March 10, 2006

The Honorable Michael Enzi
Chairman of the Conference Committee on
the Pension Protection Act of 2005 (HR 2830) and
the Preservation of Defined Benefit Plans Act of 2005 (HR 4274)
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Re: Section 307 of the Pension Protection Act ("PPA"), which amends §502(a)(3) of the Employee Retirement Income Security Act ("ERISA") to expressly authorize plan fiduciaries to sue for money under ERISA §502(a)(3), *but does not expressly provide this relief for participants and beneficiaries*

Dear Chairman Enzi:

The 162 attorneys, organizations, and other interested persons who have endorsed the positions in this letter, some of whom are distinguished law professors and authors of articles or books on ERISA, are all involved in helping protect the interests of participants and beneficiaries in their employer-provided ERISA benefits (pension and/or welfare). We write to express our concerns over subparagraph (a) of §307, which authorizes plan fiduciaries to sue for money under ERISA §502(a)(3), *but does not expressly provide this relief for participants and beneficiaries.* ERISA's primary remedial objective is to protect the interests of participants (and their beneficiaries) in their employer-provided benefits. See 29 U.S.C. §1001 ("Congressional findings and declaration of policy"). A provision that is so obviously lopsided and unfair undermines this goal and impugns the integrity of our legislative process.[1] Accordingly, at the end of this letter (page 6), we propose a modification to Section 307.

As introduced on June 9, 2005, the PPA was touted as a bill to improve the funding of defined benefit pension plans, and to address various issues concerning cash balance pension plans. At that time and for six months thereafter, the PPA did not speak to the remedies available under ERISA §502(a)(3). However, on December 15, 2005, just before the House was scheduled to vote on the bill, §307 was added to the PPA. Consequently, there was no opportunity for interested persons (other than the plans and insurance companies that lobbied for the addition) to comment on §307.

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[1] As currently drafted, §307(a) reads as follows:
(a) In General- Section 502(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132(a)) is amended by adding, after and below paragraph (9), the following new sentence:
'Actions described under paragraph (3) include an action by a fiduciary for recovery of amounts on behalf of the plan enforcing terms of the plan that provide a right of recovery by reimbursement or subrogation with respect to benefits provided to or for a participant or beneficiary.'.

While §307 appears rather innocuous given the breadth of the PPA, it drastically alters and tips a previously level playing field (based on the language of ERISA §502(a)(3)) *in favor of plan fiduciaries* with respect to the remedies available under ERISA §502(a)(3). Worse, §307 could be erroneously construed as suggesting that monetary relief is not available to participants and beneficiaries under ERISA §502(a)(3). As I will explain, any amendment to ERISA's remedies provisions must make clear that participants and beneficiaries --the persons ERISA was designed to protect--may obtain benefits and other make-whole monetary relief under §502(a)(3).

Under ERISA's remedial statute, §502(a), only two provisions permit participants and beneficiaries to recover losses incurred as a result of a violation of ERISA or the terms of the plan: ERISA §502(a)(1)(B), which authorizes suits to recover benefits due under the terms of the plan; and ERISA §502(a)(3), which authorizes suits to enjoin any act or practice that violates ERISA or the terms of the plan, or to obtain other "appropriate equitable relief" to redress such violations.[2] If a participant or beneficiary suffers a monetary loss because of a violation of ERISA (as opposed to a violation of the terms of the plan), the participant's only avenue of recovery is to sue under ERISA §502(a)(3). Unfortunately, some courts have erroneously denied participants and beneficiaries monetary relief under §502(a)(3) believing an award of money can never be an equitable remedy, leaving aggrieved participants with a statutory right but no concomitant remedy, a result surely never intended by the drafters of ERISA's remedial framework.

Pertinent Case Law and Legislative History

Crosby v. Bowater, 382 F.3d 587 (6th Cir. 2004), illustrates the problem. There, Frank J. Crosby sought to recover on behalf of himself and approximately 350 other participants and beneficiaries lump sum pension benefits due and owing under ERISA's anti-forfeiture rule.[3] Although the district court granted summary judgment for Crosby and the class, and awarded equitable restitution in the amount of the difference between the lump sum paid and the lump sum that *should* have been paid if defendants had complied with ERISA's anti-forfeiture rule, the Sixth Circuit reversed, reasoning that monetary relief is unavailable under ERISA §502(a)(3). Id. at 593-597. In effect, the Sixth Circuit held that Crosby was entitled to no relief under ERISA §502(a)(3), even though the plan's method and manner of calculating the lump sums was illegal under ERISA's anti-forfeiture rule.

The denial of monetary relief under §502(a)(3) is not limited to claims for pension benefits owed under ERISA's minimum benefit rules (e.g., the anti-forfeiture rules, present-value rules,

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[2] The full text of ERISA §502(a)(3) reads as follows:
A civil action may be brought--

* * *

(3) by a participant, beneficiary, or fiduciary (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 provision of this subchapter or the terms of the plan;

[3] I and my partners Bradley J. Schram and Robert P. Geller represented the class.

benefit accrual rules, and minimum vesting rules). Participants and beneficiaries have been prohibited from recovering monetary losses suffered on account of a breach of ERISA's fiduciary duties. For example, in Calhoon v. Trans World Airlines, Inc., 400 F.3d 593 (8th Cir. 2005), the Eighth Circuit held that substantial medical expenses incurred by the plaintiff as a result of the plan fiduciary sending the plaintiff's COBRA premium coupons to the wrong address were not recoverable under ERISA §502(a)(3). The effect of this ruling was to deny the plaintiff any relief because the medical expenses incurred could not be recovered under ERISA §502(a)(1)(B).

Crosby, Calhoon and other similar cases routinely cite the Supreme Court's decision in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), as the basis for their conclusion that monetary relief is unavailable under ERISA §502(a)(3). Great-West did not, however, hold that monetary relief is never available under ERISA §502(a)(3). On the contrary, Great-West held that monetary relief *typically* available at equity (e.g., equitable restitution) may be awarded under ERISA §502(a)(3). 534 U.S. at 212-217. The Supreme Court denied monetary relief to Great-West because its claim to recover medical benefits from an injured (quadriplegic) beneficiary under the plan's reimbursement provision was based on contract,[4] and a claim for money due and owing under a contract was not *typically* available at equity. Great-West, 534 U.S. at 210-211. In light of this ruling, insured plans and their insurers have often been unable to utilize ERISA §502(a)(3) to recover monies allegedly owed by a participant or beneficiary under the plan's reimbursement or subrogation provision--a situation that is undoubtedly the motivating factor behind the addition of §307 to the PPA.

Although equity courts in the days of the divided bench *typically* awarded monetary relief when it was necessary to make the aggrieved party whole,[5] as noted, many courts have interpreted Great-West as precluding participants and beneficiaries from *ever* obtaining monetary relief under ERISA §502(a)(3). Even if this were a correct interpretation of Great-West, it is not a correct interpretation of ERISA §502(a)(3). As explained by the four-Justice dissent in Great-West, scholarly commentators, and the Department of Labor,[6] Congress intended to provide make-whole monetary relief to participants and beneficiaries under ERISA §502(a)(3). Further, in their

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[4] Like a great many reimbursement provisions, the reimbursement provision in the health plan at issue in Great-West gave the plan the right to recover from a beneficiary any payment for benefits that the beneficiary was entitled to recover from a third party. Great-West, 534 U.S. at 207.

[5] See, e.g., the following Supreme Court cases, all of which were decided in the days of the divided bench (i.e., when there existed separate law and equity courts): Riddle & Co. v. Mandeville and Jamieson, 9 U.S. 322, 332-333 (1809) (holding that "a right exists in the holder of a promissory note, at least where he cannot obtain payment at law, to sue a remote endorser in equity.") (emphasis added); Clews v. Jamieson, 182 U.S. 461 (1901) (applied constructive trust principles in determining that petitioners' action for the payment of money was maintainable in equity); and Pennington v. Gibson, 57 U.S. 65 (1853) (citing numerous cases where the equity courts ordered the payment of money, and holding that such decrees are enforceable).

[6] See, e.g., the DOL's amicus brief in the Tenth Circuit in Callery v. United States Life Insurance Co. (Ct. of Appeals No. 03-4097), which can be found at the DOL's website.

concurring opinion in Aetna Health Inc. v. Davila, 124 S. Ct. 2488 (2004), Justices Ginsburg and Breyer emphasized that it is high time for Congress and the Court to expressly say so:

> A series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief. . . . As the array of lower court cases and opinions documents, see, *e.g., DiFelice; Cicio v. Does*, 321 F.3d 83 (C.A.2 2003), . . .a fresh consideration of the availability of consequential damages under §502(a)(3) is plainly in order. See 321 F.3d at 106, 107 (Calabresi, J., dissenting in part) ("gaping wound" caused by the breath of preemption and limited remedies under ERISA, as interpreted by this Court, will not be healed until the Court "start[s] over" or Congress "wipe[s] the slate clean"); *DiFelice*, 346 F.3d at 467 ("The vital thing . . . is that either Congress or the Court act quickly, because the current situation is plainly untenable."); Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Error in *Russell, Mertens* and *Great-West*, 103 Colum. L.Rev. 1317, 1365 (2003) (hereinafter Langbein) ("The Supreme Court needs to . . . realign ERISA remedy law with the trust remedial tradition that Congress intended when it provided in §502(a)(3) for 'appropriate equitable relief.'").
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> "Congress . . . intended ERISA to replicate the core principles of trust remedy law, including the make-whole standard of relief." Langbein 1319. I anticipate that Congress, or this Court, will one day so confirm.

Davila, 124 S. Ct. at 2503.[7]

ERISA's legislative history reveals that Congress intended to afford aggrieved participants and beneficiaries the broadest of legal and equitable remedies and to eliminate jurisdictional obstacles to the recovery of benefits. See H.R. Rep. No. 93-533, 1974 U.S.C.C.A.N. 4639, 4655 (Oct. 2, 1973); S. Rep. No. 93-127, 1974 U.S.C.C.A.N. 4838, 4870 (Apr. 18, 1973). As further explained in the legislative history, Congress sought to enlarge the equitable remedies "traditionally available" because they failed to adequately safeguard the interests of participants and beneficiaries. H.R. Rep. No. 93-533, 1974 U.S.C.C.A.N. 4639, 4643 (Oct. 2, 1973).

Not surprisingly, when Congress finally enacted ERISA, the only condition it placed on the equitable remedies available under ERISA §502(a)(3) is that they be "appropriate." 29 U.S.C.

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[7] In light of the Court's construction of ERISA §502 in Great-West, persons who are the victims of malfeasance by ERISA-regulated plans often have neither state nor federal remedies for their injuries. This is frequently the case for victims of negligent HMO decisions concerning eligibility for plan benefits. See Edward A. Zelinsky, Against a Federal Patients' Bill of Rights--The Sequel, New York University Review of Employee Benefits and Executive Compensation (2005).

§1132(a)(3). Thus, by its very language, ERISA §502(a)(3) contemplates relief broader than mere injunctive orders and, by use of the disjunctive "or," permits an award of appropriate equitable relief to redress the violation even absent a grant of injunctive relief.[8] Nevertheless, some courts continue to deny equitable monetary relief to participants and beneficiaries under ERISA §502(a)(3).

Although ERISA does not define the term "equitable relief," when interpreting ERISA, the Supreme Court has stated that it "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990) (citations omitted). The term "equitable" ordinarily means "just," "fair," and "right." Black's Law Dictionary 537 (6th ed. 1990); Webster's Collegiate Dictionary 383 (1979). Given ERISA's remedial purpose of protecting participants' interests in their employer-provided benefits, and its intent to provide the broadest of equitable remedies to redress violations of ERISA, the term "equitable relief" in ERISA §502(a)(3) was facially intended to mean relief that is "just," "fair," and "right."

If a participant or beneficiary incurs an expense or suffers a loss as a result of an ERISA violation, and is unable to recover those monies under ERISA §502(a)(1)(B), it is clearly "just", "fair" and "right" that the participant or beneficiary be able to recover under ERISA §502(a)(3). As the Supreme Court explained in Varity Corp. v. Howe, 516 U.S. 489 (1996), ERISA §502(a)(3) is a "catchall" provision that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy"; ERISA's enforcement provisions were intended to provide "broad remedies" for redressing violations of ERISA; it is "hard to imagine" that Congress would want to deny injured beneficiaries a remedy; and granting a remedy is "consistent with" the literal language of the statute, ERISA's purpose of protecting participants and beneficiaries, and pre-existing trust law. Id. at 512-515.

Proposed Solution

For the foregoing reasons, ERISA §502(a)(3) desperately needs to be amended to expressly provide for monetary relief to participants and beneficiaries so as to eliminate any perceived uncertainty as to the provision's remedial objectives. Therefore, we propose that §307(a) of the PPA be re-written to read as follows:

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[8] When Congress enacted ERISA in 1974, federal courts sitting in equity routinely ordered monetary relief when it was necessary to make the injured party whole. See Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (backpay for violation of Civil Rights Act); Chris-Craft Industs. v. Piper Aircraft Corp., 480 F.2d 341, 390-391 (2nd Cir. 1973) ("ancillary" monetary relief for violation of securities laws); Jordan v. Weaver, 472 F.2d 986, 993, 994 and n. 14. (7th Cir. 1973) (benefits owed under Aid to the Aged, Blind and Disabled program); Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535-536 (3rd Cir. 1971) (sums wrongfully withheld under Equal Pay Act).

As the Supreme Court has oft stated, Congress is presumed to know the state of the law when it passes legislation. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 350 (1998); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990); Cannon v. Univ. of Chicago, 441 U.S. 677, 697-698 (1979).

(a) In General- Section 502(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1132(a)) is amended by adding, at the end of paragraph (3)(B), the following language:

'including make-whole monetary relief'

While some might argue that amending ERISA §502(a)(3) to expressly provide for monetary relief to participants and beneficiaries will impose inappropriate liabilities on plans, we would respectfully disagree, as the statute retains the threshold requirement that the relief be "appropriate." Accordingly, if a participant or beneficiary has failed to take reasonable steps to mitigate his damages or has unreasonably contributed to his damages, a court could properly take those facts into consideration in determining the monetary relief that is "appropriate."

Thank you for giving us the opportunity to address our concerns about §307 of the PPA as currently drafted. If you have any questions or need additional information, please feel free to call me or e-mail me.

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