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Some Nonfiduciary Liability Issues After Harris Trust

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BACKGROUND

In *Harris Trust and Savings Bank v. Salomon Brothers, Inc.*,[1] the Supreme Court, in a unanimous decision reversing the Court of Appeals for the Seventh Circuit,[2] held that ERISA §502(a)(3)[3] authorizes a suit against a nonfiduciary[4] party in interest who was a transferee of ill-gotten trust assets for knowing participation in a prohibited transaction under ERISA §406(a).[5] However, because the Supreme Court, as

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[1] 530 U.S. 238 (2000). Prior to the Supreme Court's decision in *Harris Trust*, the extent of nonfiduciary liability was a frequently litigated issue, both before and after the Supreme Court decision in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), holding that nonfiduciaries could not be held liable for money damages under ERISA. For a discussion of the pre-*Mertens* case law, see C.R. Brock, *Note: Nonfiduciary Liability under ERISA*, 1 San Diego Just. J. 541 (1993), and Maria Linda Cattafesta, *Mertens v. Hewitt Associates*: *Nonfiduciary Liability for Money Damages under ERISA*, 43 Cath. Univ. L. Rev. 1165 (1994). Pre-*Mertens*, the issue of nonfiduciary liability under ERISA was sometimes framed in terms of liability under ERISA §409. *See* Kevin B. Bogucki, Charles B. Cullen, and Judith A. Hagley, *ERISA: Nieto v. Ecker: The Propriety of Non-Fiduciary Liability under Section 409*, 64 Notre Dame L. Rev. 271 (1989). For a discussion of the case law pre-*Mertens* and post-*Mertens* but before *Mertens v. Hewitt Associates*, see Susan Stabile, *Breach of ERISA Fiduciary Responsibilities: Who's Liable Anyway*," 5 Employee Rights and Employment Policy Journal 135, 141-148 (2001).

[2] 184 F.3d 646 (7th Cir. 1999).

[3] The parallel U.S.C. cite is 29 U.S.C. §1132(a)(3). Relief under ERISA §502(a)(3) is limited to appropriate equitable relief. Under the common law of trusts, it was firmly established that a nonfiduciary could be held liable for money damages. *See* George G. Bogert and George T. Bogert, Trusts and Trustees (2d ed. 1982) 868 (Bogert and Bogert) (stating that "a third party who has assisted a trustee in committing a breach of trust has been held liable in a suit by the beneficiary or his representative for money damages"). *See also* Maria Linda Cattafesta, *Mertens v. Hewitt Associates: Nonfiduciary Liability for Money Damages under ERISA*, 43 Cath. U. L. Rev. 1165 (1994), n. 66, collecting cases but not reflecting later Supreme Court decisions indicating the circumstances under which monetary relief could be equitable in nature.

[4] Obviously, a threshold issues in many cases is whether a party is, with respect to a particular activity, acting as a fiduciary. Since fiduciary status "is not an all or nothing concept. . .[A] court must ask whether an entity is a fiduciary with respect to the particular act in question." *Srein v. Frankford Trust Co.*, 323 F.3d 214, 221 (3d Cir. 2003); *Maniace v. Commercial Bank of Kan. City, N.A.* 40 F.3d 264, 267 (8th Cir. 1994). This article generally does not discuss cases addressing the issue of whether a party is a fiduciary, but notes a recent series of related district court cases in the Third Circuit, which distinguish between clerical errors, which do not convert an entity that would otherwise be a nonfiduciary into a fiduciary. *IT Corp. v. Gen. Amer. Life Ins. Co.*, 107 F. 3d 1415, 1421 (9th Cir. 1997) ("[t]he power to err . . .is not the kind of discretionary authority which turns an administrator into a fiduciary") In addition, "where a nonfiduciary acts at the request of a stranger to the plan's assets, it may be found to have exercised 'undirected authority or control' over those assets. This is so even where the plan or policy document expressly provides that the nonfiduciary lacks discretion. That is because the execution of the stranger's request is made 'in defiance' of that document's strictures."*Morgen v. Oswood Construction Co., Inc.*, 2022 BL 267218, *7 (E.D. Pa. Aug. 1, 2022) (citations omitted).

[5] A nonfiduciary who knowingly participates in a fiduciary's ERISA violation is jointly and severally liable with the fiduciary. *Phones Plus v. Hartford Financial Servs. Group, Inc.*, 2007 BL 131902 (D. Conn. Oct. 23, 2007); *Diduck v. Kaszycki & Sons Contractors*, 974 F.2d. 270, 281-282 (2d Cir. 1992), *abrogated on other grounds*, *Gerosa v. Savasta & Co.*, 329 F.3d 317 (2d Cir.

ISSN 0747-8607

would any other court, limits its holding to the specific issue before it, the decision left several issues unresolved. Since the Supreme Court in *Harris Trust* looked to common law remedies under trust law in determining that an action could be maintained against a nonfiduciary under ERISA, and ERISA is rooted in the common law of trusts,[6] it is useful as a starting point[7] to consider the treatment of nonfiduciary liability at common law.

At common law, a trust beneficiary reasonably expected third persons not to knowingly participate in a fiduciary's breach.[8] Third persons who knowingly participate in a fiduciary's breach will be liable to the beneficiary for such conduct.[9] At common law, a nonfiduciary was liable only for knowing participation in a fiduciary's breach of duty, which required a beneficiary to establish two elements. First, the beneficiary was required to show that the nonfiduciary's act or omission furthered or completed the fiduciary's breach of duty. Second, the beneficiary was required to prove that the nonfiduciary had actual or constructive knowledge that the transaction was a breach of the fiduciary's duty.[10]

SCOPE

Technically, *Harris Trust* only answered the narrow question of whether an ERISA plaintiff can sue a nonfiduciary party in interest who was the transferee of ill-gotten gains for knowing participation in an ERISA §406(a) violation. If limited to its holding, *Harris Trust* would provide limited relief to plan participants and beneficiaries. Not all prohibited transactions are ERISA §406(a) transactions; not all nonfiduciaries participating in prohibited transactions are parties in interest; not all fiduciary participations in prohibited transactions involve a transfer of ill-gotten gains; and not all fiduciary breaches are prohibited transactions. The Court of Appeals for the Third Circuit[11] and Fourth Circuit[12] have held that *Harris Trust*, is equally applicable to ERISA §406(b) violations. Similarly, in *In re Regions Morgan Keegan*

2003).

[6] See *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (ERISA fiduciary duties draw content from the common law of trusts); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989); *Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc*. 472 U.S. 559, 569 (1985) (examining duties of multiemployer plan trustee ''under ERISA and under the common law of trusts upon which ERISA duties are based''). The legislative history of ERISA also indicates that Congress intended to provide the full range of legal and equitable remedies available under the common law of trusts, while at the same time instructing courts to bear in mind the nature of employee benefit plan when developing federal common law. *See also* Susan Stabile, *Breach of ERISA Fiduciary Responsibilities: Who's Liable Anyway*, 5 Employee Rights and Employment Policy Journal 135 (2001) (hereinafter Stabile), and Gregory A. Hewett, *Note: Should Non-Fiduciaries Who Knowingly Participate in a Fiduciary Breach be Liable under ERISA*, 71 Wash. U. L. Q. 773, 776-778 (1993) (hereinafter Hewett).

[7] While courts look to the common law of trusts in developing the federal common law of ERISA, the Supreme Court has emphasized that trust law is only a starting point for interpreting ERISA, something that ''will inform but not necessarily determine the outcome of an effort to interpret ERISA's fiduciary duties.'' *Varity Corp*, 516 U.S. 489, 497. In a similar vein, ERISA's legislative history instructed courts that in developing a federal common law based upon trust principles, they should bear in mind the nature of employee benefit plans.

[8] Bogert and Bogert, Trusts and Trustees 901 (stating that ''beneficiary as equitable owner of the trust res has the right that third persons shall not knowingly join with the trustee in a breach of trust''). Hewett, p. 777, n. 26, and Stabile, p. 158, n. 126.

[9] Restatement (Second) of Trusts §326 states that ''a third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust.''); Bogert and Bogert, 861 and 868; Austin Scott, The Law of Trusts, 321-326 (3d ed. 1967 and Supp. 1985); *Blankenship v. Boyle*, 329 F. Supp. 1089, 1099 (D.D.C. 1971) (a pre-ERISA case involving an employee benefit plan applying these trust principles). In *Smith v. Ayer*, 101 U.S. 320, 327 (1879), the Supreme Court stated that ''The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. . .The doctrine pervades the whole law of trusts.'' *See Hewett*, p. 777, n. 27. The common law's rationale for imposing liability on nonfiduciaries who knowingly aid in a fiduciary's breach is that beneficiaries may not otherwise be able to obtain full relief unless courts can impose liability upon nonfiduciaries. *Id*. *See Brock v. Gerace*, 635 F. Supp. 563, 569 (D.N.J. 1986) (plan participants would be denied full relief if they were unable to recover from plan fiduciaries), and *Lowen v. Tower Asset Management, Inc*. 829 F.2d 1209, 1220-1221 (2d Cir. 1987) (recognizing the necessity of imposing liability on nonfiduciaries under ERISA to prevent a fiduciary from shifting fiduciary obligations to one legal entity with no assets ''while channeling profits from self-dealing to a separate legal entity under the fiduciary's control'').

[10] Bogert & Bogert, 868 and 901, quoted in Hewett, p. 777.

[11] *National Securities System v. Iola*, 700 F.3d 365 (8th Cir. 2012). There was language in an earlier Third Circuit case, *Renfro v. Harris Corp*., 671 F.3d 314, 325 (3d Cir. 2011), that indicated that *Harris Trust* was limited to ERISA §406(a) claims, but the court in *National Securities System* felt that such analysis was inconsistent with *Harris Trust* and therefore would not be followed.

[12] *LeBlanc v. Cahill*, 153 F.3d 134, 151-153 (4th Cir. 1998), cited in *Coleman v. PBGC*, 94 F. Supp. 2d 18 (D.D.C. 2000). *See also Gamino v. KPC Healthcare Holdings, Inc*., 2021 BL 428065 (C.D. Cal. Nov. 1, 2021), and *Machinery Movers Riggers and Machinery Erectors Local 136 v. Nationwide Life Ins*., 2006 BL 107473 (N.D. Ill. Oct. 10, 2006). *Cf. Gamino v. KPC Healthcare Holdings, Inc.*, Case 5: 20-cv-01126-SB-SHK (C.D. Cal. Aug. 15, 2022) (not deciding whether *Harris Trust* extends to ERISA §406(b) claims). *But see In re Marsh ERISA Litig*, 2006 BL 2634, *9 (S.D.N.Y. Dec. 14, 2006) (stating that ''it seems unlikely that the alleged breaches fall within the narrow scope of the Section 406(a) party in interest transactions considered in [*Harris Trust*],'' but not deciding because the action was for money damages, not equitable relief.).

ISSN 0747-8607

ERISA Litigation,[13] the district court stated that ''[a]lthough *Harris Trust* addressed violations of the prohibited transaction rule in ERISA §406(a), its holding on liability applies equally to other prohibited transactions.''

In addition, several courts, noting the *Harris Trust* court's categorization of ERISA §406(a) as a ''supplement [of] the fiduciary's general duty of loyalty to the plan's beneficiaries,''[14] have concluded that the *Harris Trust* reasoning applies equally to any ERISA §502(a)(3) claims alleging violations of ERISA §404.[15] In *Rudowski v. Sheetmetal Workers Int'l. Association, Local Union No. 24*,[16] the district court stated that defendants have attempted ''to distinguish *Harris* by noting that the substantive provision relied upon in Harris was *section 406(a)(1)*, while Plaintiffs here allege violations of [ERISA] section 404(a)(1). That, however, is a distinction without a difference.''[17] In *In re Enron Corp. Sec. Derivative and ERISA Litigation*,[18] the district court commented that ''the Supreme Court's broad language [in *Harris*] indicated that ERISA 502(a)(3) authorizes a private cause of action for 'appropriate equitable relief' to redress any violation of ERISA's Title I, which would include violation of 404's fiduciary duties.''[19] In *Daniels v. Bursey*,[20] defendants argued that *Harris Trust* should be read narrowly to apply only to nonfiduciary parties in interest that violated ERISA §406(a), and therefore the cause of action against them should be dismissed because they were not parties in interest. The district court disagreed, explaining that ''In [*Harris Trust*], the Supreme Court interpreted [ERISA] §502(a)(3), not [ERISA] §406, and accordingly it governs any suit under [ERISA] §502(a)(3) alleging a violation of any substantive provision of ERISA.''[21] In *Walsh v. Fensler*,[22] an Illinois district court referenced the decision of the Seventh Circuit in *Halperin v. Richards*,[23] in which it noted that *Harris Trust* would seem to extend equally to an ERISA §404(a) claim.[24] However, in *Appvion Inc. Retirement Savings and Employee Stock Ownership* by and through *Grant Lyon. v. Buth*[25] and *Halperin*,[26] courts concluded that two circuits[27] have held that there is no cause of action against a nonfiduciary for breach of fiduciary duty and another circuit has flagged the

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[13] 692 F. Supp. 2d 944, 966 (W.D. Tenn. 2020).

[14] *Harris Trust*, 530 U.S. 238, 241.

[15] *See Blue Moon Fiduciary, LLC v. Hutcheson*, 2014 BL 225814 (M.D.N.C. Aug. 14, 2014) (collecting cases).

[16] 113 F. Supp. 2d. 1176 (S.D. Ohio 2000).

[17] *Id.* at 1180.

[18] 284 F. Supp. 2d 511 (S.D. Tex. 2003).

[19] *Id.* at 571. *See also In re Xerox Corporation ERISA Litigation*, 483 F. Supp. 2d 206 (D. Conn. 2007) (''While the underlying breach of fiduciary duty in *Harris* was engaging in a prohibited transaction, the holding in *Harris* is not limited to such situation.''); *Nationwide Life Ins. Co*., 2006 BL 107473, *8 (''*Harris Trust* dealt with an alleged violation of [ERISA §]406(a), but its reasoning applies with equal force to alleged violations of [ERISA §]404(a)(1) and [ERISA §]406(b)(3).'' In addition, ''Because the holding of *Harris Trust* relied on an interpretation of [ERISA] §502(a)(3), rather than [ERISA] §406(a)(1), it governs any suit under [ERISA] §502(a)(3).''); *Remy v. Lubbock National Bank*, 403 F. Supp. 3d 496, n. 5 (E.D.N.C. Aug. 8, 2019) (''*Harris Trust* affirmatively decided non-fiduciaries who knowingly participate in a breach of fiduciary duty are liable under [ERISA §]502(a)(3)''). *See also Lutz Surgical Partners, LLC v. Aetna*, No. 3:15-cv-02595 (BRM) (TJB), 2021 BL 231575 (D.N.J. June 20, 2021); *LD v. United Behavioral Health*, 508 F. Supp. 3d 583 (N.D. Cal. 2020); In *Davis v. Stadion Money Management, LLC*, 2020 BL 99840 (D. Neb. Mar. 16, 2020), the district court rejected the claim of a nonfiduciary that ERISA does not authorize claims against nonfiduciaries for knowing participation in a breach of fiduciary duty. *Cf. Perez v. Braun*, 2015 BL 180892, *13 (C.D. Cal. Jan. 30, 2015) (''Neither the Ninth Circuit nor the Supreme Court has addressed the scope of knowing participation liability under ERISA §404. However, the construction of ERISA in *Harris Trust* suggests that such liability may exist.''); *McDannald v. Starr Bank*, 261 F.3d 478 (6th Cir. 2001) (in *Harris Trust*, ''liability was premised on the nonfiduciary's role as a party-in-interest to the prohibited transaction, though the Court's rationale would seem to apply to other non-fiduciaries as well.'').

[20] 313 F. Supp. 2d 790 (N.D. Ill. 2004).

[21] *Id.* at 808.

[22] 2022 BL 274703 (N.D. Ill. Aug. 8, 2022).

[23] 7 F.4th 534 (7th Cir. 2021).

[24] *Id*. at 553, n. 3.

[25] 475 F. Supp. 3d 910 (E.D. Wisc. 2020).

[26] 7 F.4th 534 (7th Cir. 2021). In footnote 3 to the opinion, the Seventh Circuit discussed but did not decide the issue. See Note 24, above.

[27] The circuits cited were the Third Circuit's decision in *Renfro v. Unisys Corp*., 671 F.3d 314, 325 (3d Cir. 2011), and the Second Circuit's decision in *Gerosa*, 329 F. 3d 317 (2d Cir. 2003). However, when *Renfro* was cited in *Hausknecht v. John Hancock Life Insurance Co. of New York*, 334 F. Supp. 3d 665 (E.D. Pa. 2018), the district court held that *Renfro* had been limited by *Natl. Security Systems v. Iola*, 700 F.3d 65 (3d Cir. 2012), and did not follow it. Technically, *National Securities System* did not overrule *Renfro*, but it did call its analysis into question. In *Genosa*, the Second Circuit indicated that its overruling of *Diduck v. Kaszycki & Sons Contractors, Inc*., 874 F. 2d. 912 (2d Cir. 1984), was limited to ERISA's civil enforcement provisions (i.e., money damages).

ISSN 0747-8607

issue and expressed concerns but did not address the issue.[28]

ERISA §502(a)(3) CLAIM AGAINST A NONFIDUCIARY

An ERISA violation[29] ''is anecessary predicate for liability against the non-fiduciary Defendants.''[30] If no defendant is held to be a fiduciary[31] or a breach of fiduciary duty claim is dismissed[32] or there is no prohibited transaction,[33] there can be no cause of action against a nonfiduciary for knowing participation in an ERISA violation. In *Haley v. Teachers Insurance and Annuity Association of America*,[34] the District Court for the Southern District of New York held that plaintiff must plausibly allege the following elements of an ERISA §406(a)(1)[35] knowing participation claim against a nonfiduciary to survive a motion to dismiss: (i) the fiduciary caused the plan to enter into a transaction as defined by ERISA §406(a)(1); (ii) the factual circumstances of the transaction are such that an ERISA §408 exemption does not clearly apply; (iii) in causing the transaction, the fiduciary knew or should have known the factual circumstances underlying the transaction that satisfy ERISA §406(a)(1); (iv) the nonfiduciary knew that the transferor was an ERISA fiduciary; (v) the nonfiduciary knew that the fiduciary caused the transaction with the knowledge of the underlying facts that bring the transaction within ERISA §406(a)(1); and (vi) the nonfiduciary knew or should have known the factual circumstances underlying the transaction that satisfied ERISA §406(a)(1).

More generally, courts have defined the elements necessary to maintain an action against a nonfiduciary in slightly different fashions. For example, in *Phones Plus*,[36] the district court indicated that a plaintiff must allege (i) a breach by a fiduciary of a duty owed to the plaintiff; (ii) knowing participation[37] in the breach by a named fiduciary,[38] and (iii) damages. In *Del Castillo v. Community Child Care Council of Santa Clara Cty*,[39] the district court indicated that a viable claim against a nonfiduciary under ERISA requires (i) the existence of a remedial wrong (i.e., a violation of ERISA or a plan's terms); (ii) that the relief sought is appropriate equitable relief; and (iii) actual or constructive knowledge of wrongfulness on the part of the named fiduciary. In *Daniels,*[40] the district court explained that to state a claim against a nonfiduciary under ERISA §502(a)(3), ''the plaintiff must allege only that a fiduciary violated a substantial provision of ERISA and the nonfiduciary participated in the conduct that constituted the violation.''[41] In *Godfrey v. Great Banc Trust Co*.[42] the District Court for the Northern District of Illinois held that the elements of a claim against a nonfiduciary were a breach of fiduciary duty.

More recently, in *Hausknecht*[43] the District Court for the Eastern District of Pennsylvania focused upon the specific language of *Harris Trust* in describing the

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[28] *Gordon v. Cigna Corp*., 890 F.3d 463, 477, n. 2 (4th Cir. 2018). However, the Fourth Circuit looked to the *Renfro* and *Gerosa* opinions, so its concerns regarding the issue may have been overstated.

[29] ERISA claims against nonfiduciaries have been recognized only under ERISA §502(a)(3), not ERISA §502(a)(2). *Healthcare Strategies, Inc. v. Ivy Life Insurance*, 2012 BL 425777 (D. Conn. Jan. 19, 2012). The broadest possible reading of ERISA §502(a)(3) would allow for claims against nonfiduciaries, even if the underlying ERISA violation was a nonfiduciary act. *Pender v. Bank of North America Corp*., 2010 BL 77882 (W.D.N.C. Apr. 7, 2010).

[30] *Nationwide Life Ins. Co*., 2006 BL 107473 (N.D. Ill. Oct. 10, 2006). *See also Rosen v. Prudential Ret. Ins. and Annuity Co*., 2016 BL 436738 (D. Conn. Dec. 30, 2016), *aff'd*, 718 Fed. Appx. 3 (2d Cir. 2017) (''Without an underlying breach of duty or breach of trust on the part of a plan fiduciary, Prudential cannot be held liable for a knowing participation in a breach of trust.'').

[31] *In re Fidelity ERISA Fee Litigation*, 2020 BL 54722 (D. Mass. Feb. 14, 2020).

[32] *Smith v. Aon Corp*., 2006 BL 151322 (N.D. Ill. 2006); *Mohr-Lercara v. Oxford Health Insurance Co*., 2022 BL 58279 (S.D.N.Y. Feb. 22, 2022); *Bernaola v. Checksmart Fin., LLC*, 322 F. Supp. 3d 830 (S.D. Ohio 2018). *Cf. Massachusetts Laborers Health & Welfare Fund v. Blue Cross Blue Shield of Massachusetts*, No. 1:21-cv-10523 (D. Mass. Mar. 26, 2022) (''a claim under §1132(a)(3) may be brought against a party that is not a fiduciary, but such a party must have participated in a fiduciary breach (ostensibly in concert with a fiduciary) for a claim under §1132(a)(3) to stand.'').

[33] *Chendes v. Xerox*, 2017 BL 375684 (E.D. Mich. Oct. 19, 2017); *Scott v. Aon Hewitt*, 2018 BL 92715 (N.D. Ill. Mar. 19, 2018).

[34] 377 F. Supp. 3d. 250 (S.D.N.Y. 2019).

[35] ERISA §406(a)(1) sets forth five types of party in interest transactions.

[36] 2007 BL 131902 (D. Conn. Oct. 23, 2007). *See also Upstate New York Engineers Pension Fund v. Ivy Asset Management*, 131 F. Supp. 3d 103, 131 (S.D.N.Y. 2015), *aff'd*, 843 F.3d 561 (2d Cir. 2016).

[37] In determining whether there was knowing participation, courts look to a nonfiduciary defendant's knowledge at the time that the challenged transaction took place. *Carlson v. Principal Life*, 2006 BL 129570 (E.D.N.Y. Sept. 28, 2006), and *L.I. Head Start Child Development Services, Inc. v. Frank*, 165 F. Supp. 2d 367 (E.D.N.Y. 2001); *Donovan v. Schmoutey*, 592 F. Supp. 1361 (D. Nev. 1984).

[38] The Supreme Court did not determine who has the burden of proof on the knowing participation issue, but at least in the Second Circuit the burden is on the plaintiff to establish that the defendants had actual or constructive knowledge. *Carlson v. Principal Life*, 2006 BL 129570 (E.D.N.Y. Sept. 28, 2006).

[39] 2019 BL 480744 at *4-5 (N.D. Cal. Dec. 16, 2019).

[40] 313 F. Supp. 2d 790, 808 (N.D. Ill. 2004).

[41] *Id.* at 808.

[42] 2020 BL 315859 (N.D. Ill. Aug. 19, 2020).

[43] 334 F. Supp. 3d 665 (E.D. Pa. July 14, 2022).

ISSN 0747-8607

two key elements required to be met before liability can be imposed upon a nonfiduciary. First, there must be a ''plan fiduciary with actual or constructive knowledge of the facts satisfying the elements of a[prohibited] transaction, [and] caused the plan to engage in the [unlawful] transaction.''[44] Second, the nonfiduciary must have ''had actual or constructive knowledge of the circumstances that rendered the [fiduciary's] transaction unlawful.''[45]

The follow-up question, asked by the district court in *Foster v. Adams & Associates*,[46] is what does it mean to have ''actual or constructive knowledge of the circumstances that render the transaction unlawful,'' further noting that ''[t]he parties briefs do little to elucidate this issue.''[47] The Court of Appeals for the Fourth Circuit posed a similar question in *Walsh v. Vinoskey*:[48]

> But what exactly does it mean to knowingly participate in a fiduciary's violation? The Supreme Court in *Harris Trust* explained that the nonfiduciary 'must have actual or constructive knowledge of the circumstances that rendered the transaction unlawful.' This language provides us with two insights. On the one hand, the other person does not have to know that the transaction was unlawful under ERISA. Nothing in *Harris Trust* suggests that nonfiduciaries must possess knowledge of legal conclusions.[49] On the other hand, general knowledge of the circumstances is not enough.[50] The ''other person must know the circumstances that rendered the transaction unlawful.''

The district court in *Gimino v. KPC Healthcare Holdings, Inc.*[51] recently elaborated upon the analysis in *Walsh*:

> In its cautionary note, the Supreme Court [in *Harris Trust*] stated that the definition of scienter should be informed by the fact 'that ERISA should not be construed to require counterparties to transactions to a plan to monitor the plan for compliance with each of ERISA's intricate details. ERISA holds a fiduciary to a very high standard and imposes what amounts to a rebuttable presumption of illegality when a fiduciary engages in a prohibited transaction. While it is reasonable to impose liability on a nonfiduciary when it participates in a prohibited transaction and knows or should know that a fiduciary caused the plan to buy property for more than its fair market value, it goes too far to hold the counterparty to virtually the same standard as the fiduciary.[52]

Consistent with these general principles, a claim against a nonfiduciary will be dismissed when there is no evidence that the nonfiduciary's participation was knowing,[53] although in general whether a defendant was a knowing participant is a fact intensive inquiry precluding summary judgment,[54] and may be dependent upon the credibility of witnesses.[55]

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[44] *Harris Trust*, 530 U.S. 238, 251.

[45] *Id.*

[46] 2020 BL 250202 (N.D. Cal. July 6, 2020).

[47] *Id.* at *10.

[48] 19 F.4th 672 (4th Cir. 2021). *Walsh* was followed in *Gimino v. KPC Healthcare Holdings, Inc.*, 2021 BL 175091 (C.D. Cal. May 10, 2021).

[49] See also *National Securities System, Inc. v. Iola*, 2010 BL 222974 (D.N.J. Sept. 24, 2010), n.7, *aff'd*, 70 F.3d. 365 (3d Cir. 2012), rejecting defendant's contention that plaintiff was required to show that defendant had actual or constructive knowledge that the conduct was prohibited. *But see* the district court decision in *Teets v. Great-West Life & Annuity Corp*., 286 F. Supp. 3d 1192, 1209 (D. Colo. 2017), *aff'd*, 921 F. 3d 120 (10th Cir. 2019), concluding that a claim against a nonfiduciary must show that the defendant knew or should have known that the transaction violated ERISA.

[50] *See also Del Castillo*, 2019 BL 480744 at *8 (''mere knowledge that a transaction is (or might be) 'prohibited'. . .does not mean that [the defendants] knew or should have known of any wrongdoing, as required under Harris [Trust].''

[51] Case 5:20-cv-01126-SB-SHK, p.11 (C.D. Cal. Aug. 15, 2022).

[52] *See also Teets*, 286 F. Supp. 3d 1192, 1209 (''[A]n ERISA plaintiff cannot rely solely on the knowledge that would satisfy a fiduciary's liability for a prohibited transaction to likewise hold a nonfiduciary party in interest liable for that transaction. Rather, the plaintiff must show that the defendant knew or should have known that the transaction violated ERISA.''), and *Rozo v. Principal Life Ins Co.*, 344 F. Supp. 3d 1025, 1037-38, *rev'd on other grounds*, 949 F. 3d 1071 (8th Cir. 2020) (granting summary judgment to a nonfiduciary defendant where the plaintiff failed to meet the ''heightened standard'' for nonfiduciary liability under *Harris Trust*).

[53] *Clevenger v. Dillards*, 412 F. Supp. 2d 832, 844 (S.D. Ohio 2006); *Dana Ltd. v. Aon Consulting*, 984 F. Supp. 2d 755 (N.D. Ohio 2013); *Briscoe v. HealthCare Services Corp*., 281 F. Supp. 3d 725 (N.D. Ill. 2017); *Delphi Beta Fund, LLC v Univest Bank & Trust Co*., 2015 BL 86142 (E.D. Pa. Mar. 27, 2015) (action against nonfiduciaries dismissed where there were no allegations, other than conclusory statements that defendants had actual or constructive knowledge of the circumstances which rendered each of the loans improper under ERISA). *Cf. Ahrendsen v. Prudent Fiduciary Services, LLC*, 2022 BL 33463 (E.D. Pa. Feb. 1, 2022) (action dismissed when it was only speculation that chief financial officer and secretary of corporation knew or should have known that there was a lack of adequate consideration).

[54] *Scalia v. Reliance Trust Company*, 2021 BL 73816 (D. Minn. Mar. 2, 2021); *Wilson v. Aerotek, Inc*., 854 Fed. Appx. 430 (3d Cir. 2011); *Hausknecht,* 334 F. Supp. 3d 665 (E.D. Pa. July 14, 2022).

[55] *Spear v. Fenkell*, 2016 BL 325481 (E.D. Pa. Sept. 30, 2016).

ISSN 0747-8607

Courts have defined knowing participation in various ways, as indicated by the following illustrative cases. In *Donovan*,[56] the district court indicated that the elements of knowing participation in a fiduciary breach are an act or omission which furthers or completes the breach and actual or constructive knowledge at the time that the transaction amounted to a breach or the legal equivalent of such knowledge. In *Upstate New York v. Engineers Pension Fund v. Ivy Asset Mgmt*.,[57] the district court concluded that to establish knowing participation by a nonfiduciary, a plaintiff must allege that defendants affirmatively assisted, helped conceal, or failed to act when required to do so. In *Lieber v. Citigroup, Inc*.,[58] the District Court for the Southern District of New York held that knowing participation requires that the nonfiduciary defendant knew the primary violator's status as a fiduciary, and knew that the primary violator's conduct contravened a fiduciary duty. In *In re Syncor ERISA Litigation*,[59] the District Court for the Central District of California held that when pleading that a defendant or defendants should have known of alleged breaches of ERISA fiduciary duty, ERISA requires an allegation of knowing participation in or facilitation of the underlying breach.[60] In *Daniels,*[61] the district court stated that a claim against a nonfiduciary under ERISA §502(a)(3) ''essentially asserts that the nonfiduciary aided and abetted the fiduciary's breach.'' In *Laborers Pension Fund v. Arnold*,[62] the District Court for the Central District of California stated that that *Harris Trust* applies to ''transactions in which the fiduciary and party in interest have actual or constructive knowledge that the transaction at issue is unlawful.'' Courts have also held that the same standard of knowing participation by a nonfiduciary applies to prohibited transaction and breach of fiduciary duty violations.[63]

There is agreement among the courts that actual knowledge is not required, and that constructive knowledge, which is an objective standard,[64] is sufficient.[65] A nonfiduciary's knowledge of a breach can be inferred from the surrounding circumstances raising a reasonable inference of knowledge.[66]

The issue of constructive knowledge was addressed in greater detail in *Hausknecht.*[67] The District Court for the Eastern District of Pennsylvania again focused upon the Supreme Court's language in *Harris Trust* that constructive knowledge by a nonfiduciary has been interpreted to mean that the nonfiduciary ''should have known of the existence of the trust and the circumstances that rendered the [action] in breach of trust.''[68] Section 297, cmt. a of the Restatement (Second) of Trusts states that ''a third party has knowledge of a breach of trust not only when he knows of the breach, but also when he should know of it; that is, that he knows facts which, under the circumstances would lead a reasonably intelligent and diligent person to inquire whether the trustee. . . is committing a breach of trust, and if such inquiry when pursued with reasonable intelligence and diligence would give him knowledge or reason to know that the trustee is committing a breach of trust.''[69] Thus, a nonfiduciary defendant ''who is on notice that conduct violates a fiduciary duty is chargeable with constructive knowledge of the breach if reasonably diligent investigation would have revealed the breach.''[70]

While the more frequently litigated aspect of a knowing participation claim against a nonfiduciary is whether the participation in the conduct was knowing, the issue of whether a nonfiduciary participated is occasionally raised. A leading case in this area is *Mellon Bank, NA v. Levy*,[71] which presented the issue of whether an attorney's opinion on a matter, which was held to be a prohibited transaction, constituted participation in the conduct for purposes of establishing liability for knowing participation in a prohibited transaction. The District Court for the Western District of Pennsylvania, in a decision affirmed by the Court of Appeals for the Third Circuit, concluded that plaintiff failed to state a viable claim for the following reasons. In that case, nowhere in the complaint does plaintiff allege that Attorney Levy was a party to or directly

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[56] 592 F. Supp. 1361, 1396 (D. Nev. 1984).

[57] 131 F. Supp. 3d. 103, 131 (S.D.N.Y. 2015), *aff'd,* 843 F. 3d 561 (2d Cir. 2016).

[58] 2010 BL 55992 (S.D.N.Y. Mar. 16, 2010). *See also Liss v. Smith*, 991 F. Supp. 278, 305 (S.D.N.Y. 2005).

[59] 351 F. Supp. 2d 970 (C.D. Cal. 2004).

[60] See also *Godfrey v. GreatBanc Trust Co*., 2020 BL 315859 (N.D. Ill. Aug. 19, 2020).

[61] 313 F. Supp. 2d 790 (N.D. Ill. 2004).

[62] 2001 BL 1446, *8 (N.D. Ill. Feb. 26, 2001).

[63] *Gamino v. KPC HealthCare Holdings, Inc*., 2021 BL 428065 (C.D. Cal. Nov. 1, 2021).

[64] *Castro v. City of Los Angeles*, 797 F.3d 654, 673 (9th Cir. 2015).

[65] *Carlson*, 2006 BL 129570 (E.D.N.Y. Sept. 28, 2006).

[66] *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 2008). *See also Walsh,* 19 F.4th 672 (4th Cir. 2021) (it is sufficient if district court's inferences with respect to constructive knowledge were reasonable. There is no requirement that what the nonfiduciary knew needed to be obvious).

[67] 334 F. Supp. 3d 665 (E.D. Pa. July 14, 2022).

[68] 530 U.S. 238, 251.

[69] *Spires v. Schools*, 2017 BL 413536 (D.S.C. Sept. 19, 2017).

[70] *Diduck v. Kaszycki & Sons Contractors, Inc*., 974 F.2d 270, 283 (2d Cir. 1992), *abrogated on other grounds by Gerosa v. Savasta & Co., Inc*., 329 F. 3d 317, 322-323 (2d Cir. 2003).

[71] No. 01-1493 (W.D. Pa. Apr. 22, 2002), *aff'd,* 71 Fed. Appx. 146 (3d Cir. 2003).

ISSN 0747-8607

participated in the underlying transaction. To the contrary, the plaintiff limits its allegations to the defendant having knowingly enabled and caused the prohibited transaction to occur by issuing the legal opinion. This very type of professional service was previously excluded from liability in other cases analyzing the ERISA fiduciary analysis.[72] Thus, this is not the type of nonfiduciary 'participation' that forms the basis for legal liability. Thus, the *Mellon* district court read *Harris Trust* narrowly, such that liability only occurs to a transferee of ill-gotten asset for knowing participation in a prohibited transaction.[73] A contrary approach was taken in *Spear v. Fenkell*.[74] It first concluded that a nonfiduciary can knowingly participate in a violation of ERISA, even if it does not receive plan assets, an approach consistent with the common law of trusts. Second, it would define participation more broadly. It referred to Black's Law Dictionary, which defined participation as ''the act of taking part in something, such as a partnership, a crime, or a trial,''[75] and to the Oxford English Dictionary,[76] which defined participate to mean ''to take part in an action or event,'' both of which definitions are broader than the *Mellon Bank* definition.

EQUITABLE RELIEF

ERISA imposes far more limited sanctions on nonfiduciaries who knowingly participate in a breach of fiduciary duty than on fiduciaries who participate in a breach of fiduciary duty or who breach a fiduciary duty themselves.[77] That is, while *Harris Trust* does not restrict defendants,[78] it does limit relief to appropriate equitable relief.[79] Thus, since *Mertens,*[80] nonfiduciaries, even those who knowingly participate in a breach of fiduciary duty, cannot be sued for money damages.[81] Typical equitable relief for knowing participation in a fiduciary's breach would be an order requiring the party to return whatever plan assets it obtained in the transaction,[82] whether by disgorgement[83] or restitution.[84] Accounting would be another available equitable remedy.[85] However, being enjoined from future participation in a breach of trust,[86] ''such other and further relief as the court deems appropri-

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[72] *Id.*

[73] *See Eslava v. Gulf Telephone Company*, 2006 WL 8437765, p.6 (S.D. Ala. 2006) (''the Court in *Mellon* drew a distinction between allegations that a party 'participated' in an underlying prohibited transaction and allegations that a party directly participated by receiving excessive compensation.''). *Mellon Bank* was followed in *Agway v. Employees 401(k) Thrift Investment Plan v. Magnuson*, 2006 BL 137856 (N.D.N.Y. July 13, 2006). In dismissing a complaint against PricewaterhouseCoopers as auditor, the district court indicated that the liability of a nonfiduciary for a breach of ERISA §502(a)(3) is dependent upon a showing of actual participation, and the complaint failed to allege that PricewaterhouseCoopers was directly involved in or a party to the transaction. *Carlson v. Principal Life*, 2006 BL 129570 (E.D.N.Y. Sept. 28, 2006), is another case in which a district court focused upon the receipt of ill-gotten gains. *Magnuson,* 2006 BL 137856 at *4. It indicated that the first prong of determining whether a nonfiduciary defendant could be liable was whether it was the transferee of ill-gotten gains. It stated that ''Under Harris Trust, a nonfiduciary may be a proper defendant under §502(a)(3) if it would be a proper defendant under the 'common law of trusts,' '' then drew the questionable conclusion that defendant was not a proper defendant because plaintiff cannot demonstrate that the principal was the recipient of ill-gotten gains. That is, in the view of the *Carlson* Court, being the recipient of ill-gotten assets was the exclusive way in which a nonfiduciary defendant could be held liable at common law. *Cf. American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assn. Soc. of the U.S.*, 841 F.2d 658, 665 (5th Cir. 1988) (nonfiduciary respondeat superior liability attaches under ERISA only when the principal actively and knowingly participates in the agent's breach).

[74] 2016 BL 325481 (E.D. Pa. Sept. 30, 2016). *See also Walsh v. Fensler*, 2022 BL 274703 (N.D. Ill Aug. 8, 2022), and *Daniels*, 313 F. Supp. 2d. 790, 808 (N.D. Ill. 2004).

[75] Black's Law Dictionary (10th Ed. 2020).

[76] 3d Edit., Rev. 2008.

[77] *Acosta v. Reliance Trust Company*, 2019 BL 297149 (D. Minn. Aug. 9, 2019). *See also In re Unisys Corp. Retiree Medical Ben. ERISA Litigation*, 57 F.3d 1255, 1268 (3d Cir. 1995) (the remedies under ERISA are broader in scope than those available against a nonfiduciary).

[78] ERISA §502(a)(3) ''admits of no limit. . .on the universe of possible defendants.'' *Harris Trust,* 530 U.S. 238, 246.

[79] *Neil, v. Zell*, 677 F. Supp. 2d 1010 (N.D. Ill. 2010). *See also Trustees of the Local 8A-28A Welfare Fund*, 2017 BL 305920 (E.D.N.Y. Aug. 28, 2017) (the nonfiduciary must be a proper defendant under the common law of trusts, such as a transferee of ill-gotten trust assets) and *Mellon Bank,* 71 Fed. Appx. 146 (3d Cir. 2003) (the remedies available under ERISA serve to define the contours of potential nonfiduciary defendants).

[80] *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1983). The holding in *Mertens* differs from traditional trust law, which allowed a beneficiary to recover from a nontrustee who knowingly participated in a breach of fiduciary duty. Restatement (Second) of Trusts 326; Scott on Trusts 506, cited in *Petrilli v. Gow*, 957 F. Supp. 366 (D. Conn. 1997).

[81] *Gerosa v. Savasta & Co*., 329 F.3d. 317, 322 (2d Cir.); *Faith Regional Health Services v. Ironshore Ind., Inc*., 2021 BL 246132 (D. Neb. June 30, 2021); *Serafin v. The William C. Earhart Company, Inc*., 2020 BL 29820 (D. Ore. Jan. 28, 2020).

[82] *Landwehr v. Dupree*, 72 F. 3d. 726, 736 (9th Cir. 1995); *Spire* , 2017 BL 413536 (D.S.C. Sept. 19, 2017).

[83] *In re Beacon Assocs. Litig.*, 818 F. Supp. 2d 697, 707-708 (S.D.N.Y. 2011); *Donovan v. Daugherty*, 550 F. Supp. 390, 411 (S.D. Ala. 1982); *Powell v. Chesapeake and Potomac Telephone Co*., 780 F.2d 419, 424 (4th Cir. 1985).

[84] *Magnuson*, 2006 BL 137856 (N.D.N.Y. July 13, 2006), and *Leber v. Citigroup, Inc*., 2010 BL 55992 (S.D.N.Y. Mar. 16, 2010).

[85] *Spear v. Fenkell*, 2016 BL 325481 (E.D. Pa. Sept. 30, 2016).

[86] *Wehmer v. Genetech*, 2021 BL 48012 (N.D. Cal. Feb. 9, 2021). Breach of trust claims are generally interchangeable with breach of duty claims, except that breach of trust claims can only be brought against nonfiduciaries. *In re Omnicom*, 2021 BL 290139 (S.D.N.Y. Aug. 7, 2021); *Reliant Transportation, Inc. v. Division 1181 Amalgamated Transit Union*, 2019 BL 439160 (E.D.N.Y. Nov. 14, 2019); *Garthwait v. Eversource Energy Company*, 2021 BL 368150 (D. Conn. Sept. 27, 2021) (same standards

ISSN 0747-8607

ate;"[87] enforcement of ERISA's claims review procedures;[88] and indemnification.[89] Additionally, in *Mimms v. PriceWaterhouseCoopers, LLC*,[90] the District Court for the Southern District of New York held that neither ERISA nor the common law of ERISA provide a right of action in which a plaintiff can bring a derivative suit against a nonfiduciary for breaches of state law.

CONTRIBUTION AND INDEMNITY

In addition to the well-known disagreement among courts as to whether there is a right of contribution among co-fiduciaries under ERISA, there is also a split of authority among district courts addressing the issue of whether fiduciaries can maintain a cause of action against nonfiduciaries,[91] although the majority view is that no right of contribution can be brought by a fiduciary against a nonfiduciary.[92] There is also a split of authority as to whether ERISA preempts a state law contribution or indemnity action.[93] However, ERISA generally does not preempt state law claims against third-party service providers in connection with professional services rendered to an ERISA plan.[94]

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apply to both).

[87] *Severstall Wheeling v. WPN Corp*., 809 F. Supp. 2d 245, 263 (S.D.N.Y. 2011) (collecting cases).

[88] *Duggan v. Town Properties Group Health Plan*, 2019 BL 113453 (S.D. Ohio Mar. 31, 2019).

[89] *Clevenger v. Dillards*, 412 F. Supp. 2d 832, 845 (S.D. Ohio 2006).

[90] 2012 BL 62401 (S.D.N.Y. Feb. 16, 2012).

[91] The right to contribution or indemnification on a federal claim is an issue of federal law. *Daniels*, 329 F. Supp. 2d 975 (N.D. Ill. 2004); *Leventhal v. The Mandmarblestone Group, LLC*, 2020 BL 197040 (E.D. Pa. May 27, 2020), where the district court noted that the Court of Appeals for the Third Circuit had not yet opined on whether parties may bring claims for contribution and indemnity against nonfiduciaries. *Cf. Board of Trustees of UAW Group Health & Welfare Plan v. Acosta*, 2022 BL 194808 (D.N.J. June 6, 2022) (following decisions of district courts in the Third Circuit not allowing a fiduciary to seek contribution from a nonfiduciary). The issue of whether a fiduciary could seek contribution from a nonfiduciary was also addressed but not decided in *Whitfield v. Lindeman*, 853 F.2d. 1298, 1303 (5th Cir. 1988), and *McDannald v. Star Bank*, 261 F.3d 478, 485 (6th Cir. 2001), discussed in *Daniels v. Bursey*, 329 F. Supp. 2d. 975 (N.D. Ill. 2004). In *Spear v. Fenkell*, 2015 BL 32494 (E.D. Pa. Feb. 5, 2015), the District Court for the Eastern District of Pennsylvania held that contribution is not available to nonfiduciaries who are facing claims under ERISA.

[92] *See Remy v. Lubbock National Bank*, 403 F. Supp. 3d 496 (E.D.N.C. 2019) (declining to find a right of contribution between fiduciaries and nonfiduciaries and collecting cases). *See also Trustees of the Local 8A-28A Welfare Fund v. American Group Administrators*, 2017 BL 305920 (E.D.N.Y. Aug. 28, 2017) (collecting cases in the Second Circuit holding that contribution against nonfiduciaries is not available under ERISA); *McLaughlin v. Biasucci*, 688 F. Supp. 965, 966 (S.D.N.Y. 1988) (third-party complaint failed to state a claim under ERISA because fiduciary has no right to bring a third party claim for contribution under ERISA against a nonfiduciary who knowingly participates in a fiduciary's breach and collecting cases). The leading cases concluding that fiduciaries have a right of contribution against nonfiduciaries are *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-42 (W.D. Wis. 1979); *Schaffler v. McDowell National Bank*, 1985 BL 566 (W.D. Pa. 1985), and *Daniels*, 329 F. Supp. 2d 975 (N.D. Ill. 2004).

[93] *Ruggeri v. Quaglia,* 2008 BL 283903 (E.D. Pa. Dec. 24, 2008) (collecting cases).

[94] *Penny/Ohlman/ Nieman, Inc. v. Miami Valley Pension Corp*., 399 F.3d 692 (6th Cir. 2005); *McLaughlin v. Biasucci*, 688 F. Supp. 965, 967-968 (S.D.N.Y. 1988) (in action by Secretary of Labor for alleged violations of ERISA, a third-party complaint against an attorney advisor failed to state a claim under ERISA but did contain possible state law claims for malpractice and negligence.).

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