Varity Corp. v. Howe: Will it Cause an Increase in Litigation Against Employers Who Administer ERISA Plans?

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In *Varity Corp. v. Howe,* the United States Supreme Court held that section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA") authorizes an award of relief to an individual for a breach of fiduciary duty by the administrator of an employee benefit plan covered by ERISA and affirmed the relief awarded.\(^1\)

I. FACTUAL BACKGROUND

In the mid-1980s, Varity Corporation ("Varity") and its wholly-owned subsidiary, Massey-Ferguson, Inc. ("Massey-Ferguson"), devised a corporate reorganization designed to transfer Massey-Ferguson's money-losing divisions and various debts to a newly created corporation, Massey Combines.\(^4\) One of Varity's objectives was to eliminate obligations to pay nonpension benefits to employees in those unprofitable divisions covered by Massey-Ferguson's self-funded employee welfare benefit plan.\(^5\) Instead of exercising its reserved right to terminate employee benefits directly, Varity persuaded those employees to transfer to the new company.\(^6\) The employees who transferred relinquished their status as participants in and beneficiaries of Massey-Ferguson's plan in exchange for coverage under Massey Combines' self-funded plan because Varity assured them that their plan benefits would be secure.\(^7\) Varity also transferred to Massey Combines its obligation to pay benefits to

2. 29 U.S.C. § 1132(a)(3) (1994). The Supreme Court cited to the 1988 version of the United States Code. This Article cites to the 1994 version because no substantive changes have been made to the provisions discussed.
3. 116 S. Ct. at 1079.
4. *Id.* at 1068.
5. *Id.* These benefits included "basic health, major medical, life insurance, vision care, hearing care, and dental benefits." *Howe v. Varity Corp.*, 36 F.3d 746, 749 (8th Cir. 1994), *aff'd*, 116 S. Ct. 1065.
6. 116 S. Ct. at 1068.
7. *Id.* at 1068-69.
certain retired Massey-Ferguson workers without the retirees' knowledge or permission.\(^8\)

When Massey Combines failed, employees who retired both before and after the reorganization lost their benefits and sued Varity and Massey-Ferguson seeking reinstatement in Massey-Ferguson's ERISA plan.\(^9\) After finding that Varity and Massey-Ferguson had harmed the plan beneficiaries through deliberate deception while acting as ERISA fiduciaries, the United States District Court for the Southern District of Iowa held that the companies had violated their fiduciary obligation under ERISA section 404(a)\(^10\) "to administer Massey-Ferguson's benefit plan 'solely in the interest of the participants and beneficiaries' of the plan."\(^11\) The court also held that ERISA section 502(a)(3)\(^12\) authorized the lawsuit and relief by giving the former employees the right to obtain appropriate equitable relief for "the harm that this deception had caused them individually."\(^13\) The court gave the former employees a choice of being reinstated into the Massey-Ferguson plan or taking compensatory damages awarded by the jury.\(^14\) The Eighth Circuit Court of Appeals affirmed but set aside the compensatory damages.\(^15\) The Supreme Court granted certiorari primarily to resolve disagreement among the federal courts of appeals about the proper interpretation of ERISA section 502(a)(3).\(^16\) The Court affirmed that section 502(a)(3) authorizes an award of relief to individuals harmed by a plan administrator's breach of fiduciary duty.\(^17\)

II. LEGAL BACKGROUND

ERISA was enacted in 1974 to protect participants in and beneficiaries of employee benefit plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries . . . and by providing for

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8. *Id.* at 1069. The Massey-Ferguson plan continued to provide benefits to employees of Massey-Ferguson's profitable divisions that were not transferred to Massey Combines. *Id.*
9. *Id.*
11. 116 S. Ct. at 1069 (quoting ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)).
13. 116 S. Ct. at 1069.
14. 36 F.3d at 751.
15. *Id.* at 756. The case was submitted to a jury, but the district court made its own findings of fact. The jury awarded compensatory and punitive damages. The district court set aside the punitive damages and gave the plaintiffs a choice of compensatory damages or reinstatement in the plan with payment of past-due benefits. The Eighth Circuit modified the remedy by setting aside the compensatory damages. *Id.* at 751.
16. 116 S. Ct. at 1069.
17. *Id.* at 1079.
appropriate remedies, sanctions, and ready access to the Federal
courts." Several provisions in ERISA address fiduciary responsibility
and authorization to sue. For example, ERISA section 404(a) imposes
a "prudent man standard of care" on fiduciaries to act "solely in the
interest of the participants and beneficiaries." In addition, ERISA
section 409(a) establishes personal liability for a fiduciary who breaches
any of the fiduciary duties imposed by ERISA. Furthermore, ERISA
section 502(a) provides, in part, that a civil action may be brought by the
following parties:

(1) by a participant or beneficiary . . . (B) 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;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for
appropriate relief under section 1109 of this title;

(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 provisions of this
subchapter or the terms of the plan;

. . . .

(5) except as otherwise provided in subsection (b) of this section, by
the Secretary (A) to enjoin any act or practice which violates any
provision of this subchapter, or (B) to obtain other appropriate
equitable relief (i) to redress such violation or (ii) to enforce any
provision of this subchapter.21

Two Supreme Court decisions interpreting ERISA provisions
contributed to the legal background of Varity. In 1985 the Court held

18. 29 U.S.C. § 1001(b) (1994). The Supreme Court has described ERISA as a
"comprehensive and reticulated statute,' the product of a decade of congressional study of
the Nation's private employee benefit system." Mertens v. Hewitt Assocs., 508 U.S. 248,
251 (1993) (quoting Nachman Corp. v. PBGC, 446 U.S. 359, 361 (1980)).
20. ERISA section 409(a) states:
Any person who is a fiduciary with respect to a plan who breaches any of the
responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter
shall be personally liable to make good to such plan any losses to the plan
resulting from each such breach, and to restore to such plan any profits of such
fiduciary which have been made through use of assets of the plan by the fiduciary,
and shall be subject to such other equitable or remedial relief as the court may
deem appropriate, including removal of such fiduciary. A fiduciary may also be
removed for a violation of section 1111 of this title.
in *Massachusetts Mutual Life Insurance Co. v. Russell*\(^2\)\(^2\) that ERISA section 409 did not authorize compensatory or punitive damages against a plan administrator who had wrongfully delayed payment of the plaintiff’s claim for benefits.\(^2\)\(^3\) The Court said that the text of section 409 “persuades us that Congress did not intend that section to authorize any relief except for the plan itself.”\(^2\)\(^4\) In *Russell*, the plaintiff sued under ERISA section 502(a)(2), which cross-references ERISA section 409, not under ERISA section 502(a)(3).\(^2\)\(^5\) In a concurring opinion joined by three other justices, Justice Brennan said that the Court’s narrow holding did not preclude consideration of whether ERISA section 502(a)(3) authorizes awards to individuals for a breach of fiduciary duty.\(^2\)\(^6\)

In 1993 the Court held in *Mertens v. Hewitt Associates*\(^2\)\(^7\) that ERISA section 502(a)(3) does not authorize suits for legal damages, including compensatory and punitive damages.\(^2\)\(^8\) The petitioners asserted that the denial of monetary damages failed to recognize “ERISA’s roots in the common law of trusts.”\(^2\)\(^9\) However, the Court stated that even though money damages were available against trustees in equity courts, which had exclusive jurisdiction over actions by beneficiaries for breach of trust at common law, equitable relief in the context of ERISA refers to relief typically available in equity, such as injunction, mandamus, and restitution.\(^2\)\(^0\) The Court also said that the “authority of courts to develop a ‘federal common law’ under ERISA . . . is not the authority to revise the text of the statute.”\(^2\)\(^1\) Therefore, courts cannot add to the remedies listed in the statute.

After the Supreme Court decided *Russell*, the Ninth Circuit,\(^3\)\(^2\) the Eleventh Circuit,\(^3\)\(^3\) and the Sixth Circuit\(^3\)\(^4\) held that ERISA section

\(^{22}\) Id. at 134 (1985).
\(^{23}\) Id. at 138.
\(^{24}\) Id. at 144.
\(^{25}\) Id. at 149-50 (Brennan, J., concurring).
\(^{26}\) Id. at 153-54.
\(^{27}\) 508 U.S. 248 (1993).
\(^{28}\) Id. at 256-59.
\(^{29}\) Id. at 255.
\(^{30}\) Id. at 256. “[A]t common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust. It is also true that money damages were available in those courts against the trustee . . . .” Id. (citations omitted).
\(^{33}\) See *Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614, 617 (11th Cir. 1991).
\(^{34}\) See *Vespasian v. Sweeney*, 52 F.3d 327 (6th Cir. 1995).
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502(a)(3) does not authorize awards of relief to individuals for a breach of fiduciary duty. In contrast, the Third Circuit,\(^{35}\) the Seventh Circuit,\(^{36}\) and the Eighth Circuit\(^{37}\) have not extended the holding in *Russell* to ERISA section 502(a)(3). For example, in *McLeod v. Oregon Lithoprint Inc.*,\(^{38}\) the petitioner sued her employer and the employee benefit plan for failing to notify her that she was eligible to apply for cancer insurance.\(^{39}\) Her doctor diagnosed her with cancer before she was notified of her eligibility, and she sued in part to recover compensatory damages equal to the benefits she would have received if she had been covered.\(^{40}\) The Ninth Circuit said it was bound by its prior decision in *Watkins v. Westinghouse Hanford Co.*\(^{41}\) to extend the Supreme Court holding in *Russell* to ERISA section 502(a)(3) based on the Court's language "implying that all of the statute's provisions relating to fiduciary duties run only to plans, and not to . . . individuals."\(^{42}\) Similarly, in *Simmons v. Southern Bell Telephone & Telegraph Co.*,\(^{43}\) the Eleventh Circuit interpreted *Russell* to mean that ERISA section 409 provided the sole basis for suits involving breach of fiduciary duty and did not authorize an individual beneficiary to recover in those cases.\(^{44}\) The Sixth Circuit also followed this reasoning in *Vespasian v. Sweeney*,\(^{45}\) a case that was decided after the Eighth Circuit's decision in *Howe v. Varity Corp.*\(^{46}\)

However, the Third Circuit followed the approach of Justice Brennan's concurring opinion in *Russell* and held that ERISA section 502(a)(3) does authorize an individual plaintiff to recover for breach of fiduciary duty.\(^{47}\) The Seventh Circuit reached the same conclusion in *Anweiler v. American Electric Power Service Corp.*\(^{48}\) after considering the Supreme Court's limitation of its holding in *Mertens* to the forms of relief available under ERISA section 502(a)(3) rather than to the parties who

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38. 46 F.3d 956.
39. Id. at 959-60.
40. Id. at 957.
41. 12 F.3d 1517, 1528 (9th Cir. 1993).
42. 46 F.3d at 959-60.
43. 940 F.2d 614.
44. Id. at 617.
45. 52 F.3d 327.
46. 36 F.3d 746.
47. 12 F.3d at 1298.
48. 3 F.3d at 992.
could obtain relief. The court was also influenced by the Secretary of Labor’s amicus curiae brief, which took the position that Mertens allows an individual to recover under ERISA section 502(a)(3) for a fiduciary’s breach of duty.

III. RATIONALE OF THE COURT

In Varity Corp. v. Howe, the Supreme Court held in a six-to-three decision: (1) that the employer was acting as an ERISA fiduciary when it deliberately misled employees based on the facts determined by the lower courts; (2) that the employer violated the fiduciary obligations of ERISA section 404; and (3) that ERISA section 502(a)(3) gives individual beneficiaries the right to appropriate equitable relief when they are harmed by an administrator’s breach of fiduciary obligations.

Holding that Varity was acting as a fiduciary, the Court noted that ERISA section 3(21)(A) provides that persons are fiduciaries of a plan and are subject to ERISA fiduciary duties to the extent that they exercise any discretionary authority or discretionary control in plan management or any discretionary authority or discretionary responsibility in plan administration. Interpreting management and administration based on common law trust principles, the Court said that “conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power ‘appropriate’ to carrying out an important plan purpose.” In addition, because Varity did not authorize special individuals to speak as plan administrators, reasonable employees could have thought the company was acting both as employer and as plan administrator when it told the employees that their benefits would remain secure.

Varity argued that it was not acting as a fiduciary for three reasons. First, it was not acting as a plan administrator because neither ERISA nor the plan instruments required it to make the statements to the employees. The Court responded that the fiduciary duty would serve no purpose if it applied only to activities already controlled by other legal duties. Second, Varity contended it must have been speaking

49. Id. at 993.
50. Id.
51. 116 S. Ct. at 1068.
53. 116 S. Ct. at 1071.
54. Id. at 1073.
55. Id.
56. Id.
57. Id. at 1074.
as the employer when it discussed Massey Combines' bright future because those statements were unrelated to plan administration.\textsuperscript{58} However, Varity's ultimate message of secure benefits depended in part on its assurances about Massey Combines' future, and the Court said that "making intentional representations about the future of plan benefits" was an act of plan administration under the circumstances.\textsuperscript{59}

Third, Varity argued that a decision to amend or terminate a plan can be made only by an employer.\textsuperscript{60} The Court agreed but said that making statements about the likely future of the plan is not beyond the scope of plan administration.\textsuperscript{61}

The Court only briefly discussed its second holding that Varity's deception was a violation of ERISA fiduciary standards because lying and "deceiving a plan's beneficiaries . . . to save the employer money at the beneficiaries' expense" are not consistent with the fiduciary duties imposed by ERISA section 404.\textsuperscript{62}

The third holding resolved the split in the circuits regarding whether ERISA section 502(a)(3) authorizes a lawsuit for individual relief. Varity made a four-step argument that the type of relief sought by the beneficiaries is not "appropriate" equitable relief under ERISA section 502(a)(3).\textsuperscript{63} First, ERISA section 502(a)(2) allows a plaintiff to bring a civil action "for appropriate relief under section 409."\textsuperscript{64} Second, ERISA section 409(a) provides that fiduciaries who breach their duties are liable to the plan. Third, the Supreme Court had held in \textit{Russell} that beneficiaries could not recover compensatory or punitive damages for a breach of fiduciary duty based on ERISA sections 409 and 502(a)(2).\textsuperscript{65} Varity pointed to language in \textit{Russell} that "draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary."\textsuperscript{66} Fourth, based on \textit{Russell} and ERISA's language, structure, and purposes, ERISA section 502(a)(3) should not authorize individual relief that the Supreme Court said Congress excluded under ERISA section 502(a)(2).\textsuperscript{67}

\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.} at 1076.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.} (quoting \textit{Russell}, 473 U.S. at 142).
\textsuperscript{67} \textit{Id.}
The Supreme Court, however, disagreed with Varity for four reasons. 68 First, the Court stated that Russell applies to ERISA section 502(a)(2), not section 502(a)(3), and the reference to ERISA section 409, which provides that the fiduciary is liable only to the plan, is in section 502(a)(2). 69 In addition, the plaintiff in Russell had not sued under ERISA section 502(a)(3), which authorizes only equitable relief. 70 The Court further distinguished Russell because ERISA section 502(a)(1) already provided relief for the type of injury the plaintiff in that case had suffered—the wrongful denial of benefits. 71 The Court concluded that Russell is not controlling, "either implicitly or explicitly," in suits under ERISA section 502(a)(3). 72

Second, the Court found that the language of ERISA section 502(a)(3) was broad enough to cover individual relief for individuals harmed by a breach of fiduciary duty. 73 ERISA sections 502(a)(2) and 409 do not cover all liability for breach of fiduciary duty even though ERISA section 409 is titled "Liability for Breach of Fiduciary Duty." 74 The Court explained, moreover, that ERISA section 502(l), 75 added in 1989, imposes a civil penalty as a percentage of the amount "ordered by a court to be paid by such fiduciary ... to a plan or its participants and beneficiaries" under ERISA section 502(a)(5), which is identical to section 502(a)(3) except that section 502(a)(5) authorizes the Secretary of Labor to sue. 76 Therefore, the Court concluded, the new subsection "seems to foresee instances in which the sort of relief provided by both subsection five and, by implication, subsection three, would include an award to 'participants and beneficiaries,' rather than to the 'plan,' for breach of fiduciary obligation." 77

Third, in response to Varity's argument that specific provisions control over general ones, so that ERISA section 502(a)(2) with its reference to ERISA section 409 controls over the general catchall provision of ERISA section 502(a)(3), the Court noted that canons of statutory construction are simply "rules of thumb" that sometimes help courts to interpret

68. Id.
69. Id.
70. Id.
71. Id. ERISA section 502(a)(1) allows a civil action to be brought "by a participant or beneficiary ... 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." 29 U.S.C. § 1132(a)(1) (1994).
72. 116 S. Ct. at 1076.
73. Id.
74. Id.
76. 116 S. Ct. at 1076-77.
77. Id. at 1077.
This Court viewed the canon that a specific provision controls over a general one as a means to prevent courts from undermining specific limitations by applying more general limitations found in other provisions of a statute. The Court concluded that Congress did not intend the specific remedies in ERISA section 409 to be a limitation. Although subsections one, two, four, and six of ERISA section 502 deal with specific areas, subsections three and five are catchall provisions that provide appropriate equitable relief for any ERISA violation.

Fourth, providing the plaintiffs with a remedy is consistent with the purpose of ERISA as stated in ERISA section 2(b): to protect participants and beneficiaries by establishing standards of conduct for fiduciaries, providing appropriate remedies, and providing access to federal courts.

Justice Thomas, joined by Justices O'Connor and Scalia, wrote a strong opinion dissenting from all three of the Varity holdings. Disagreeing with the majority's application of rules of statutory construction, he argued "that Congress intended §§ 409 and 502(a)(2) to provide the exclusive mechanism for bringing claims of breach of fiduciary duty" because ERISA is a comprehensive statute through which Congress "deliberately targeted specific problems with specific solutions." In addition, Justice Thomas did not agree that Varity breached its fiduciary duty under ERISA. He said that Congress struck a balance in the definition of "fiduciary" because Congress understood "that virtually every business decision an employer makes can have an adverse impact on the plan, and that an employer would not be able to run a company profitably if every business decision had to be

78. Id.
79. Id.
80. Id.
81. Id. ERISA section 502(a)(1) addresses "wrongful denial of benefits and information;" ERISA section 502(a)(2) addresses "fiduciary obligations related to the plan's financial integrity;" ERISA section 502(a)(4) addresses "tax registration;" and ERISA section 502(a)(6) addresses "civil penalties." Id.
82. 116 S. Ct. at 1078.
83. 29 U.S.C. § 1001(b).
84. 116 S. Ct. at 1078.
85. Id. at 1079 (Thomas, J., dissenting).
86. Id. at 1081.
87. Id. He would not dismiss Russell easily because the holding in that case "relied on the language and structure of ERISA as a whole, and not solely on the text of [sections] 409 and 502(a)(2)." Id. at 1083.
88. Id. at 1084.
made in the best interests of plan participants." He stressed that an employer is not acting as a fiduciary unless it is acting as plan administrator. Consequently, Justice Thomas did not believe Varity's communication with its employees about the financial prospects of Massey Combines and the effect of ordinary business transactions on the security of plan benefits involved plan administration for which Varity had a fiduciary duty. He also said an employee's reasonable belief that an employer is acting as a plan administrator does not trigger fiduciary duty under ERISA.

Justice Thomas believed the holding should be limited to cases with similar facts to prevent the undermining of "the careful balance Congress struck in enacting ERISA." He also maintained that the holding has the potential to result in increased liability for employers, increased litigation costs, and a reduction in plan benefits to accommodate these costs.

IV. IMPLICATIONS

The Supreme Court's decision continues a trend of increasing litigation under ERISA. Varity leaves open several issues that the Supreme Court eventually will need to address to provide guidance for courts and for employers who administer ERISA plans. For example, because the Court found it unnecessary to decide whether ERISA fiduciaries have a duty to disclose information to employees either on their own initiative or in response to questions, employers do not know how far they must go to avoid misleading employees about a benefit plan or future changes.

89. Id. at 1085.
90. Id. Moreover, even some decisions that affect the plan and the participants, such as whether to change or terminate benefits, do not involve discretionary administration of the plan; therefore, an employer making those decisions is not acting as a fiduciary under ERISA. Id. at 1086.
91. Id. at 1088.
92. Id. at 1089.
93. Id. at 1090.
94. Id. at 1091.
96. 116 S. Ct. at 1075.
Employers will also have to decide whether to terminate plan benefits instead of offering different coverage or benefits. An employer who chooses to offer different benefits will face a potential suit under ERISA section 502(a)(3) if the employer provides false or insufficient information. Alternatively, an employer who chooses to terminate benefits may face a suit under ERISA section 510, a provision prohibiting employers from discriminating against participants or beneficiaries for exercising their rights under ERISA.

Furthermore, in light of plaintiffs' ever-increasing attempts to assert state common-law claims in employee benefit litigation, the Court's approach in Varity may contribute to courts allowing plaintiffs to assert the theories of those state common-law claims under the guise of developing a federal common law of ERISA although those claims would otherwise be preempted under ERISA.

Another issue is the nature of the money damages awarded to the plaintiffs as past-due benefits. The Eighth Circuit in Varity called the money damages restitution, but the dissent said the amounts were actually compensatory damages for benefits owed under the plan, a remedy that the Eighth Circuit had previously held was unavailable as an equitable remedy. The dissent said the majority fashioned an equitable remedy through semantics by calling compensatory damages "restitution" to avoid following binding precedent. However, because this issue was not presented to the Supreme Court, lower courts will continue to struggle with whether money damages are appropriate equitable relief under ERISA section 502(a)(3).

Finally, Varity is indicative of a trend in the courts toward a more liberal approach to the determination of who qualifies as a plan participant, resulting in an erosion of the defense that the plaintiff is not a participant in the plan. Many courts are allowing plaintiffs to sue under ERISA if they are "within the zone of interests protected" by the statute because literal interpretations left many sympathetic plaintiffs,
like the plaintiffs in *Varity*,\(^{108}\) without any legal remedy.\(^{109}\) As another case in a trend of increasing ERISA litigation, *Varity* opens the door to individual lawsuits against employers who are also plan administrators and contributes to increasing costs of creating and administering employee benefit plans.\(^{110}\)

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108. *Id.* For example, the plaintiffs in *Varity* had no legal remedy without the Supreme Court's interpretation of ERISA section 502(a)(3) to authorize individuals to recover for a breach of fiduciary duty. 116 S. Ct. at 1079.

109. Mishkind et al., *supra* note 95, at 413.

110. *Id.* at 255.