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Mutual Mistake Under ERISA

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In this article, the author discusses the law of mutual mistake under the Employee Retirement Income Security Act of 1974.

The Employee Retirement Income Security Act of 1974 (ERISA) does not expressly recognize a cause of action for equitable reformation of a contract.[1] However, because reformation is a form of equitable relief, courts have sustained claims for equitable relief under ERISA Section 502(a)(3).[2] Absent an express choice of law provision, a claim for reformation under ERISA is governed by federal common law.[3] Reformation is available in cases of mistake[4] and fraud.[5] Thus, in the absence of fraud or inequitable conduct,[6] a unilateral mistake will generally not justify the equitable reformation of a contract,[7] and the primary focus of this article will be on mutual mistake.[8]

MUTUAL MISTAKE

In The Common Law,[9] Oliver Wendell Holmes stated that mutual mistake exists when there is "a difference in kind between the

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actual subject matter and that to which the attention of the parties was directed," resulting in "the terms of the supposed contract, although seemingly consistent, [being] contradictory in matters that [go] to the root of the bargain."[10] A more contemporaneous statement of the doctrine appears in Williston & Lord: "The Law permits reformation of instruments to reflect the true intent of the parties when . . . the party seeking relief is able to establish to the court's satisfaction that both parties intended something other than what is reflected in the instrument in question."[11] Section 155 of the Restatement (Second) of Contracts states the general rule regarding reformation of a contract to correct a mutual mistake: "Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effects of a writing, the court may at the request of a party reform the writing to express the agreement."[12]

The mutual mistake can be a mistake of fact or a mistake of law.[13] Reformation of a mutually mistaken term does not require the approval of a third-party beneficiary.[14] While reformation most frequently applies to a plan or insurance policy, it can apply to a settlement agreement,[15] a contractual release,[16] or an offer in compromise with the Internal Revenue Service.[17] The requirement of tendering back consideration is excused in multiple situations, such as when there is fraud or mutual mistake.[18] A plan administrator cannot equitably reform an ERISA plan.[19] Even if an SPD violates ERISA Section 102, that showing alone is insufficient to support reformation; plaintiff still must prove mutual mistake.[20] A "self-serving statement that a party did not understand the contract to mean what it says or appears to say will not suffice"[21] to establish a mutual mistake; "ignorance of a mistake is insufficient proof of a party's intent to the contrary."[22] and a party cannot invoke the mutual mistake doctrine "to avoid the consequences of its own negligence."[23] Mutual mistake is not recognized as a defense under ERISA Section 515.[24] A contract based upon a mutual mistake is voidable rather than void,[25] although a contract is not voidable because of mutual mistake if the mistaken party bore the risk of mistake under Section 154 of Restatement (Second) of Contracts.[26] The distinction between void and voidable contracts can be significant, because a voidable agreement results in a contract, while a void agreement is a nullity.[27] While a contract can be equitably reformed and possibly rescinded[28] as a result of mutual mistake, a contract cannot be formed by virtue of mutual mistake alone.[29] In the context of ERISA plans, mistake is measured by comparing the actual terms of the plan to the baseline of the beneficiaries' objective, reasonable expectations about the scope of benefits provided.[30]

REFORMATION

Although it may be an available remedy under ERISA Section 502(a)(3), "reformation is appropriate only in extreme cases."[31] "A mistake must be so material that . . . it goes to the foundation of the agreement."[32] In *Grun v. Pneumo Abex Corporation*, the U.S. Court of Appeals for the Seventh Circuit explained that a court can ignore unambiguous language and rely upon extrinsic evidence to determine the meaning of a contract if it finds that a mutual mistake has occurred in the formation of a contract.[33] However, the court went on to state that "this is not done lightly; where language is unambiguous [the court] ignore[s] it only in the rare case where literal application of a text would lead to absurd results or thwart the obvious intentions of the drafter."[34] In *Cinelli v. Security Pacific Company*, the Court of Appeals for the Ninth Circuit concluded that application of the principles of mutual mistake would be inconsistent with ERISA's strong preference for the written terms of the plan and the goal of ERISA to ensure that an employee's rights and obligations can be readily ascertained from the plan document.[35]

With respect to scrivener's error, that issue was addressed in *International Union of Electronic, Elec. Salaried Machine and Furniture Workers, AFL-CIO v. Murata Erie North America, Inc.*,[36] in which the Third Circuit held that reformation is permissible where a mutual mistake in the preparation of a writing has been established and where ERISA's goal of ensuring that every employee may determine his rights by examining the plan documents would not be frustrated by the reformation. The Third Circuit elaborated upon that discussion in *Central Pennsylvania Teamsters Pension Fund v. Mc Cormack Dray Line, Inc.*, in which it explained that "the central holding of Murata's scrivener's error discussion is that in circumstances where a court can establish that no plan participants were likely to have relied upon the scrivener's error in question in determining their rights and obligations under the plan, allowing reformation of the scrivener's error does not thwart ERISA's statutory purpose of ensuring that plan participants can rely upon the language."[37] In recognition of the tension between ERISA's goals and the reasons for allowing equitable reformation for mutual mistakes, the party moving for reformation faces a heavy burden,[38] as courts require satisfying the "high bar"[39] of clear and convincing evidence,[40] or, at least in the Third Circuit clear, precise and convincing evidence[41] before authorizing the equitable reformation of a contract. The required evidence must be objective written evidence[42] that is "not dependent on the credibility of an interested party."[43]

Other courts have stated the strict standard in somewhat different terms, stating that reformation of a contract is available for mutual mistake, provided that the party claiming reformation can "show in no

uncertain terms, not only that mistake . . . exists, but exactly what was really agreed on between the parties."[44]

PLEADING

From a procedural perspective, some cases state that pleading a claim of mutual mistake requires factual allegations establishing: (i) that both contracting parties shared the same erroneous belief as to a material fact, and (ii) that their acts do not in fact accomplish their mutual intent,[45] while other cases hold that a party seeking equitable reformation of a contract satisfy the pleading standards under Federal Rules of Civil Procedure Section 9(b).[46] Also, while there is contrary authority,[47] several cases have held that reformation is not a defense but rather an affirmative claim that must be raised as a counterclaim.[48] Thus, motions to reform an ERISA plan have been construed as a counterclaim, rather than as an affirmative defense,[49] and are therefore subject to the applicable state statute of limitations.[50] Because a showing of mutual mistake requires evidence of the intention of both parties[51] at the time that the parties entered into the agreement,[52] summary judgment is generally not appropriate.[53] A district court's finding with respect to the expression of the contracting parties' intent will not be disturbed unless they are clearly erroneous.[54]

NOTES

1. Scarangella v. Group Health, Inc., 2009 WL 764454 (S.D.N.Y. March 24, 2009); Krishna v. Colgate Palmolive Co., 7 F. 3d 11, 16 (2d Cir. 1993); Weber v. AVX Pension Plan for Bargaining Unit Hourly Employees, 07-CV-615S (W.D.N.Y. Sept. 26, 2009).

2. The corresponding United States Code reference is 29 U.S.C. §1132(a)(3). Kawski v. Johnson & Johnson, 2005 WL 3555517 (W.D.N.Y. December 19, 2005); Nechis v. Oxford Health Plans, Inc., 421 F. 3d 96, 103 (2d Cir. 2020); Bona v. Barasch, 2003 WL 1395932 (S.D.N.Y. March 20, 2003); Weber v. AVX Pension Plan for Bargaining Unit Hourly Employees, supra, n. 1.; Gore v. El Paso Energy Corp. Long Term Disability Plan, 477 F. 3d 833, 842, n. 2 (6th Cir. 2007) (Reformation is possible equitable relief under ERISA Section 1132(a)(3)).

3. Amara v. Cigna Corp., 775 F. 3d 510, 525 (2d Cir. 2014) ("In applying the standards of contract reformation in the context of ERISA, the court looks to federal common law rather than any particular state's common law.") Scarangella v. Group Health, Inc., supra, n. 1; Silverman v. Miranda, 918 F. Supp. 2d 200 fn.13 (S.D.N.Y. 2013, vacated sub. nom. on other grounds Silverman v. Teamsters Local 210 Affiliated Health & Ins. Fund, 761 F. 3d 277 (2d Cir. 2014)); Aramony v. United Way of America, 949 F. Supp. 1080 (S.D.N.Y. 1996). Cf. Turner v. Liberty Mutual Retirement Benefit Plan, 2023 WL 5179194 (D. Mass. August 11, 2023) (The scope of reformation under ERISA Section 502(a)(3) generally follows federal common law principles.). Courts may look to the Restatement (Second) of Contracts to develop federal common law. Gamewell Mfg.,

Inc. v. HVAC Supply, Inc., 715 F. 2d 112,116 (4th Cir. 1983). While there is no federal common law, federal courts may create federal common law where such development is necessary to interpret federal statutes. The Supreme Court has expressly approved of this development in ERISA cases. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). Although subject to federal common law, courts will frequently look to applicable state law. See, for example, Silverman v. Miranda, supra, applying New York Law. Cf. Von Grabe v. Ziff Davis Publishing Co., 1995 WL 688912, n. 5 (S.D.N.Y. Nov. 20, 1995) (Simply because federal law governs a matter, does not necessarily require a uniform federal rule).

4. A predisposition or judgment as to events to occur in the future, even if erroneous, is not a mistake as that term is defined under the doctrine of mutual mistake. Lakeshore Engineering Service v. United States, 748 F. 3d 1341,1350 (Fed. Cir. 2014). In other words, a mutual mistake of fact cannot be against a future event. Dairyland Power Coop v. United States, 16 F. 3d 1197 (Fed. Cir. 1994); Canpro Investments, Ltd. v. United States, 130 Fed. Cl. 320, 2017 WL 372055 (Fed. Cl. 2017).

5. Amara v. Cigna Corp., supra, n. 3 (Under ERISA, a contract may be reformed due to the mutual mistake of both parties or where one party is mistaken, and the other commits fraud or inequitable conduct); Kawski v. Johnson & Johnson, supra, n. 2 (same); Koam Produce, Inc. v. DiMare Homestead, Inc., 213 F. Supp. 2d 314, 326 (S.D.N.Y. 2002); Amara v. Cigna Corp., 925 F. Supp. 2d 242, 252 (D. Conn. 2012), aff'd 775 F. 3d 510 (2d Cir. 2014) ("Equity courts traditionally had the power to reform contracts that failed to express the agreement of the parties owing either to mutual mistake or to the fraud of one party and the mistake of the other."); Skinner v. Northrop Grumman Ret. Plan B, 673 F. 3d 1162, 1166 (9th Cir. 2012) ("Reformation is proper only in cases of fraud or mistake."); Gabriel v. Alaska Elec. Pension Fund, 773 F. 3d 945, 955 (9th Cir. 2014) (same); Laurent v. PriceWaterhouseCoopers LLP, 2017 WL 3142067 (S.D.N.Y. July 24, 2017) (cases in Second Circuit hold that the equitable remedy of reformation is available in cases of fraud or mutual mistake); AMEX Assurance Co. v. Caripides, 316 F. 3d 154, 161 (2d Cir. 2003); Scarangella v. Group Health, Inc., supra, n. 1 ("A mutual mistake of the parties, or a mistake on a plaintiff's part, and a fraud by the defendants are the classic grounds for a reformation of an investment in equity."); D'lorio v. Winebow, Inc., 920 F. Supp. 2d 313 (E.D.N.Y. 2013) (same); Morales v. Intelsat Global Services, 554 Fed. App'x. 4, 5 (D.C. Cir. 2014) (reformation under ERISA section 1132(a)(3) "has long been reserved for those situations in which the moving party demonstrates that reform is necessary either to correct mistake or prevent fraud."); De Pace v. Matsushita Electric Corp., 257 F. Supp. 2d 543 (E.D.N.Y. 2003), citing Allen Farnsworth, Farnswoth on Contracts, Section 7.5 (the equitable remedy of reformation is available in cases of mutual mistake); Ramsey v. Chubb. of America, 12 F. 3d 472, 479-480 (5th Cir. 1994), abrogated on other grounds Moody National Bank of Galveston v. GE Life and Annuity Insurance Co., 383 F. 3d 247 (5th Cir. 2004) ("A court may reform a contract only where both parties are mistaken as to a material aspect of the contract."); Cross v. Bragg, 329 Fed. App'x 443 (4th Cir. 2009); Turner v. Liberty Mutual Retirement Benefit Plan, supra, n. 3; Cf.; Northwest Pipeline Corp. v. Helms, 583 F. Supp. 37, 39 (D.D.C. 1983) (Absent clear evidence of the mutual intent of the parties, reformation would be inappropriate); and Mulligan v. Resolution Trust Corp., 903 F. Supp. 121, 124 (D.D.C. 1995) ("A mistake of fact can be the basis for the reformation of a contract, but the mistake must be mutual."). While not relevant for purposes of this article, terms that violate ERISA may also be a basis for equitable reformation. Laurent v. PriceWaterhouseCoopers LLP, 945 F. 3d 739, 748 (2d Cir. 2019).

6. Skinner v. Northrop Grumman Retirement Plan B, supra, n. 5; Moyle v. Liberty Mutual Retirement Benefit, 263 F. Supp. 3d 999 (S.D. Cal. 2017); Blenko v. Cabell Huntington Hospital, Inc., 2021 WL 4721067 (S.D. W. Va. Oct. 8, 2021) (Equitable

reformation not available where plaintiff has neither claimed nor satisfied the elements of a fraud claim, and there is no existence of a material mutual mistake); Investors Insurance Co. of America v. Dorinco Reinsurance Co., 917 F. 2d 100, 105 (2d Cir. 1990) (Granting summary judgment and rejecting a claim for mutual mistake where a party offered no evidence whatsoever that the other party was similarly mistaken); Silverman v. Miranda, supra, n. 3 (same).

7. Healy v. Rich Products Corp., 981 F. 2d 68 (2d Cir. 1992); Alden Auto Parts Warehouse, Inc. v. Dolphin Equip. Leasing Corp., 682 F. 2d 330 (2d Cir. 1982); Airline Pilots Association v. Shuttle, 55 F. Supp. 2d 47 (D.D.C. 1999). (A court will not reform a plan under the doctrine of unilateral mistake, although a contract may be reformed for a unilateral mistake if the non-mistaken party has engaged in fraud or inequitable conduct.) For an example of a case in which reformation was requested because of fraud or inequitable conduct, see Pearce v. Chrysler LLC Pension Plan, 2017 WL 9440777 (E.D. Mich. Feb. 14, 2017). However, negligence on the part of one party which induces the mistake does not preclude a finding of mutual mistake. That is, the fact that the mistake arises because the party who is seeking the reformation supplied the inconsistent information does not make the mistake unilateral. Metropolitan Prop. & Cas. Co. v. Dillard, 126 N.C. App. 795, 487 S.E. 2d 157 (1997) cited in Lawyers Title Ins. Co. v. Golf Links Dev. Corp., 87 F. Supp. 2d 505 (W.D.N.C. Sept. 16, 1999).

8. For a more detailed discussion of mutual mistake, see Restatement (Second) of Contracts, Section 152. The doctrine of mutual mistake allows the adversely affected party to void the contract at his or her election because there was no meeting of the minds. Davis v. Dawson, Inc., 15 F. Supp. 2d 64 (D. Mass. 1998). A doctrine closely associated with mutual mistake is scrivener's errors, and many of the same legal rules apply to both. However, mistakes in scrivener's errors execution of contracts are fundamentally different than mistakes of extrinsic facts that go to the basic assumptions on which the contract is made. For that reason, there is no reference to the assumption of risk of the mistake associated with scrivener's error. See Thomas v. Del Biaggio, 527 B.R. 33 (N.D. Cal. 2010), discussed in Contract Profs Blog, Jeff Lipshaw, "That's a Hell of a Mistake," (Nov. 2, 2022). For an excellent discussion of the scrivener's error doctrine, see Rosina Barker, "Is There a Scrivener's Error Doctrine in ERISA," 13 Benefits Law Journal 59 (Spring 2000). Cf. Luciano v. TIAA CREF, 2023 WL 4760578 (D.N.J. July 26, 2023) (Courts in the Third Circuit do not require a showing of mutual mistake or fraud in an action for equitable reformation of a contract based on scrivener's error.)

9. 1881.

10. The Common Law 280, G. Edward White, Ed., Harvard University Press 2009, quoted in Cross v. Bragg, supra, n. 5.

11. §70.9, quoted in Cross v. Bragg, supra, n. 5. See also, J. Calamari and J. Perillo, Contracts §9-26 (3d ed. 1987), quoted in McLaughlin v. Jung, 859 F. 2d 1310 (7th Cir. 1988) ("Where both parties share a common assumption about a vital existing fact upon which they based their bargain and that assumption is false, the transaction may be avoided if, because of the mistake, a quite different exchange of values occurs from the exchange of vales the parties contemplated.").

12. Quoted in Torre v. Federated Mutual Insurance Company Medical Plan #501, 854 F. Supp. 790, fn. 45 (D. Kan. 1994). To avoid a contract based upon a mutual mistake, a party must show that it does not bear the risk of a mistake. Ameritrust v. United States, 2016 WL 1055058 (Fed. Cl. March 17, 2016). Additionally, a party seeking to avoid an agreement on the basis of a mutual mistake must ordinarily avoid the entire contract, including any part that has already been performed. Fadili v. Deutsche Bank National Trust Company, 2014 WL 888660 (D. N.H. March 6, 2014).

13. See In re: Unisys Corp. Retiree Medical Benefits ERISA Litigation, 2006 WL 2822261, n.10 (E.D. Pa. Sept. 29, 2006) (The Restatement (Second) of Contracts does not make a distinction between mistake of fact and mistake of law.) Claim of mutual mistake of law is clearly distinguishable from a claim resting on a change in the law. Holland v. Virginia Lee Co., Inc., 188 F.R.D. 241 (W.D. Va. 1999). A subsequent change in the law is not a mistake of law sufficient to invalidate a contract. Keiser v. CDC Investment Management Corp., 2003 WL 1733729 (S.D.N.Y. March 25, 2003) and Board of Trustees of Sheet Metal Workers Local Union No. 137 v. Vic Construction Corp., 825 F. Supp. 463,467-468 (E.D.N.Y. 1993). At common law, courts of equity were reluctant to equitably reform contracts for mistakes of law. Cf. First National Bank of Boston v. Perfection Bedding Co., 631 F. 2d 31, fn. 3 (5th Cir. 1980), noting that under Alabama law, equity did not grant relief for mistakes of law. However, there is generally no longer a distinction between mistakes of law and mistakes of facts. Anita Foundation, Inc. v. ILGWU National Retirement Fund, et al., 710 F. Supp. 983 (S.D.N.Y. 1989). See also, E.A. Farnsworth, Contracts, §9.42 at 649 (1982) ("The existing law is part of the state of facts at the time of the agreement."). However, ERISA Section 403(c)(2)(A)(i) distinguishes between mistakes of fact and mistakes of law. As an illustration of a mutual mistake of law, if Microsoft and its workforce both honestly believed that the members of Microsoft's workforce were independent contractors rather than employees, those understandings would have been an illustration of a mutual mistake of law. Verizon v. Microsoft Corp., 120 F. 3d 1005 (9th Cir. 1987).

14. Silverman v. Miranda, supra, n. 3.

15. McPherson v. Acco USA, Inc., 1997 WL 598138 (N.D. Ill. Sept. 15, 1997) (parties agreeing that there was a mutual mistake in a settlement agreement); Brown v. County of Geneees, 872 F. 2d 169, 174 (6th Cir. 1989); Lowman v. General Motors Corp., 2021 WL 6618766 (E.D .Mich. Nov. 19, 2021). However, a settlement agreement made when the law was uncertain cannot be successfully attacked as a mutual mistake on the basis of the subsequent resolution of that uncertainty. Moses -EccoCo. v. Roscoe Ajax Corp., 320 F. 2d 685,690 (D.C. Cir. 1963); Fashion Affiliates v. ILGWU, 902 F. 2d. 185 (2d. Cir. 1990).

16. DePace v. Matsushita Elec. Corp. of America, supra, n. 5; Fournier v. Canadian Pacific Railroad, 512 F. 2d. 317 (2d Cir. 1975); Shaheen v. B.F. Goodrich, 873 F. 2d 105 (6th Cir. 1989). Martinez v. Pilgrim's Pride Corporation, 2017 WL 6372385 (N.D. Tex. Dec. 13, 2017); Kaplan v. First Options of Chicago, Inc., 189 B.R. 882 (E.D. Pa. 1995) (A signed release not binding, if executed and procured through mutual mistake); Russell v. Harmon International Industries, Inc., 56 EBC 1154, 2013 WL 2237793 (D.D.C. May 22, 2013) (A waiver of right pursuant to a release is not knowing in the event of mutual mistake.); Osterbye v. Estate of Anne Osterbye, 2020 WL 3546869 (D. N.J. June 30, 2020).

17. IRS Manual 8.13.1, Processing Closing Agreements in Appeals (Compromises are largely subject to the law of contracts (for example, mutual mistake may nullify them); CBS 200145042 (Following the IRS acceptance of an offer in compromise, neither the IRS nor the taxpayer can reopen the case except where false information was submitted, the taxpayer's ability to pay was concealed, or there is a mutual mistake of a material fact.)

18. Jakimas v. Hoffman-LaRoche, Inc., 485 F. 3d 770 (3d Cir. 2007); Raczak v. Ameritech Corp., 103 F. 3d 1257 (6th Cir. 1997); Reid v. IBM Corp., 21 EBC 1953, 1997 WL 357, 969 (S.D.N.Y. June 26, 1997).

19. Luciano v. TIAA-CREF, supra, n. 8, fn. 6. See also, Williston & Lord, A Treatise on The Law of Contracts, §70.93 (4th ed. 2003) (The power to recognize and correct a

scrivener's error in an ERISA plan rests exclusively with the courts. An administrator cannot simply reform a plan to correct what it unilaterally perceives to be a mutual mistake or error in the plan's written terms.").

20. Morales v. Intelsat Global Services, supra, n. 5.

21. AM International Inc. v. Graphics Management Assoc., Inc., 44 F. 3d 572, 575 (7th Cir. 1995).

22. Cross v. Bragg, supra, n. 5, and citing Williston & Lord, §70.9: "[A] clear mistake by one party, coupled with ignorance by the other party, is not mutual mistake and will not be corrected.")

23. Sec. Alarm Fin. Enters, L.P. v. Citizen Bank, N.A., 19 CV 2679 (GBD) (S.D.N.Y. Jan. 23, 2020).

24. Trustees of the Local 813 Insurance Trust Fund v. Wilmer's Livery Service, Inc., 2012 WL 4327070 (E.D.N.Y. Sept. 19, 2012). Benson v. Brower's Moving & Storage, Inc., 907 F. 2d 310 (2d Cir. 1990); Bituminous Coal Operators, Assn v. Connors, 867 F. 2d 625, 632 (D.C. Cir. 1989) (An employer may not assert mutual mistake of fact in entering into a collective bargaining agreement as a defense under ERISA Section 515.); Central Pennsylvania Teachers Pension Fund v. McCormick Dray Line, Inc., 85 F. 3d 1098 (3d Cir. 1996); Keane v. Zitomer Pharmacy, Inc. 2010 WL 624285 (S.D.N.Y. Feb. 23, 2010) (Mutual mistake may not be asserted as a defense by an employer seeking to avoid its obligations under a collective bargaining agreement to contribute to a multiemployer fund); Bricklayers and Allied Craftworkers Local 2 v. C.G. Yantch, Inc., 316 F. Supp. 2d. 130 (N.D.N.Y. 2003); Construction Industry Laborers Pension Fund v. Explosive Contractors, 2013 WL 3984371 (D. Kan. Aug. 1 2013); Gay v. Brencorp, 2011 WL 3794651 (M.D. Fla. Aug. 26, 2011).

25. See Restatement (Second) of Contracts Section 152 (1979) (providing that if a "mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performance, the contract is voidable by the adversely affected party, unless the adverse party bears the risk of the mistake,") quoted in Cross v. Bragg, supra, n. 5. See also Bricklayers and Allied Craftsworkers Local 2 v. C G Yantch, supra, n. 24.

26. Under Restatement of Contracts Section 154, a party bears the risk of mistake when: (i) the risk is allocated to it under the agreement of the parties; or (ii) the party was aware at the time that the contract was made that it had limited knowledge with respect to the facts to which the risk related but treated that limited knowledge as sufficient; or (iii) to the party by a court because it was reasonable under the circumstances to do so, cited in Anco v. Acco Brands., 2012 WL 774945(N.D. Ill. Mar. 7, 2012); Lee v. Equity Properties Asset Management, 2015 WL 6956556 (M.D. Fla. Nov. 10, 2015); Eastern Airlines Inc. v. Air Line Pilots Association, Int'l., 861 F. 2d 1546, 1551 (11th Cir. 1988).

27. Dairy Fresh Corp. v. Poole, 108 F. Supp. 2d 1344 (S.D. Ala. 2000).

28. Operating Engineers Local 324 Fringe Benefit Fund v. Rieth- Riley Construction Company, 2023 WL 4409096 (E..D. Mich. July 6, 2023); Cincinnati, I & W. R. Co. v. Indianapolis Union Ry. Co., 36 F. 2d 323, 324 (6th Cir. 1929). See also Restatement (Second) of Contracts Section 151, cmt (b) 384 (1981), cited in Fashion Affiliates, supra, n. 15 for the proposition that it is "well settled that an agreement predicated on a mutual mistake of law can be the subject of rescission." Cf. Lerra v. Monsanto Corp., 521 F. Supp. 1257 (D. Mass. 1981) (The effect of proving mutual mistake is rescission of the contract, not reformation) and Berardi v. Drexel University, 58 EBC 2399, 2014 WL 219942 (E.D. Pa., May 27, 2014); Appeal of Assoc. Elec. Cooperatives, Inc.,

867 F. 2d 625 (D.C. Cir. 1989) (A contract may be rescinded if the contracting parties entertained a material mistake of fact that went to the heart of the bargain.) For an illustration of a rescission of a contract because of a mutual mistake about the scope of coverage under a group policy, see Ramsey v. Chubb Life, supra, n. 5. Cf. Krumme v. Westpointt Stevens, 143 F. 3d 71 (2d Cir. 1998) (not rescinding a contract, where rescission would create a windfall for plaintiffs).

29. Operating Engineers Local 324 Fringe Benefit Fund v. Rieth-Riley Construction Company, supra, n. 28; Trustees of Michigan Regional Council of Carpenters Employee Benefits Fund v. Fox Bros. Co., 2005 WL 8155051 at *11 (E.D. Mich. May 23, 2005).

30. Amara v. Cigna Corp., supra, n. 5.

31. McCutcheon v. Colgate Palmolive Co., 481 F. Supp. 3d 252 (S.D.N.Y. 2020). See also, Cross v. Bragg, supra, n. 5 and Audio Fidelity Corp. v. Pension Benefit Guaranty Corp., 624 F. 2d 513 (4th Cir. 1980) (In limited circumstances, a court is entitled to reform an ERISA plan to correct a mutual mistake.); J.P. Morgan Chase Bank, N.A. v. Winget, 602 Fed. App'x 246 (6th Cir. 2015) ("Reformation is permitted only in very limited circumstances. Among those is the parties' mutual mistake."); Pearce v. Chrysler LLC Pension Plan, supra, n. 7.

32. Simkin v. Blank, 968 N.E. 2d 459, 19 NY 3d 46, 52 (2012); MV Realty PBC, LLC v. Innovatus Capital Partners, LLC, 2019 WL 7293868 (2d Cir, Dec. 30, 2019). Cf. Restatement (Second) of Contracts Section 152: "In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise."

33. See, for example, Brown v. Equitable Life Assurance Co. of U.S., 766 F. Supp. 928, 932 (D. Kan. 1991) (parol evidence is admissible to show that the purported agreement is not the true one by reason of the parties' mutual mistake).

34. 163 F. 3d 411 (7th Cir. 1998), cert. den. 526 U.S. 1087(1999). See also, Marlowe v. Bottarelli, 938 F. 2d 807, 812 (7th Cir. 1991); Malloy v. Ameritech, 2000 WL 35525477 (N.D. Ill. Feb. 7, 2000).

35. 61 F. 3d 1437(9th Cir. 1995). See also, Tatum v. R.J. Reynolds Tobacco, 2013 WL 692832 (M.D.N.C. Feb. 25, 2013) (The goals of ERISA must not be compromised absent clear and convincing evidence of mutual mistake or scrivener's error) and Airline Pilots Association v. Shuttle, Inc., supra, n. 7 ("In deciding whether to reform a plan in equity, courts have considered ERISA's goals along with other equitable factors."). See also, Central Pennsylvania Teachers Pension Fund v. McCormick Dray Line, supra, n. 24 (Reforming a contract for mutual mistake creates "a tension with the statutory purpose of ERISA."); Luciano v. TIAA CREF, supra, n. 8. Cf. Blackshear v. Reliance Standard Life Insurance Co., 509 F. 3d 634 (4th Cir. 2007), abridged on other grounds as stated in Williams v. Metro. Life Ins. Co., 609 F. 3d 622, 630 (4th Cir. 2010) (One of the goals of ERISA is "ensur[ing] that an employee's rights and obligations can be readily ascertained from plan documents".)

36. (3d Cir. 1992). Murata was followed in Waters v. Wells Fargo & Co. Cash Balance Plan, 2020 WL 7841163 (D.N.J. Dec. 30, 2020).

37. Supra, n. 24. McCormick Dray Line, Inc. was followed in Luciano v. TIAA-CREF, supra, n. 8.

38. Meza v. General Battery Corporation, 908 F. 2d 1262 (5th Cir. 1990); Citibank NA v. Morgan Stanley & Co. Int'l. PLC, 724 F. Supp. 2d 407, 416 (S.D.N.Y. 2010) ("The burden upon a party seeking reformation is a heavy one since it is presumed that a deliberately prepared and executed written instrument accurately reflect the true intention

of the parties.") See also, George Backer Management Corp. v. Acme Quilting Corp., 46 NY 2d 211, 219(NY 1978) (evidence of a very high order is required to overcome the "heavy presumption" that a deliberately prepared and executed agreement reflects the manifest intent of the parties), quoted in MV Realty PBC, LLC v. Innovatus Capital Partners, LLC. supra, n. 32; Barbagallo v. Marcum, LLP, 820 F. Supp. 2d 429 (E.D.N.Y. 2011) (same); Earl T. Sydney and Sydney Sheet Metal, Inc. v. Sheet Metal Workers Pension Fund, 2017 WL 507210 at *11 (D. Mass. Feb. 7, 2017) (courts require "strong evidence" to reform an ERISA plan).

39. McCutcheon v. Colgate Palmolive Co., supra, n. 31.

40. *Id.*, Healy v. Rich Products Corp., supra, n. 7; Board of Trustees of University of Illinois v. Insurance Co. of Ireland, Ltd., 969 F. 2d 329, 332 (7th Cir. 1992); Silverman v. Miranda, supra, n. 3; Airline Pilots Association v. Shuttle, supra, n. 7; Meza v. General Battery Corp., supra, n. 38; Royal Aviation, Inc. v. Aetna Casualty and Surety Co., 770 F. 2d 1298, 1302 (5th Cir. 1985); Aetna Insurance Co. v. Paddock, 301 F. 2d. 807,811 (5th Cir. 1962); Cross v. Bragg, supra, n. 5; Audio Fidelity Corp. v. PBGC, supra, n. 31; Collins v. Harrison-Bode, 303 F. 3d 429, 435 (2d Cir. 2002); Rispler v. Sol Spitz Co., 418 F. Supp. 2d 82 (E.D.N.Y. 2005); Brown v. Equitable Life Assurance Co. of US, supra, n. 33; Torre v. Federated Mutual Ins. Co., supra, n. 12; Humphrey v. United Way of Texas Gulf Coast, 2010 WL 4791486 (S.D. Tex. Nov. 15, 2010). Cf. Patton v. Mid Continent Systems, Inc., 841 F. 2d 742, 746 (7th Cir. 1988) ("The party alleging mutual mistake must convince the judge and convince him clearly."); and Seebold v. Halmar Constr. Corp., 146 A.D. 2d 886, 536 N.Y.S. 2d 871-872 (3d Dept. 1989) (applying New York law, i.e., to reform a contract, mutual mistake must be established by clear and convincing evidence). In Missouri, the standard is "clear, cogent, and convincing," although as a practical matter it is not clear under what circumstances that standard would be more demanding than the clear and convincing standard. Silgan Containers Corp. v. Sheet Metal Workers Int'l. Assn. Local Union No. 2, 2015 WL 13298568 (W.D. Mo. May 1, 2015); Lawyers Title Ins. Co. v. Golf Links Development Corp., supra, n. 7; United States v. Arthur, et. al., 109 AFTR 2d 2012-1939 (E.D. Mo. 2012).

41. Amara v. Cigna Corp., supra, n. 3, citing 2 *Dobbs, Law of Remedies*, §11.06(1) at 743; CNA Insurance Group v. Nationwide Mutual Ins. Co., 2000 WL 288241 at *9 (E.D. Pa., March 8, 2000); International Union v. Murata Erie North America supra, n. 36; Stanford v. Foamex, 2010 WL 348865 (E.D. Pa. Aug. 30, 2010); Central Pennsylvania Teachers Pension Fund v. McCoriack Dray Line, supra, n. 25; Schutte III v. Maleski, 1993 WL 183845 (E.D. Pa. May 27, 1993); Waters v. Wells Fargo & Co. Cash Balance Plan, supra, n. 36.

42. McCutcheon v. Colgate Palmolive Co., supra, n. 31.

43. Young v. Verizon's Bell Atlantic Cash Balance Plan, 615 F. 3d 808, 820 (7th Cir. 2010).

44. Loewenson v. London Market Companies, 351 F. 3d 58 (2d Cir. 2003); Rispler v. Sol Spritz Co., supra, n. 40 Scarangella v. Group Health, Inc., supra, n. 1; D'Lorio v. Winebow, Inc., supra, n. 5.

45. Silverman v. Miranda, supra, n. 3; FSP, Inc. v. Societe Generale, 2005 WL 475986 at *15 (S.D.N.Y. Feb. 28, 2005).

46. Tyll v. Stanley Black & Decker Life Ins. Program and Aetna Life Insurance Company, 2018 WL 4356747 (D. Sept. 11, 2018); Barbagello v. Marcus, LLP, supra, n. 38 (To satisfy FRCP §9(b), moving party must plead both the nature of the mistake and when it occurred). See also, Citibank, N.A. v. Morgan Stanley & Co. Intl., supra, n. 38; Netherby Ltd. v. GV Licensing, Inc., 1993 WL 463679 at *5 (S.D.N.Y. Nov. 9, 1993).

47. Luciano v. TIAA CREF, supra, n. 8. (Equitable reformation may be raised as an affirmative defense); Waters v. Wells Fargo & Co. Cash Balance Plan, supra, n. 36; MV Realty PBC, LLC v. Innovatis Capital Partners, LLC, supra, n. 32. Anco v. Arco Brands., supra, n. 26 (There is precedent in the common law for asserting mutual mistake of fact as an affirmative defense). See also, Harris, N.A. v. Acadia Investment, LC, 2010 WL 4781458 at *5 (N.D. Ill. Nov. 16, 2010); Martinez v. Pilgrim's Pride Corp., supra, n. 16.

48. McCutcheon v. Colgate Palmolive Co., supra, n. 31; Scarangella v. Group Health, Inc., supra, n. 1; Powermat Techs, Ltd. v. Belkin Intl., Inc. 2020 WL 2892385 at *7 (S.D.N.Y. April 2, 2020) (reformation is a counterclaim by defendants, while mutual mistake is an affirmative defense). Keane v. Zitomer Pharmacy, supra, n. 24 (Mutual mistake is an affirmative defense.)

49. Young v. Verizons Bell Atlantic Cash Balance Plan, supra, n. 43 and Stanford v. Foamex, L.P., supra, n. 41.

50. See, for example, American Annuity Group v. Guarantee Reassurance Corp. Liquidating Trust, 55 Fed. Appx. 255 (6th Cir. 2003) (A counterclaim based on reformation under the doctrine of unilateral or mutual mistake was time barred by the applicable Florida statute of limitations) and American 1 Credit Union v. Puckett, 2020 WL 2836308 (E.D. Mich. May 31, 2020) (A counterclaim for equitable reformation was time barred by the Michigan statute of limitations for contract actions.)

51. Cross v. Bragg, supra, n. 5. ("By its very nature, mutual intent requires a manifestation of will from both parties"), and citing Restatement (Second) of Contracts Section 155, cmt. a, which requires "some agreement between the parties prior to the writing" for there to be court reformation due to mutual mistake); Blackshear v. Reliance Standard Life Ins. Co., supra, n. 35. ("A mutual mistake occurs when the intention of the parties is identical at the time of the transaction but the written agreement does not express that intention because of that error," quoting 27 Williston & Lord, A Treatise on the Law of Contracts, §70.93 (4th ed. 2007); "A mutual mistake occurs when both parties to a bilateral transaction and their acts do not in fact accomplish their mutual intentions," 21 NY 2d Jur. Contracts §121 (1982), quoted in Healy v. Rich Products, Corp., supra, n. 7; Allen v. West Point Pepperell, Inc., 945 F. 2d 40, 46 (2d Cir. 1991) (Mutual mistake defense, if available, requires a showing that "both parties shared the same erroneous belief as to a material fact"); Keane v. Zitomer Pharmacy, Inc., supra, n. 24 (same); Investors Ins. Co. of America v. Dorinco Reinsurance Co., supra, n. 5. (A plaintiff is required to show that both he/she and the defendants shared the same mutual belief); Anita Foundation, Inc. v. ILGWU National Retirement Fund, supra, n. 13. (Under the law of contracts, a mutual mistake involves the belief of both parties to a contract that is not in accordance with the facts, citing Restatement (Second) of Contracts), Section 151 (1981).

52. Int'l Multifoods Corp v. Commercial Union Ins. Co., 98 F. Supp. 2d 498, 507 (S.D.N.Y. 2000) (No grounds for reformation where a party offers no contemporaneous evidence of the other contracting party's understanding); Silverman v. Miranda, supra, n. (same); Anita Foundations, Inc. v. ILGWU National Retirement Fund, supra, n. 13 (For equitable reformation to apply, the mistake or erroneous belief must relate to the facts as they exist at the time of making of the contract.); New York State Elec. & Gas Corp. v. Saranac Power Partners, 117 F. Supp. 2d 211, 253, n. 79 (N.D.N.Y. 2000), aff'd 267 F. 3d 128 (2d Cir. 2001) (The mutual mistake defense is properly applied "[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances."); Rispler v. Sol Spitz Co., Inc., supra, n.40.

53. Equal Employment Opportunity Comm. v. Home Ins. Co., 672 F. 2d 252, 257 (2d Cir. 1982) ("In light of the court's obligation to treat all reasonable inferences against the nonmoving party, summary judgment is rarely appropriate where the moving party's state of mind is a material fact."). See also, 10A Charles Wright, Arthur Miller, and Mary Kay Kane, Federal Practice and Procedure §2730 at 238 (summary judgment on state of mind is often inappropriate because such a determination usually entails the drawing of factual inferences as to which reasonable [persons] might differ."), quoted in Allen v. West Point Pepperill, Inc., 908 F. Supp. 1209 (S.D.N.Y. 1995).

54. Healy v. Rich Products, Corp., supra, n. 7; Marine Transportation Lines, Inc, v. International Org, of Masters, Mates & Pilots, 878 F. 2d 41, 45, cert den. 493 U.S. 1022 (1990); Fisher v. Aetna Life Ins. Co., 32 F.4th 124 (2d Cir, 2022); W. Alton Jones Foundation v. Chevron USA, Inc. 97 F. 3d 29 (2d. Cir.1996); Manning v. Energy Conversion Devices, Inc., 13 F. 3d 606 (2d Cir. 1994).

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