

18-1591

Sullivan-Mestecky v. Verizon

1 In the
2 United States Court of Appeals
3 For the Second Circuit
4

5
6 AUGUST TERM, 2019

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8 ARGUED: MAY 15, 2019

9 DECIDED: JUNE 1, 2020

10
11 No. 18-1591-cv
12

13 KRISTINE SULLIVAN-MESTECKY, individually and as the beneficiary of the
14 life insurance policy of Kathleen Sullivan, deceased,
15 *Plaintiff-Appellant,*

16
17 *v.*

18
19 VERIZON COMMUNICATIONS INC. and THE PRUDENTIAL INSURANCE
20 COMPANY OF AMERICA,
21 *Defendants-Appellees.**
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24 Appeal from the United States District Court
25 for the Eastern District of New York.
26

27
28 Before: WALKER, CABRANES, and HALL, *Circuit Judges.*
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* The Clerk of the Court is respectfully requested to amend the caption as set forth above.

1 Plaintiff-Appellant Kristine Sullivan-Mestecky brought this action
2 individually and as the beneficiary of the life insurance policy of her mother,
3 Kathleen Sullivan, under the Employee Retirement Income Security Act of 1974
4 (ERISA), 29 U.S.C. § 1001 *et seq.*, following the denial of Sullivan's life insurance
5 benefits by Defendants-Appellees Verizon Communications Inc. (Verizon) and
6 The Prudential Insurance Company of America (Prudential). On appeal, Sullivan-
7 Mestecky argues that the district court (Sandra J. Feuerstein, *Judge*) erred in
8 granting summary judgment to Verizon and Prudential on her claim for benefits
9 under ERISA § 502(a)(1)(B) and in dismissing her fiduciary breach claim under
10 ERISA § 502(a)(3). We conclude that the district court did not err in dismissing
11 Sullivan-Mestecky's § 502(a)(1)(B) claim against both defendants and her
12 § 502(a)(3) claim against Prudential. We conclude, however, that the district court
13 did err in dismissing her § 502(a)(3) claim against Verizon. We therefore AFFIRM
14 the district court's dismissal of Sullivan-Mestecky's § 502(a)(3) claim against
15 Prudential and its ruling granting Verizon and Prudential summary judgment on
16 Sullivan-Mestecky's § 502(a)(1)(B) claim, VACATE the district court's dismissal of
17 Sullivan-Mestecky's § 502(a)(3) claim against Verizon, and REMAND for further
18 proceedings consistent with this opinion.

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JOHN M. WALKER, JR., *Circuit Judge*:

3 Plaintiff-Appellant Kristine Sullivan-Mestecky brought this action
4 individually and as the beneficiary of the life insurance policy of her mother,
5 Kathleen Sullivan, under the Employee Retirement Income Security Act of 1974
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12 ERISA § 502(a)(3). We conclude that the district court did not err in dismissing
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15 did err in dismissing her § 502(a)(3) claim against Verizon. We therefore AFFIRM
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21

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BACKGROUND

23

24

Kathleen Sullivan was employed by the New York Telephone Company, a predecessor entity to Verizon, from 1970 until 1978, during which period her

1 annual income was \$18,600. Sullivan received various benefits from the New York
2 Telephone Company and other predecessor companies of Verizon, both
3 individually and through her husband, who was also employed by the New York
4 Telephone Company. Upon Sullivan's husband's death in January 2005, Verizon
5 terminated all of Sullivan's benefits, which Sullivan challenged over subsequent
6 years.

7 Pursuing her challenge, in June 2011, Sullivan contacted the Verizon
8 Benefits Center, which at that time was administered on behalf of Verizon by the
9 Aon Hewitt Company. The Verizon Benefits Center responded by sending
10 Sullivan a "Retirement Enrollment Worksheet" on Verizon letterhead.¹ The
11 worksheet said that Sullivan was eligible for life insurance option "1 x Pay" of
12 Verizon's Group Life Insurance plan, which provided coverage in the amount of
13 \$679,700.² Following the instructions on the worksheet, Sullivan called the
14 Verizon Benefits Center to enroll in "1 x Pay."

15 After enrolling and designating her daughter, Kristine Sullivan-Mestecky,
16 as the beneficiary of the life insurance policy, Sullivan received various mailings
17 from Verizon, as plan administrator, that confirmed the existence and coverage
18 amount of the policy. Some of these mailings prompted Sullivan to call the
19 Verizon Benefits Center for more information. On these calls, Sullivan expressed
20 her understanding, and even surprise, about the extent of her benefits. However,
21 Center representatives repeatedly confirmed the existence and coverage amount
22 of the policy. As one example, during a call on December 19, 2011, Sullivan told a

¹ App'x at 346.

² *Id.* at 349.

1 representative, “And hell. I have benefits I didn’t even know existed.”³ The
2 representative informed Sullivan, “Okay what I’m showing here, your retiree—
3 retiree life is currently [\$]679,700.”⁴ The representative confirmed the coverage
4 amount three more times on the call, explaining further how the amount would
5 decline as Sullivan aged.

6
7 Sullivan’s calls raised questions internally at Aon Hewitt about her coverage
8 amount. On July 26, 2011, one Aon Hewitt employee wrote to a colleague that
9 Sullivan “was not salaried when active she was hourly. . . . The dollar amount
10 seems high is there a possibility that [our software] could be giving a higher figure
11 than what [Sullivan] is eligible for?”⁵ The next day, another Aon Hewitt employee
12 wrote back that Sullivan’s annual income had been “\$970920,” approximately 52
13 times her actual annual income, and confirmed (erroneously) that the software
14 “shows the correct amount of life insurance.”⁶ It turned out that Aon Hewitt had
15 coded Sullivan’s annual \$18,600 income as her weekly income, but did not catch
16 the mistake until after she died.

17
18 Sullivan-Mestecky, understanding herself to be the beneficiary of a
19 generous life insurance policy, allowed her aging mother to live rent-free at her
20 home, covered her mother’s living expenses, and paid off her mother’s debts.
21 Sullivan-Mestecky also took an extended unpaid leave of absence from work to

³ *Id.* at 362.

⁴ *Id.* at 363.

⁵ *Id.* at 383.

⁶ *Id.*

1 care for Sullivan while Sullivan was living with her. On November 17, 2012,
2 Sullivan died. Based on Sullivan's age at the time of her death, Sullivan-Mestecky
3 believed that her life insurance policy was worth \$582,600. Sullivan-Mestecky
4 submitted a claim to Prudential, as claims administrator, for \$582,600 in death
5 benefits under the policy. In response, Prudential paid \$11,380 for Sullivan's
6 funeral expenses and sent Sullivan-Mestecky a check for \$20, which Prudential
7 said was the remainder of Sullivan's death benefits.

8
9 Sullivan-Mestecky disputed the non-payment of her benefits, which she
10 expected to be in line with what her mother had been told. Verizon responded
11 that "Hewitt operating under the title Verizon Benefits Center" had mistakenly
12 calculated Sullivan's large coverage amount and thus "provided Ms. Sullivan with
13 incorrect information" about her life insurance policy.⁷ Verizon and Prudential
14 rejected Sullivan-Mestecky's claim. Sullivan-Mestecky then filed this suit in state
15 court. The defendants removed the case to the Eastern District of New York, and
16 Sullivan-Mestecky filed an amended complaint adding claims under
17 §§ 502(a)(1)(B) and 502(a)(3) of ERISA. On July 7, 2016, the district court granted
18 Verizon's and Prudential's motion to dismiss the § 502(a)(3) claim on the
19 pleadings, under Rule 12(b)(6).⁸ And on May 16, 2018, the district court granted
20 summary judgment to Verizon and Prudential on the § 502(a)(1)(B) claim.

⁷ *Id.* at 334–35.

⁸ In the same opinion, the district court found that most of Sullivan-Mestecky's state law claims were preempted by ERISA and dismissed them. It allowed Sullivan-Mestecky to pursue one state law claim based on an alleged settlement agreement between Sullivan and Verizon. Because Sullivan-Mestecky could not locate the alleged settlement agreement during discovery,

DISCUSSION

On appeal, Sullivan-Mestecky challenges both decisions. “We review a grant of summary judgment de novo, examining the evidence in the light most favorable to, and drawing all inferences in favor of, the non-movant.”⁹ Similarly, “[w]e review de novo a district court’s dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff’s favor.”¹⁰

I. Sullivan-Mestecky’s § 502(a)(1)(B) claim.

Section 502(a)(1)(B) of ERISA empowers “a participant or beneficiary” to bring a civil action “to recover benefits due to him under the terms of his plan.”¹¹ After reviewing the plan documents and communications between Sullivan, Verizon, and Prudential that emerged during discovery, the district court concluded that the terms of Verizon’s Group Life Insurance plan did not entitle Sullivan-Mestecky to benefits in excess of \$11,400 and granted summary judgment in favor of Verizon and Prudential. On appeal, Sullivan-Mestecky argues that the

the district court ultimately granted summary judgment for Verizon on that claim. None of the state law claims are at issue in this appeal.

⁹ *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 109 (2d Cir. 2003) (internal quotation marks omitted).

¹⁰ *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).

¹¹ 29 U.S.C. § 1132(a)(1)(B).

1 district court erred in allowing Verizon and Prudential to reduce her mother's
2 benefits after they had vested upon her death.

3 Sullivan-Mestecky misunderstands the district court's ruling. The Group
4 Life Insurance plan expressly granted discretionary authority to Verizon and
5 Prudential to interpret the plan's terms. Because the plan granted such authority
6 to Verizon and Prudential, the district court could not overturn their interpretation
7 of the plan unless it was "arbitrary and capricious."¹² The district court found that
8 Verizon and Prudential's interpretation of the plan—that Sullivan-Mestecky was
9 entitled to no more than \$11,400—was based on substantial evidence and not
10 arbitrary or capricious. Notwithstanding the clerical error reflected on the
11 Retirement Enrollment Worksheet and other documents, Section 5.4.1 of the plan
12 clearly explained that its "1 x Pay" option entitles beneficiaries to a percentage of
13 the participant's annual salary, to be reduced as the participant ages. None of the
14 mailings Sullivan received from Verizon or Prudential purported to displace
15 Section 5.4.1. Under the terms of Section 5.4.1, Sullivan-Mestecky was entitled to
16 a fraction of Sullivan's annual income of \$18,600. Verizon and Prudential chose,
17 in their discretion, to interpret Sullivan's plan consistent with Section 5.4.1, not
18 with her Retirement Enrollment Worksheet and other documents. Deferring to
19 that reading, the district court found that Verizon and Prudential provided
20 Sullivan-Mestecky with the benefits that the plan had always promised: \$11,400.

21 On appeal, Sullivan-Mestecky does not challenge Verizon and Prudential's
22 interpretation of Section 5.4.1 or expressly take the position that their
23 interpretation of the plan as a whole was arbitrary and capricious. Instead, she

¹² *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 441 (2d Cir. 1995) (internal quotation marks omitted).

1 implies that the terms of the plan entitled her to the more generous death benefits
2 and argues that Verizon and Prudential's interpretation resulted in an
3 impermissible retroactive amendment to Sullivan's plan after her death. She cites
4 *Blackshear v. Reliance Standard Life Ins. Co.*,¹³ but *Blackshear* is inapposite. In
5 *Blackshear*, the Fourth Circuit found that a fiduciary could not correct a clerical
6 error that appeared in a participant's ERISA plan and summary plan description
7 after that participant died, causing the benefits as set forth in the plan to vest with
8 the beneficiary.¹⁴ The outcome in *Blackshear* was premised on the fact that the
9 erroneous terms in the plan and its description unambiguously provided for the
10 benefits at issue. Here, terms limiting Sullivan's death benefits to a percentage of
11 her annual income were accurately stated in the plan and its description. The
12 generous benefits Sullivan-Mestecky seeks never vested under the terms of the
13 plan. We find no reason to disturb the district court's grant of summary judgment
14 on Sullivan-Mestecky's § 502(a)(1)(B) claim.

15 **II. Sullivan-Mestecky's § 502(a)(3) claim.**

16 Sullivan-Mestecky's § 502(a)(3) claim requires an entirely different analysis
17 because, where circumstances allow, ERISA provides for equitable remedies that
18 transcend the plan. Section 502(a)(3) authorizes a "participant, beneficiary, or
19 fiduciary" of an employee benefit plan to bring a civil action to obtain "appropriate
20 equitable relief" to redress violations of ERISA Subchapter I, including, as relevant
21 here, fiduciary breaches.¹⁵ Without addressing whether Verizon and Prudential

¹³ 509 F.3d 634 (4th Cir. 2007).

¹⁴ *Id.* at 641–42.

¹⁵ 29 U.S.C. § 1132(a)(3).

1 had breached their fiduciary duties under ERISA Subchapter I, as opposed to the
2 terms of Sullivan’s plan and summary plan description, the district court
3 dismissed the § 502(a)(3) claim for failure to state a claim under Rule 12(b)(6) on
4 the basis that Sullivan-Mestecky sought an impermissible remedy. The district
5 court concluded that Sullivan-Mestecky, despite framing her claim as one for
6 injunctive relief, could be “entirely compensated by damages allowing her to
7 recover the value of [Sullivan’s] death benefits” and had therefore brought a claim
8 for money damages rather than for equitable relief.¹⁶

9 Sullivan-Mestecky argues, however, that the district court’s classification of
10 her claim as one for damages rather than for equitable relief conflicts with the
11 Supreme Court’s decision in *CIGNA Corp. v. Amara*.¹⁷ She contends that *Amara*
12 undermines the district court’s reasoning with its holding that “the fact that . . .
13 relief takes the form of a money payment does not remove it from the category of
14 traditionally equitable relief” because “[e]quity courts possessed the power to
15 provide relief in the form of monetary ‘compensation.’”¹⁸ *Amara* details three
16 different kinds of equitable relief that historically provided a “kind of monetary
17 remedy” even “prior to the merger of law and equity”¹⁹: estoppel, surcharge, and
18 reformation.²⁰ Sullivan-Mestecky argues that her claim satisfies the requirements
19 of each. For the reasons we now set forth, we agree that Sullivan-Mestecky is

¹⁶ *Sullivan-Mestecky v. Verizon Commc’ns Inc.*, No. 14-CV-1835, 2016 WL 3676434, at *25 (E.D.N.Y. July 7, 2016).

¹⁷ 563 U.S. 421 (2011).

¹⁸ *Id.* at 441.

¹⁹ *Id.* at 442.

²⁰ *Id.* at 440–43.

1 appropriately seeking equitable relief and hold that her § 502(a)(3) claim can
2 proceed against Verizon but not Prudential.

3 A. Appropriate Equitable Relief

4 1. Estoppel

5 The Restatement (Second) of Contracts provides that promissory estoppel is
6 an appropriate equitable remedy when a “promisor should reasonably expect [his
7 promise] to induce action or forbearance on the part of the promisee,” the promise
8 actually “does induce such action or forbearance,” and “injustice can be avoided
9 only by enforcement of the promise.”²¹ We have previously found that “principles
10 of estoppel can apply in ERISA cases,” albeit only “under extraordinary
11 circumstances.”²² We have required a showing of extraordinary circumstances “to
12 lessen the danger that commonplace communications from employer to employee
13 will routinely be claimed to give rise to employees’ rights beyond those contained
14 in formal benefit plans.”²³ As a result, to make a claim for estoppel under
15 § 502(a)(3), a plaintiff must plausibly allege five elements: “(1) a promise, (2)
16 reliance on the promise, (3) injury caused by the reliance, . . . (4) an injustice if the
17 promise is not enforced,” and (5) extraordinary circumstances.²⁴

²¹ Restatement (Second) of Contracts § 90(1) (Am. Law Inst. 1981).

²² *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 78 (2d Cir. 1996).

²³ *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 151 (2d Cir. 1999).

²⁴ *Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst.*, 404 F.3d 167, 172–73 (2d Cir. 2005) (quoting *Schonholz*, 87 F.3d at 79).

1 The district court held that Sullivan-Mestecky had not plausibly alleged the
2 requisite elements of an ERISA estoppel claim. It found that, “[t]o the extent
3 plaintiff relies upon alleged oral representations by defendants as the basis for her
4 promissory estoppel claim, her claim fails ‘because oral promises are
5 unenforceable under ERISA and therefore cannot vary the terms of an ERISA
6 plan.’”²⁵ It then determined that Sullivan-Mestecky’s “amended complaint is
7 bereft of any factual allegations from which ‘extraordinary circumstances’ may
8 reasonably be inferred” because none of the documents sent by Verizon or
9 Prudential “were sent in order to induce Sullivan or plaintiff to take any particular
10 action for the benefit of the defendant who sent the particular document.”²⁶

11 We disagree with the district court’s reasoning in two respects. First,
12 although the district court correctly recited the law of this circuit that “oral
13 promises are unenforceable under ERISA,”²⁷ it went beyond that proposition in
14 declining to consider whether the Verizon Benefits Center’s repeated oral
15 representations collectively supported Sullivan-Mestecky’s estoppel claim as an
16 extraordinary circumstance. There is daylight between considering an oral
17 representation simply as the requisite promise in an estoppel analysis and
18 considering an oral representation as a fact exacerbating, if not supplying, the
19 extraordinary circumstances under which the requisite promise was made, was
20 relied upon, caused injury, or would lead to injustice if unenforced. We see no

²⁵ *Sullivan-Mestecky*, 2016 WL 3676434, at *30 (quoting *Perreca v. Gluck*, 295 F.3d 215, 225 (2d Cir. 2002)).

²⁶ *Id.* at *30.

²⁷ *Perreca*, 295 F.3d at 225.

1 conflict between considering as an extraordinary circumstance the Verizon
2 Benefits Center’s oral misrepresentations, here coupled with misrepresentations
3 in written documents, and ERISA’s demand that “[e]very employee benefit
4 plan . . . be established and maintained pursuant to a written instrument.”²⁸ We
5 therefore examine the Verizon Benefits Center’s repeated oral assurances to
6 Sullivan about the value of her life insurance policy in determining whether
7 Sullivan-Mestecky has pled extraordinary circumstances.

8 Second, we take issue with the district court’s implication that extraordinary
9 circumstances arise only when the requisite promise was made for the purpose of
10 inducing certain employee conduct. In *Devlin v. Empire Blue Cross and Blue Shield*,
11 we expressly disavowed the existence of such a rule and left open the possibility
12 that “extraordinary circumstances other than intentional inducement would
13 suffice” for an ERISA estoppel claim.²⁹ And while Verizon highlights our
14 statement in *Greifenberger v. Hartford Life Ins. Co.* that “the ‘extraordinary
15 circumstances’ necessary [for] equitable estoppel in the context of an ERISA plan
16 require conduct tantamount to fraud,”³⁰ the Supreme Court has long recognized
17 that “[f]raud has a broader meaning in equity (than at law) and intention to
18 defraud or to misrepresent is not a necessary element.”³¹ “Fraud” in a “court of
19 equity properly includes all acts, omissions and concealments which involve a
20 breach of legal or equitable duty, trust, or confidence, justly reposed, and are

²⁸ 29 U.S.C. § 1102(a)(1).

²⁹ 274 F.3d 76, 86 (2d Cir. 2001).

³⁰ 131 F. App’x 756, 759 (2d Cir. 2005) (non-precedential summary order).

³¹ *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193 (1963).

1 injurious to another.”³² The breadth of courts’ power in equity has led at least one
2 circuit, the Sixth, to allow ERISA estoppel claims regarding “such gross negligence
3 as to amount to constructive fraud.”³³ We now join the Sixth Circuit in finding
4 that estoppel can be plausibly pled as an appropriate equitable remedy by an
5 ERISA plaintiff alleging gross negligence in the absence of intentional inducement.

6 Sullivan-Mestecky has plausibly pled the five elements required to make a
7 claim for estoppel against Verizon. In June 2011, Verizon’s agent sent Sullivan the
8 Retirement Enrollment Worksheet indicating that Sullivan was eligible for a life
9 insurance policy valued at \$679,700. Following that initial document, Verizon’s
10 agents sent Sullivan a Retirement Confirmation of Enrollment, a Confirmation of
11 Coverage on Demand, a Beneficiary Confirmation Notice, and a W-2, all of which
12 represented that Verizon was providing her with this generous life insurance
13 policy.³⁴ These written documents, taken together, constitute and reflect the
14 promise that Sullivan-Mestecky seeks to enforce.

15 Sullivan-Mestecky has amply pled that reliance and injury followed upon
16 this promise. In response to Verizon’s written promise, Sullivan enrolled in
17 Verizon’s offered plan, paid taxes based on the plan’s taxable imputed income,
18 and forwent procuring an alternative life insurance policy.³⁵ Sullivan-Mestecky
19 also paid her mother’s debts and took an unpaid leave of absence from work to
20 take care of her mother, anticipating that her short-term financial losses would be

³² *Id.* at 194 (internal quotation marks omitted).

³³ *Bloemker v. Laborers’ Local 265 Pension Fund*, 605 F.3d 436, 444 (6th Cir. 2010).

³⁴ App’x at 179–82.

³⁵ *Id.* at 179, 183.

1 more than covered by Sullivan’s life insurance payout. It would be unjust to allow
2 these losses and forbearances, traceable to Verizon’s gross negligence, to be borne
3 by Sullivan and her daughter Sullivan-Mestecky, both of whom believed Verizon’s
4 repeated misrepresentations. Altogether, Sullivan-Mestecky has satisfied the
5 standard requirements of promissory estoppel.

6 The final requirement of ERISA estoppel—extraordinary circumstances—is
7 also met here based on Verizon’s conduct amounting to gross negligence, as
8 follows. Verizon’s agents sent numerous mailings informing and assuring
9 Sullivan that she was entitled to a life insurance policy in the amount of \$679,000.
10 She relied on these representations only after diligently and repeatedly confirming
11 their veracity and meaning with the Verizon Benefits Center. On calls with the
12 Verizon Benefits Center, Sullivan expressed her surprise at the stated value of her
13 life insurance policy, effectively alerting Verizon to the fact that it may have
14 miscalculated the value. Not only did Sullivan draw attention to the high coverage
15 figure, but an Aon Hewitt employee flagged the policy amount, writing in an
16 email to a colleague that the amount seemed high and asking if the company’s
17 software was somehow computing the wrong amount. Another Aon Hewitt
18 employee then responded, erroneously, that the amount was correct. Instead of
19 opening an investigation that likely would have uncovered the clerical error that
20 led Sullivan and her daughter to believe that she had procured a generous life
21 insurance policy, Verizon representatives reassured Sullivan that her beneficiary
22 would receive, after the age discount, more than half a million dollars in death
23 benefits. It was only after Sullivan’s death, when the purchase of alternative life
24 insurance to support Sullivan-Mestecky was impossible, that Verizon attempted
25 to correct its clerical error. In contravention of what it had repeatedly and
26 unambiguously represented to Sullivan in writing and on calls, Verizon paid

1 Sullivan-Mestecky a total of \$11,400, less than two percent of what Verizon had
2 promised. Verizon's acts of gross negligence present circumstances far "beyond
3 the ordinary."³⁶ The persistence and size of Verizon's error, notwithstanding the
4 ample inquiry notice provided by Sullivan's calls to the Verizon Benefits Center,
5 were "remarkable."³⁷ We find that Sullivan-Mestecky satisfactorily pled
6 extraordinary circumstances.

7 That Sullivan-Mestecky pled estoppel as "appropriate equitable relief" is
8 sufficient to determine that the district court erred in dismissing her § 502(a)(3)
9 claim against Verizon. Still, we briefly address Sullivan-Mestecky's argument that
10 her § 502(a)(3) claim alternatively merits the remedy of surcharge or reformation.
11 While our circuit's law on these remedies is somewhat less developed than it is on
12 estoppel in the ERISA context, we believe that Sullivan-Mestecky also has
13 adequately pled facts meeting their requirements.

14 2. Surcharge

15 In *Amara*, also a § 502(a)(3) case, the Supreme Court described surcharge
16 historically as "relief in the form of monetary 'compensation' for a loss resulting
17 from a trustee's breach of duty."³⁸ *Amara* continued, "The surcharge remedy
18 extended to a breach of trust committed by a fiduciary" whose role is "analogous
19 to [that of] a trustee" and "encompass[ed] any violation of a duty imposed upon

³⁶ *Aramony*, 191 F.3d at 152.

³⁷ *Id.* (internal quotation marks omitted).

³⁸ 563 U.S. at 442.

1 that fiduciary.”³⁹ Inasmuch as ERISA imposes fiduciary duties on parties who
2 manage employee benefit plans,⁴⁰ the Supreme Court has recognized that “these
3 fiduciary duties draw much of their content from the common law of trusts, the
4 law that governed most benefit plans before ERISA’s enactment.”⁴¹ In this regard,
5 Sullivan-Mestecky’s § 502(a)(3) claim is dependent on her allegation of fiduciary
6 breach, specifically that Verizon and Prudential failed to act “with the care, skill,
7 prudence, and diligence under the circumstances then prevailing that a prudent
8 man acting in a like capacity and familiar with such matters would use,” as ERISA
9 requires.⁴² As outlined above, Sullivan-Mestecky plausibly pled that Verizon
10 breached its fiduciary duties through its gross negligence in its management of
11 Sullivan’s life insurance policy by consistently failing to “provide complete and
12 accurate information” about Sullivan’s “status and options” “in response to
13 [Sullivan’s] questions about plan terms and/or benefits.”⁴³ This fiduciary breach
14 is sufficient to support the equitable remedy of surcharge.⁴⁴

³⁹ *Id.*; see also *Morrissey v. Curran*, 650 F.2d 1267, 1282 (2d Cir. 1981) (“[W]e see no reason not to permit a surcharge, when warranted by the facts, against one occupying any fiduciary status.”).

⁴⁰ 29 U.S.C. § 1104 (entitled “Fiduciary duties”).

⁴¹ *Vanity Corp. v. Howe*, 516 U.S. 489, 496 (1996).

⁴² 29 U.S.C. § 1104(a)(1)(B).

⁴³ *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 8 (2d Cir. 1997) (internal quotation marks omitted) (describing ERISA fiduciaries’ duties).

⁴⁴ Like other circuits that have considered surcharge in ERISA cases post-*Amara*, we recognize a plaintiff’s non-procurement of alternative coverage as a loss resulting from a fiduciary’s material misrepresentation of the plaintiff’s extent of, or eligibility for, coverage. Joining those circuits, we think it appropriate for a plaintiff to seek relief in the amount of the

1 its fraudulent representations. Reforming the plan to accord with Sullivan's
2 reasonable expectations is an appropriate equitable remedy.⁴⁹

3 Although we find that Sullivan-Mestecky has plausibly pled circumstances
4 that would entitle her to "appropriate equitable relief" against Verizon under
5 § 502(a)(3), her arguments do not carry the same force against Prudential. Unlike
6 Verizon and its agents, Prudential sent only one letter to Sullivan, informing her
7 how the value of her policy would decrease as she aged. Neither Prudential nor
8 its agents fielded questions from Sullivan regarding her policy and repeatedly
9 misrepresented its benefits. We are reluctant to say that Prudential's single
10 mailing was even negligent. As the plan administrator, Verizon, not Prudential,
11 was responsible for assessing Sullivan's eligibility for and enrolling Sullivan in her
12 benefits plan. The core of Sullivan's dispute was therefore with Verizon. Even if
13 Prudential could have checked Verizon's work to confirm that Sullivan had been
14 properly enrolled, it had no duty to do so and any failure in that regard pales in
15 comparison to Verizon's gross negligence and does not rise to the level of
16 extraordinary circumstances or equitable fraud.

17 B. Fiduciary Breach

18 Unable to provide a compelling rationale for why Sullivan-Mestecky is not
19 able to pursue equitable relief, Verizon makes two arguments to support its denial
20 that it committed a fiduciary breach. Verizon first claims that its agents, not
21 Verizon itself, ran the Verizon Benefits Center and provided the misinformation

⁴⁹ Prudential suggests that granting Sullivan-Mestecky relief would require the reformation of the Group Life Insurance plan for all plan participants. Prudential, however, provides no authority for this suggestion, and we see no basis for adopting it.

1 about which Sullivan-Mestecky complains. Verizon then argues that, in any event,
2 our *In re DeRogatis* decision precludes liability for unintentional
3 misrepresentations when the pertinent terms of the employee benefits plan are
4 clear.⁵⁰ Neither argument is persuasive.

5 First, as *In re DeRogatis* held, plan administrators, like Verizon, “act as
6 fiduciaries when they communicate with plan members and beneficiaries about
7 plan benefits.”⁵¹ As that case explained, plan administrators “may perform a
8 fiduciary function through ministerial agents,” such as Aon Hewitt in this case,
9 even “without converting those individual agents themselves into fiduciaries.”⁵²
10 Accordingly, when Verizon arranged for Aon Hewitt to communicate with
11 Sullivan about her plan benefits, Verizon was performing a fiduciary function and
12 was bound by its fiduciary duty to properly administer the plan. Although
13 Verizon makes much of the fact that the district court “unequivocally ruled that
14 Hewitt was not a plan administrator or fiduciary” for Sullivan’s benefits plan,⁵³
15 this finding, based on Aon Hewitt’s status as a ministerial agent, does not prevent
16 us from imputing Aon Hewitt’s gross negligence to Verizon, Aon Hewitt’s
17 principal. Indeed, Aon Hewitt’s status as a ministerial agent allows us to do so.⁵⁴

⁵⁰ 904 F.3d 174 (2d Cir. 2018).

⁵¹ *Id.* at 192.

⁵² *Id.*

⁵³ Defendant-Appellee Verizon’s Br. at 40.

⁵⁴ *In re Derogatis*, 904 F.3d at 192.

1 Verizon cannot hide behind Aon Hewitt's actions to evade liability for the
2 fiduciary breach that occurred here.

3 Nor can Verizon hide behind Sullivan's plan documents, which it
4 characterizes as "clear, unambiguous, and in no way lack[ing in] clarity."⁵⁵
5 Verizon urges us to read *In re DeRogatis* as foreclosing liability for unintentional
6 misrepresentations when a fiduciary has provided a plan participant with a clear
7 and unambiguous summary plan description. But *In re DeRogatis* expressly
8 declined to answer the question of whether "an ERISA fiduciary may breach a
9 duty because of unintentional misrepresentations even when the SPD [summary
10 plan description] is clear if there is no evidence that the plaintiff knew or should
11 have known of the applicable SPD provisions at the time of the relevant
12 conduct."⁵⁶ *In re DeRogatis* found that the plaintiff had every reason to know of
13 the applicable, clear plan terms because even though the fiduciary's agents had
14 provided ambiguous responses to the plaintiff's queries, they had also sent the
15 plaintiff a copy of the terms with specific citations to the relevant sections on
16 pension and survivor benefits.⁵⁷ Under such circumstances, *In re DeRogatis*
17 concluded that the agents' ambiguous responses to the plaintiff did not rise to the
18 level of materially misleading information.⁵⁸

19 This case differs from *In re DeRogatis* in three respects: (1) as pled, Verizon,
20 through its agents, directly and repeatedly informed Sullivan that she had a life

⁵⁵ Defendant-Appellee Verizon's Br. at 47.

⁵⁶ 904 F.3d at 196 n.27.

⁵⁷ *Id.*

⁵⁸ *Id.* at 195–96.

1 insurance policy in the amount of \$679,000; (2) in responding to Sullivan’s queries
2 about her policy, Verizon never referred Sullivan to clear plan terms that would
3 have alerted her to her ineligibility for the promised benefits; and (3) Sullivan’s
4 plan was far from clear and unambiguous because it expressly incorporated her
5 “enrollment materials, and other such communications relative to the Plan,”
6 including the Retirement Enrollment Worksheet indicating Sullivan’s eligibility
7 for a \$679,000 life insurance policy and other documents of similar import.⁵⁹ When
8 all is considered, Sullivan-Mestecky has plausibly alleged that Verizon breached
9 its fiduciary duty to act “with . . . care, skill, prudence, and diligence”⁶⁰ when it
10 failed to provide Sullivan with “complete and accurate information” on her
11 benefits.⁶¹

12

13

CONCLUSION

14 For the reasons stated above, we AFFIRM the district court’s dismissal of
15 Sullivan-Mestecky’s § 502(a)(3) claim against Prudential and its ruling granting
16 Verizon and Prudential summary judgment on Sullivan-Mestecky’s § 502(a)(1)(B)
17 claim, VACATE the district court’s dismissal of Sullivan-Mestecky’s § 502(a)(3)

⁵⁹ Sullivan’s plan stated, “This Plan document hereby incorporates by reference any summary plan descriptions, summaries of material modifications, enrollment materials, and other such communications relative to the Plan as may be approved from time to time by Verizon.” App’x at 288.

⁶⁰ 29 U.S.C. § 1104(a)(1)(B).

⁶¹ *Estate of Becker*, 120 F.3d at 10.

- 1 claim against Verizon, and REMAND for further proceedings consistent with the
- 2 opinion.