**Nos. 13-56330 & 13-56412**

*In the*

# United States Court of Appeals

*for the*

# Ninth Circuit

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GEOFFREY MOYLE, *et al.*

*Plaintiffs-Appellants/Cross-Appellees*,

v.

LIBERTY MUTUAL RETIREMENT BENEFIT PLAN, *et al.*,

*Defendants-Appellees/Cross-Appellants.*

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## PETITION FOR REHEARING OR REHEARING EN BANC

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## INTRODUCTION & RULE 35 STATEMENT

The question presented in this appeal is whether a class of 1,166 employees—hired by Liberty Mutual some twenty years ago as part of a corporate acquisition—may be entitled to an equitable remedy requiring Liberty Mutual to pay them pension benefits to which they did not contribute and which their plan administrator reasonably concluded the plan terms do not provide, all because Liberty Mutual failed to anticipate and clear up their misunderstanding of the terms of the plan when they were hired.

Answering that question in the affirmative, the panel—in an opinion authored by Judge Pregerson—expressly overturned two decades of circuit precedent and deepened a lopsided circuit conflict on the availability of equitable relief in cases that, at bottom, involve claims for benefits.

This is a matter of tremendous practical importance. Read aggressively, the panel opinion appears to impose an unworkable burden on employers to read the minds of their employees and to correct all possible misimpressions concerning the terms of their pension plans. It thus opens the door for every plaintiff with a losing claim for benefits to recast her claim as an equitable request for "reformation" on the ground that her plan fiduciaries did not predict and correct her misimpression about the terms of her plan. If that became the law of this circuit, ERISA-protected plans would cease to mean what they say and would come to mean, instead, whatever plan participants

*imagined* them to say. That result would rob plan sponsors of their discretion to design and interpret their own plans and undercut one of ERISA's core purposes, to establish a system of predictable liabilities that encourages employers to offer benefits. Rehearing or rehearing en banc is imperative.

## BACKGROUND

***Factual background.*** This appeal concerns Liberty Mutual's acquisition of Golden Eagle Insurance Company assets after Golden Eagle entered conservatorship some twenty years ago. It concerns, more particularly, the retirement benefits to which former Golden Eagle employees are entitled under the terms of Liberty Mutual's ERISA-protected pension plan.

After Liberty Mutual won the Conservator Court's approval of the acquisition, Golden Eagle employees received a letter from Conservator Karl Rubenstein (SER1656-61) detailing the benefits they would receive. The letter accurately explained that employees would receive credit for prior years of service with Golden Eagle for purposes of pension benefits *eligibility and vesting*; it did not suggest that the *amount* of employees' pension benefits would include past service credit for their years at Golden Eagle. That made sense: Golden Eagle had never had a pension plan of its own, and it thus had no pension-plan assets to contribute to Liberty Mutual's plan.

Around the same time, Liberty Mutual hosted a number of benefits enrollment meetings so the prospective employees could learn more about the

transition to Liberty Mutual. *See* slip op. 9. Slides shown during the presentation again stated that employees would receive credit in Liberty Mutual's pension plan for prior years of service with Golden Eagle for purposes of "eligibility and vesting"; other slides explained what eligibility and vesting meant. *See* SER4175, SER4200-01, SER4255, SER4305, SER4327.[1]

Plaintiffs—former employees of Golden Eagle who remained in the employ of a newly-formed subsidiary of Liberty Mutual—nevertheless say that they came away from the enrollment meetings with the "understanding" that they would receive past service credit for purposes of not only eligibility and vesting, but also *accrual* (that is, the amount) of their pension benefits. Slip op. 9-10. Plaintiffs do not assert that any Liberty Mutual plan fiduciary affirmatively misled them—they say only that the presenters "omitted any limitation on [past service credit] from the Facilitator Guide and discussions during the meetings." First Br. 6.

***Procedural background.*** Plaintiffs sought and were denied pension accrual credit for their time working for Golden Eagle. They then filed this

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[1] After taking employment with the new company, plaintiffs additionally received plain-language documents called summary plan descriptions (SPDs), which explained the benefits that Liberty Mutual employees received at the time (*e.g.*, SER2350-69 (1998 SPD)) and individual benefit statements (*e.g.*, SER1771-86 (Moyle statement)) detailing their benefits packages. Like the Rubinstein letter and presentation slides, neither of these communications suggested that employees of the old Golden Eagle Insurance Company would receive past service credit for purposes of pension accrual.

lawsuit, asserting a cause of action under 29 U.S.C. § 1132(a)(1)(B) "to recover benefits due to [them] under the terms of [their] plan." They also asserted a cause of action under 29 U.S.C. § 1132(a)(3) "to obtain other appropriate equitable relief" to "redress" claimed breaches of the Liberty Mutual Retirement Board's fiduciary duties.

The district court certified a class (Doc. 113) but subsequently granted summary judgment to Liberty Mutual (Doc. 252). The court held (1) that the Liberty Mutual Retirement Board was entitled to deference in its interpretation of the plan documents and had not interpreted those documents unreasonably, and (2) that *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and its Ninth Circuit progeny prevented plaintiffs from repackaging their denial-of-benefits claim under Section 1132(a)(1)(B) as a claim for "equitable" relief under Section 1132(a)(3).

The panel affirmed in part and reversed in part in an opinion by Judge Pregerson. Although the panel agreed with the district court that the Liberty Mutual Retirement Board was entitled to deference and that its interpretation of the plan documents was reasonable (slip op. 14-20), it held that plaintiffs were not barred from bringing their denial-of-benefits claim under Section 1132(a)(3). In the panel's view, the district court looked to *Varity* but "gave . . . short shrift" to the Supreme Court's later decision in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), "even though the latter is controlling

authority." Slip op. 22. Focusing on dictum from *Amara*, the panel reasoned that if plaintiffs lose under Section 1132(a)(1)(B), they can still prevail on the same claim—seeking redress for the same harm—under Section 1132(a)(3). *Id.* at 22-25. The panel acknowledged that this Circuit's "pre-*Amara* cases held that litigants may not seek equitable remedies under § 1132(a)(3) if § 1132(a)(1)(B) provides adequate relief," but held that "those cases are now 'clearly irreconcilable' with *Amara* and are no longer binding." *Id.* at 25.

Having overturned circuit precedent and ruled that plaintiffs may pursue their denial-of-benefits claim via a claim for equitable relief under Section 1132(a)(3), the panel stated (without explanation) that there were triable issues of fact as to whether "Liberty Mutual breached its fiduciary duty by failing to inform Golden Eagle employees that past service credit for the purpose of benefit accrual did not include the period prior to October 1, 1997, when they were first employed by Golden Eagle." Slip op. 26.

At the same time, the panel affirmed the district court's dismissal of plaintiffs' challenge to the summary plan descriptions (SPDs) that Liberty Mutual provided to employees years after the acquisition. Although the panel took the position that the SPDs contained a material omission because they did not expressly address past service credit with respect to benefits accrual, it agreed with the district court that the undisputed facts showed that plaintiffs "were not harmed [by any statements made in the SPDs] because

they did not rely to their detriment on" those documents. Slip op. 29. Instead, any class members who decided to stay with Liberty Mutual based on a misunderstanding of the terms of the pension plan did so based on the initial enrollment meetings years earlier. *Id*.; *see also* slip op. 9.

## REASONS FOR GRANTING THE PETITION

In holding that plaintiffs may convert an unsuccessful denial-of-benefits claim under Section 1132(a)(1)(B) into a claim for equitable relief under 1132(a)(3), the panel opinion puts this circuit in conflict with the law of five other circuits. More importantly, it overrules this circuit's own precedents in *Ford v. MCI Communications*, 399 F.3d 1076 (9th Cir. 2005)[2] and *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), which the panel declared to be "clearly irreconcilable" with *Amara*. Slip op. 24-25. But *Amara* is not at all irreconcilable with *Forsyth* or *Ford*, much less "clearly" so—in fact, all three cases follow naturally from the holding in *Varity* that equitable relief under 1132(a)(3) is available only if the plaintiff lacks of a cause of action under 1132(a)(1)(B) or one of ERISA's other remedial provisions.

Ensuring the uniformity of this Court's precedents and avoiding a conflict with five other circuits is reason enough for rehearing. But the question presented is also tremendously important. In concluding that plain-

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[2] Overruled on unrelated grounds by *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011) (en banc).

tiffs may pursue equitable relief here—effectively giving them a second bite at the apple—the panel opened the door for plaintiffs to argue that Liberty Mutual breached its duty of loyalty, not because it failed to inform them truthfully of the terms of the pension benefits that they *do* have, but because it failed to predict and disabuse them of any misunderstandings concerning benefits that they do *not* have. Slip op. 9, 26. If ERISA truly imposed such a premonitive duty, employers would be less likely to offer benefits in the first place, undercutting the core purpose of the statute.

### A. The panel opinion improperly overturns important circuit precedent and puts this circuit on the wrong side of a lopsided circuit conflict

The panel opinion has erroneously overruled longstanding circuit precedent and put this circuit in conflict with five other circuits, all based on a misapprehension of the issues it was deciding.

1. Section 1132(a)(1)(B) plays a lead role in ERISA's carefully balanced remedial scheme, allowing plan participants to sue their pension plans "to recover benefits due to [them] under the terms of [their] plan." On the face of it, Section 1132(a)(1)(B) provides the exclusive means for plan participants to obtain benefits provided by plan terms. *Cf. Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-263 (1993).

In cases where Section 1132(a)(1)(B) does not apply, Section 1132(a)(3) provides an equitable stopgap, authorizing participants to sue "to enjoin any

act or practice which violates any [fiduciary duty]" or "to obtain other appropriate equitable relief." But when is equitable relief under Section 1132(a)(3) "appropriate"? The Supreme Court held in *Varity* that equitable relief "normally would *not* be 'appropriate'" within the meaning of Section 1132-(a)(3) "where Congress elsewhere provided adequate relief for a beneficiary's injury." 516 U.S. at 515 (emphasis added). That conclusion is consistent with the general adequate-alternative-remedy rule: "[I]f the party seeking [equitable relief can] raise the same issues in [a] proceeding [at law], the court typically will take the position that the party has an adequate alternative remedy and does not need injunctive relief." 11A Charles A. Wright et al., *Fed. Prac. & Proc. Civ.* § 2942 (3d ed. 2016).

Adequacy for this purpose does not mean, however, that the plaintiff must have a *winning* claim under Section 1132(a)(1)(B) before relief will be precluded under Section 1132(a)(3). Rather, it is "'the right to *bring* a claim for benefits under § 1132(a)(1)(B)'" that "'provide[s] adequate relief.'" *Geissal v. Moore Med. Corp.*, 338 F.3d 926, 933 (8th Cir. 2003) (emphasis added). Thus, the question is only whether "[Section] 1132(a)(1)(B) provides a remedy for [the plaintiff's] alleged injury [by] allow[ing] him to bring a lawsuit to challenge" the "denial of benefits to which he believes he is entitled." *Wilkins v. Baptist Healthcare Sys.*, 150 F.3d 609, 615 (6th Cir. 1998). If it does, then equitable relief is not appropriate under *Varity*. *See* 516 U.S. at 515.

2. In light of these principles, "the great majority of circuit courts have interpreted *Varity* to hold that a claimant whose injury creates a cause of action under § 1132(a)(1)(B) may not proceed with a claim under § 1132-(a)(3)." *Korotynska v. Metro. Life Ins. Co.*, 474 F.3d 101, 106 (4th Cir. 2006) (collecting cases from the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits). "These courts have not allowed claimants to proceed with § 1132(a)(3) claims where relief was potentially available to them under § 1132(a)(1)(B), because . . . [a] plaintiff whose injury consists of a denial of benefits 'has adequate relief available for the alleged improper denial of benefits through his right to sue [the benefit plan] directly under section 1132(a)(1).'" *Id.* at 106-107 (quoting *Tolson v. Avondale Indus.*, 141 F.3d 604, 610 (5th Cir. 1998)).

Prior to the panel opinion in this case, this Court was among that majority of circuits: In *Forsyth*, the Court held that "[e]quitable relief under § 1132(a)(3) is not 'appropriate' [when] § 1132(a)(1) provides an adequate remedy." 114 F.3d at 1475. And in *Ford*, the Court said that a plaintiff who has "asserted specific claims under 29 U.S.C. [§] 1132(a)(1)(B) . . . cannot obtain relief under 29 U.S.C. § 1132(a)(3)" for the same injuries. 399 F.3d at 1083. The panel opinion purports to overrule *Forsyth* and *Ford*, declaring those cases to be "clearly irreconcilable" with the Supreme Court's 2011 decision in *Amara*. With all due respect, that is wrong.

In *Amara*, the plaintiffs asserted that their plan sponsor had "inten-

tionally misled" them with summary plan descriptions that described pension cutbacks as "significant enhance[ments]" and "overall improvement[s]" to their benefits. 563 U.S. at 428, 431. The question presented was whether state-ments made in SPDs could be enforced under (a)(1)(B) as "terms of the plan." 563 U.S. at 435-436. The Court held they could not. An SPD is extrinsic evidence relevant to interpreting ambiguous plan terms, but it "may [not] be enforced (under § [1132](a)(1)(B)) as the terms of the plan itself." *Id.* at 436. Having decided that the plaintiffs there lacked a cause of action under (a)(1)(B), the Court went on to consider—in what this Court has called dictum, *Skinner v. Northrop Grumman*, 673 F.3d 1162, 1167 (9th Cir. 2012) (Goodwin, O'Scannlain, Graber, JJ.)—whether the plaintiffs were entitled to "reformation of the terms of the plan" under (a)(3). The Court concluded that such relief was in theory available. *Amara*, 563 U.S. at 440-442.

The Supreme Court's reasoning in *Amara* is consistent with *Forsyth* and *Ford*. The Court in *Amara* said, in effect, that because the plaintiffs' theory of the case was *not* cognizable under (a)(1)(B) as a claim for benefits "under the terms of the plan," the plaintiffs could (in theory) obtain equitable relief under (a)(3) instead. 563 U.S. at 440-442. That same reasoning underlies the holding in *Varity*—there, the plaintiff lacked a cause of action under (a)(1)(B) because he was not "a participant or beneficiary." 516 U.S. at 507. For their part, *Forsyth* and *Ford* simply reflect the inverse of that reasoning:

When a plaintiff's theory of the case *is* cognizable under (a)(1)(B), the plaintiff may *not* obtain equitable relief under (a)(3) because she has an adequate alternative remedy. Nothing in "*Amara*'s dictum discussing reformation" (*Skinner*, 673 F.3d at 1167) contradicts that rule.

3. In purporting to overrule *Forsyth* and *Ford*, the panel misapprehended the adequate-alternative-remedy rule and its grounding in the traditional prerequisites for the exercise of equitable power. As the panel saw it, the rule is merely a prophylactic against "double recoveries." Slip op. 23-24. Accordingly, a plaintiff with an (a)(1)(B) claim seeking benefits may repackage the same claim, seeking redress for the same harm, as an (a)(3) equitable claim; and equitable relief would be "appropriate" in such cases if and when the plaintiff's legal claim *fails on the merits* under (a)(1)(B), eliminating the risk of a "double recovery." *See* slip op. 23-24.[3]

Nothing in *Amara* supports recasting the adequate-alternative-remedy rule in that way. As we have explained, the adequacy of alternative remedies

[3] The Sixth and Eighth Circuits have both used similar language concerning "duplicative recoveries." *See Rochow v. Life Ins. Co. of N. Am.*, 780 F.3d 364 (6th Cir. 2015) (en banc); *Silva v. Metropolitan Life Ins.*, 762 F.3d 711 (8th Cir. 2014). But in *Rochow*, the plaintiff's (a)(1)(B) claim was successful, and the court merely explained that (a)(3) relief would have been "duplicative" and therefore inappropriate. 780 F.3d at 371-373. In *Silva*, the court held that the plaintiff's (a)(1)(B) and (a)(3) claims were *not* duplicative, meaning they did not overlap. 762 F.3d at 726-727. Neither case supports the view that equitable relief under (a)(3) can be appropriate even when the plaintiff can bring suit under (a)(1)(B) seeking relief for the same harm.

does not turn on whether the plaintiffs' particular claim is a meritorious one. The question, instead, is whether Congress provided a specific cause of action for the *kind* of harm that the plaintiffs claim to have suffered. If it did, then under *Varity* plaintiffs must use it, and it alone, to remedy their alleged harm—even if relief is ultimately denied. *See, e.g.*, *Wilkins*, 150 F.3d at 615 (remedy under (a)(1)(B) was adequate, and relief under (a)(3) was foreclosed, even though "denial of benefits was correct" under (a)(1)(B)).

The panel compounded its error by conflating the question of the availability of remedies with the question whether plaintiffs are entitled to plead inconsistent alternative causes of action. *See* slip op. 23-26. Thus, the panel cited *Silva v. Metropolitan Life Insurance*, 762 F.3d 711 (8th Cir. 2014), as a basis for holding that plaintiffs may allege causes of action simultaneously under both (a)(1)(B) and (a)(3). Slip op. 23, 26 (citing Fed. R. Civ. P. 8(a)(3)). But that, too, misunderstands the question presented. As "masters of their complaint," plaintiffs are free to plead whatever they like. *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016). The question here is only whether a plaintiff may *obtain* equitable relief under (a)(3) for a claim that is (as we demonstrate more fully below) actually an (a)(1)(B) claim.

On that score, *Silva* cuts against the panel opinion. The Eighth Circuit held there that, although "*Varity* does not limit the number of ways a party can initially seek relief *at the motion to dismiss stage*," courts can and should

dismiss (a)(3) claims *at the summary judgment stage* if the evidence makes it apparent that the (a)(3) claim "overlap[s]" with the plaintiff's (a)(1)(B) claim, which "alone will provide the plaintiff with 'adequate relief.'" *Silva*, 762 F.3d at 727 (emphasis added). Thus, as the Eighth Circuit has elsewhere explained, post-*Amara*, "[p]laintiffs' ability to seek . . . relief in their § 1132(a)(1)(B) claim forecloses them from also pursuing it in [a] § 1132(a)(3)(B) claim." *Pilger v. Sweeney*, 725 F.3d 922, 927 (8th Cir. 2013).

### B. The panel opinion opens the door for plaintiffs to repackage all losing denial-of-benefits claims as claims for "equitable" relief, upending ERISA's remedial scheme

Any assertion that plaintiffs' claim for reformation and surcharge is *not* the same claim as their claim for benefits depends on sleight of hand. Plaintiffs' claim here is—by their own admission—a single "position" with "two parts." First Br. 2. They say *first* that they are entitled to past service credit for purposes of pension accrual under the terms of the plan—a claim plainly cognizable under Section 1132(a)(1)(B). They say *second* that—if they are wrong about the terms of the plan after all—their claim converts into a claim for equitable relief on the theory that the plan administrator had a fiduciary obligation to anticipate and clear up their confusion concerning past service credit and pension accrual. First Br. 11-12.

Those are not two separate claims, but a single claim dressed up in two different ways. And make no mistake, the same two-bites-at-the-same-apple

approach could be taken in any (a)(1)(B) case involving ambiguous plan language. Any employee with a denial-of-benefits claim in such a case will claim to have been confused about the contested plan terms and contend that plan fiduciaries had an obligation to anticipate her confusion—and, because it did not, that the court should impose through equity *her* preferred reading of the ambiguous terms.[4]

That prospect—likely unintended by the panel—is troubling for a range of reasons. First, because all (a)(1)(B) plaintiffs will claim to have been confused by ambiguous language and accuse their fiduciary of failing to address their confusion, it would effectively deprive plan administrators of their "'discretionary authority . . . to construe the terms of the plan.'" *Varity*, 516 U.S. at 514. Second, it diverges from the elements of equitable relief laid out in *Skinner* and *Gabriel v. Alaska Electrical Pension Fund*, 773 F.3d 945 (9th Cir. 2014), which require a showing of "wrongful conduct" or "undue

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[4] This is no mere conjecture. *See* Order, *Dimtry v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, No. 16-cv-1413 (N.D. Cal. June 14, 2016) (Dkt. 33) (citing the panel opinion as a basis for allowing the plaintiff, who alleges both that he is entitled to benefits under the terms of his plan and that plan fiduciaries have "thwart[ed] [his] reasonable expectations" concerning those terms (Dkt. 1, Compl. ¶ 39(H)), to amend to seek relief under (a)(3)).

To be clear, however, our position is not that plaintiffs are barred from obtaining relief under both (a)(1)(B) and (a)(3) in cases where they have two distinct claims and harms—and where, with respect to the (a)(3) claim, the plaintiffs "could not proceed under [(a)(1)(B)]." *Varity*, 516 U.S. at 515. But as we have shown, this isn't such a case; plaintiffs here seek redress of a single harm, invoking overlapping (a)(1)(B) and (a)(3) theories.

influence, duress, or fraud" to support claims for reformation. *Gabriel,* 773 F.3d at 955 (quoting *Skinner*, 673 F.3d at 1166). And finally, it would impose an unworkable new fiduciary obligation on plan administrators to ensure, by sixth sense, that plan participants do not develop subjective misimpressions about plan terms.[5]

Such an approach would upend ERISA's "carefully crafted and detailed enforcement scheme" (*Mertens*, 508 U.S.at 254), replacing deferential review under 1132(a)(1)(B) with an indeterminate set of rules and standards under 1132(a)(3). That would run directly counter to one of the core purposes of ERISA—to "induce[] employers to offer benefits by assuring a predictable set of liabilities" that are governed by "uniform standards of primary conduct." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010). That is why the Supreme Court said in *Varity* that it "would not be 'appropriate'" to grant equitable relief on a claim that can be brought under (a)(1)(B). 526 U.S. at 515. The panel was wrong to overrule circuit precedent to that effect and to put this Court in conflict with five other circuits that have addressed the issue.

## CONCLUSION

Panel rehearing or rehearing en banc should be granted.

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[5] For these reasons, the panel may wish to limit its opinion more clearly to the potential availability of (a)(3) relief by striking the second full paragraph on page 26 of the slip opinion, leaving it to the district court to determine in the first instance whether plaintiffs have a viable claim under (a)(3).

Dated: June 17, 2016

Respectfully submitted,

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/s/ *Nancy G. Ross*