IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD RANKE, et al,	:	CIVIL ACTION
Plaintiffs,	:	04-1618
v.	:	
SANOFI-SYNTHELABO, INC., SANOFI-SYNTHELABO GROUP PENSION PLAN, EASTMAN KODAK CO., and KODAK RETIREMENT INCOME PLAN,	:	
Defendants.	:	

MEMORANDUM AND ORDER

JOYNER, J. **November 2, 2004**

Via the motions now pending before this Court, Defendants Eastman Kodak Co. and Kodak Retirement Income Plan (the "Kodak Defendants") and Defendants Sanofi-Synthelabo Inc. and Sanofi-Synthelabo Group Pension Plan (the "Sanofi Defendants") move to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons outlined below, the motions shall be granted in their entirety.

Facts

Plaintiffs, currently employees of Sanofi-Synthelabo Inc. (Sanofi), bring this ERISA action against the Kodak and Sanofi Defendants in connection with alleged misrepresentations regarding their pension benefits.

In 1988, Plaintiffs were employed by Eastman Kodak Co. (Kodak) and participated in the Kodak Retirement Income Plan

(KRIP). When Kodak began the process of merging with Sterling Winthrop, Inc. (Sterling), human resources personnel at both companies assured Plaintiffs that their KRIP pension entitlements would be kept whole upon transfer of employment to Sterling. Plaintiffs were informed that their total years of service at both Kodak and Sterling would be used to determine vesting and early retirement eligibility, and that their pensions under both KRIP and the Sterling Plan would be calculated using their final average salaries at Sterling. Based upon these representations, Plaintiffs decided to accept employment with Sterling in 1988.

In 1994, Plaintiffs were chosen to become employed with Sanofi, which had acquired certain Sterling assets pursuant to an asset purchase agreement. Human resources personnel at Sanofi advised Plaintiffs that their benefits would remain undiminished for two years after becoming employed with Sanofi, and that Plaintiffs would continue to accrue years of service based upon their original Kodak start dates. Sanofi advised Plaintiffs that they would be informed of any benefit changes after the two-year period. Based upon these representations, Plaintiffs decided to accept employment with Sanofi in 1994.

In 1996, Sanofi sent Plaintiffs a memorandum indicating that the name of the Sanofi pension plan would be changed to “Sanofi Group Pension Plan” (SSGP), but that Plaintiffs’ benefits would remain unchanged. Plaintiffs have identified only two further contacts regarding their pension plains until 2002. At some point between 1995 and 2000, Kodak told some Plaintiffs that the IRS "same desk rule" prohibited them from combining their 401K savings or pension plans. Between 1998 and 2000, Sanofi told some Plaintiffs that discussions were underway regarding a possible combination of the KRIP and SSGP pensions into a single Sanofi pension of equal or greater value.

In 2002, Plaintiffs received retirement estimate calculations from Kodak indicating that their KRIP pensions would be calculated based only on total years of service with Kodak, and would be based on Plaintiffs' final average salaries at Sterling in 1994. Plaintiffs also learned from Sanofi that their SSGP pension entitlements would be calculated based only on total years of service at Sterling and Sanofi, and would not include Plaintiffs' years of service at Kodak.

Discussion

In considering a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6), a court must consider only those facts alleged in the complaint and accept all of the allegations as true. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3rd Cir. 1994). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief could be granted. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3rd Cir. 1997).

I. Count 1: Breach of ERISA Fiduciary Duty

Plaintiffs bring this claim pursuant to § 502(a)(3) and § 409 of the Employee Retirement Income Security Act (ERISA), alleging that Defendants breached their fiduciary duties under ERISA § 404. See 29 U.S.C. 1132(a)(3); 29 U.S.C. 1109(a); 29 U.S.C. 1104. Specifically, Plaintiffs claim that the Kodak Defendants, in 1988 and 1994, and the Sanofi Defendants in 1994, misrepresented to Plaintiffs that their pension plans would not be adversely affected upon transfer of employment from Kodak to Sterling and, ultimately, to Sanofi. Plaintiffs further allege that Defendants failed to notify them that these representations were incorrect until 2002.

To make out a claim of breach of fiduciary duty under ERISA, a plaintiff must show: (1) that the company was acting in a fiduciary capacity; (2) a misrepresentation or failure to adequately inform plan participants and beneficiaries; (3) that the misrepresentation or failure to inform was material; (4) resulting harm to or detrimental reliance by employees. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. V. Skinner Engine Co., 188 F.3d. 130, 148 (3rd Cir. 1999).

A. Pension Plans Not Subject to Fiduciary Duty Requirements

As an initial matter, we find that Plaintiffs have failed to state a claim for breach of fiduciary duty with respect to Defendants Sanofi-Synthelabo Group Pension Plan and Kodak Retirement Income Plan. These entities cannot be liable as fiduciaries under ERISA § 409, which imposes personal liability on any "person who is a fiduciary with respect to a plan." 29 U.S.C. 1109(a). The ERISA definition of "person" includes individuals, corporations, and other associations, but does not include employee benefit plans. 29 U.S.C. 1002(9); See also Adams v. Koppers Co., Inc., 684 F. Supp. 399, 400-01 (W.D. Pa. 1988) (dismissing ERISA § 510 claim against defendant retirement plan on the grounds that a plan cannot be a "person"); Boucher v. Williams, 13 F. Supp. 2d 84, 93 (D. Me. 1998) (holding that an employee health and welfare fund is not a "person" for the purposes of fiduciary duty liability under ERISA § 404).

B. Plaintiff's Fiduciary Duty Claim is Time-Barred

Defendants contend that Plaintiffs fail to state a claim for breach of fiduciary duty because this action, filed on April 13, 2004, is time-barred by 29 U.S.C. § 1113.[1] Defendants claim that the last act constituting a part of the alleged breach, and the latest date on which Defendants could have cured such breach, occurred earlier than April 13, 1998. We find that Plaintiffs'

[1] No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part [Title I], or with respect to a violation of this part, after the earlier of--

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation. 29 U.S.C. § 1113 claim is time-barred under § 1113 because the Complaint identifies no breach of fiduciary duty or detrimental reliance occurring after April 13, 1988.

1. Inapplicability of the "Fraud and Concealment" Provision

We note initially that the "fraud or concealment" provision of § 1113, which allows an action to be commenced six years after the date of discovery of the breach, is inapplicable to this case. The Third Circuit has held that the "fraud or concealment" provision does not apply where the complaint merely "sounds in concealment," but only where there is evidence that the defendant took affirmative steps beyond the breach itself to hide its breach of fiduciary duty. In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 242 F.3d 497, 502-03 (3rd Cir. 2001); Kurz v. Philadelphia Elec. Co., 96 F.3d 1544, 1552 (3rd Cir. 1996); Holmes v. Pension Plan of Bethlehem Steel Corp., No. 98-1241, 1998 U.S. Dist. LEXIS 19490 at 12-14, 1998 WL 901545 (E.D. Pa. 1998). In Unisys, the Third Circuit held that the "fraud or concealment" clause would generally be inapplicable if all the plaintiff could show was that "a counselor represented to him that he had guaranteed .... benefits or failed to give him accurate advice knowing that he believed he had such benefits," even if such misrepresentations were later repeated. Unisys, 242 F.3d at 503. The Third Circuit in Unisys ultimately denied the defendant's motion for summary judgment on this issue, finding that there were factual questions as to whether a retirement counselor's advice may have dissuaded some employees from consulting counsel and so arguably constituted active concealment. Unisys, 242 F.3d at 504-05.

In deciding this motion to dismiss, however, this Court must determine whether the allegations in the Complaint itself support a cause of action for breach of fiduciary duty, and must not consider any additional contentions or questions of fact raised outside the context of the initial pleading. ALA, Inc., 29 F.3d at 859. While Plaintiffs' briefs allege a "pattern of continuing misrepresentations" by Defendants, their Complaint, even viewed in the most favorable light, does not allege that Defendants took any affirmative action to conceal the misrepresentations at the heart of this breach of fiduciary duty claim. Beyond Defendants' alleged breaches of fiduciary duty in 1988 and 1994, Plaintiffs have identified only three further actions taken by Defendants – Sanofi's 1996 name-change memorandum, Kodak's 1995-2000 representations regarding the IRS "same desk rule," and Sanofi's 1998-2000 representations about a possible Sanofi pension combining the KRIP and SSGP pensions. However, Plaintiffs do not contend that these actions in any way misrepresented Plaintiffs' pension entitlements or were intended to actively conceal Defendants' 1988 and 1994 breaches of fiduciary duty.

Plaintiffs further allege that, during the "evolution of

Plaintiffs' pension plan participation," Defendants failed to notify Plaintiffs that their pension entitlements would be adversely affected, and advised Plaintiffs that they would be kept whole if they decided to move on with their new employers. Complaint, ¶ 31. This allegation, if true, does not support a claim of ongoing affirmative misrepresentations sufficient to satisfy the requirements of § 1113, as it relates only to the alleged breaches of fiduciary duty in 1988 and 1994, at the time Plaintiffs were considering a transfer of employment. Indeed, Plaintiffs cite ¶ 31 as a representation made "when [Plaintiffs'] employment transferred from Sterling Winthrop to Sanofi" and "when [Plaintiffs'] employment transferred from Eastman Pharmaceuticals to Sterling Winthrop." Complaint, ¶ 41, 42.

Because, under even the most favorable reading of the Complaint, Plaintiffs have not pled any affirmative acts of concealment beyond Defendants' initial alleged breaches of fiduciary duty, they may not rely on the "fraud or concealment" provision of § 1113 to defend the timeliness of this action.

2. <u>Date of Last Action or Chance of Cure</u>

Plaintiffs further contend that this action is timely pursuant to 29 U.S.C. § 1113(1) because it was filed within six years of Defendants' last action and Plaintiffs' detrimental reliance.

In <u>Unisys</u>, the Third Circuit held that a breach of fiduciary duty is completed, for the purposes of § 1113(1), no later than the date upon which the employee relied to his detriment on the fiduciary's misrepresentations. Unisys, 242 F.3d at 505-06. In that case, the last date of reliance and possible cure was found to be the date on which plaintiff employees decided to take voluntary retirement. However, the court left open the possibility that some retirees made other decisions in detrimental reliance after the date of retirement, and denied summary judgment until factual issues surrounding later instances of reliance were resolved. Unisys, 242 F.3d at 505-07. In the instant action, however, the only allegations of reliance made in the Complaint are that Plaintiffs "decided to accept employment with Sterling Winthrop" in 1988 and "decided to accept employment with Sanofi" in 1994. Indeed, it is difficult to see what steps Defendants could have taken after Plaintiffs' transfer of employment to effectively cure the alleged misrepresentations upon which Plaintiffs relied.

The Complaint itself in no way reflects Plaintiffs' claims that they made "important financial and general life choices" (Plaintiffs' Response to Kodak Defendants' Motion to Dismiss, p. 20) after April 13, 1998 in detrimental reliance on Defendants' misrepresentations. Vague and unspecified allegations of detrimental reliance are insufficient to withstand a motion to dismiss an ERISA claim of breach of fiduciary duty. Burstein v.

Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found., 334 F.3d 365, 387-89 (3rd Cir. 2003). Even reading the Complaint in its most favorable light, Plaintiffs have failed to show detrimental reliance or the possibility of cure within the 6-year statute of limitations set forth in § 1113(1).

Plaintiffs further contend that their action is within the in § 1113(1) statute of limitations because Defendants were under an ongoing duty to furnish accurate information regarding the plan, and breached this duty after April 13, 1998. While, under the common law of trusts, a fiduciary has a duty to disclose material information, this duty has never been used by this Court to extend the ERISA statute of limitations in cases alleging affirmative misrepresentations. See, e.g. Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., 93 F.3d 1171, 1180 (3rd Cir. 1996) (finding that fiduciary duties under ERISA generally include a duty to inform, applicable where defendant is charged with failure to disclose information about an employee); Pa. Fed'n, Bhd. of Maint. of Way Employees v. Norfolk Southern Corp. Thoroughbred Ret. Inv. Plan, No. 02-9049, 2004 U.S. Dist. LEXIS 1987 at 17-18, 2004 WL 228685 (E.D. Pa. 2004) (finding that, where plaintiffs do not allege fraud or misrepresentation, defendant's fiduciary duty under ERISA encompasses a duty to disclose material information); Harte v.

Bethlehem Steel Corp., 214 F.3d 446, 452-54 (3rd Cir. 2000) (finding that fiduciary duty under ERISA includes an affirmative duty to speak when the fiduciary knows that silence might be harmful; holding limited to situations where plaintiff did not allege affirmative misrepresentations and plan service was broken through severance of employee).

Indeed, this Court has explicitly rejected the doctrine of "continuing duty" under ERISA, finding that establishment of an ongoing duty to remedy breaches of fiduciary duty would in effect extend the § 1113(1) statute of limitations indefinitely. Holmes, 1998 U.S. Dist. LEXIS 19490 at 13; see also Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers v. Murata Erie N.A., Inc., 980 F.2d 889, 899 (3rd Cir. 1992) (holding that, where the initial breach of fiduciary duty was grounded in a plan amendment or benefits determination, subsequent transfers of assets claimed by the plaintiffs did not constitute a "continuing breach" for the purposes of extending the statute of limitations); Henglein v. Colt Indus., 260 F.3d 201, 214 (3rd Cir. 2001) (statute of limitations should begin to run upon outright repudiation of employee rights, not upon plaintiff's subsequent failure to pay benefits allegedly due to employees). We cannot permit Plaintiffs to "confuse[] the failure to remedy the alleged breach of an obligation with the commission of an alleged second breach, which, as an overt act of its own recommences the limitations period." Kuhns v. Meridian Bancorp, No. 92-4065, 1993 U.S. Dist. LEXIS 5121 at 49-50, 1993 WL 34786 (E.D. Pa. 1993). Only if a subsequent independent act is of a different character than the original breach, results in a new injury to the plaintiff, or alters the status quo will it qualify as a continuing violation initiating a new statute of limitations period. Kuhns, 1993 U.S. Dist. LEXIS 5121 at 51; Adelman v. Neurology Consultants, 109 F. Supp. 2d 400, 403-404 (E.D. Pa. 2000); McChesney v. Pension Plan of Bethlehem Steel Corp., No. 92-7457, 1994 U.S. Dist. LEXIS 3967 at 34-35, 1994 WL 114773 (E.D. Pa. 1994) (holding that failure to remedy an initial breach of fiduciary duty does not qualify as a continuous violation recommencing the limitations period).

As discussed above, Plaintiffs have not pled any affirmative misrepresentations by Defendants beyond the alleged breaches of 1988 and 1994 and the implicit reaffirmation of 1996. Plaintiffs have not indicated that any acts and omissions allegedly taking place after April 13, 1998 were of a different character than the initial misrepresentations or resulted in any additional injury or change in status with respect to the initial violations. Even accepting all well-pleaded allegations in the Complaint as true, Plaintiffs' cause of action for breach of fiduciary duty is barred by § 1113.

C. Plaintiffs Seek Unauthorized Relief

While Plaintiffs may be able to amend their complaint to incorporate facts bringing this claim within the 6-year statute of limitations, the claim is legally deficient on other grounds. Plaintiffs' breach of fiduciary duty claim as currently pled seeks relief not falling within the scope of "appropriate equitable relief" authorized by ERISA § 502(a)(3).[2] 19 U.S.C. 1132(a)(3)(B).

In determining whether relief sought under ERISA is legal or equitable, a court is required to examine the basis for the plaintiff's claim and the nature of the underlying remedies sought. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002). Remedies traditionally viewed as equitable include injunction, mandamus, and restitution, but not compensatory or punitive damages. Mertens v. Hewitt Assocs., 508 U.S. 248, 255-56 (U.S. 1993). The Supreme Court's decision in Great-West has served to further limit ERISA recovery by narrowly

---

[2] In their prayer for relief, Plaintiffs request that this Court:

A. Declare, adjudge and decree that the [Defendants] have breached their fiduciary duties to plaintiffs and are obligated to provide normal and/or early retirement benefits to plaintiffs that are to be determined according to formulas and/or calculations that are not less favorable to these plaintiffs than the applicable formulas and/or calculations of such benefits that applied to these plaintiffs at the time that they transferred their employment from Kodak to Sterling Winthrop and, subsequently, to Sanofi;

B. Declare, adjudge and decree that plaintiffs are entitled to retiree medical benefits on terms not less favorable than were available to them at retirement at the time that they transferred their employment from Kodak to Sterling Winthrop and, subsequently, to Sanofi.

defining the scope of equitable relief under ERISA § 502(a)(3). “Almost invariably, ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.” Great-West, 534 U.S. at 210 (quoting Bowen v. Mass., 487 U.S. 879, 918-19 (1988)). The Supreme Court in Great-West identified a few instances where a judicial remedy requiring one party to pay money to another will not qualify as legal money damages. For example, specific performance of a contract to pay money, a traditionally legal remedy, may be available in equity if it is sought in connection with an injunction “to correct the method of calculating payments going forward,” or where payment on the contract is necessary to “prevent future losses that [are] either incalculable or would be greater than the sum awarded.” Great-West, 534 U.S. at 211-14. Restitution, in the form of a constructive trust or equitable lien, may be an appropriate equitable remedy where the action does not seek to impose personal liability on the defendant but rather to restore funds or property identified as belonging to the plaintiff and traceable to funds in the defendant’s possession. Great-West, 534 U.S. at 211-14.

Courts applying Great-West, however, are split over whether a plaintiff alleging breach of fiduciary duty under ERISA and requesting payment of benefits or reinstatement into a benefit plan is seeking a legal or an equitable remedy. See Tannenbaum v. UNUM Life Ins. Co., No. 03-1410, 2004 U.S. Dist. LEXIS 5664 at 18-19, 2004 WL 1084658 (E.D. Pa. 2004) (rejecting plaintiff's demand for restitution of benefits due under a plan and unpaid because of defendant's breach of fiduciary duty as a legal, rather than equitable remedy); Weinreb v. Hospital for Joint Diseases Orthopaedic Institute, 285 F.Supp.2d 382, 388 (S.D. N.Y. 2003) (finding that a request for an injunction directing employer to enroll plaintiff in a benefits plan was a "thinly disguised attempt" to recover compensatory damages); Caffey v. Unum Life Ins. Co., 302 F.3d 576, 583-84 (6th Cir. 2002) (rejecting plaintiff's claim for reinstatement of lost health benefits, although framed as a request for equitable restitution under ERISA § 502(a)(3), as not permitted after Great-West); compare with Godshall v. Franklin Mint Co., 285 F. Supp. 2d 628, 634 (E.D. Pa. 2003) (holding that because Great-West does not bar a claim for "equitable restitution," plaintiffs were permitted to seek restitution, disgorgement, and an order enjoining defendants to identify and enroll in the ERISA plans all persons actually eligible to participate but misclassified by defendants); Ross v. Rail Car Am. Group Disability Income Plan, 285 F.3d 735, 740-41 (8th Cir 2002) (holding that plaintiff alleging that plan amendments were void and seeking restoration of full benefits under original plan presented equitable claim under ERISA § 502(a)(3))

We find that Plaintiffs' request for reinstatement of benefits calculated using formulas from prior to transfer of employment, while presented as an equitable "make-whole" remedy, is closer in nature to a legal remedy not contemplated by ERISA § 502(a)(3). Plaintiffs, while not alleging that they are in fact entitled to increased benefits under the terms of the current plans, claim that they are entitled to these benefits because they suffered harm from reliance on Defendants' misrepresentations. This form of relief appears to be within the scope of non-equitable money damages defined by the Supreme Court as "compensation for loss resulting from the defendant's breach of legal duty." Great-West, 534 U.S. at 210 (citing Bowen, 487 U.S. at 918-19). As the requested remedy in this case would ultimately require Defendants to pay out a sum of money upon Plaintiffs' retirement, and as this remedy does not appear to fall within one of the few exceptions outlined in Great-West, we find that Plaintiffs' request for reinstatement of benefits is not within the scope of "appropriate equitable relief" authorized by ERISA § 502(a)(3).

II. Count 4: Failure to Provide Plan Documents

Count 4 must be dismissed, as Plaintiffs may not bring a civil cause of action under ERISA § 502(c) for the Sanofi Defendants' alleged failure to provide plan documents as required by § 503(2) and 29 C.F.R. 2560.503-1(h)(2)(iii). See 29 U.S.C. 1132(c); 29 U.S.C. 1133(2).

The provisions of § 502(c) impose penalties on plan administrators for violations of subchapter 1 of ERISA, 29 U.S.C. § 1101 - § 1145. Groves v. Modified Ret. Plan for Hourly Paid Employees of Johns Manville Corp. & Subsidiaries, 803 F.2d 109, 116-17 (3rd Cir. 1986). The Third Circuit has expressly held that § 502(c) authorizes the imposition of sanctions against a plan administrator only for his own failures or refusals, not those of the plan. Groves, 803 F.2d at 116.[3] For these reasons, Plaintiffs cannot seek to impose § 502(c) penalties for violation of a regulation, 29 C.F.R. 2560.503-1(h)(2)(iii), especially one imposing requirements on plans rather than administrators. Likewise, Plaintiffs cannot seek § 502(c) penalties for violation of § 503(2), because this subsection (albeit within subchapter 1) imposes duties only on plans. See Groves, 803 F.2d at 116.

[3] Plaintiffs suggest that the Supreme Court's recent decision in Aetna Health Inc. v. Davila, 124 S. Ct. 2488, 2502 (2004) somehow "tied the implementing regulations of 29 C.F.R. 2560.503-1 to the 'full and fair review' requirements of ... 29 U.S.C. 1133(2)," and contend that this link arguably supports a cause of action under § 502(c) for violations of a regulatory provision dealing with plan responsibilities. This Court refuses to accept such a strained reading of Davila, as that case dealt purely with ERISA preemption, and did not even address the scope of civil liability under § 502(c).

III. Count 5: Attorney's Fees and Costs

Count Five, requesting attorney's fees and costs pursuant to ERISA § 502(g)(1), must be dismissed because it fails to state an independent cause of action, but may properly be pled in Plaintiffs' Prayer for Relief. See 29 U.S.C. 1132(g)(1).

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD RANKE, et al, Plaintiffs, v. SANOFI-SYNTHELABO, INC., SANOFI-SYNTHELABO GROUP PENSION PLAN, EASTMAN KODAK CO., and KODAK RETIREMENT INCOME PLAN, Defendants.	:	CIVIL ACTION 04-1618

ORDER

AND NOW, this 2nd day of November, 2004, upon consideration of the Sanofi and Kodak Defendants' Motions to Dismiss and Strike Jury Demand (Docs. No. 5, 6, 8, 9) and all responses thereto (Docs. No. 12, 13, 18, 19), and it appearing to the Court that Plaintiffs agree to voluntary dismissal of Counts 2 and 3 and withdraw their demand for a jury trial, it is hereby ORDERED that the Motions are GRANTED as to all counts.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.