

No. 11-20184

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**ERIN SANBORN-ALDER, Individually and as Independent Executrix
Of the Estate of Clifford Alder,**

Plaintiff-Appellant,

v.

**LIFE INSURANCE COMPANY OF NORTH AMERICA; CDCA
ADMINISTRATORS, INC.; NATIONAL EMPLOYMENT BENEFIT
COMPANIES, INC.; A.C. STRIP, AS RECEIVER FOR CBCA
ADMINISTRATOS, INC.; CBCA INSURANCE SERVICES, INC.; SAN
JACINTO AGENCY, INC.; AND THE LOGE GROUP,**

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION, CIVIL DOCKET NO. 4:09-CV-00806**

**BRIEF OF APPELLEE
NATIONAL EMPLOYMENT BENEFIT COMPANIES, INC.**

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Erin Sanborn-Alder (Plaintiff-Appellant);
2. Estate of Clifford Alder (Plaintiff-Appellant);

3. Continental Airlines, Inc. Employee Benefit Plan (ERISA plan at issue);
4. Life Insurance Company of North America (“LINA”) (Defendant-Appellee);
5. Connecticut General Corporation (Parent Corporation of LINA);
6. CIGNA Holdings, Inc. (Parent Corporation of Connecticut General Corp.);
7. CIGNA Corporation (Parent Corporation of CIGNA Holdings, Inc.);
8. CBCA Administrators, Inc. (“CBCA”) (Defendant-Appellee);
9. The Loge Group, LLC (Parent Corporation of CBCA);
10. National Employer Benefit Companies, Inc. (“NEBCO”) (Defendant-Appellee);
11. American Wholesale Insurance Group Inc. (Parent Corporation of NEBCO);
12. BoyarMiller (Counsel for Defendant-Appellee NEBCO);
13. Jackson Walker LLP (Counsel for Defendant –Appellee CBCA);
14. Foster Law Firm, LLC (Counsel for Plaintiffs-Appellants);
15. Stris & Maher, LLP (Counsel for Plaintiffs-Appellants);
16. Ford & Mathiason, LLP (Counsel for Plaintiffs-Appellants); and
17. Wilson, Elser, Moskowitz, Edelman & Dicker (Counsel for LINA).

By: /s/ Chris Hanslik
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BENEFIT COMPANIES, INC.

STATEMENT REGARDING ORAL ARGUMENT

Appellee/Defendant National Employee Benefits Companies, Inc.
("NEBCO") asserts that oral argument is not necessary for this appeal.

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STATEMENT OF THE CASE

NEBCO adopts by reference the Statement of the Case in the brief filed by Appellee/Defendant Life Insurance Company of North America (“LINA”) (Document No. 00511541657).

STATEMENT OF THE FACTS

NEBCO adopts by reference the Statement of the Facts in the brief filed by LINA (Document No. 00511541657).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

NEBCO disagrees with Issue No. 1 as framed by Alder in her appeal as it does not completely address the legal issues that need to be decided by this Court. NEBCO believes Issue No. 1 is properly framed as follows:

Did the District Court err in dismissing Alder’s alternative 502(a)(3) claim where Alder is also pursuing her right to legal redress under Section 502(a)(1)(B) and considering controlling Federal case law states that a plaintiff with a right to legal redress under 502(a)(1)(B) is barred from bringing an alternative claim under 502(a)(3) even if the 502(a)(1)(B) claim ultimately fails?

SUMMARY OF THE ARGUMENT

The district court properly dismissed Alder’s claim for benefits under Section 502(a)(3) of ERISA on the grounds that Alder was not entitled to

equitable relief since she was asserting a claim for benefits under Section 502(a)(1)(B). This ruling is consistent with well established precedent in this and other Circuits.

The Supreme Court Case of *CIGNA v. Amara* does not overrule this Court's previous decisions, and in particular *Tolson. Amara* is irrelevant to the issues in this case. The Supreme Court in *Amara* did not hold, or much less discuss whether, 502(a)(1)(B) and 502(a)(3) claims can coexist. Thus, the *Amara* decision did not, contrary to Alder's assertions, overrule any of the current Fifth Circuit precedent.

The district court properly granted summary judgment on Alder's claims for benefits under Section 502(a)(1)(B) of ERISA for the reasons specified in LINA's Brief (Document No. 00511541657).

ARGUMENT

I. The District Court Properly Dismissed Alder's Claim pursuant to Section 502(a)(3) for Failure to State a Claim.

NEBCO hereby adopts by reference all factual citations and legal arguments included in the Argument Section of LINA's Appeal Brief (Document No. 00511541657), and as a supplement thereto, NEBCO provides as follows:

A. The District Court Properly Dismissed Alder’s 502(a)(3) Claim Because Alder Had a Right to Relief Under 502(a)(1)(B).

Appellant Erin Sanborn-Alder (“Alder”) asks this Court to ignore established legal precedent in this Circuit and reverse the district court’s order dismissing her Section 502(a)(3) claim. See Appellant’s Brief, pp. 8-14. Alder contends that it is reversible error for a district court to dismiss a 502(a)(3) claim that was pled in the alternative when the main underlying claim is a claim under 502(a)(1)(B). Alder’s contention is misplaced. The district court properly dismissed Alder’s 502(a)(3) claim because, as this Court held in *Tolson v. Avondale Industries*, 141 F.3d 604 (5th Cir. 1998), Alder’s 502(a)(1)(B) claim affords Alder an avenue for legal redress under her husband’s ERISA Plan, so she cannot properly maintain an alternative 502(a)(3) claim.

This Court held in *Tolson* that a plaintiff cannot maintain a 502(a)(3) claim that is pled as an alternative claim to the plaintiff’s main claim pursuant to 502(a)(1)(B), even if the plaintiff does not prevail on his 502(a)(1)(B) claim. 141 F.3d at 610. In that case, Tolson sued his former employer, the ERISA plan administrators and the plans themselves for failure to cover the cost of treatment for a psychiatric condition under his employer’s health insurance coverage. *Id.* at 606-607. Tolson alleged that the defendants wrongfully denied his insurance claims pursuant to the language of the plans and that this denial constituted a violation of ERISA section 502(a)(1)(B). *Id.* at 607. In addition, and as an

alternative claim, Tolson alleged that the plans and the administrators breached their fiduciary duties by misrepresenting the terms of available coverage in the plans. *Id.*

This Court in *Tolson* was asked to reverse the district court's order granting summary judgment in favor of defendants dismissing both of Tolson's claims. *Id.* at 605. This Court first held defendants did not wrongfully deny Tolson's claims for benefits and upheld the district court's decision to grant summary judgment pursuant to 502(a)(1)(B). *Id.* at 610. After holding that Tolson had no viable 502(a)(1)(B) claim, this Court turned to the issue of whether Tolson could maintain his breach of fiduciary duty claim pursuant to 502(a)(3) for other appropriate equitable relief. *Id.* In holding that Tolson could not maintain his 502(a)(3) claim, this Court stated:

Because Tolson has adequate redress for disavowed claims through his right to bring suit pursuant to section [502(a)(1)(B)], he has no claim for breach of fiduciary duty under section [502(a)(3)] ...

...Tolson was the beneficiary of two viable plans whom he had standing to sue and did sue. Further, both Plans are viable and before the Court. Because this relief was available, and indeed, utilized, it would be inappropriate for the Court to fashion any further equitable relief under section [502(a)(3)]. *Id.*

This Court further held that the fact that Tolson did not prevail on his 502(a)(1)(B) claim "does not make his alternative claim under section [502(a)(3)] viable." *Id.* As such, this Court was direct and unequivocal in its ruling that a

plaintiff cannot make a 502(a)(3) claim once he avails himself of his right to sue under 502(a)(1)(B).

The case at hand is very similar to *Tolson*. Alder sued Defendants to recover alleged benefits under the Plan. Specifically, Alder contends that under 502(a)(1)(B) she is entitled to life insurance benefits from her husband's ERISA benefits plan.¹ Alder alleges that LINA abused its discretion when it denied her benefits pursuant to the Plan documents. In this appeal, Alder continues to claim that she is entitled to benefits under the Plan, and that the district court abused its discretion when it granted summary judgment holding that she was not entitled to benefits under the Plan.

In addition to her main claim for benefits under 502(a)(1)(B), Alder also alleged, in the alternative, a cause of action for breach of fiduciary duty against defendants pursuant to section 502(a)(3). Alder's alternative claim also seeks life insurance benefits from a separate insurance policy under her husband's ERISA plan that he allegedly allowed to elapse. Although she is seeking life insurance benefits under both claims, Alder alleges that she is entitled to equitable relief

¹ Alder's main and back-up claims are for the same kind of benefits – life insurance benefits under her husband's Continental ERISA employee benefits plan. In her main claim, Alder is asking for \$400,000.00 in life insurance benefits she alleges she is due under a life insurance policy that her husband converted from accidental insurance in 2005. In her alternative claim for 502(a)(3), Alder is requesting \$180,000.00 in life insurance benefits from another life insurance policy in her husband's ERISA employee benefits plan that he allegedly allowed to elapse in 2006. As such, although different amounts, the claims are simply claims for benefits under an ERISA employee benefits plan.

under 502(a)(3) if she is not entitled to benefits under the plan pursuant to her 502(a)(1)(B) claim.

Under *Tolson*, this is exactly the type of alternative claim that this Circuit does not allow. Alder has adequate redress for disavowed claims through her right to bring suit pursuant to section 502(a)(1)(B), so she has no claim for fiduciary duty under section 502(a)(3). Alder was the beneficiary of a viable plan whom she had standing to sue and did in fact sue. In addition, her 502(a)(3) claim, although masked as a claim for equitable relief is simply seeking life insurance benefits under the same ERISA employee benefits plan. Because relief is available under 502(a)(1)(B), and indeed, utilized by Alder, it would be inappropriate for the Court to fashion any further equitable relief under Section 502(a)(3). As in *Tolson*, the fact that the district court granted summary judgment on Alder's 502(a)(1)(B) claim does not make her 502(a)(3) claim viable. As such, the district court properly dismissed Alder's claim pursuant to (a)(3).

The *Tolson* holding was further reinforced by this Court's decision in *Rhorer v. Raytheon Engineers and Constructors, Inc.*, 181 F.3d. 634 (5th Cir. 1999). In *Rhorer* this Court held that a plaintiff could not maintain a breach of fiduciary duty claim pursuant to 502(a)(2) if he also sued to recover under section 502(a)(1)(B). *Id.* at 639. This Court observed that the plaintiff's claim to recover plan benefits was the predominant cause of action even though she had an alternative claim for

equitable relief. *Id.* Although *Rhorer*'s cause of action for breach of fiduciary duty was under a different section (502(a)(2) as opposed to 502(a)(3)), this Court reiterated the holding in *Tolson* that because 502(a)(1)(B) "affords [plaintiff] an avenue for legal redress, she may not simultaneously maintain her claim for breach of fiduciary duty." *Id.*

Not only was the *Tolson* holding reiterated by this Court in *Rhorer*, but it is also the regular standard for the district courts in the Fifth Circuit. For instance, in *Metropolitan Life Insurance Co. v. Palmer*, the district court dismissed plaintiff's 502(a)(3) claim for failure to state a claim upon which relief can be granted because "it is settled law in this circuit that a potential beneficiary may not sue for breach of fiduciary duty if he has a pending claim under section 1132(a)(1)(B)." 238 F.Supp.2d 826, 829 (E.D. Tex. 2002). In a similar fashion, in *Moore v. Raytheon Corporation et al.*, the district court dismissed plaintiff's claim at the summary judgment stage relying on *Tolson* and holding that because plaintiff's "primary claim was for benefits" under 502(a)(1)(B), "a private action for breach of fiduciary duty is not available." 314 F.Supp.2d 658, 664 (N.D. Tex. 2004); *see also Constantine v. American Airlines Pension Benefit*, 162 F.Supp.2d 552, 557 (N.D. Tex. 2001) ("Because plaintiff has resorted to the principal remedy for ERISA claimants [section 1132(a)(1)(B)], she has also failed to state a claim under § 1132(a)(3)"); *Burnside v. Anthem Blue Cross Blue Shield*, 2006 WL 3499202

("[I]t is settled law in this circuit that a potential beneficiary may not sue for breach of fiduciary duty if he has a pending claim under section 1132(a)(1)(B)"); *Hager v. NationsBank Corp. Pension*, 1999 WL 1044498, *3 (N.D. Tex. 1999) (concluding that a plaintiff that brings a lawsuit for benefits may not also bring a claim under section 1132(a)(3) for breach of fiduciary duty).

Yet, Alder's appeal, in essence, requests that this Court reverse its prior ruling in *Tolson* regarding the availability of a 502(a)(3) claim when Alder is also asserting a 502(a)(1)(B) claim. In fact, Alder's Brief seems to ignore the *Tolson* decision and only mentions it in a footnote along with a string of other cases. The *Tolson* decision expressly lays out the current law on this issue, and has been favorably cited numerous times by this Court and district courts across this Circuit. No United States Supreme Court case, including *Amara*, has held differently. In fact, contrary to Alder's assertions, *Amara* does not alter the standard in the Fifth Circuit as established by *Tolson* and its progeny.

B. The *Amara* Decision Does Not Overturn *Tolson*.

Alder contends that the recent Supreme Court decision in *Cigna Corporation v. Amara*, overturns Fifth Circuit precedent and supports her position that a claim under 502(a)(3) should be allowed even though the plaintiff has a right to relief pursuant to 502(a)(1)(B). 131 S.Ct. 1866 (2011). But such assertion is baseless, because the *Amara* Court did not address the question presented here –

whether claims pursuant to 502(a)(1)(B) and 502(a)(3) can coexist. In *Amara*, the Court held that a district court erred in relying on § 502(a)(1)(B) to reform the terms of an ERISA plan and making the plan pay benefits pursuant to the reformed terms. *Id.* at 1876-1877. The Court further held that 502(a)(1)(B) does not give a court discretion to reform any terms, but simply to interpret the terms that are already in place. *Id.* The Court explained that a remedy like reformation of a plan is only available only by applying 502(a)(3). *Id.* at 1880. Here, Alder's claim is not for reformation of the Plan terms, or for any other equitable relief, but for benefits under an ERISA Plan (either \$400,000.00 or \$180,000.00 in life insurance proceeds). The Supreme Court in *Amara* did not hold, or much less discuss whether, 502(a)(1)(B) and 502(a)(3) claims can coexist. Thus, the *Amara* decision did not, contrary to Alder's assertions, overrule any of the current Fifth Circuit precedent.

C. Other Circuits Have Adopted the Ruling in *Tolson*.

Importantly, Alder's assertion that plaintiffs in general are "regularly permitted to plead (a)(1)(B) and (a)(3) claims" is misplaced. In support for such assertion, Alder cites to one Second Circuit decision, *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d. 76 (2d. Cir. 2001), and two separate district court decisions from the Third Circuit, *DeVito v. Aetna, Inc.*, 536 F.Supp.2d 523 (D.N.J 2008), and *Bell v. Guardian Life Ins. Co.*, 2008 WL 4852840 (D.N.J 2008).

Interestingly, yet not surprisingly, Alder fails to identify a single case from the Fifth Circuit or from any other circuits that support her position. While these three specific cases might support Alder's position, it is far from overwhelming support for Alder's assertion and those cases do not provide any basis for ignoring established Fifth Circuit precedent. In fact, even the New Jersey District Court in *DeVito*, one of the cases cited by Alder, acknowledged that its holding is not established law in the Third Circuit.

In contrast to Alder's assertion, other Circuits have agreed with the rule in *Tolson*. See e.g. *LaRocca v. Borden, Inc.* 276 F.3d 22, 28-29 (1st Cir. 2002) (holding that relief under (a)(3) is not appropriate if plaintiff can pursue a (a)(1)(B) claim even if the (a)(3) remedies sought are equitable in nature); *Katz v. Comprehensive Plan of Group Ins.*, 197 F.3d 1084, 1088-89 (11th Cir. 1999) (holding that a plaintiff with a right to bring a claim for benefits under (a)(1)(B) cannot bring an action under (a)(3) even if she does not prevail on her (a)(1)(B) claim); and *Wald v. Southwestern Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996) (same). Alder has failed to show a compelling reason to disturb established precedent in the Fifth Circuit as well as the other Circuits that have considered this issue.

Accordingly, the district court's dismissal of Alder's 502(a)(3) claim was proper, because a plaintiff may not bring a claim under 502(a)(3) if the plaintiff has a right to relief under 502(a)(1)(B).

II. The District Court Properly Granted Summary Judgment on Alder's Claim for Benefits Pursuant to Section 502(a)(1)(B).

NEBCO hereby adopts by reference all factual citations and legal arguments included in the Argument Section of LINA's Appeal Brief (Document No. 00511541657).

CONCLUSION

Alder's claim for breach of fiduciary duty pursuant to 502(a)(3) has been properly dismissed by the district court for failure to state a claim upon which relief can be granted. Alder's main cause of action in the litigation was her claim pursuant to 502(a)(1)(B), which gave her a legal right to legal redress under the terms of the Plan. Because Alder had a viable remedy pursuant to 502(a)(1)(B), Alder is not entitled to keep an alternative claim for equitable relief under 502(a)(3). In addition, the district court properly granted summary judgment on Alder's claims for benefits under 502(a)(1)(B). Therefore, NEBCO requests that this Court affirm the district court's January 26, 2010 order dismissing Alder's claim pursuant to 502(a)(3) and affirm the district court's order of February 15, 2011 granting summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Fed. R. Civ. P. 25, I hereby certify that I have served the following counsel of record with the foregoing Appellee’s Brief via ECF on this 29th day of July, 2011, with paper copies to be served on the following counsel when they are requested by the Court of Appeals.

| | |
|--|---|
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This Appellee's Brief complies with the requirements of Fed. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(C):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because: this brief contains 2,568 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in proportionately spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman font.

/s/ Michel Perez

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