* proceeds representing compensation for the loss that the insurer has indemnified. See D. Laycock, Modern American Remedies 673-674 (3d ed. 2002).

[22] Petitioners' tracing theory is belied by their assertion that Mid Atlantic could have sought recovery from the third-party tortfeasor. Pet. Br. 21. If true, then it is undisputed that Mid Atlantic successfully traced the funds from the third-party tortfeasors into petitioners' hands.

[23] Petitioners' reliance on Professor Dobbs's work in this regard is misplaced because Dobbs was speaking of a different context, *i.e.*, when a party has taken another's money, in suggesting that the funds must be traced back to the plaintiff. Professor Palmer explains that the term "restitution" is "not wholly apt since it suggests restoration to the successful party of some benefit obtained by him." 1 Palmer, *supra*, §1.1, at 4. That understanding of tracing, although describing many cases, wrongly ignores the "cases in which the successful party obtains restitution of something he did not have before, for example a benefit received by the defendant from a third party which justly should go to the plaintiff." *Ibid.*

was received by the executors . . . in trust for [the insurers]"); see *supra* notes 5 & 6.

Nor has petitioners' cramped interpretation of traceability ever been the rule in other, similar contexts. In *Barnes* v. *Alexander*, the fund received from the third-party defendant obviously did not find its source in the attorney's own bank account. 232 U.S., at 121-122. The attorney's interest arose because he performed services required under an agreement with his client. But those services gave rise to an equitable claim to a share of the funds that the agreement specifically identified as the potential source from which the attorney would be paid. *Id.*, at 122; see also *Wylie*, 15 How., at 420 (recognizing that a contractual obligation to pay an attorney out of specific funds creates a lien on those funds that may be enforced through a suit in equity); *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 133-142 (1962) (awarding general contractor's surety a "superior right and title [over the trustee in bankruptcy] to a fund withheld by the [landowner] out of earnings due the contractor" when the surety paid the subcontractors, even though the money in the fund was not traceable to the surety's payments to the subcontractors).

C. The Disputed Funds Are in Petitioners' Possession.

The disputed funds or property must be in the defendant's possession, a requirement that is indisputably met in this case. Pet. Br. 23 (conceding that the funds are within petitioners' "possession and control"). In *Great-West*, the plan sued the plan participants, even though they did not possess the proceeds from the tort settlement. That posed an insuperable bar to recovery because it revealed that the plan sought personal liability against the plan participants rather than an equitable remedy over specific proceeds. 534 U.S., at 214; see also *Bauhaus USA, Inc.* v. *Copeland*, 292 F.3d 439, 445 (CA5 2002) (finding suit not equitable when funds were in

court registry and not in possession of defendant).[24] No such bar exists in this case because Mid Atlantic seeks to recover the identifiable settlement proceeds that the defendants have segregated and maintained in their investment accounts pending appeal. Joint App. 39, 41-42, 69.

IV. THE REMEDIES SOUGHT ARE APPROPRIATE BECAUSE THEY WERE TYPICALLY AVAILABLE IN EQUITY, AND POLICY CONSIDERATIONS STRONGLY FAVOR ALLOWING THE CLAIMS.

Mid Atlantic's action for equitable restitution is appropriate because it seeks relief that was "*typically* available in equity." *Great-West*, 534 U.S., at 210 (quoting *Mertens*, 508 U.S., at 256), and because Congress has not elsewhere provided adequate relief to enable the plan to enforce its equitable rights under the plan when a beneficiary refuses to fulfill its clear reimbursement obligations. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 515 (1996) ("[W]e should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate' [under section 502(a)(3)].").

Because Mid Atlantic's restitution claims fall within the strict confines of equity jurisdiction, the Court may also give due regard to ERISA's trust-like character. *Ibid.* The Court has recognized that "ERISA abounds with the language and terminology of trust law . . . and [makes] applicable . . . certain principles developed in the evolution of the law of trusts." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989). Petitioners' persistence in refusing to recognize the equitable character of actions to enforce the terms of ERISA plans leads them to ignore the substantial distinctions

[24] The Court expressed no opinion "whether [the plan] could have obtained equitable relief against [the plan participants'] attorney and the trustee of the Special Needs Trust." *Great-West*, 534 U.S., at 220.

between the common law of contracts, which developed in the law courts, and the equity jurisprudence governing the oversight and enforcement of trust documents, which developed in the courts of chancery. See G. Bogert & G. Bogert, The Law of Trusts and Trustees §17, at 215 (rev. 2d ed. 1984). Most important, the means of enforcing trust terms and the duties arising under trusts was historically the exclusive province of the equity courts, which applied their own rules of construction and devised their own means of enforcing their decrees that were distinctly different from those of the law courts. *Mertens*, 508 U.S., at 256.

Additional policy considerations strongly favor allowing Mid Atlantic's claims. Preventing the unjust enrichment of a plan participant who would otherwise recover twice for the same loss is an entirely fair rule.[25] Petitioners irrationally lament that allowing suits for equitable restitution under §502(a)(3) will make plan fiduciaries "whole" at the expense of their beneficiaries who may in some cases be left "in part." Pet. Br. 34. In doing so, they ignore that the operation of the subrogation doctrine ensures that the plan participant receives a full indemnity, but not more than indemnity, for the particular losses covered by a plan. The possibility of an incomplete recovery from a third-party tortfeasor already exists, and the plan's provision of benefits subject to equitable subrogation leaves the beneficiary in no worse position than if she had to rely solely on the third-party suit.

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[25] "In this case, [the plan] did not agree to indemnify [petitioners] for pain or suffering or disability. Yet, denial of its [reimbursement] claim for medical expenses because [petitioners] had not also recovered for other elements of damage would have the effect of making [the plan] an insurer against those losses as well. This would be a windfall to [a plan participant] who has not paid for such protection." *Ludwig* v. *Farm Bureau Mut. Ins. Co.*, 393 N.W.2d 143, 147 (Iowa 1986).

Moreover, petitioners' argument that the equitable relief in this case is not appropriate because the plan language does not ensure that the beneficiary is made whole, Pet. Br. 33-34, is not properly before the Court because, even if the argument could be made to apply, it addresses only the amount of the recovery, not whether a court could grant a recovery at all. In any event, no federal court of appeals has ever suggested that an ERISA plan's subrogation-based reimbursement right may be cut off on that basis. To the contrary, several federal courts of appeals have noted that this make-whole argument has no place in the enforcement of a plan's subrogation rights,[26] and certainly cannot override the plain language of an ERISA plan.[27]

Petitioners' make-whole arguments also fail both as a matter of corrective justice and as a matter of efficiency. Pet. Br. 34. For example, a plan participant might receive $10,000 for medical expenses from the plan and another $10,000 for the same medical expenses from the wrongdoer. But if, for whatever reason, the plan participant recovers only $50,000 from the wrongdoer when she feels that $100,000 was appropriate, then she might reason that she should be able to use the extra $10,000 in medical-expense payments to

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[26] *Harris* v. *Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 280-281 (CA1 2000); *Waller* v. *Hormel Foods Corp.*, 120 F.3d 138, 140 (CA8 1997); *Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried & Non-Bargaining Hourly Employees* v. *Whitehurst*, 102 F.3d 1368, 1377-1378 (CA5 1996); see also *Kress* v. *Food Employers Labor Relations Ass'n*, 391 F.3d 563, 568-569 (CA4 2004). In addition to citing fairness and efficiency arguments, some of those courts of appeals have correctly concluded that adopting a make-whole rule would be a disservice to ERISA's requirement of straightforward language. *Harris*, 208 F.3d, at 280; *Whitehurst*, 102 F.3d, at 1374-1376.

[27] *Cagle* v. *Bruner*, 112 F.3d 1510, 1521 (CA11 1997); *Cutting* v. *Jerome Foods, Inc.*, 993 F.2d 1293, 1297 (CA7 1993); *Barnes* v. *Indep. Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan*, 64 F.3d 1389, 1394-1395 (CA9 1995).

reduce the corrective-justice deficit from $50,000 to $40,000. The extra $10,000 in medical-expense payments that the injured plan participant wants to use to offset her pain and suffering would have to come from the plan and, ultimately, other plan beneficiaries. See *Cutting*, 993 F.2d, at 1298 (observing that rejection of the make-whole approach in favor of unequivocal reimbursement rights has the effect of reducing costs for plan participants and their beneficiaries and enabling them to obtain more coverage, "in effect trading an uncertain bundle of tort rights for a larger certain right, which is just the sort of trade that people seek through insurance"). That subrogation or reimbursement recovery would be wrongly taken from the plan, since under both equity and the plan agreement, it should have been the plan's.[28]

Despite petitioners' uninformed claims to the contrary, plans do calculate expected subrogation recoveries in setting premiums, and, consequently, increased costs would have to be borne by the other members of the plan. *Harris*, 208 F.3d, at 280-281 ("Although plan members like the Harrises would benefit financially, ultimately the costs would be borne by all other plan members in the form of higher premiums for coverage."). That is fundamentally unfair to members of any ERISA plan.[29] Preventing self-funded plans, like the one in this case, from recovering equitable restitution can be especially damaging to small employers. Subrogation reduces the

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[28] Petitioners and the commentator on whom they rely, Pet. Br. 34, cite no authority, for there is none, for the extraordinary proposition that a court may decline to enforce a plan as a means of transferring to the plan the obligations of a third-party tortfeasor who cannot make the beneficiary whole. See *supra* note 25.

[29] "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." G. Bogert & G. Bogert, The Law of Trusts and Trustees §191, at 478 (rev. 2d ed. 1979).

costs of health-care coverage by allowing ERISA plans to use recoveries to pass on savings to employers and employees in the form of lower health-care costs. Enforcing the kind of subrogation rights at issue in this case not only prevents the participants' unjust enrichment but also helps protect the financial viability of employer-sponsored plans. Despite petitioners' claims to the contrary, allowing subrogation does not entitle insurers to a double recovery by collecting both premiums and subrogated amounts. The insurer assumes the very real risk of unpaid losses, which is the risk at the heart of indemnity insurance. Losses that have been compensated, such as the Sereboffs' medical expenses, should not fall on the shoulders of the employer's self-funded plan; they should be recovered for the benefit of other ERISA-plan participants, beneficiaries, and employers.[30]

Petitioners' approach is also economically inefficient because—to the extent the plan participant is in reality not made whole—it burdens the plan with a cost that the wrongdoer should have been forced to internalize. And, contrary to petitioners' argument, a rule allowing subrogation suits under §502(a)(3), when necessary (and they usually will not be), is more efficient and uses fewer judicial resources than a rule denying §502(a)(3) suits for equitable subrogation. Application of the make-whole rule, in contrast, would require cases that would have settled to be litigated anyway to determine what amount of damages would make the plan participant whole. *Harris*, 208 F.3d, at 281.

But despite the policy considerations favoring Mid Atlantic, in the final analysis, it is important that policy arguments "be directed to [a plan's] trustees, or to Congress, rather than

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[30] Furthermore, placing additional restrictions on a plan's ability to enforce reimbursement provisions "would surely discourage plan sponsors from providing the very sorts of accident and sickness benefits" that the plan offered to petitioners. *Kress*, 391 F.3d, at 569-570.

to the federal courts." *Kress*, 391 F.3d, at 570. After all, once plans have complied with ERISA's statutory requirements, Congress has generally left it "to plan sponsors—not courts—'to adopt, modify, or terminate welfare plans.'" *Ibid.* (quoting *Schoonejongen*, 514 U.S., at 78).

CONCLUSION

For these reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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