Justice Ginsburg's Fiduciary Loophole: A Viable Achilles' Heel to HMOs' Impenetrable ERISA Shield

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I. INTRODUCTION

Although at first Juan Davila only felt weak, he was later rushed to the emergency room to find severe internal bleeding that nearly took his life. With seven units of blood, five days in critical care, and a subsequent hospital stay, he barely cheated death, but not unscathed.\(^1\) Previously, his health maintenance organization (HMO), Aetna, had refused to cover Vioxx—the medication recommended by his physician to treat his rheumatoid arthritis—and instead only consented to cover Naproxen, a less expensive pain killer.\(^2\) With neither the time nor the means to appeal Aetna’s decision, Davila opted to accept the covered treatment.\(^3\) As a result of his HMO’s coverage decision of what it considered a “medical necessity,” Davila barely escaped impending death and was left in a state in which he could no longer take any oral medication, including Vioxx.\(^4\)

Sadly enough, Juan Davila is just one tragic example of many Americans who have suffered from poor HMO decisions or delays.\(^5\) What is almost equally tragic is that legally the courts’ hands are tied from providing compensatory relief to patients injured from HMOs’ decisions, such as denying coverage of doctor-prescribed treatments. Under the federal Employee Retirement Income Security Act (ERISA), courts cannot provide compensatory relief for victims like Juan Davila—or so courts have interpreted ERISA historically.\(^6\)

In reality, the U.S. Supreme Court has inadvertently painted itself into a corner by restrictively interpreting ERISA to preclude


\(^2\) Id.

\(^3\) Id.

\(^4\) Brief for Respondents at 7, Davila, 542 U.S. 200 (Nos. 02-1845, 03-83).

\(^5\) See Cicio v. Does, 321 F.3d 83, 83 (2d Cir. 2003), vacated, Vytra Healthcare v. Cicio, 542 U.S. 933 (2004) (delaying a plaintiff’s cancer treatment resulting in the plaintiff’s demise due to disagreement between the plaintiff’s treating physician and his HMO as to whether a blood stem cell transplant was too experimental); Roark, 307 F.3d at 303–04 (refusing to cover treatments of the plaintiff’s spider bite wound resulted in double amputations).

compensatory relief to victims of HMO patient treatment decisions, which is duly incompatible with issues like HMO liability for employer-based HMO plans. Congress intended ERISA to provide national uniformity in administration of employee benefit plans.\textsuperscript{7} To this end, ERISA expressly provides that any claims related to an employer plan under state laws are preempted by ERISA.\textsuperscript{8} But at the time of ERISA’s creation, employer-based HMOs were not prevalent in the health care system. And because ERISA was created before the rise of HMOs, Congress could not anticipate the extent to which ERISA would affect HMO liability. The Supreme Court has interpreted the statutory language of ERISA to indicate that Congress intended to only provide traditional equitable relief, such as injunction or restitution, for claims brought against ERISA plans.\textsuperscript{9} What this means, in part, is that persons injured due to delay or denial of benefit coverage cannot receive compensatory relief from their HMO. In effect, the law initially enacted to protect plan participants is thus turned against them in the HMO context.

Consequently, injured participants are left with few options. With no compensatory damages available under ERISA, a natural reaction for plaintiffs would be to make claims under different state laws. However, ERISA also preempts any claim related to ERISA plans.\textsuperscript{10} Hence, plaintiffs still receive no compensation. Crafty lawyers have attempted—with limited success—to circumvent the ERISA barrier in other ways. For instance, ERISA itself contains a safe harbor called the Savings Clause, which allows state law claims to avoid ERISA preemption if the claims relate to the “business of insurance.”\textsuperscript{11} However, the Supreme Court has narrowly interpreted the Savings Clause to only allow exemption from preemption if the state law claimed does not replace, or in other words, conflict with what is covered by ERISA’s remedial scheme as contained in § 502.\textsuperscript{12} In a few situations, other state claims against HMOs have circumvented

\textsuperscript{7} See id. § 1001(a).
\textsuperscript{8} Id. § 1144(a).
\textsuperscript{10} 29 U.S.C. § 1144(a).
\textsuperscript{11} See id. § 1144(b)(2)(A); see, e.g., Ky. Ass’n of Health Plans, Inc. v. Miller, 538 U.S. 329, 336 (2003).
\textsuperscript{12} See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 375–76 (2002) (stating that there are few civil enforcement exemptions from ERISA’s federal preemption).
ERISA preemption, such as corporate negligence, bad faith, vicarious liability, and even federal RICO claims.

Recently, however, in a concurring opinion of the Actna Health Inc. v. Davila decision, Justice Ginsburg referred to an argument in the Government’s amicus brief mentioning a specific uncharted area of the law that may potentially provide monetary relief to ERISA plan members. She pointed out that the Supreme Court had not yet precluded make-whole relief under a breach of fiduciary duty claim.

In related cases, Justice Scalia, writing for the majority, based his decision solely on specific statutory language, interpreting ERISA’s remedial scheme to protect only ERISA plans and to preclude individual relief for breach of fiduciary duty. Naturally, with such an extreme action from the textualist side of the Court, one can expect an (nearly) equal and opposite reaction from the purposivist side of the Court. And so it came; Justice Stevens’s dissent countered the majority with a more employee-friendly alternative approach based on common law trust principles that would award individual compensatory relief under ERISA for breaches of fiduciary duty. Indeed, it is difficult to predict which side will prevail when the issue of ERISA damages based on a claim of HMO breach of fiduciary duty finally is

15. See, e.g., Villazon v. Prudential Health Care Plan, Inc., 843 So. 2d 842, 848–49 (Fla. 2003) (holding that a state law wrongful death claim, based on vicarious liability against an HMO for medical malpractice of its physicians, is not preempted by ERISA because it does not “relate to” ERISA plan administration).
16. See, e.g., In re Managed Care Litig., 185 F. Supp. 2d 1310, 1314–15 (S.D. Fla. 2002) (finding the plaintiff’s RICO claims reverse-preempted by particular state law that does not allow civil damages). Emotional distress claims did not survive. See, e.g., Palmer v. Superior Court, 127 Cal. Rptr. 2d 252, 266–67 (Ct. App. 2002) (reasoning that an HMO’s decision to use medical utilization review was not an administrative decision but a medical clinical judgment).
18. See id.
20. Mertens, 508 U.S. at 263 (White, J., dissenting); see also Great-West, 534 U.S. at 225–28 (Ginsburg, J., dissenting); id. at 223 (Stevens, J., dissenting).
squarely before the Supreme Court. One may question if perhaps this is the long-awaited claim for relief—the light at the end of the tunnel—that will finally survive under ERISA. That depends on a delicate balance between textualists and purposivists that exists among the Supreme Court Justices.

This Comment discusses how Justice Ginsburg’s fiduciary “loophole”—specifically, damages claimed for the breach of fiduciary duty under ERISA in the context of HMOs—may fare before the Supreme Court in light of the delicate balance that exists among Supreme Court Justices. This Comment argues that Justice Ginsburg’s loophole should be in fact a viable Achilles’ heel to HMOs’ impenetrable ERISA shield. The drafters of ERISA’s remedial scheme intended the courts to derive its interpretation from its more readily apparent context and the purpose of the statute, as Justice Stevens has suggested, rather than encrypting it in outmoded terminology, as Justice Scalia has reasoned. Under this interpretation, Congress obviously intended to provide compensatory relief to those injured ERISA plan members. As the issue now stands, Justice Ginsburg emphasizes that there is a “rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.”

Furthermore, as HMO liability is really an issue more far reaching than ERISA is designed to cover, this Comment argues that HMO liability truly deserves closer congressional attention.

Part II of this Comment provides a background of ERISA and its troubling application in HMO liability. Part III describes the significant case history, in which Justice Scalia and Justice Stevens clashed on the issue of what sort of remedies ERISA provides. Part IV contrasts the overarching viewpoints of Scalia and Stevens. Finally, particularly in light of the Court’s two opposing approaches toward ERISA remedies, Part V implicates how Justice Ginsburg’s fiduciary loophole should be the proper interpretation.

II. ERISA BACKGROUND

ERISA first made its way into the congressional limelight with the closing of the Studebaker South Bend, Indiana factory in 1963.\(^\text{22}\) Studebaker defaulted on pension payments because its pension plan was not adequately funded to compensate all of its vested pension obligations.\(^\text{23}\) This event catalyzed long-awaited congressional action in pension reform.\(^\text{24}\) Assistant Secretary Thomas R. Donahue depicted Studebaker’s tangled plight before Congress as follows:

In all too many cases the pension promise shrinks to this: “If you remain in good health and stay with the same company until you are 65 years old, and if the company is in business, and if your department has not been abolished, and if you haven’t been laid off for too long a period, and if there is enough money in the fund, and if that money has been prudently managed, you will get a pension.”\(^\text{25}\)

As a result of the flaws in pension systems, United Auto Workers (UAW) labor union proposed legislative reform.\(^\text{26}\) UAW officials, for example, proposed legislation to protect employee benefits from default risk by creating a pension reinsurance.\(^\text{27}\) This marked the beginning of a series of employee benefit reforms that compose ERISA, which was enacted in 1974.\(^\text{28}\)

Congress wanted to create a comprehensive scheme to regulate employee benefit plans—both pension plans and welfare plans.\(^\text{29}\) ERISA was intended to provide uniform regulation of employee benefit plans\(^\text{30}\) and “to protect . . . the interests of [plan] participants . . . by providing for appropriate remedies, sanctions, and ready ac-


\(^{23}\) Id. at 683–84.

\(^{24}\) Id. at 684.


\(^{26}\) Wooten, supra note 22, at 684.

\(^{27}\) Id.

\(^{28}\) See id.


cess to the Federal courts.” In general, ERISA’s provisions ensure (1) adequate funding of pension plans, (2) vesting of benefits for plan participants, and (3) fiduciary obligations for plan administrators, arguably based in trust law, as will be explained later.

Because ERISA is a lengthy statute, the following sections will explore only those portions that seem most relevant to the issue of individual relief for breach of fiduciary duty in the HMO context. Section A will give a brief overview of HMOs and how they relate to ERISA. Section B will explain the civil remedies provided for in ERISA § 502(a)(1)(B). Section C will describe how the Supreme Court’s interpretation of § 502(a)(1)(B) has limited the availability of ERISA civil remedies. Last, Section D will discuss how the Court’s overly-narrow interpretation has created a “regulatory vacuum” of remedies for plaintiffs.

A. HMO Background in ERISA Context

Before delving further into an analysis of ERISA civil remedies against HMOs for breach of fiduciary duty, it is helpful to first understand how HMOs fit into the ERISA context. In the thirty years since ERISA was enacted, the health care industry has changed dramatically. Managed care systems, such as HMOs, did not exist as the massive, industry-dominating giants we know today. At the time of ERISA’s enactment, physicians billed insurers after treating patients in a fee-for-service program, whereupon insurers made retrospective coverage decisions. If insurers denied coverage for treatments, patients could seek benefits due under ERISA § 502(a).

Today, however, managed care employee-benefit plans are more prevalent among the American workforce, with three out of four workers having this type of plan. In contrast to the fee-for-service practice in the past, HMOs now determine treatment coverage prospectively as

34. DiFelice, 346 F.3d at 464.
35. Id.
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a cost-saving measure, based on a utilization review board’s determination of “medical necessity” before any treatment takes place.\footnote{36 See id.}

Unfortunately, under today’s HMO coverage system, a wrongful delay or denial of coverage can cause injurious, even tragic, consequences. Quite often, the HMO’s coverage decision in a medical emergency “\textit{de facto} determines a patient’s actual treatment along with his eligibility for benefits . . . .”\footnote{37 Id.} Because of the time and inconvenience involved in appealing coverage denial, most patients in urgent circumstances do not attempt to appeal the denial of coverage.\footnote{38 See id.} Instead, they opt in haste to pay out of pocket, to forego the treatment, or to use a less expensive treatment.\footnote{39 Id.} As will be discussed later, ERISA does not permit compensatory damages according to the Supreme Court majority—a tragedy for a plan participant who is injured from an HMO’s negligence.\footnote{40 Mertens v. Hewitt Assocs., 508 U.S. 248, 256–58 (1993).}

One of the primary purposes of ERISA is to enforce the fiduciary duties of plan administrators.\footnote{41 See 29 U.S.C. § 1001(b) (2000); Aetna Health Inc. v. Davila, 542 U.S. 200, 224 (2004) (Ginsburg, J., concurring) (citing Langbein, \textit{supra} note 32, at 1319).} A fiduciary under ERISA is any person “[who] has any discretionary authority or discretionary responsibility in the administration of [an employee benefit] plan.”\footnote{42 ERISA § 3(21)(iii), 29 U.S.C. § 1002(21)(A)(iii) (2000).} Therefore, HMOs are generally regarded as plan fiduciaries when they use their discretion, as part of their plan administrative duties, to make eligibility decisions for plan benefits,\footnote{43 Id.; Davila, 542 U.S. at 219.} though that distinction is not always clear.\footnote{44 See infra Part III.A.} Once a court determines that an HMO is acting as a fiduciary, it may then determine what relief is available under ERISA for an HMO’s breach of fiduciary duty.

Most claims against HMOs were typically brought under state law claims to avoid ERISA’s strict remedial scheme. Consequently, Congress included a preemption provision that supersedes most state laws relating to employee benefit plans to maintain uniformity in...
regulation of employee benefit plans. Therefore, plan participants are limited to seeking a remedy under § 502(a).

B. Section 502(a)(1)(B) Civil Enforcement Provisions

In terms of HMO liability for breach of fiduciary duty, the remedies provided in the ERISA Civil Enforcement Provisions, as contained in § 502, are the source of much of the debate. ERISA § 502(a)(1)(B) provides that a plan participant or beneficiary may bring civil action “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” Additionally, § 502(a)(2) allows plan participants, beneficiaries, or fiduciaries to bring a civil action “for appropriate relief under [§ 409] of this title.” Section 502(a)(3) allows them to bring civil action “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.”

The central debate concerning the scope of ERISA Civil Enforcement Provisions stems from the judicial interpretation of “appropriate equitable relief” in § 502(a)(3). The Supreme Court, under Justice Scalia, feared that the phrase could potentially cover all types of relief, “render[ing] the modifier [‘equitable’] superfluous.” Therefore, in the landmark Mertens v. Hewitt Associates decision, the Court limited the scope of “appropriate equitable relief” to “those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory dam-

47. Id. § 1132(a)(2); see id. § 1109(a) (“Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.”).
48. Id. § 1132(a)(3) (emphasis added).
Prior to limiting the scope of civil remedies available within ERISA in *Mertens*, the Court limited the availability of civil remedies outside of ERISA in *Pilot Life Insurance Co. v. Dedeaux*.

**C. Section 502(a) Exclusive List of Remedies:**

_Pilot Life Insurance Co. v. Dedeaux_

Unfortunately for plaintiffs, the Supreme Court has made it clear that ERISA was intended to provide a “comprehensive civil enforcement scheme.” In other words, plaintiffs are limited to the remedies expressly provided for in the “plain” language of ERISA itself. Indeed, according to the Court in *Pilot Life Insurance Co. v. Dedeaux*, plan participants would undermine the policy reasons Congress adopted when it selected the provisions contained in § 502(a), such as uniformity in plan administration, if they “were free to obtain remedies under state law that Congress rejected in ERISA.” Thus, “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive” and is preempted by the provisions in § 502(a). For better or for worse, plaintiffs are stuck with ERISA’s exclusive remedial scheme.

**D. Regulatory Vacuum**

In essence, Justice Scalia’s narrow scope of remedies combined with ERISA’s preemption clause has left most injured ERISA plan participants empty-handed, without remedy against their HMO, in what has been termed a “regulatory vacuum.” ERISA’s broad pre-

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50. *Id.* at 256, 262–63.
52. *Id.*
53. *See id.*
54. *Id.*
emptive power strips the plaintiff of state remedies. Yet, ERISA’s “comprehensive and reticulated” scheme fails to replace them with appropriate federal remedies for a plaintiff physically injured due to delay or denial of medical treatment coverage. The Court has made it abundantly clear that there is no compensatory relief available under ERISA for consequential injury. If the most an HMO would have to provide as an ERISA remedy would be an injunction or the cost of the denied treatment, it stands to reason that an HMO would seek ERISA preemption. In most cases, unless the plaintiff seeks a preliminary injunction or reimbursement for denied treatment that he or she has already paid for out-of-pocket, the plaintiff, being unable to recover for resulting injuries, is simply out of luck, while the HMO incurs no liability for the injury. Under ERISA’s liability shield, there seems to be little that can stop HMOs from inducing unbridled harm to ERISA plan members.

Thus, perhaps the Court, in its strict textualist approach for consistency, has lost sight of ERISA’s mission to protect the interests of plan participants. Indeed, the Court indicated that the ERISA drafters “were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of the individual beneficiary.”

Furthermore, ERISA participants’ desperate attempts to circumvent ERISA’s remedial scheme have been met with little success in the courts—those claims that do succeed tend to be the exception.

59. Id. at 256–58, 262–63.
61. See Davila, 542 U.S. at 211.
62. See DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453–54 (3d Cir. 2003) (“However, with the rise of managed care and the Supreme Court’s series of decisions holding preempted any action for damages against HMOs, ERISA has evolved into a shield that insulates HMOs from liability for even the most egregious acts of dereliction committed against plan beneficiaries, a state of affairs that I view as directly contrary to the intent of Congress. Indeed, existing ERISA jurisprudence creates a monetary incentive for HMOs to mistreat those beneficiaries, who are often in the throes of medical crises and entirely unable to assert what meager rights they possess.”).
rather than the rule. Instead of trying to get around ERISA preemption, Justice Ginsburg’s unique approach to this dilemma actually embraces ERISA’s remedial scheme. In her concurrence in the recent Davila decision, she proposed the breach of fiduciary duty claim as a potential source of relief available under § 502(a)(3), which provides for “other appropriate equitable relief.” Though the Court has not yet ruled on this exact issue in the HMO context, Part III introduces a series of cases that illustrate the tug-of-war within the Court for the “appropriate” scope of § 502(a)(3).

III. “APPROPRIATE EQUITABLE RELIEF” REVEALED

A. ERISA § 502(a)(3): Outside of the Realm of HMOs

1. Massachusetts Mutual Life Insurance Co. v. Russell

Beginning with Massachusetts Mutual Life Insurance Co. v. Russell in 1985, a sharp division arose in the Court as to the scope of “equitable” relief available to individual ERISA plan beneficiaries. The plaintiff in Russell sought compensation for her disability plan’s wrongful denial of benefits. The majority decision, authored by Justice Stevens, ruled against individual relief under §§ 409(a) and 502(a)(2), which allowed relief only to the plan for breach of fiduciary duty. What is more, Justice Stevens read ERISA as so “comprehensive and reticulated” that the Court is precluded from inferring other remedies not expressly included in the statute because Con-
gress had actually intended to omit them.\textsuperscript{69} Taking it one step further, Justice Scalia extended this theory to § 502(a)(3) relief in his decision in \textit{Mertens v. Hewitt Associates}\textsuperscript{70} and \textit{Great-West Life and Annuity Insurance Co. v. Knudson}.

As explained in more detail below, it was Justice Stevens’s opinion in \textit{Russell} that seemed to later spark Justice Scalia’s restrictive \textit{Mertens} opinion.\textsuperscript{72}

The \textit{Russell} concurrence by Justice Brennan was quick to catch Justice Stevens’s assumed misstatement: that ERISA is a “comprehensive and reticulated statute.”\textsuperscript{73} According to Brennan, ERISA’s legislative history demonstrates that Congress rather intended ERISA to provide a general skeletal scheme that was to be further developed by case law.\textsuperscript{74}

2. \textit{Mertens} v. Hewitt Associates

Gleaning from Justice Stevens’s dicta in \textit{Russell}, Justice Scalia’s opinion in \textit{Mertens} took an awkwardly narrow approach to “equitable” relief. In \textit{Mertens}, the plaintiff was unable to recover all of his accrued benefits from either his insolvent employer or the ERISA plan’s termination insurance program.\textsuperscript{75} The plaintiff sought compensatory damages against an actuarial firm for its involvement with the employer’s plan accounts and for the firm’s failure to reveal that the accounts were under-funded.\textsuperscript{76} The Court held that because Congress intended ERISA to be an all-inclusive legal package, according to \textit{Russell}, “equitable” relief in § 502(a)(3) against a non-fiduciary must not include the application of outside trust law.\textsuperscript{77} The Court reasoned that “[e]quitable’ relief must mean \textit{something} less than all relief.”\textsuperscript{78} Instead, it must only refer to those remedies typi-

\begin{itemize}
  \item \textsuperscript{69} \textit{Id.} at 146 (quoting Nachman Corp. v. Pension Guar. Corp., 446 U.S. 359, 361 (1980)).
  \item \textsuperscript{70} 508 U.S. 248, 253–54 (1993).
  \item \textsuperscript{71} 534 U.S. 204, 209 (2002).
  \item \textsuperscript{72} \textit{See infra} note 77 and accompanying text.
  \item \textsuperscript{73} \textit{See Russell}, 473 U.S. at 155 (Brennan, J., concurring). This decision was joined by Justices White, Blackmun, and Marshall.
  \item \textsuperscript{74} \textit{See id.} at 152 n.6, 155–57 (Brennan, J., concurring); \textit{see also infra} note 266 and accompanying text. Justice Brennan’s appeal to legislative history will be highlighted in greater detail in Part IV of this Comment.
  \item \textsuperscript{75} \textit{Mertens}, 508 U.S. at 250.
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{Id.} at 251, 261–63.
  \item \textsuperscript{78} \textit{Id.} at 258 n.8.
\end{itemize}
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cally available in equity from the days of the divided bench. Those remedies included injunction, mandamus, and restitution, but expressly excluded compensatory damages.

In a surprising about-face of loyalty from the strict textualist Scalia camp to the more purposivist side, Justice Stevens switched from his majority opinion in *Russell* against individual compensatory relief under § 502(a)(2) to the dissent approach in *Mertens*, favoring individual compensatory relief under § 502(a)(3). He, along with Chief Justice Rehnquist and Justice O’Connor, joined Justice White’s dissent. The dissent argued that monetary compensatory damages to “make the victims [of the breach] whole” are an acceptable form of equitable relief traditionally awarded in trust common law. Thus, according to the dissent, the majority under Justice Scalia was mistaken in precluding all forms of compensatory damages.

3. Varity Corp. v. Howe

Just when it seemed there was no hope for any kind of practicable relief for injured individual ERISA plan participants, hope finally came in the *Varity Corp. v. Howe* decision of 1996, in which the Supreme Court purposivist camp finally prevailed and thereby provided individual compensatory relief for breach of fiduciary duties to plan participants. In *Varity*, the plan fiduciaries purposefully misled the employees under the plan. The Court distinguished *Russell*, holding that even though individual relief for breach of fiduciary duty is not available under §§ 409(a) and 502(a)(2), it is available under § 502(a)(3). According to the majority, there was no reason why Congress would have denied relief under those circumstances.

79. Id. at 256–57.
80. Id. at 256.
83. Id. at 266–67.
84. Id. at 263–64.
86. Id. at 494.
87. Id. at 515.
88. Id. at 513.
Naturally, the textualist camp contended this result.\textsuperscript{89} Justice Thomas’s lengthy dissent reiterated a strict, confined statutory construction—arguing in true textualist style against any remedy not expressly included in the statute.\textsuperscript{90} It maintained that \textit{Russell} should also apply to § 502(a)(3), especially since ERISA was not intended to follow the trust common law definition of fiduciary duty to protect plan participants, but to protect the integrity of the plan itself.\textsuperscript{91} In short, there should be no recovery for breach of fiduciary duty under § 502(a)(3).\textsuperscript{92}

4. Great-West Life and Annuity Insurance Co. v. Knudson

Lastly, in 2002, the pendulum swung back in favor of the textualist side in \textit{Great-West Life and Annuity Insurance Co. v. Knudson},\textsuperscript{93} in which Justice Scalia supported the majority’s earlier \textit{Mertens} decision. Great-West Life & Annuity Insurance Co., the plaintiff in this case, sought subrogation for insurance benefits it paid a plan beneficiary who later received compensatory relief from the third party tortfeasor.\textsuperscript{94} Again, the majority under Justice Scalia reiterated the same narrow interpretation of “appropriate equitable relief” used in \textit{Mertens}\textsuperscript{95}—those “typically available in equity”\textsuperscript{96}—due to the comprehensive nature of ERISA’s construction.\textsuperscript{97} The Court ruled that a plaintiff could not hold a defendant personally liable for restitution in equity but could only recover the plaintiff’s particular identifiable property in the defendant’s possession.\textsuperscript{98} However, the Court held against recovery for the ERISA plan because the settlement funds were not in the defendant’s possession.\textsuperscript{99}

Justice Stevens dissented from the majority’s decision. He pointed out that \textit{Mertens} applied only to § 502(a)(3)(B) for “other

\begin{thebibliography}{99}
\bibitem{89} See \textit{id.} at 516 (Thomas, J., dissenting). This dissent was joined by Justices O’Connor and Scalia.
\bibitem{90} \textit{Id.} at 516–22.
\bibitem{91} \textit{Id.} at 522–25.
\bibitem{92} \textit{Id.} at 516.
\bibitem{93} 534 U.S. 204, 209–10 (2002).
\bibitem{94} \textit{Id.} at 208.
\bibitem{95} \textit{Id.} at 209 (quoting 29 U.S.C. § 1132(a)(3) (1994)).
\bibitem{96} \textit{Id.} at 210 (quoting \textit{Mertens} v. \textit{Hewitt} Assoc., 508 U.S. 248, 256 (1993)).
\bibitem{97} \textit{Id.} at 209–10.
\bibitem{98} \textit{Id.} at 213–14.
\bibitem{99} \textit{Id.} at 214.
\end{thebibliography}

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appropriate equitable relief”—not to the instant case seeking injunction under § 502(a)(3)(A). Essentially, he saw no reason why Congress would create a cause of action and not provide a remedy for plan participants. So, according to Justice Stevens, it would stand to reason that the majority had no basis for insisting that Congress intended to preclude compensatory remedies to plan participants, other than its historical analysis of an obsolete court system.

Justice Ginsburg also wrote a dissenting opinion, joined by Justices Stevens, Souter, and Breyer. First, reflecting Justice Stevens’s separate comments, Justice Ginsburg blasted the majority for relying on an unjustifiable definition of “equitable” relief that not only had been abandoned since the 1930s but also contradicted “Congress’ stated goals in enacting ERISA.” Justice Ginsburg’s dissent supported a flexible definition of equitable relief, based in trust law, adaptable to provide the “appropriate . . . equitable relief in each case.”

Also, it is worth noting some critical flaws in Justice Scalia’s position in Great-West on § 502(a)(3) restitution, as pointed out by Professor John H. Langbein—an author whose article is widely recognized on the issue, notably by Justice Ginsburg in her Davila concurrence. First, Justice Scalia had to amend his views of restitution as an appropriate form of relief in order to maintain his position against monetary damages. Accordingly, he distinguished restitution in law and in equity. The plaintiff could not impose personal liability on the defendant, as such would constitute restitution in law. Yet, had Justice Scalia paid more attention to the same text he relied on to revive the antiquated definition of “equity” in Mertens, he would have found that the plan, as the “equitable assignee” in subrogation cases, should have a right to restitution of repaid funds in equity. Another significant problem lies in the fact that neither

100. Id. at 222 (Stevens, J., dissenting).
101. Id. at 223.
102. Id.
103. Id. at 225–28 (Ginsburg, J., dissenting).
104. Id. at 230 (quoting 42 U.S.C. § 2000e–5(g)(1) (1994)).
106. Langbein, supra note 32, at 1357.
108. Id. at 214.
109. Langbein, supra note 32, at 1358.
restitution nor mandamus existed in equity before the divided bench, only quasi-contract and constructive trusts did.\textsuperscript{110} This brings into question the validity of Justice Scalia’s \textit{Mertens} opinion, which originally included restitution as a form of relief “typically available in equity.”\textsuperscript{111} Also, Justice Scalia’s inflexible interpretation would permit plan beneficiaries, such as the defendant in \textit{Mertens}, to use ERISA as an “instrument of fraud” against their plan.\textsuperscript{112} These are some serious flaws that call Justice Scalia’s whole logic into question.

Thus, we see from the Court’s complicated history that the future of individual compensatory relief for breach of fiduciary duty under § 502(a)(3) is nearly impossible to predict. On the one end of the tug-of-war is Justice Scalia’s textualist camp, insisting on a limited interpretation of § 502(a)(3) that leaves most injured ERISA plan participants without compensatory relief. On the other end is Justice Stevens’s purposivist camp, relying on common law trust principles to provide a broader, make-whole standard for compensatory relief under § 502(a)(3). And more recently, the replacements of two swing voters on this issue—former Chief Justice Rehnquist and Justice O’Connor—could tip the scales in either direction.

With that background of the Court’s general approach to §502(a)(3) jurisprudence, the \textit{Pegram} case, laid out below, illustrates in particular the Court’s approach to HMOs under ERISA’s remedial scheme.

\textbf{B. Plugging HMO Breach of Fiduciary Duty into the ERISA § 502(a)(3) Equation}

1. \textit{Pegram v. Herdrich}: Davila \textit{Precursor}

\textit{Pegram v. Herdrich}\textsuperscript{113} was a noteworthy precursor in 2000 that helped set the stage for the \textit{Davila} decision. Like \textit{Davila}, this case concerned HMO liability for the treatment of its employee plan participants. The HMO in this case, Carle Care, was owned by physicians that provided prepaid medical care under employer contracts.\textsuperscript{114} Dr. Pegram required Ms. Herdrich to wait eight days to have an ul-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{110} Id. at 1357.
\item \textsuperscript{111} Id.; see also \textit{Mertens v. Hewitt Assoc.}, 508 U.S. 248, 256 (1993).
\item \textsuperscript{112} Langbein, supra note 32, at 1358.
\item \textsuperscript{113} 530 U.S. 211 (2000).
\item \textsuperscript{114} Id. at 215.
\end{itemize}
\end{footnotesize}
trasound of her abdomen.\textsuperscript{115} It was during this delay that her appendix burst, resulting in peritonitis.\textsuperscript{116} Accordingly, Ms. Herdrich originally filed state claims for medical malpractice and for fraud. When defendants removed the case to federal court under ERISA preemption, she amended her complaint to include a claim for breach of fiduciary duty under ERISA.

In order to determine Carle’s liability for a breach of fiduciary duty under ERISA, the Supreme Court had to consider whether treatment decisions made by HMO physician employees of an ERISA-regulated plan constituted fiduciary acts.\textsuperscript{117} The “threshold question” for ERISA breach of fiduciary duty was “not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary’s interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.”\textsuperscript{118} An ERISA plan administrator may wear many hats, but he or she must wear only one hat at a time, meaning the administrator is a fiduciary for the purposes of ERISA only when he or she acts in that capacity.\textsuperscript{119} Indeed, to argue the existence of injury before the existence of a duty would put the cart before the horse.

The Court distinguished this case, where Carle’s physicians made mixed treatment and eligibility decisions, from situations involving pure eligibility decisions.\textsuperscript{120} According to the Court, pure eligibility decisions were strictly administrative actions—clearly part of ERISA fiduciary duty.\textsuperscript{121} But mixed treatment and eligibility decisions were not fiduciary decisions.\textsuperscript{122}

One of the Court’s primary concerns with mixed eligibility decisions was the troublesome task of separating pure eligibility decisions from treatment decisions and the impact that may have on claims.\textsuperscript{123} Most HMO plans require a determination of “medical necessity” for

\begin{itemize}
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id. Peritonitis is in general an inflammation of the abdominal cavity.
\item \textsuperscript{117} Id. at 214.
\item \textsuperscript{118} Id. at 226.
\item \textsuperscript{119} Id. at 225.
\item \textsuperscript{120} Id. at 228–29.
\item \textsuperscript{121} See id.
\item \textsuperscript{122} Id. at 229.
\item \textsuperscript{123} Id. at 228.
\end{itemize}
coverage eligibility. The opinion of the treating physician generally holds great weight in the determination of “medical necessity.” In mixed decisions, however, the employee physician is making both kinds of decisions: “medical necessity” and coverage. To further complicate the matter, quite often the physician is not deciding whether to cover a condition, but when and how to treat the condition so as to constitute a covered “medical necessity.” The Court reasoned that an HMO could possibly claim medical judgment in defense of its eligibility decision. In addition, the Court pointed out that participants may also cloak their medical malpractice cases as ERISA fiduciary duty claims to access HMOs’ deeper pockets, in addition to the claims against the physician. Or, in the alternative, HMOs may use this same tool to successfully remove cases to federal courts—a more agreeable jurisdiction for them, as explained earlier.

Hence, the Court believed that to allow ERISA preemption of mixed eligibility decisions would erode the distinction between state malpractice and federal ERISA actions. Such an allowance would render any medical malpractice claims of HMO physicians in state court superfluous, no doubt clogging the federal courts with litigation. As a result, federal judges would have to integrate local medical malpractice standards into federal ERISA fiduciary cases if mixed decisions were considered fiduciary acts. Obviously, the Court explained, Congress did not intend ERISA to have such far-reaching ramifications. Therefore, the Court unanimously concluded that mixed decisions were not fiduciary actions.

124. Id. at 229.
125. Id.
126. See id.
127. Id. at 228–29.
128. Id. at 235.
129. Id. at 235–36. It may also be used as a mechanism to collect attorneys’ fees. Id.; see 29 U.S.C. § 1132(g)(1) (2000).
130. See supra Part II.D.
132. Pegram, 530 U.S. at 235.
133. Id. at 236.
134. Id. at 237.
135. Id.
there was no need to determine whether there had been a breach of fiduciary duty.\footnote{136}

2. Aetna Health Inc. v. Davila: On the Brink of Defining Remedies

Finally, in 2004 the Davila case presented the Court with claims for breaches of fiduciary duty against HMOs. In Aetna Health Inc. v. Davila,\footnote{137} the U.S. Supreme Court combined two ERISA preemption cases. In one case, described at the beginning of this paper, Aetna’s denial of coverage for Vioxx pain medication compelled Juan Davila to resort to a less expensive pain medication that Aetna would cover—a decision that led to severe intestinal bleeding and damage.\footnote{138} The other respondent, Ruby Calad, suffered complications when CIGNA cut short her post-surgery hospital stay—a decision that resulted in rehospitalization.\footnote{139} Both respondents alleged in state court that denial of coverage for recommended treatment constituted a breach of ordinary care in making treatment decisions under the Texas Health Care Liability Act (THCLA) and was the proximate cause of their injuries.\footnote{140}

The HMO petitioners successfully removed the cases to federal court under an ERISA § 502(a) preemption theory.\footnote{141} On appeal, the Fifth Circuit held that the claims were not preempted because they were seeking tort damages, not benefit reimbursement.\footnote{142} Complete preemption occurs when state causes of action duplicate those contained in ERISA § 502(a).\footnote{143} Since THCLA does not provide for benefit reimbursement, it does not “duplicate the causes of action listed in ERISA.”\footnote{144} Thus, the Fifth Circuit concluded that the case should not be preempted.\footnote{145}

Reversing the circuit court’s decision, the Supreme Court held that ERISA completely preempts the THCLA claim for breach of

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136. \textit{Id}.  \\
137. 542 U.S. 200 (2004).  \\
138. \textit{Id.} at 205; \textit{see also} Roark v. Humana, Inc., 307 F.3d 298, 303 (5th Cir. 2002).  \\
139. Davila, 542 U.S. at 205.  \\
140. \textit{Id}.  \\
141. \textit{Id}.  \\
142. \textit{Id.} at 206.  \\
144. \textit{Id}.  \\
145. \textit{See id}.}

ordinary care.\footnote{Id. at 214.} Since the respondents’ coverage denial claims were merely in regard to the administration of their benefits, their claims fell within the scope of ERISA § 502(a)(1)(B) fiduciary duties.\footnote{See id.} Moreover, the Court reasoned that permitting state law to supplement § 502(a) remedies would undermine congressional intent that § 502(a)(1)(B) causes of action remain exclusive.\footnote{Id. at 216.}

Relying on the Court’s reasoning in \textit{Pegram v. Herdrich},\footnote{530 U.S. 211 (2000).} the respondents contended that their cases should not be preempted since they did not relate to employee benefits.\footnote{Davila, 542 U.S. at 218.} The Court distinguished its holding in \textit{Pegram} from the instant cases. It limited \textit{Pegram}’s reach to mixed eligibility cases where the treating physician also made benefit administration decisions—that is, where the plan coverage “eligibility decision and the treatment decision were inextricably mixed.”\footnote{Id. (citing Pegram, 530 U.S. at 229).} In contrast, the plan administrators in these instant cases were “neither respondents’ treating physicians nor the employers of respondents’ treating physicians.”\footnote{Id. at 221.} Furthermore, the respondents only claimed recovery for denial of benefits—a pure eligibility decision.\footnote{Id.} Therefore, since pure eligibility decisions are fiduciary acts under \textit{Pegram}, these cases fell under ERISA fiduciary regulation\footnote{Id. at 218–19.} and should be completely preempted.\footnote{Id. at 214, 221. The Court also held that these state claims are not saved from preemption even if the state law regulating insurance only generally duplicates or supplements ERISA § 502(a), rather than exactly duplicating ERISA, because of the overpowering comprehensiveness intended with § 502(a). See Davila, 542 U.S. at 216.}

The Court mentioned the Government’s suggestion that § 502(a)(3) could potentially provide make-whole relief to the respondents.\footnote{Id. at 221 n.7.} Yet, since respondents failed to amend their pleadings to include § 502(a), the scope of § 502(a) and the remedies thereby available were out of the Court’s reach to decide.\footnote{Id.; see also Scott Rhodes, Note, \textit{ERISA Strikes Back: Aetna Health Inc. v. Davila’s Use of ERISA To Strike Down the Texas Health Care Liability Act}, 57 \textit{Baylor L. Rev.} 481, 499 (2005) (citing Davila, 542 U.S. at 221 n.7).}
issues to address, the cases were remanded for further proceedings, but the parties did not pursue the case further.\textsuperscript{158} And so, the fiduciary loophole for ERISA § 502(a) remedies evaded the Court’s consideration.

Justice Ginsburg, in her sympathetic concurrence, encouraged Congress and the Court to correct ERISA’s “regulatory vacuum,” which generally leaves plan participants without relief.\textsuperscript{159} Moreover, she further elaborated on make-whole relief which the Court had mentioned might be available under ERISA\textsuperscript{160}—a potential loophole to the seemingly hopeless “regulatory vacuum.”\textsuperscript{161}

The aforementioned cases illustrate the sharp division within the Court over the scope of § 502(a)(3) relief. At present, the Supreme Court has not yet precluded compensatory damages against an ERISA fiduciary. The plaintiffs in the \textit{Varity} case, which was decided in between \textit{Mertens} and \textit{Great-West}, were awarded equitable relief against a fiduciary in the form of reinstatement, not monetary damages.\textsuperscript{162} As the Government pointed out in its amicus brief in \textit{Davila}, both the \textit{Mertens} and \textit{Great-West} decisions involved claims against non-fiduciaries.\textsuperscript{163} In addition, the mixed decisions at issue in \textit{Pe-gram} were also considered non-fiduciary acts.\textsuperscript{164} Finally, the Court again missed the opportunity to address damages against a fiduciary in \textit{Davila} because the plaintiffs did not pursue any issues beyond complete preemption.\textsuperscript{165} Thus, it remains to be seen whether the Court’s textualists or purposivists will allow trust law remedies under ERISA § 502(a)(3)—specifically make-whole compensatory relief—against a breaching HMO fiduciary.

\begin{thebibliography}{166}
\bibitem{158} Calad v. CIGNA Healthcare of Tex., Inc., 388 F.3d 167 (5th Cir. 2004).
\bibitem{159} \textit{Davila}, 542 U.S. at 222 (Ginsburg, J., concurring) (quoting DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 456 (3d Cir. 2003)).
\bibitem{160} \textit{Id}. at 221 n.7 (majority opinion).
\bibitem{161} \textit{Id}. at 223–24 (Ginsburg, J., concurring).
\bibitem{165} \textit{Davila}, 542 U.S. at 221 n.7.
\end{thebibliography}
IV. SCALIA V. STEVENS: TEXT OR PURPOSE

As evidenced by the above line of cases, a nearly-even division has emerged among the Justices of the Court, each side staunchly advancing its respective interpretation of ERISA § 502(a)(3) relief. Claiming to use a strict textual approach, Justice Scalia’s camp supports a narrow interpretation of “equitable relief” to protect only the integrity of the plan itself. On the other side, Justice Stevens’s camp applies common law trust principles to award a broader range of make-whole compensatory damages to individuals, as well as the plan. But with the delicate balance that already exists within the Supreme Court and the recent turnover in justices, this tug-of-war between Scalia’s interpretation and Stevens’s interpretation could go either way.

Although the Supreme Court has not yet precluded compensatory damages for individual plan beneficiaries for breach of fiduciary duty, the Scalia camp’s unwavering treatment of strictly applying the language of § 502(a)(3) suggests it is inevitable. First, the Court set the stage to preclude compensatory damages in *Russell* by expressing its reluctance to “tamper” with a “comprehensive and reticulated” enforcement scheme so carefully crafted in ERISA. The Court further expressed that ERISA’s fiduciary liability provision and corresponding enforcement provision were intended to protect the plan as a whole, rather than the individual plan beneficiaries.

Second, the Scalia camp attributes its § 502(a) interpretation generally out of strict allegiance to clear congressional intent. In particular, as Justice Scalia aptly put it, “It is, however, not our job to find reasons for what Congress has plainly done; and it is our job to avoid rendering what Congress has plainly done (here, limit the available relief) devoid of reason and effect.” Indeed, Justice Scalia insisted that if Congress had intended to authorize such broad relief as the dissent interpreted § 502(a) to provide, it would have simply

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said so in the statute. Another example of the Court’s blind obedience to the text of the statute is in part of Justice Stevens’s rationale for denying relief to a plan participant for detrimental delay in benefit claims processing—“the text of ERISA does not explicitly regulate ‘the possible consequences of delay in the plan administrators’ processing of a disputed claim.’” Although Justice Stevens has since made an about-face in his views, Justice Scalia was still convinced in *Mertens* that trust law would provide a broader range of remedies than Congress intended. Hence, Justice Scalia’s side insists that Congress intended his narrow construction of ERISA § 502(a)(3).

Last, and more importantly, the Court’s insistence in *Mertens* that compensatory damages are not “appropriate equitable relief” as contained in ERISA § 502 in the non-fiduciary context will likely carry over to the fiduciary context. In the *Great-West* opinion, the Scalia camp expressly reinforced that it would not vary its interpretation of § 502 depending on the context by carving out one exclusive, narrow exception—allowing only “restitution traditionally available in equity,” or non-legal relief. In other words, “for restitution to lie in equity,” the plaintiff cannot impose personal liability on the defendant, as it would be considered legal relief, except to recover identifiable money in the defendant’s possession that “in good conscience” belongs to the plaintiff. Interestingly enough, contrary to the pattern set by Justice Scalia, Justice Breyer’s *Varity* opinion indicated that § 502(a)(3) does cover breaches of fiduciary duty.

171. *Id.* at 218. One could also argue the opposite: if Congress had intended such a narrow definition of “other appropriate equitable relief” as the majority interpreted ERISA § 502(a) to provide, it would have expressly said so.


174. See *id.* at 256 (limiting the scope of “other appropriate equitable relief” in ERISA § 502(a)(3) to “those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)’); *see also Great-West*, 534 U.S. at 221 (holding that ERISA § 502(a)(3) does not authorize legal relief); *Bowen v. Massachusetts*, 487 U.S. 879, 918–19 (1988) (Scalia, J., dissenting) (“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.”); *Russell*, 473 U.S. at 145 (holding that ERISA § 409 only authorizes extra-contractual damages to the plan itself, not to plan beneficiaries). And “[m]oney damages are, of course, the classic form of legal relief.” *Mertens*, 508 U.S. at 255.

175. *Great-West*, 534 U.S. at 214.

176. *Id.* at 213–14.

Justice Thomas weighed in on the issue of “appropriate equitable relief” for the Scalia camp. In his dissent to the Varity opinion, he “conclude[d] that Congress intended §§ 409 and 502(a)(2) to provide the exclusive mechanism for bringing claims of breach of fiduciary duty,” indicating rather clearly that he opposed individual relief for breach of fiduciary duty.\(^{178}\) And, buried in a footnote at the end of the Great-West decision, Justice Scalia clarified Justice Thomas’s dissent, emphasizing the limited spectrum of equitable remedies available under § 502(a)(3), even in the fiduciary context.\(^{179}\)

Whereby the Scalia camp implied, as some lower courts have reasoned, that “the status of the defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute ‘appropriate equitable relief’ under § 502(a)(3).”\(^{180}\) Therefore, it seems the fiduciary context would likely present a distinction that would not make a difference for the Scalia camp in its narrow application of § 502(a)(3).

In contrast, Justice Stevens’s camp would likely include make-whole remedies under its broad interpretation of “appropriate equitable relief” for breach of ERISA fiduciary duty. The first and foremost reason is that one of the primary purposes of ERISA, expressly written into the text of the statute, was to protect the “interests of participants in employee benefit plans.”\(^{181}\)

Second, from the fact that ERISA was originally conceived from common law trust principles, it was obvious to the Stevens camp that Congress actually intended ERISA to provide a broad frame under which the courts could apply make-whole compensatory relief.\(^{182}\)

Third, also written in the text of the statute are monetary damages for breach of fiduciary duty under § 502(a)(5), which should be

\(^{178}\) \textit{Id.} at 520 (Thomas, J., dissenting).

\(^{179}\) \textit{See Great-West}, 534 U.S. at 221 n.5 (clarifying its decision in \textit{Varity Corp.}, 516 U.S. 489, a breach of fiduciary duty case where the Court allowed reinstatement as appropriate equitable relief under ERISA § 502(a)(3)).

\(^{180}\) \textit{Callery v. U.S. Life Ins. Co. in N.Y.}, 392 F.3d 401, 409 (10th Cir. 2004) (quoting \textit{McLeod v. Or. Lithoprint, Inc.}, 102 F.3d 376, 378 (9th Cir. 1996)); \textit{see also Calhoon v. Trans World Airlines, Inc.}, 400 F.3d 593, 598 (8th Cir. 2005) (“[T]he statutory language does not condition available remedies on the defendant’s identity, but simply states that ‘a participant, beneficiary, or fiduciary’ may bring a civil action ‘to obtain other appropriate equitable relief to enforce the act or the plan.’” (quoting 29 U.S.C. § 1132(a)(3))).


\(^{182}\) \textit{Varity Corp.}, 516 U.S. at 496–97, 502–03.
applied to § 502(a)(3). After the Russell decision, the Court pointed out in Varity that § 502(l) of ERISA provides for payment of civil penalties by breaching fiduciaries to plan participants and beneficiaries (as well as to the plan) for claims brought under § 502(a)(5), which language is nearly identical to § 502(a)(3). The difference is that § 502(a)(5) only authorizes suits by the Secretary of Labor, whereas § 502(a)(3) also includes suits by participants and beneficiaries. So, contrary to the Court’s prior Russell opinion, the Court held in Varity that ERISA does not preclude individual recovery for breach of fiduciary duty under § 502(a)(3).

Fourth, as Justice Ginsburg has pointed out, the only decisions denying individual relief under § 502(a)(3) were against non-fiduciaries.

And fifth, restitution, like that which the Scalia majority ruled as “appropriate” in both Mertens and Great-West, is a form of monetary relief in equity. Hence, there exists overwhelming support favoring monetary damages under § 502(a)(3) for individual plan beneficiaries for breach of fiduciary duty.

Most lower courts remain loyal to the Supreme Court’s interpretation of “appropriate” equitable relief in Great-West, though some
were obedient somewhat reluctantly.\(^{189}\) For example, before Great-West, the Second Circuit in Strom v. Goldman, Sachs & Co. held that make-whole relief was appropriate as restitution for an alleged breach of fiduciary duty under § 502(a)(3).\(^{190}\) However, the Supreme Court’s Great-West dictum supposedly has added a new gloss to its meaning: restitution damages are available only in very limited circumstances.\(^{191}\) Accordingly, in the wake of that landmark decision, many lower courts, including the Second Circuit, have since rejected Strom and declined to extend common law trust remedies—such as restitution or any other legal remedies—to § 502(a)(3).\(^{192}\) Those determined ineligible for benefits would have no claim to benefits that were never theirs.\(^{193}\) Indeed, the Second

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189. Davila, 542 U.S. at 223 (Ginsburg, J., concurring); DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 467 (3d Cir. 2003) (“The vital thing . . . is that either Congress or the Court act quickly, because the current situation is plainly untenable.”); Cicco v. Does, 321 F.3d 83, 106, 107 (2d Cir. 2003) (Calabresi, J., dissenting in part) (arguing that the “gaping wound” caused by the breadth of preemption and limited remedies under ERISA, as interpreted by this Court, “will not be healed” until the Court either “start[s] over” or Congress “wipe[s] the slate clean”); see also McLeod v. Or. Lithoprint Inc., 102 F.3d 376, 378 & n.2 (9th Cir. 1996) (citing Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11 (5th Cir. 1994) (holding that the plaintiffs could not recover tax liabilities from lump sum payments because “Mertens precludes make-whole damages which are not equitable in nature,” regardless of whether the claims are against a fiduciary or non-fiduciary)); Hein v. F.D.I.C., 88 F.3d 210, 223–24 (3d Cir. 1996); Zimmerman v. Sloss Equip., Inc., 72 F.3d 822, 828–29 (10th Cir. 1995); Fraser v. Lintas: Campbell-Ewald, 56 F.3d 722, 725 (6th Cir. 1995); Lee v. Burkhardt, 991 F.2d 1004, 1011 (2d Cir. 1993); Novak v. Andersen Corp., 962 F.2d 757, 759–61 (8th Cir. 1992); Harsch v. Eisenberg, 956 F.2d 651, 654–60 (7th Cir. 1992); McRae v. Seafters’ Welfare Plan, 920 F.2d 819, 822 (11th Cir. 1991); Sommers Drug Stores Co. v. Corrigan Enter., Inc., 793 F.2d 1456, 1462–64 (5th Cir. 1986); Powell v. Chesapeake & Potomac Tel. Co., 780 F.2d 419, 424–25 (4th Cir. 1985).

190. 202 F.3d 138, 144–45, 150 (holding that, for a breach of fiduciary duty, restitution would be “equitable relief” within the meaning of 29 U.S.C. § 1132(a)(3)); see also Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 592 (7th Cir. 2000) (holding that the plaintiff was entitled to the equitable remedy of restitution).

191. See Great-West, 534 U.S. at 214.


193. See Kollman, 2005 WL 1941658, at *12 (citing Great-West, 534 U.S. at 211–14) (holding that front pay is not an acceptable form of equitable damages since it never belonged to the plaintiff).
Circuit summarized the lower courts’ reliance on the *Great-West* dictum well: “Despite the sweep of the language from the Restatement supporting actions in equity against fiduciaries for breach of their duties . . . I am persuaded that the Supreme Court’s dictum in *Great-West*, sends a signal that should not be ignored.”\(^{194}\) Therefore, as it now stands, the majority of lower courts have not pursued Justice Ginsburg’s proposal for a fiduciary exception.

Unlike the lower federal courts, the outcome of this tug-of-war in the Court over the scope of § 502(a)(3) will be a close finish, focusing briefly on just numbers. In review, on one end, Justice Scalia is joined by Justice Thomas, adopting a narrow interpretation of “appropriate equitable remedies.”\(^{195}\) And on the other end, Justice Breyer and Justice Stevens maintain a broader definition based on trust principles.\(^{196}\) The other remaining Justices, such as the classic swing-voters Justice O’Connor and Justice Kennedy, have played on both sides.\(^{197}\) Justice Stevens actually switched sides between the *Russell* and *Mertens* decisions.\(^{198}\) Also, *Mertens* and *Great-West* were both narrow wins (five-to-four) for the Scalia camp.\(^{199}\) *Varity* was a broader six-to-three victory for the Stevens camp.\(^{200}\) And *Davila*, though unanimous, never addressed the issue of remedies.\(^{201}\) With two new Justices joining the bench (Chief Justice Roberts and Justice Alito) to replace two middle-ground Justices (the former Chief Justice Rehnquist and Justice O’Connor), the future of this issue is uncertain.

V. CONGRESSIONAL INTENT FAVORS STEVENS

Though the Court’s ultimate outcome in this tug-of-war over § 502(a)(3) “equitable” relief may seem uncertain, one thing is plain: Justice Stevens’s camp clearly has a more appropriate approach. Justice Scalia’s textualist/originalist approach is simply too

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197. See *id.; see also Great-West*, 534 U.S. at 208; *Mertens*, 508 U.S. 248.
199. See *Great-West*, 534 U.S. at 206; *Mertens*, 508 U.S. at 249.
200. See *Varity Corp.*, 516 U.S. at 491.
myopic to encompass the true congressional intent. Justice Scalia would leave ERISA plans without any meaningful regulation of their eligibility decisions and plan participants without any meaningful remedies, especially given the fact that ERISA preempts any claims related to benefit plans. With no enforceable fiduciary duty to plan participants under ERISA, HMOs are not accountable for their injurious actions. Surely, lawmakers would not intend such a result. Using Justice Stevens’s more suitable approach, courts should award ERISA plan participants at least make-whole compensatory damages for breach of fiduciary duty via Justice Ginsburg’s illusive loophole mentioned in Davila. First, ERISA expressly indicates one of its primary purposes: to impose duties on the plan fiduciaries to protect the individual plan participants and beneficiaries. Second, since ERISA was indisputably founded on common law trust principles, it stands to reason that Congress intended the courts to apply those trust principles to ERISA claims, rather than Justice Scalia’s abandoned principles from the divided bench. Finally, with the more recent rise of HMOs to dominate the health care industry, ERISA’s far-reaching impact on something as complex as HMO liability was surely beyond anything Congress fathomed years prior upon the statute’s creation. For this reason, Justice Stevens’s make-whole approach may not actually be the best approach to HMO fiduciary liability, but it is the only approach that would make sense under ERISA, as it now stands, to provide more feasible relief to injured

202. See Kevin M. Stack, The Divergence of Constitutional and Statutory Interpretation, 75 U. COLO. L. REV. 1, 10 (2004) (“With regard to statutes and the Constitution, the core commitment of Justice Scalia’s textualist originalist view is that judicial interpretation should aim to discern the ‘objective indication of the words’ as they would have been understood at the time of their enactment. This view is textualist because it takes statutory or constitutional text as the sole interpretive object, and it is originalist because it seeks to capture the understanding of the text at the time of enactment, as opposed to at the time of interpretation (or some other time).” (quoting Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION 3, 29 (Amy Gutmann ed., 1996))). Wherefore, Justice Scalia strayed from his own credo by adopting an interpretation of “equitable” that “would [not] have been understood at the time of [ERISA’s] enactment.” Id.


plan participants. Therefore, it is evident that ERISA’s remedial scheme deserves further consideration by Congress, its creator—not further creativity in the courts.

Section A will discuss one of Justice Stevens’s strongest justifications for interpreting § 502(a)(3) to provide compensatory relief to plan participants, which is to support the purposes Congress expressly included in the statute. Then, in light of ERISA’s express purposes, as well as its trust law foundation, Section B will consider § 502(a)(3) application in the trust law context. Section C explains how Justice Scalia’s approach would in essence legitimize fraudulent HMO behavior. Section D describes ERISA’s impact on HMO liability.

A. Comprehensive Statutory Language of ERISA

Like most laws, ERISA was not created in a vacuum. Courts have other sources to help shed light on that troublesome little phrase “other appropriate equitable relief.”\(^{209}\) The Supreme Court basically debated whether Congress intended to base ERISA § 502(a)(3) remedies for breach of fiduciary duty on trust law or on remedies available in equity during the practice of separate courts of law and of equity.\(^{210}\) Justice Stevens’s purposivist camp relied on the overall purposes behind ERISA to support the former theory,\(^{211}\) whereas Justice Scalia’s textualist camp supported the latter theory solely on a textual basis of one word in the statute: “equitable.”\(^{212}\) Justice Stevens, writing for the Court in \textit{Varity}, emphasized that “[w]e should expect that courts, in fashioning ‘appropriate’ equitable relief, will keep in mind the ‘special nature and purpose of employee benefit plans,’ and will respect the ‘policy choices reflected in the inclusion of certain remedies and the exclusion of others.’”\(^{213}\) Indeed, Justice Stevens did just that, finding ample support for his assertions not only in the text of the statute, but also in the legislative history.

\(^{210}\) \textit{See}, e.g., \textit{Great-West}, 534 U.S. at 225–28 (Ginsburg, J., dissenting).
\(^{211}\) \textit{Id.}
As already mentioned, ERISA itself indicates the statute was intended to “provide[e] . . . appropriate remedies” to its participants. 214 The text of the statute contains the general purposes Congress intended the statute to promote—namely, to protect the interests of participants and beneficiaries by (1) establishing fiduciary standards and (2) “provid[ing] for appropriate remedies” and “ready access to the Federal courts.” 215 What is more, ERISA fiduciaries are expected to act “solely in the interest of the participants and beneficiaries.” 216

Along with those direct statements, ERISA’s language also contains more subtle indications that Congress intended to enforce fiduciary obligations under ERISA. To begin with, comparing ERISA’s pension plan provisions to non-pension welfare benefit plan provisions suggests the concern Congress had in fiduciary regulation of ERISA plan administration. 217 ERISA covers both pension plans and non-pension welfare benefit plans, which include medical, surgical, accident, and health programs. 218 As for pension plans, Title I of ERISA provides strict rules in such areas as funding, vesting, an anti-cutback rule, plan termination insurance for the employer, and fiduciary duties in managing the plan benefits. 219 In contrast, Congress excluded welfare benefit plans from these Title I rules with the notable exception of fiduciary duty in managing the plan benefits—a strong indication of the import fiduciary law holds in welfare benefit plan administration. 220 Another subtle example of fiduciary enforcement is the aforementioned civil penalties in § 502(l), awarded to the plan and to participants for breach of fiduciary duty under §§ 502(a)(2) and 502(a)(5), which is nearly identical to § 502(a)(3). 221

Thus, even if the Court were to go strictly by the “comprehensive” language of the statute, the Court would clearly reach the same result as Justice Stevens reached. Even the legislative history indi-

215. Id.
216. Id. § 1104(a)(1).
217. Langbein, supra note 32, at 1323.
219. Langbein, supra note 32, at 1322; see also 29 U.S.C. § 1054(g)(1).
220. Langbein, supra note 32, at 1323–24 (citing ERISA §§ 201(1), 301(a)(1), 4021(a)(1)).
221. Varity Corp. v. Howe, 516 U.S. 489, 510, 515 (1996); see also supra note 184 and accompanying text.

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cated that Congress intended to provide broad remedies for breach of fiduciary duty. Indeed, “[g]iven these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy.”

The *Mertens* majority, led by Justice Scalia, relied on a few other provisions of the statute to distinguish legal remedies from equitable remedies. For example, the placement together of both the terms “equitable” and “legal,” as well as “equitable” and “remedial,” in a few other provisions of the statute were distinguishing factors, according to the majority’s opinion. Hence, according to the majority, legal remedies cannot be considered equitable. From that, Justice Scalia inferred that § 502(a)(3) included only those remedies “typically available in equity” from the days of the divided bench. Not only has the divided bench been long-retired from the court system, but also, as the dissent pointed out, those provisions the majority relied on made the distinction out of necessity because it had no trust law analogue to refer to. Hence, Justice Scalia missed the mark by narrowly deciphering the word “equity” in the wrong context with the rest of the statute—failing to consider those purposes Congress actually wrote into the text of the statute.


223. *Id.* at 513.


225. *Id.* at 256–57. This system, which typically did not award legal or monetary damages in courts of equity, was abandoned in the 1930s. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 224 (2002) (Ginsburg, J., dissenting). “The rarified rules underlying this rigid and time-bound conception of the term ‘equity’ were hardly at the fingertips of those who enacted § 502(a)(3).” *Id.* “By 1974, when ERISA became law, the ‘days of the divided bench’ were a fading memory, for that era had ended nearly 40 years earlier with the advent of the Federal Rules of Civil Procedure.” *Id.* at 224–25.

226. *See Mertens*, 508 U.S. at 269–70 (White, J., dissenting). Although the majority claims it has such an analogue, *id.* at 259 n.9 (majority opinion), the dissent points out it is quite tenuous, at best. *Id.* at 269 n.3 (White, J., dissenting).
B. Trust Law Foundation

Fiduciary duties have a well-established foundation in trust law. For instance, the fiduciary duties described in ERISA, such as duty of loyalty,\textsuperscript{227} duty of prudence,\textsuperscript{228} and benefit determinations,\textsuperscript{229} obviously parallel trust law language.\textsuperscript{230} And, in the HMO context, the Supreme Court looked at plan benefits as a “medical trust.”\textsuperscript{231}

Although there is little doubt that ERISA was originally derived from trust law principles,\textsuperscript{232} there is some question as to what extent trust law is reflected in ERISA.\textsuperscript{233} Yet, another look at the Court’s own case law, the legislative history, and even the statute itself clearly provide the answer: courts should use trust common law—which is settled and contemporary—as the template for deciding the scope of “appropriate equitable relief” rather than referring to Justice Scalia’s antiquated system. Put plainly in Firestone Tire & Rubber Co. v. Bruch, the Court stated that

\begin{itemize}
\item \textsuperscript{227} 29 U.S.C. § 1104(a)(1)(A) (2000) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries."); Restatement (Second) of Trusts § 170(1) (1959) ("The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.").
\item \textsuperscript{228} An ERISA fiduciary is to exercise “the care, skill, prudence, and diligence of a "prudent man acting in a like capacity." 29 U.S.C. § 1104(a)(1)(B). See Restatement (Second) of Trusts § 174 ("The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.").
\item \textsuperscript{229} 29 U.S.C. § 1133 (requiring ERISA plans to follow written claims procedures for benefit denial, to give reasons for denials, and to provide for review of denials "by the appropriate named fiduciary").
\item \textsuperscript{228} Langbein, supra note 32, at 1324–29; see also Pegram v. Herdrich, 530 U.S. 211, 224 (2000) ("These responsibilities imposed by ERISA have the familiar ring of their source in the common law of trusts.").
\item \textsuperscript{228} Aetna Health Inc. v. Davila, 542 U.S. 200, 219 (2004).
\item \textsuperscript{228} See, e.g., Pegram, 530 U.S. at 224.
\item \textsuperscript{228} "[A]ll assets of an employee benefit plan shall be held in trust by one or more trustees." 29 U.S.C. § 1103(a). In addition to the trustees, ERISA also provides that fiduciary duties apply to any of those that administer the plan or exercise any discretion over the plan benefits. Id. § 1002(21)(A). See, e.g., Mertens v. Hewitt Assoc., 508 U.S. 248, 262 (1993) ("The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."). But see Mertens, 508 U.S. at 264–65 (White, J., dissenting) (stating that “congress intended that the courts would look to the settled experience of the common law” to give shape to ERISA plans and “it is to the common law of trusts that we must look” to determine the correct scope of relief); Langbein, supra note 32, at 1324.
\end{itemize}
ERISA abounds with the language and terminology of trust law. See, e.g., 29 U.S.C. §§ 1002(7) (“participant”), 1002(8) (“beneficiary”), 1002(21)(A) (“fiduciary”), 1103(a) (“trustee”), 1104 (“fiduciary duties”). ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions, 29 U.S.C. §§ 1101–1114, “codify[] and make[] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.” Given this language and history, we have held that courts are to develop a “federal common law of rights and obligations under ERISA-regulated plans.”

In Firestone, the Court applied trust law to fill in the blank for the appropriate standard of review for a denial of plan participants’ benefits, unanimously holding that de novo review was the appropriate standard. As Professor Langbein indicated, “[t]he core fallacy of the majority opinion in Russell, which has carried over to Mertens and Great-West, is to confuse applying with implying.” In other words, Justice Scalia’s camp mistakenly inferred that Congress, by implication, intentionally omitted certain remedies from ERISA rather than applying the trust law principles to fashion “appropriate equitable remedies,” as Congress intended. For instance, the ERISA § 404(a) fiduciary duty description and the § 502(a)(3) “catchall” remedy provision were only generally described. And, as Professor Langbein pointed out, Congress also left out a statute of limitations, a jury trial requirement, a standard of review, when attorney fees are


236. Langbein, supra note 32, at 1343. “Accordingly, interpreting Congress’s term “appropriate equitable relief” to cover so predictable and recurrent a case as fiduciary breach resulting in consequential injury entails applying the cause of action Congress created, not implying a cause of action that Congress omitted.” Id. at 1344.

237. Id. The Court referred to ERISA §§ 502(a)(3) and 502(a)(5) as “catchall” provisions. Varity Corp. v. Howe, 516 U.S. 489, 512 (1996) (“This structure suggests that these ‘catchall’ provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.”).
appropriate, and whether punitive damages are permissible.\textsuperscript{238} Indeed, “when enacting ERISA Congress was transposing the trust model into regulatory law for the newly federalized field of pension and employee benefit plans.”\textsuperscript{239}

Therefore, unless otherwise expressly indicated in the statute, common law trust principles should apply by default to develop “appropriate equitable relief” for breaches of fiduciary duty, just as Justice Ginsburg suggested in \textit{Davila}.\textsuperscript{240} Trust law traditionally provides make-whole relief in various instances, such as for “[a]cts of ‘negligence or misconduct in the making or retaining of investments.’”\textsuperscript{241} It stands to reason that such a remedy could apply to ERISA fiduciary liability cases. Justice Scalia even stated that the meaning of § 502(a)(3) relief “remains a question of interpretation in each case which meaning is intended.”\textsuperscript{242} The make-whole standard, a “core principle of trust remedy law, . . . restores the victim to the positions that he or she would have had ‘if there had been no breach of trust.’”\textsuperscript{243} Trust law allows for specific performance and restitution, as well as monetary damages.\textsuperscript{244} In fact, the Uniform Trust Code provides that “[t]o remedy a breach of trust . . . the court may . . . compel the trustee to redress a breach of trust by paying money.”\textsuperscript{245} “The trust remedy tradition grew up in equity and remains, in the

\textsuperscript{238} Langbein, \textit{supra} note 32, at 1345. The courts have addressed some of these issues and “filled in the blanks.” \textit{See}, \textit{e.g.}, Firestone, 489 U.S. at 108–09 (stating that “federal courts have adopted the arbitrary and capricious standard” of review); \textit{see also} Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985) (holding that fiduciaries are not liable for punitive damages).

\textsuperscript{239} Langbein, \textit{supra} note 32, at 1343–44.


\textsuperscript{241} Langbein, \textit{supra} note 32, at 1337 (quoting \textit{George G. Bogert & George T. Bogert, THE LAW OF TRUSTS AND TRUSTEES} § 862, at 38 (rev. 2d ed. 1982)). Langbein refers to one such example of trust law application in an executor’s administration of a probate estate. \textit{Id. (citing In re Estate of Rothko, 372 N.E.2d 291, 298 (N.Y. 1977)).}

\textsuperscript{242} \textit{Rothko, 372 N.E.2d} at 256–57.

\textsuperscript{243} Langbein, \textit{supra} note 32, at 1335 (quoting \textit{Austin Wakeman Scott & William Franklin Fratcher, THE LAW OF TRUSTS} § 205, at 237 (4th ed. 1988)).

\textsuperscript{244} Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002) (“[A] plaintiff could seek restitution \textit{in equity}, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant’s possession.” (citing \textit{Restatement of Restitution} § 160 cmt. a (1936); \textit{3 Dobbs, supra note} 192, at 587–88; \textit{George E. Palmer, LAW OF RESTITUTION} § 1.4, at 17, § 3.7, at 262 (1978))).

And, “there is no reason to suspect that Congress intended to base ERISA on the law of trusts while omitting the predicate law’s core remedy.” Thus, trust law does include compensatory damages as an available equitable remedy.

Nevertheless, ignoring those aspects of the trust remedy law as “other appropriate equitable relief” under ERISA, Justice Scalia’s overly-restrictive “categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)” effectively provide no relief at all to most victims wrongfully denied or delayed benefits by HMOs. And a “crime” (in this case, a cause of action) with no punishment, is no crime at all, as explained in the following section.

C. Negative Effects of HMOs’ ERISA Shield

Including a cause of action in ERISA for breach of fiduciary duty that preempts state law claims yet denies individual compensatory relief creates a vehicle for HMOs to defraud. With no enforceable liability outside of injunction and restitution, the denial of individual relief provides further incentive for HMOs to deny or short-change medical coverage to ERISA plan participants, legitimizing what may seem to some people an already common HMO practice. Indeed, one of the foremost reasons for which Justice Scalia’s approach is enticing to HMOs is the liability shield ERISA provides them. Participants in the midst of medical crises are generally in no position to appeal their beneficiary rights. And with only “equitable” remedies under ERISA, as interpreted by the courts, the most that could happen is the HMO would be forced to cover only the medical treatment in question and not any resulting harm from the HMO’s decision to deny the physician’s prescribed medical treatment. By then, the plaintiff is often seeking damages, not coverage, which are supposedly unavailable under ERISA’s § 502(a) civil enforcement provisions. Thus, one could say an HMO may literally get away with murder.

246. Langbein, supra note 32, at 1320 (quoting RESTATEMENT (SECOND) OF TRUSTS § 197 (1959)).
One is left to wonder why Justice Scalia would thus limit “other appropriate equitable relief”—especially since most claims seeking payment to the plaintiff, whether by judgment, declaration, or injunction, are “[a]lmost invariably” for loss caused by defendant’s breach of fiduciary duty or legal damages. All that remains of “typically equitable” remedies after Great-West is “(1) injunction, for which Congress did not need to provide ‘other appropriate equitable relief’ in § 502(a)(3), having already expressly authorized injunction earlier in the same sentence; and (2) restitution for cases that might have been brought as constructive trust actions before fusion.” Indeed, Professor Langbein was puzzled at why the drafters would hide the ball by calling it “other appropriate equitable relief” if what they had really intended was just a constructive trust.

Justice Scalia’s response was that § 502(a) was intended to protect the plan, not the plan beneficiaries. His reasoning referred back to Justice Stevens’s concept of a comprehensive enforcement scheme in his Russell decision. Since §§ 409 and 502(a)(2) were the only places that expressly addressed breaches of fiduciary duty, that was the only way Congress intended the courts to allow recovery for a breach of fiduciary duty. And, from the Russell decision, those sections will not provide individual relief for breaches of fiduciary duty. In addition, in a further effort to protect plan assets, Justice Scalia rejected the application of current trust law principles as too expansive (and perhaps expensive). He explained that Congress must have meant to limit the relief available by using the word “equitable,” “[s]ince all relief available for breach of trust could be obtained from a court of equity.” With nothing else to turn to—no legislative history, no case law, not even the trust law ERISA was

251. Langbein, supra note 32, at 1360.
252. Id.
254. See id.
257. Id. at 256–58, 262.
258. See id. However, it is worth noting that restitution, like that upheld in Mertens, is based in trust law, further implicating the weakness of his stance against the application of trust law. Id. at 256. In Great-West, Justice Scalia tried to cover his oversight by distinguishing restitution in equity from that in law. 534 U.S. at 213 (quoting Reich v. Cont'l Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994)).
Achilles’ Heel to HMOs’ Impenetrable ERISA Shield

based on—Justice Scalia unearthed ancient principles from the obso-
lete practice of a divided bench to reach a narrow definition of “eq-
utable” that would favor protection to ERISA plans.\textsuperscript{259} In effect,
Justice Scalia’s strict textual approach was actually more of a
stretch—rejecting the “vague notion” of protecting plan beneficiaries
for protection of the plan assets themselves.\textsuperscript{260} In opposition to Jus-
tice Scalia’s baseless inferences, Justice Ginsberg stated appropri-
ately,

The Court is no doubt correct that “vague notions of a statute’s
‘basic purpose’ are . . . inadequate to overcome the words of its
text regarding the specific issue under consideration.” But when
Congress’ clearly stated purpose so starkly conflicts with question-
able inferences drawn from a single word in the statute, it is the lat-
ter, and not the former, that must give way.\textsuperscript{261}

With the recent emergence of HMOs, the vast intricacies of
HMO administration, and the fact that the stakes are much higher
when dealing with people’s health than with their retirement funds,
perhaps HMOs should be held to a different fiduciary standard than
ordinary ERISA fiduciaries. Thus, ERISA’s application to HMO
plans deserves a closer look.

\textbf{D. HMO Considerations}

Despite Justice Scalia’s questionable justification supporting his
narrow definition of equity, his theory may have some redeeming
qualities in the context of emerging HMO liability. An argument
could be made that shifting focus of fiduciary duty of loyalty from
the plan to individual plan beneficiaries would inevitably lead to
costly consequences and confusion. Justice Scalia has even men-
tioned that increasing liability may induce higher costs, discouraging
employers from offering private benefit plans.\textsuperscript{262} Furthermore, as
illustrated by the amicus curiae brief cited in \textit{Varity}, plan administra-

\textsuperscript{259.} \textit{Mertens}, 508 U.S. at 256–58.

though Congress sought to guarantee that employees receive the welfare benefits promised by
employers, Congress was also aware that if the cost of providing welfare benefits rose too high,
employers would not provide them at all.”); see also \textit{Mertens}, 508 U.S. at 262 (“Exposure to
that sort of liability would impose high insurance costs upon persons who regularly deal with
and offer advice to ERISA plans, and hence upon ERISA plans themselves.”).

\textsuperscript{261.} \textit{Great-West}, 534 U.S. at 227–28 (Ginsberg, J., dissenting) (emphasis omitted)
(quotting \textit{Mertens}, 508 U.S. at 261).

\textsuperscript{262.} \textit{See Varity Corp.}, 516 U.S. at 538–39 (Thomas, J., dissenting).
tive decisions will favor payment to the beneficiaries over preserving plan assets, thereby hiking costs for ERISA plans.\textsuperscript{263} Non-expert courts may place plan administrators’ “technical decisions” under the microscope for closer supervision,\textsuperscript{264} and plaintiffs may cloak their ordinary benefit claims as fiduciary duty claims.\textsuperscript{265} Thus, some legal authorities, including Justice Scalia, reason that Congress must have intended this restrictive remedial scheme for ERISA HMO plans.

Still, this is all speculative, especially in the HMO context. In fact, none of these arguments were made in terms of HMOs and the climbing medical costs that burden this country today. Without any support of this theory precipitated anywhere, such as in the legislative history, it does not explain how Congress intended to apply ERISA’s § 502 remedial scheme in HMO liability claims relating to employee benefit plans. Because HMOs, in the form they exist today, did not dominate the health care industry at the time ERISA was created, Congress could not have anticipated the extent of the effects of HMO liability under ERISA benefit plan regulation. What ERISA’s legislative history does demonstrate is that Congress intended to word the statute broadly (“other appropriate equitable relief”) in order to provide flexibility in employment benefit plan regulation, thereby leaving the federal courts to “fine-tune ERISA’s remedial scheme” based on trust common law tradition.\textsuperscript{266} Or, as Professor Langbein summarized Justice Stevens’s approach,

To expect express statutory regulation in ERISA concerning such details of sound fiduciary practice misconceives how Congress constructed ERISA. What Congress did in ERISA was (1) to mandate the trust device for all plan assets; (2) to make every person an ERISA fiduciary who exercises any discretion over plan assets or plan administration; and (3) to prescribe the core principles of trust fiduciary law, loyalty and prudence, to govern all aspects of plan

\textsuperscript{263} Id. at 514 (majority opinion).
\textsuperscript{264} Id.
\textsuperscript{265} Id. at 513–14.
\textsuperscript{266} Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 152 n.6, 155, 157 (1985) (Brennan, J., concurring) (citing several references in the legislative history indicating a clear intent to extend trust fiduciary principles to employee benefit plans). For example, Senator Jacob Javits, one of the principle authors of ERISA, reported to the Senate Committee on Labor and Public Welfare that “[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.” Id. at 156 (quoting 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits)). But see supra note 168 and accompanying text.
administration. In consequence, Congress had no need to spell out the details, and considerable reason not to do so when legislating for a new field whose contours were not yet fully known.\footnote{267}

Though Justice Stevens’s camp has the more fitting approach for ERISA plan management, the application of Justice Stevens’s interpretation of “other appropriate equitable relief” is simply not enough in this context. The HMO liability problem is much bigger than could be adequately covered by ERISA as it now stands. To begin with, lumping HMOs into ERISA regulation has resulted in a regulatory vacuum that needs to be addressed by either Congress or the Court. Injured plan participants have no effective relief under Justice Scalia’s approach to ERISA’s remedial scheme. Along with plan participants’ lack of effective relief are complex cost issues, such as how to balance the costs of providing benefits to plan participants, as Justice Stevens would suggest, while avoiding higher plan costs that may result from increased HMO liability, as Justice Scalia would suggest. Also, as demonstrated by the Pegram and Davila cases, ERISA fiduciary duty is not always very black and white in HMO benefit administration.\footnote{268} Eligibility decisions are inescapably steeped in medical treatment considerations, implying a more complex set of standards than ERISA’s “comprehensive and reticulated” scheme envisioned.

Thus, in response to the “regulatory vacuum” that has resulted and to the recent rise of HMOs, Congress needs to reconsider § 502(a)’s application in the context of HMOs that breach their fiduciary duty.\footnote{269} Meanwhile, courts should apply trust law principles to effectuate ERISA’s intent of protecting plan participants.

VI. CONCLUSION

Had Juan Davila actually claimed § 502(a)(3) remedies for breach of fiduciary duty, instead of limiting himself to appealing the lower court’s decision for ERISA preemption of his state law claims,

\footnote{267} Langbein, supra note 32, at 1328–29 (emphasis added) (footnotes omitted).
\footnote{269} Davila, 542 U.S. at 222 (Ginsburg, J., concurring) (quoting DiFelice v. AETNA U.S. Healthcare, 346 F.3d 442, 456 (3d Cir. 2003)).
the viability of Justice Ginsburg’s loophole would no longer remain a mystery. Thus far, lower federal courts generally do not grant compensatory relief after the Supreme Court’s *Mertens* decision. Notwithstanding, the Court is actually split over the matter. If the Court were to rule in accordance with the purposes ERISA was intended to fulfill—to protect plan participants—the success of his claim would be certain.

According to Justice Stevens’s purposivist approach, ERISA was enacted to protect the employee plan beneficiaries, based on the idea that the plan benefits are being held in trust, and to provide uniformity in the regulation of employee pension and welfare benefits plans. As such, Congress based much of ERISA on common law trust principles. But with this being a new area of law, it only provided a basic structure, with the expectation that the courts would use trust common law to develop their own “federal common law” for ERISA. On the other hand, the textualists on the Court believed that ERISA has a “comprehensive” remedial scheme that should be applied only to protect the plan itself, not the employee participants. From that, they inferred § 502(a)(3)’s “other appropriate equitable relief” to exclude compensatory damages.

Although perhaps Justice Scalia had worthy intentions of controlling increased costs that may arise from allowing individual relief under § 502(a)(3) for breaches of fiduciary duty, Congress did not share the same sentiment. In fact, with very tenuous support for his position, he rejected ample legislative history, case law, trust law principles, and even express relevant text of ERISA that overwhelmingly supported the application of make-whole compensatory remedies as “appropriate equitable relief.” In fact, what Justice Scalia said is that ERISA provides a cause of action for breach of fiduciary duty

270. *Russell*, 473 U.S. at 157–58 (Brennan, J., concurring) (“I believe that, in resolving this and other questions concerning appropriate relief under ERISA, courts should begin by ascertaining the extent to which trust and pension law as developed by state and federal courts provide for recovery by the beneficiary above and beyond the benefits that have been withheld; this is the logical first step, given that Congress intended to incorporate trust law into ERISA’s equitable remedies. If a requested form of additional relief is available under state trust law, courts should next consider whether allowance of such relief would significantly conflict with some other aspect of the ERISA scheme. In addition, courts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA—enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries.”) (footnotes omitted).

and even has exclusive jurisdiction of related claims, but his narrow interpretation of § 502(a)(3) provides no compensatory relief to those injured individual plaintiffs. Of course, this sort of “immunity” encourages HMOs to deny coverage to plan participants.

The reality is that although Justice Stevens’s trust law approach is clearly the most appropriate approach under ERISA as it now stands, it is evidently not the best approach to HMO liability. HMOs did not exist in their present form at the time of ERISA’s conception. Consequently, the HMO problem simply has too many pieces than can fit into the ERISA mold Congress has provided. Therefore, though the Court is now caught in a tug-of-war, with very polarized views of how to approach the problem, there is no question that what HMO liability needs is not judicial creativity, but careful congressional consideration and action.

Charlotte Johnson∗
