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Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA

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Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA

PAUL M. SECUNDA*

“[T]he combination [of the employee’s] state cause of action [being] preempted by ERISA even while ERISA denies him any alternative remedy . . . is disappointingly pernicious to the very goals and desires that motivated Congress to enact pension laws in the first place.”¹

— Judge Stanley F. Birch, Jr.

Congress enacted the Employee Retiree Income Security Act of 1974 (ERISA) to protect employees’ retirement and welfare benefits. Nevertheless, the Act has been interpreted by the U.S. Supreme Court over the years to be in essence an Employers’ Security Act, with employers using ERISA to shield themselves against employee benefits-related claims. The flaw in the current ERISA scheme lies at the intersection of ERISA’s preemption and remedial provisions. Courts broadly interpret the preemption provisions of ERISA to invalidate employee benefits-related state laws and then force employees to depend on an inadequate, “comprehensive and reticulated” remedial scheme. This “intersectionality” problem leads to a state of affairs that is contrary to ERISA’s purpose of protecting the interests of participants and beneficiaries by “providing for appropriate remedies, sanctions, and ready access to the Federal courts.” To cure what currently ails ERISA, this Article proposes three alternative reforms—one judicial and two legislative. The judicial approach would call for the Court to adopt a remedialist approach, which would be in line both with Congress’s intent to incorporate most of the common law of trusts into ERISA, and also consistent with a modern interpretation of a remedial statute. Additionally, Congress should reexamine and reject the far-fetched analogy between ERISA, enacted in 1974, and the “days of the divided bench” analysis and provide an express and expansive definition for “appropriate equitable relief” under proposed section 3(43). Finally, Congress should pass an ERISA Civil Rights Act under proposed section 502(a)(11), which, like the Civil Rights Act of 1991 in the Title VII context, would permit capped, compensatory, and punitive damage awards in appropriate cases.

* Associate Professor of Law, Marquette University Law School. An earlier draft of this Article was presented as part of the 2009 *Hofstra Labor & Employment Law Journal* Symposium, *The Grand Irony of ERISA?: Intersectionality of ERISA Preemption and Remedial Issues*. For their helpful suggestions on this paper, I would like to thank Debra Davis, Albert Feuer, Stephen D. Rosenberg, Susan Harthill, and Paul Mollica.

1. *Sanson v. Gen. Motors Corp.*, 966 F.2d 618, 625 (11th Cir. 1992) (Birch, J., dissenting).

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INTRODUCTION

Congress enacted the Employee Retiree Income Security Act of 1974 (ERISA or “the Act”)² to protect employees’ retirement and welfare benefits.³ Nevertheless, the Act has been interpreted by the U.S. Supreme Court over the years to be in essence an Employers’ Security Act, with employers using ERISA to shield themselves against employee benefits-related claims.⁴

The flaw in the current ERISA scheme lies at the intersection of ERISA’s preemption and remedial provisions. Courts broadly interpret the preemption provisions of ERISA under section 514 to invalidate benefits-related state laws and then force employees to depend on an inadequate, “comprehensive and reticulated”⁵ remedial scheme under section 502(a). This intersectionality problem leads to a state of affairs that is contrary to ERISA’s purpose of protecting the interests of participants and beneficiaries “by providing for *appropriate remedies*, sanctions, and ready access to the Federal courts.”⁶

The Court has accomplished this feat of perverting congressional intent by choosing to elevate a secondary purpose of ERISA over its primary one. While the primary purpose of ERISA is clearly stated in the Act to be the protection of employees’ benefits,⁷ the Court has

2. ERISA §§ 2–4402, 29 U.S.C. §§ 1001–1461 (2006). Following the practice of other ERISA scholarship, the text of this Article refers to the original section numbers as enacted by ERISA, rather than to the United State Code section numbers.

3. Section 2 of ERISA contains the “findings and declarations of policy.” Specifically, it states: “It is hereby declared to be the policy of [the Act] to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries” 29 U.S.C. § 1101(b); *see Boggs v. Boggs*, 520 U.S. 833, 845 (1997) (“The principal object of the statute is to protect plan participants and beneficiaries.”); *Mass. v. Morash*, 490 U.S. 107, 112 (1989) (“ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits.”); John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1365–66 (2003) (“Congress federalized the law of pension and benefit plan administration for the primary purpose of protecting plan participants and beneficiaries through a triple regime of mandatory trusteeship, extensive fiduciary duties, and commensurate remedies.”).

4. *See Dana M. Muir, Fiduciary Status as an Employer’s Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 392 (2000) (“Only in the realm of private sector employee benefit plans . . . have fiduciaries been able to turn their status as fiduciaries, a status that once required ‘the punctilio of an honor the most sensitive,’ into a shield against liability.” (footnote omitted) (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928))); *see also Colleen E. Medill, Resolving the Judicial Paradox of “Equitable” Relief Under ERISA Section 502(a)(3)*, 39 J. MARSHALL L. REV. 827, 829–30 (2006) (“Plan participants who enter this labyrinth find that, contrary to their expectations, federal law does not protect their rights concerning plan benefits.”).

5. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)).

6. 29 U.S.C. § 1001(b) (emphasis added); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987) (“The civil enforcement scheme of § 502(a) is one of the essential tools for accomplishing the stated purposes of ERISA.”).

7. *See supra* note 3.

instead emphasized a subsidiary policy of containing employee benefits plan costs.⁸ In doing so, the Court's ostensible goal is to ensure that employers continue to voluntarily adopt ERISA plans.⁹ Yet, this restrictive approach is contrary to the remedial nature of the legislation, and the elevation of this secondary purpose consistently favors employer interests.

Unlike some ERISA commentators,¹⁰ I believe that the legislative history of ERISA clearly rejects the idea that these "right without remedy" cases arise because of a compromise entered into by employer and employee group advocates at the time of ERISA's enactment. Although ERISA's broad preemptive reach was calculated and intentional,¹¹ there is no similar evidence that Congress meant there to be a limited remedial scheme for protecting employee benefits. Nothing in the legislative record, the views of the so-called literalist Justices to the contrary notwithstanding,¹² evinces Congress's intent to say all that it intended to say on particular remedies.¹³ Instead, it is the Supreme Court that has blundered in its incorporation of inappropriate trust law analogies in this area of the law.¹⁴ In short, intersectionality is a problem

8. See *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981) (noting that ERISA's primary goal was to benefit employees and that a secondary goal was to contain costs).

9. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-63 (1993); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); see also Susan J. Stabile, *Freedom to Choose Unwisely: Congress' Misguided Decision to Leave 401(k) Participants to Their Own Devices*, 11 CORNELL J.L. & PUB. POL'Y 361, 400 (2002) ("Any suggestion for pension reform must be assessed in light of the reality that pension plan sponsorship is voluntary. ERISA imposes significant substantive regulation on pension plans, but leaves the decision whether to offer a pension plan in the first place to employers.").

10. See, e.g., More on that Grand Irony Theory, <http://www.bostonerisalaw.com/archives/benefit-litigation-more-on-that-grand-irony-theory.html> (Dec. 3, 2007) ("ERISA simply leaves some harms incapable of remediation, something that is understood to have simply been part of the balancing act engaged in by Congress in enacting the statute, in which a decision was made to grant only limited rights of recovery in exchange for enacting a statute that would encourage the creation of employee benefits.").

11. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) ("We have observed in the past that the express pre-emption provisions of ERISA are deliberately expansive . . ."); see also Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV. 1, 3-4 (2000) ("A review of ERISA's legislative history and post-enactment amendments suggests that this Congressional silence was intentional and, more importantly, consistent in purpose with the broad scope of preemption announced by the Court nearly two decades ago.").

12. See *infra* Part III.A.

13. See S. REP. NO. 93-127, at 35 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4871 (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. REP. NO. 93-533, at 17 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4655 (describing House version in identical terms).

14. See Langbein, *supra* note 3, at 1319 ("When federalizing the administration of pension and employee benefit plans in ERISA, Congress made a deliberate choice to subject these plans to the pre-existing regime of trust law rather than to invent a new regulatory structure."); see also Susan

under the current scheme not because of a broad preemption scheme alone, but because of the impact of this broad preemption coupled with a limited ERISA remedial scheme.

To cure what currently ails ERISA, this Article proposes three legal reforms—one judicial and two legislative. The judicial approach would call for the Court to adopt a remedialist approach, which would be in line both with Congress’s intent to incorporate most of the common law of trusts into ERISA,¹⁵ and also consistent with a modern interpretation of a remedial statute. Only to the extent that there were intended to be deviations from that common law should the unique characteristics of the ERISA statute be considered in applying the remedial provisions.¹⁶

Congress should also take steps to expand the remedies available under ERISA. To effect this recalibration, Congress should reexamine and reject the far-fetched analogy between ERISA, enacted in 1974, and “the days of the divided bench”¹⁷ analysis offered up by Justice Scalia in *Mertens v. Hewitt Associates*.¹⁸ Congress should overrule *Mertens* by providing an express and expansive definition for “appropriate equitable relief” under my proposal for a new section 3(43). Additionally, Congress could pass an ERISA Civil Rights Act under my proposal for a new section 502(a)(11), which, like the Civil Rights Act of 1991 in the Title VII context,¹⁹ would permit capped, compensatory, and punitive damage awards in appropriate cases.

This Article is divided into four Parts. The first Part briefly provides an overview of the present state of ERISA law in the preemption and remedial areas. In the second Part, the Article discusses the

Harthill, *A Square Peg in a Round Hole: Whether Traditional Trust Law “Make-Whole” Relief Is Available Under ERISA Section 502(a)(3)*, 61 OKLA. L. REV. 721, 723 (2008) (deconstructing traditional trust law to determine whether make-whole relief was typically available for breaches of fiduciary duty and concluding that such relief was available, although it is an ill-fitting form of relief for modern ERISA employee welfare benefits plans).

15. *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (“[W]e recognize that these fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA’s enactment.”); see also *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985) (“[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility.”).

16. *Varity*, 516 U.S. at 497 (“[W]e believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA’s fiduciary duties. In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements.”).

17. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002).

18. 508 U.S. 248, 256–57 (1993); Langbein, *supra* note 3, at 1361 (“It was Justice Scalia, or rather, the five-member Supreme Court majority assembled for his opinions, and not Congress, which gave the term [appropriate equitable relief] the unnatural and dysfunctional meaning propounded in *Mertens* and *Great-West*.”).

19. See 42 U.S.C. § 1981a (2006).

intersectionality problem and provides illustrations of cases that demonstrate the nature of this problem. The third Part first examines the debate between the literalist and remedialist Justices on the Court over the years and then offers a judicial fix to this intersectionality problem by applying the rationale of remedialist Justices to these intersectionality cases. To the extent that the judicial recalibration does not lead to an adequately remedial statute, the fourth Part suggests that Congress define more broadly “appropriate equitable relief” in proposed section 3(43), or take more dramatic steps and enact an ERISA Civil Rights Act under section 502(a)(11), modeled on the Civil Rights Act of 1991.

I. BRIEF OVERVIEW OF THE REMEDIAL AND PREEMPTION PROVISIONS OF ERISA

ERISA is a complex statute covering an extensive area of law. It “protects employee pensions and other benefits by providing insurance . . . , specifying certain plan characteristics in detail . . . , and by setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefits plans.”²⁰ Although employers are not required to offer employee benefits plans,²¹ once such plans are adopted, ERISA provides the applicable legal framework.

This Part of the Article examines the roots of the intersectionality problem that I identify at the junction of the remedial and preemption provisions of the Act. The first section explores the intentionally-broad preemption provisions of section 514 of the Act. The second section then considers the restrictive interpretation given to ERISA’s remedial provisions under section 502(a).

A. ERISA’S BROAD PREEMPTION SCHEME

Section 514 of ERISA is a broadly-written preemption provision that permits ERISA to supersede any state law that “relate[s] to” employee benefits plans.²² A state law may nevertheless be saved from ERISA preemption if it regulates insurance, securities, or banking under “the savings clause.”²³ However, even if the state law regulates insurance,

20. *Varity*, 516 U.S. at 496.

21. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (“Nothing in ERISA requires employers to establish employee benefits plans.”).

22. 29 U.S.C. § 1144(a) (2006). State laws are defined expansively to include “all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.” *Id.* § 1144(c)(1). If the law in question relating to an employee benefits plan is either a state criminal law or another federal law, ERISA preemption does not apply. *Id.* § 1144(b)(4), (d).

23. *Id.* § 1144(b)(2)(A) (“[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.”).

it may still be preempted under section 514(b)(2)(B), known as the “deemer clause,” if the state law is being applied to a self-insured plan.²⁴

Because the “relate to” language of section 514 potentially has no meaningful limit,²⁵ the Supreme Court has struggled to bring some coherence to this provision.²⁶ The Court’s attempts can be broadly broken down into the early preemption cases and the modern preemption cases. In the end, however, ERISA preemption largely maintains its expansive characteristics, consistent with the aims of its legislative drafters.

I. *The “Relates to” Analysis Under Section 514(a)*

a. *The Early Preemption Cases*

The early preemption cases applied a broad, field preemption approach under which ERISA was thought to completely occupy the field of employee benefits law. For instance, in *Shaw v. Delta Air Lines, Inc.*, three employers provided ERISA-covered medical plans to their employees.²⁷ These plans failed to provide benefits to pregnant employees as mandated by New York state laws.²⁸ In deciding whether the New York laws were preempted by ERISA, the Court interpreted the “relates to” language in section 514(a) to mean that a state law is preempted if it makes “reference to” or has a “connection with” an ERISA plan.²⁹ The Court concluded that the New York laws requiring pregnancy coverage had a connection with employee benefits laws because the New York laws mandated what the plans had to cover.³⁰ In coming to this conclusion, the Court noted that “[t]he breadth of § 514(a)’s pre-emptive reach is apparent from that section’s language.”³¹ The Court also delved into ERISA’s legislative history and pointed out that “[t]he bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these

24. *Id.* § 514(b)(2)(B).

25. *See* N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995) (“If ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for [r]eally, universally, relations stop nowhere.” (alteration in original) (quoting HENRY JAMES, RODERICK HUDSON, at xli (N.Y. ed., World’s Classics 1980))).

26. *See* DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 808 (1997) (“This is another Employee Retirement Income Security Act of 1974 (ERISA) pre-emption case.”); *Pilot Life v. Dedeaux*, 481 U.S. 41, 47 (1987) (noting the “statutory complexity of ERISA’s three pre-emption provisions”).

27. 463 U.S. 85, 92 (1983).

28. *Id.*

29. *Id.* at 96–97.

30. *Id.* at 97.

31. *Id.* at 96.

provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language."³²

Cases subsequent to *Shaw* continued to emphasize the expansive scope of ERISA preemption. In *Pilot Life Insurance Co. v. Dedeaux*, Dedeaux injured his back while working for his employer.³³ He was covered under a long-term disability insurance plan covered by ERISA, and although he initially received coverage for his back ailment, the benefits were terminated by Pilot Life after two years.³⁴ Thereafter, Dedeaux's benefits were reinstated a number of times, and Dedeaux sought to bring a number of common-law, bad faith insurance claims under Mississippi state tort and contract law.³⁵ The Court held, however, that state tort and contracts claims alleging improper processing of a benefits claim were preempted by ERISA because the state law claims clearly related to the administration of an ERISA plan.³⁶

In another early case, *Ingersoll-Rand Co. v. McClendon*, the Court examined the "reference to" aspect of the *Shaw* test.³⁷ In that case, an employer terminated an employee in "a companywide reduction in force."³⁸ The employee claimed that the true reason for terminating him was so that he could not vest in his pension.³⁹ Rather than suing under section 510 of ERISA, which provides a remedy for interference with ERISA rights,⁴⁰ the employee sued under the Texas common law of contract and tort.⁴¹ The Court concluded that the state wrongful-discharge action was preempted.⁴² In particular, the Court found the state-law claim preempted because it made "reference to" an ERISA plan and since the existence of, and participation in, the plan was an essential element of the Texas state law action.⁴³

In all, the early preemption cases are characterized by a very broad field preemption approach.⁴⁴ Consequently, most state constitutional,

32. *Id.* at 98 (footnote omitted) (citing H.R. REP. NO. 93-1280, at 383 (1974) (Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 5038, 5162; S. REP. NO. 93-1090, at 383 (1974) (Conf. Rep.)).

33. 481 U.S. 41, 43 (1987).

34. *Id.*

35. *Id.* at 43-44.

36. *Id.* at 48 ("The common law causes of action raised in Dedeaux's complaint, each based on alleged improper processing of a claim for benefits under an employee benefit plan, undoubtedly meet the criteria for pre-emption under § 514(a).").

37. 498 U.S. 133, 139 (1990).

38. *Id.* at 135.

39. *Id.* at 135-36.

40. 29 U.S.C. § 1140 (2006).

41. *Ingersoll*, 498 U.S. at 136.

42. *Id.* at 140.

43. *Id.* The later Supreme Court case of *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 325 (1997), makes clear that the "reference to" preemption test may also be satisfied by establishing that the state law purports to regulate ERISA plans exclusively.

44. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983).

statutory, and common law claims that in any way related to employee benefits were superseded and plaintiffs would have to find whatever remedy they had under ERISA.

b. Modern Preemption Cases

At first blush, modern preemption cases appeared to abandon the broader field preemption approach in favor of a more narrow conflict preemption approach.⁴⁵ Under this new doctrine, a state cause of action is preempted only to the extent that it is impossible to comply with both ERISA and the state law or where the state law interferes with the purposes and objectives of ERISA.⁴⁶

The seminal case that introduces this paradigm shift in ERISA preemption law is *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*⁴⁷ In *Travelers*, New York's Prospective Hospital Reimbursement Methodology statute regulated inpatient hospital rates in New York.⁴⁸ Different diagnostic-related groups (DRGs) were established and set up the average cost of these services.⁴⁹ The catch was that a preference existed for patients with Blue Cross/Blue Shield insurance, Medicaid, and HMOs.⁵⁰ Such patients were billed for hospital services at the lower DRG rate, while others were charged at the DRG rate plus a twenty-four percent surcharge.⁵¹ Several nonpreferred insurers brought a claim to have the New York statute declared invalid on the basis of ERISA preemption.⁵²

Travelers starts by changing the starting point of the ERISA preemption analysis:

[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be

45. See generally *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 808–09 (1997) (finding that a state statute imposing a tax on ERISA-funded medical centers was not preempted); *Dillingham*, 519 U.S. at 319 (finding that prevailing wage laws for apprentices did not relate to ERISA plans); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) (finding that state regulation of health care costs did not relate to employee benefits plans within the meaning of ERISA section 514).

46. See Larry J. Pittman, *A Plain Meaning Interpretation of ERISA's Preemption and Saving Clauses: In Support of a State Law Preemption of Section 1132(a) of ERISA's Civil Enforcement Provisions*, 41 SAN DIEGO L. REV. 593, 598 (2004).

47. 514 U.S. 645 (1995).

48. *Id.* at 649.

49. *Id.* at 649–50.

50. *Id.* at 650.

51. *Id.*

52. *Id.* at 651–52.

superseded by the Federal Act *unless that was the clear and manifest purpose of Congress.*⁵³

In other words, *Travelers* represents a paradigm shift from field preemption to conflict preemption which potentially could leave a wider swath of state laws untouched by ERISA. It purports to create a rebuttable presumption against ERISA preemption if traditional areas of state law are involved.⁵⁴

To determine whether preemption applies, the *Travelers* Court directs that essentially two questions be addressed: (1) whether there are compelling policy reasons under ERISA to preempt state law; and (2) if so, does the state law undermine these policy objectives?⁵⁵ According to the Court, such compelling policy reasons are undermined by state law in instances where the law mandates the type of benefits a plan must provide⁵⁶ and where the law interferes too much with a secondary policy of ERISA:⁵⁷ nationally uniform administration of employee benefits plans.⁵⁸ On the other hand, the New York state law in *Travelers* was not preempted because it only had an indirect economic influence on the pricing of insurance policies.⁵⁹ Such an impact might influence the decisions of plan sponsors in selecting a health insurer, but not to the necessary degree to interfere with the national policy of benefits uniformity.⁶⁰

Although the new language under *Travelers* suggests that the scope of ERISA preemption should not have been as expansive in the modern era as it was in the early preemption cases, many state laws in the intervening years have not survived ERISA preemption.⁶¹ At first, it

53. *Id.* at 654–55 (emphasis added) (citations omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

54. *Id.*

55. *See id.* at 658–63.

56. *See Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 727–28 (1985).

57. Because this policy is only in legislative history and court cases, I refer to it as a “secondary policy,” as opposed to the primary purpose in ERISA of protecting employee benefits.

58. *See Travelers*, 514 U.S. at 657. “The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.” *Id.* The Court over the years has found that several types of state laws interfere too much with the policy of national uniformity and, therefore, relate to an employee benefits plan. *See, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (state law regulating plan participant’s beneficiary designation); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999) (state law making employer agent of insurance company). On the other hand, there are state laws that only indirectly interfere with these same ERISA policy objectives, and are not preempted. *See, e.g., Travelers*, 514 U.S. 645 (state law imposing surcharge on health care plan insurer or plan assets); *Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr.*, 519 U.S. 316 (1997) (state law regulating wages paid to apprentices at public construction work projects); *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997) (state law imposing a tax on hospitals, most of which do not operate ERISA plans).

59. *Travelers*, 514 U.S. at 668.

60. *Id.* at 662.

61. *See infra* notes 68–84 and accompanying text.

appeared that the Court would follow fairly closely its new approach to preemption. For instance, in *DeBuono v. NYSA-ILA Medical & Clinical Services Fund*, a mere two years after *Travelers*, the Court examined a New York state law which imposed a direct tax on a plan asset (a hospital that provided services for participants and their beneficiaries).⁶² Finding that the state law was “a tax on hospitals,” and that, “[m]ost hospitals are not owned or operated by ERISA funds, the Court found the law not preempted because it did not interfere too much with the underlying policy of ERISA.⁶³ One can argue about whether this law had a direct impact on plan administration, but the Court apparently decided that certain laws designed to subsidize health care financing are more in an area of traditional state concern.⁶⁴

Similarly, in *California Division of Labor Standards Enforcement v. Dillingham Construction*,⁶⁵ involving the application of a state living-wage ordinance to apprentices on public construction work projects, the Court limited the “reference to” prong of the *Shaw* preemption test to a narrower one: the question now is whether the state law is in reference exclusively to an ERISA plan.⁶⁶ In other words, does the state law exclusively regulate ERISA plans or does it also regulate non-ERISA plans? If the latter, then the state law does not make “reference to” ERISA for purposes of preemption.⁶⁷ Thus, *Dillingham* represents yet another step back from the field preemption approach and a narrowing of ERISA preemption.

Yet, a more recent case might suggest a trend back to an expansive interpretation of ERISA’s preemption clause. The family law case of *Egelhoff v. Egelhoff*⁶⁸ is a case in point. David Egelhoff initially designated his second wife, Donna Rae, as the beneficiary of his life insurance policy and pension plan.⁶⁹ They later divorced, and before he could change the beneficiary designation, he died in a car accident.⁷⁰ His children from his first marriage claimed they were owed the proceeds of the policy.⁷¹ They argued that a Washington state statute made the designation of the proceeds to Donna Rae void because the state law assumed that David would not want to assign his benefits to his

62. 520 U.S. 806, 810 (1997).

63. *Id.* at 816.

64. *See id.*

65. 519 U.S. 316 (1997).

66. *Id.* at 324–25. Because that was not the case in *Dillingham*, the state law survived. *Id.* at 319.

67. *Id.*

68. 532 U.S. 141 (2001).

69. *Id.* at 144.

70. *Id.*

71. *Id.*

estranged wife.⁷² Donna Rae argued that the state law was preempted and ERISA permitted her to keep the funds as the named beneficiary.⁷³

The Supreme Court ruled that the Washington law was preempted even though family law is an area of traditional state concern.⁷⁴ The majority found that the law interfered too much with “the payment of benefits, a central matter of plan administration,”⁷⁵ and the uniformity of plan administration for the company,⁷⁶ and noted that the Court has “not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans.”⁷⁷ Moreover, the Court reasoned, the lack of uniformity in plan administration would discourage employers from voluntarily setting up pension plans and life insurance policies, which would be contrary to a core policy concern of ERISA.⁷⁸

Egelhoff thus represents a shift back to a broader preemption scheme based on plan cost and uniform-administration concerns. Other preemption cases from around the same time as *Egelhoff* similarly have applied an expansive concept of preemption to find state laws to be preempted.⁷⁹

An even more recent example of the continuing expansive quality of ERISA preemption comes from a much ballyhooed appellate case involving Wal-Mart and the provision of health care to its workers.⁸⁰ Maryland passed “Fair Share Health Care” legislation,⁸¹ which would have required Wal-Mart to spend eight percent of its payroll on health insurance costs for its employees.⁸² In *Retail Industry Leaders Ass’n v. Fielder*, a trade association representing Wal-Mart challenged the

72. *Id.* at 144–45.

73. *Id.* at 146.

74. *Id.* at 151.

75. *Id.* at 148.

76. *Id.* at 148–49.

77. *Id.* at 151.

78. *Id.* at 149–50 (“Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of ‘minimiz[ing] the administrative and financial burden[s]’ on plan administrators—burdens ultimately borne by the beneficiaries.” (alteration in original) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990))). However, it is not even clear that an increase in plan administration costs actually causes fewer adoptions of employee benefits plans. Since most benefits are outsourced to major insurers or financial companies, which then spread the costs across numerous plans, is there really a cost impact at all on the typical employer, as the Court suggests? Thanks to Stephen Rosenberg of the McCormack Firm, LLC, for his insights on this topic.

79. *See, e.g.*, *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 364 (1999) (finding state law making employer agent of insurance company preempted).

80. *See* Stephanie Armour, *Maryland First to OK ‘Wal-Mart bill’*, USA TODAY, Jan. 12, 2006, http://www.usatoday.com/money/industries/retail/2006-01-12-walmart-maryland_x.htm.

81. MD. CODE ANN., LAB. & EMPL. §§ 8.5-101 to -107 (LexisNexis 2008).

82. The bill applies to all employers with over 10,000 Maryland employees, but the other three employers in Maryland who fell into that category had already spent at least eight percent of payroll on health insurance costs. *See* Armour, *supra* note 80.

Maryland law on ERISA preemption grounds.⁸³ The Fourth Circuit held that the Fair Share law interfered too much with the uniform administration of Wal-Mart's health plan and, therefore, was preempted as having a "connection with" an ERISA plan.⁸⁴

In the last year, however, new signs indicate that the scope of ERISA preemption may again be narrowing. A similar Fair Share law was enacted in San Francisco requiring medium and large employers in the city to make minimum health care expenditures on behalf of covered employees, either by paying into their own employee benefits plans or into a fund maintained and administered by the city.⁸⁵ In *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, the Golden Gate Restaurant Association challenged this law on behalf of its membership on ERISA preemption grounds.⁸⁶ The Ninth Circuit ruled that the San Francisco health-care law was not preempted by ERISA because such preemption is restricted in state-law areas that historically involve matters "of local concern"⁸⁷ like the provision of health care and the San Francisco ordinance "offer[ed] employers a meaningful alternative that allow[ed] them to preserve the existing structure of their ERISA plans."⁸⁸

Golden Gate thus again narrows the scope of ERISA preemption.⁸⁹ Yet, the Ninth Circuit's decision appears to be an outlier at this point and it may still be overturned on appeal. It is more likely that the Supreme Court and lower federal courts will continue to find many state-law claims preempted under an expansive notion of the "relates to" language of section 514 based on concerns of cost and national uniformity in the administration of employee benefits plans.

2. Further Broadening of ERISA Preemption: The Impact of the Savings and Deemer Clauses

The "relate to" language of section 514(a) is not the end of the preemption analysis. The savings clause generally still keeps state laws regulating insurance, banking, and securities free from ERISA

83. 475 F.3d 180, 197 (4th Cir. 2007).

84. *Id.* at 183. The reader may recall that in finding that the Maryland law had a "connection with" employee benefits plans, the court was really indicating that the state law was preempted because it was "related to" an ERISA-governed employee benefits plan. *See id.* at 192.

85. *See* Edward A. Zelinsky, *Golden Gate Restaurant Association: Employer Mandates and ERISA Preemption in the Ninth Circuit*, 47 STATE TAX NOTES 603, 603 (2008).

86. 546 F.3d 639, 642 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3691 (U.S. June 5, 2009) (No. 08-1515).

87. *Id.* at 647 (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995)).

88. *Id.* at 660.

89. *Id.* at 654 ("We read *Travelers* as narrowing the Court's interpretation of the scope of § 514(a).").

preemption.⁹⁰ At the same time, the deemer clause provides a route back into preemption for self-insured health plans.⁹¹

With regard to the savings clause, consider its narrow operation in *Pilot Life Insurance Co. v. Dedeaux*.⁹² Recall that the Mississippi common law contract and tort claims for benefits were found to be “related to” ERISA.⁹³ However, of equal importance, the Court gave a restrictive gloss to the meaning of a “state law regulating insurance”⁹⁴ under the savings clause.⁹⁵ Here, the Court held that the plaintiff’s claim had its “roots” grounded in state tort and contract law, and thus did not qualify as a law regulating insurance, which would have been saved from preemption.⁹⁶ So although the savings clause is set up to diminish the scope of ERISA preemption, it has been interpreted in a way that leads to many state common law claims being preempted.⁹⁷

On the other hand, the deemer clause is broadly construed to keep more claims within ERISA preemption. For instance, in *FMC Corp. v. Holliday*, the question presented was whether a self-funded health benefits plan was subject to a Pennsylvania antisubrogation law.⁹⁸ The preemption analysis concluded that the Pennsylvania law was preempted because it was “relate[d] to” an employee benefits plan⁹⁹ and also determined that the law was subsequently saved as a law that regulated insurance.¹⁰⁰ However, applying the deemer clause, the self-insured employer was not deemed to be an insurance company for purposes of the Pennsylvania antisubrogation law.¹⁰¹ The upshot is that FMC Corp. and other self-insured employers are exempted from state laws that

90. 29 U.S.C. § 1144(b)(2)(A) (2006).

91. *Id.* § 1144(b)(2)(B).

92. 481 U.S. 41 (1987).

93. *See supra* notes 33–36 and accompanying text.

94. 29 U.S.C. § 1144(b)(2)(A).

95. *Pilot Life*, 481 U.S. at 50.

96. *Id.*

97. It is still unclear whether the recent modification of the test for determining which state laws regulate insurance under *Kentucky Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2002), will change the result of cases like *Pilot Life*. *See* E. Farish Percy, *Applying the Common Fund Doctrine to an ERISA-Governed Employee Benefit Plan’s Claim for Subrogation or Reimbursement*, 61 FLA. L. REV. 55, 60–61 (2009) (“Even though the *Miller* test broadened the scope of the savings clause, at least one lower court has recently applied the test in a manner inconsistent with congressional intent to save state laws regulating insurance from preemption.” (footnote omitted) (referencing *Levine v. United Healthcare Corp.*, 402 F.3d 156 (3d Cir. 2005))).

98. 498 U.S. 52, 54 (1990). A subrogation clause requires a plan participant to reimburse the plan for any benefits paid if the participant also recovers on a claim in a tort action against a third party. *Id.* Pennsylvania had a law, the Motor Vehicle Financial Responsibility Law, 75 PA. CONS. STAT. § 1720 (1987), which prohibited plans from enforcing such subrogation provisions. 498 U.S. at 55.

99. 498 U.S. at 58.

100. *Id.* at 60–61.

101. *Id.* at 61 (“We read the deemer clause to exempt self-funded ERISA plans from state laws that ‘regulat[e] insurance’ within the meaning of the saving clause.” (alteration in original)).

regulate insurance.¹⁰² Not surprisingly, because of this dichotomy between insured and self-insured health plans, a tremendous shift has occurred in the United States in that many employers are setting up self-funded health plans to avoid state insurance regulation and more state-law actions are consequently being preempted under ERISA.¹⁰³

In short, the operation of the savings and deemer clauses, as interpreted by the Supreme Court, has contributed to maintaining the broad scope of ERISA preemption.

B. ERISA'S LIMITED REMEDIAL PROVISIONS

Separate and apart from the mostly expansive readings given to ERISA preemption provisions is the constricted interpretation given to the remedial provisions under section 502(a). This narrow reading stems from one of the first remedies cases, *Massachusetts Mutual Life Insurance Co. v. Russell*.¹⁰⁴ Although the Court in *Russell* was unanimous on the specific question before it—deciding there were no compensatory or punitive damages under the breach of fiduciary provisions of section 502(a)(2)¹⁰⁵—more importantly the Justices divided into camps regarding the proper way to interpret the structure of section 502(a).

The majority in *Russell* advocated a literalist approach to statutory construction that narrowly read the remedies available under ERISA.¹⁰⁶ In this regard, the five-Justice majority wrote:

The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute." . . .

We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.¹⁰⁷

102. *See id.*

103. *See* COLLEEN MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 307 (2d ed. 2007) ("In 2006, 55% of workers with employer-sponsored health care coverage were enrolled in a health care plan that was completely or partially self-insured by the employer.").

104. 473 U.S. 134 (1985); *see also* Muir, *supra* note 4, at 434 ("As the first Supreme Court precedent in the area, the opinion set the tone for ERISA remedial jurisprudence, particularly with regard to the scope of available remedies."). As will be argued in Part III.A, *infra*, what makes *Russell* pivotal is that it creates an ideological divide between literalist and remedialist Justices that has now lasted for almost twenty-five years.

105. 473 U.S. at 148.

106. 473 U.S. at 146–47.

107. *Id.* (citation omitted) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 466 U.S. 359, 361 (1980)).

On the other hand, the four remedialist Justices in *Russell* believed that trust law should be the starting point for the interpretation of these remedial provisions.¹⁰⁸ In particular, they argue that because of the primacy of trust law in ERISA,

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.¹⁰⁹

Applying this logic to *Russell*, because compensatory and punitive damages were not available as equitable remedies under trust law, the remedialist Justices had no problem agreeing that these remedies were not available under section 502(a)(2).¹¹⁰ That being said, they viewed ERISA primarily as a remedial statute and believed it should be interpreted broadly to meet its stated purpose of protecting employee benefits.¹¹¹

These statutory construction arguments pervade the analysis of the three major types of civil enforcement provisions of ERISA:¹¹² section 502(a)(1)(B) claims are instituted to recover benefits, to enforce rights under the plan, or to clarify rights to future benefits.¹¹³ Section 502(a)(2), read together with section 409, provides for breach of fiduciary duty claims and permits personal liability against individual fiduciaries to make the plan whole.¹¹⁴ Finally, section 502(a)(3) enjoins any act or practice which violates ERISA, but is limited to claims for "appropriate equitable relief."¹¹⁵ This section examines each of these remedial sections seriatim.

I. Claims for Benefits Under Section 502(a)(1)(B)

Section 502(a)(1)(B) claims are brought by a plan participant or beneficiary against the plan for the value of denied benefits or rights.¹¹⁶ For instance, if a plan participant wishes to receive a particular heart procedure under his or her health plan and the plan administrator denies the claim, the participant may file a claim against the plan for recovery of

108. See *infra* notes 109–11.

109. *Russell*, 473 U.S. at 157 (Brennan, J., concurring in judgment) (footnote omitted).

110. See *id.* at 150.

111. See *id.* at 155–56.

112. There are other civil actions under section 502(a), including a claim under section 502(a)(1)(A) for refusal to supply requested plan information, but this discussion focuses on the three most frequently utilized civil enforcement sections. See 29 U.S.C. § 1132(a) (2006). ERISA also provides for potential criminal penalties for willful violations of the Act. See *id.* § 1131.

113. *Id.* § 1132(a)(1)(B).

114. *Id.* §§ 1132(a)(2), 1109.

115. *Id.* § 1132(a)(3)(B).

116. *Id.* § 1132(a)(1)(B).

the value of that heart procedure. However, other forms of consequential relief, including compensatory and punitive damages, do not appear to be available under section 502(a)(1)(B).¹¹⁷ The lack of monetary relief is a dispositive reason why many employer-defendants would rather try these claims under ERISA, rather than under a state law wrongful death claim or other tort.

Furthermore, section 502(a)(1)(B) contains a tricky procedural landscape for ERISA plaintiffs to manage. First, it is the only remedial provision that currently requires exhaustion of internal remedies.¹¹⁸ Consequently, by the time these claims make it to federal court, the procedural posture is that of a review of a denial of benefits claim by the plan administrator. Second, and making matters worse for ERISA plaintiffs, is the fact that the standard of judicial review is highly deferential under *Firestone Tire & Rubber Co. v. Bruch*.¹¹⁹ Although the Court determined that the default review standard was de novo, as long as the company places the authority to decide benefits determinations within the plan administrator's discretion, the resulting benefits determinations will be upheld as long as they are not arbitrary or capricious.¹²⁰ Indeed, even if the plan administrator is the entity that both pays benefits and determines eligibility for benefits, *Metlife v. Glenn* stands for the proposition that the subsequent conflict is just one factor to be considered, under the totality of circumstances, by a court in deciding whether the benefits determination should be upheld under the arbitrary or capricious standard.¹²¹ In all, it will probably surprise no one to learn that plaintiffs win very few benefits claims in federal or state court under section 502(a)(1)(B),¹²² and even when they do, the remedy

117. *See* *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (“[Section 502(a)(1)(B)] says nothing about the recovery of extracontractual damages, or about the possible consequences of delay in the plan administrators’ processing of a disputed claim.”).

118. Exhaustion is mandated by section 503 and the regulations thereunder. *See* 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1 (2009). This means that once a claim has been denied by a plan administrator, the plan participant must file an appeal with the administrator and wait for a further adverse determination before bringing his or her benefits claim in state or federal court. 29 C.F.R. § 2560.503-1. Section 503 regulations set up various time limits by which a claim appeal must be filed and decided. *Id.*

119. 489 U.S. 101, 111 (1989).

120. *Id.* at 114–15.

121. *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2346 (2008) (“Often the entity that administers the plan, such as an employer or an insurance company, both determines whether an employee is eligible for benefits and pays benefits out of its own pockets. We here decide that this dual role creates a conflict of interest; that a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and that the significance of the factor will depend upon the circumstances of the particular case.”).

122. One frequent litigator of section 502(a)(1)(B) claims responded to my inquiry on a listserv about the success of these claims by stating that he almost never wins these cases if the abuse of discretion standard applies. Posting of Mark DeBofsky, mdebosky@ddbchicago.com, to BENEFITSPROF-L@lists.ou.edu (Feb. 6, 2009) (on file with the Hastings Law Journal). Even if he

available is often inadequate in relation to the harm suffered because of the lack of consequential damages.¹²³

Thus, both the nature of the remedy under this section and the standard of court review in these cases represent significant obstacles for employees in receiving adequate relief for denial of benefits under ERISA.

2. *Claims For Fiduciary Breaches Under Section 502(a)(2)*

If anything, the situation for ERISA plaintiffs might be worse under section 502(a)(2) breach of fiduciary provisions, though there is reason for hope for plaintiffs in the 401(k) pension plan context. Section 502(a)(2) directly incorporates section 409, which provides that breaching fiduciaries are personally liable to only the plan to make good for any losses, not to individual plan participants or beneficiaries.¹²⁴ As recounted above, this led the Supreme Court in *Massachusetts Mutual Life Insurance Co. v. Russell* to unanimously determine that plaintiffs may not recover compensatory or punitive damages under this section.¹²⁵

Nevertheless, the U.S. Supreme Court recently found in *LaRue v. DeWolff, Boberg & Associates, Inc.*, that an individual 401(k) account holder could bring a section 502(a)(2) claim against the plan for losses caused to that account by the plan's conduct.¹²⁶ Thus, individual participants in 401(k) plans may be able to receive relief for wrongful conduct undertaken by a plan administrator with regard to their accounts. However, and as will be discussed below,¹²⁷ the concurring opinion of Chief Justice Roberts in *LaRue*, which argues that the claim is one for benefits under 502(a)(1)(B) and requires internal exhaustion like benefits claims,¹²⁸ might prove problematic for ERISA plaintiffs going forward.

3. *Claims for Equitable Relief Under Section 502(a)(3)*

Because there is little individual relief available under the fiduciary provisions of section 502(a)(2), a plaintiff seeking to recover on an individual basis for a breach of fiduciary duty must look to section 502(a)(3). Yet section 502(a)(3), as interpreted by the Supreme Court, is limited in important respects as a remedy for plaintiffs. First of all, the

does win, the court usually "remands" to the plan administrator so the plan administrator can come up with new reasons to deny benefits, and, as a result, he ends up settling these cases (but only by taking a huge discount on the value of these claims). *Id.*

123. See discussion *infra* Part II.B.

124. 29 U.S.C. §§ 1132(a)(2), 1109 (2006).

125. 473 U.S. 134, 138 (1985).

126. 128 S. Ct. 1020, 1026 (2008). ("We therefore hold that although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.")

127. See discussion *infra* Part IV.B.

128. 128 S. Ct. at 1027 (Roberts, C.J., concurring in part and concurring in the judgment).

term “appropriate” in “appropriate equitable relief” appears to have been interpreted to mean that its provisions can only provide relief if there is no remedy available under sections 502(a)(1)(B) or 502(a)(2).¹²⁹

That being said, the potential scope of this section has been most dramatically impacted by the interpretation of “equitable” in the case of *Mertens v. Hewitt Associates*.¹³⁰ In *Mertens*, Hewitt Associates was a plan service provider who assisted in a breach of fiduciary duty in making inaccurate actuarial predictions for the company’s defined benefits plan.¹³¹ The question presented by the case was whether a nonfiduciary, like Hewitt, could be found liable under section 502(a)(3).¹³²

Not only did the Supreme Court find that nonfiduciaries could not be sued for assisting breaches of fiduciary duties under section 502(a)(3), but the Court also discussed what types of remedies are permissible.¹³³ Purporting to rely on the meaning of equity during “the days of the divided bench,”¹³⁴ the Court inexplicably interpreted “appropriate equitable relief” to mean only “injunction, mandamus, and restitution.”¹³⁵ Money damages, such as compensatory or punitive damages, are excluded.¹³⁶

This decision has sharply curtailed the nature of relief available under section 502(a)(3) and has set into motion over the last fifteen years a series of Supreme Court cases that can only be characterized as bizarre and contrary to the original purposes of ERISA. For instance, in two plan reimbursement cases,¹³⁷ the Court has further divided restitution into claims for legal restitution (not recoverable) and equitable restitution (recoverable) in *Great-West Life & Annuity Insurance Co. v. Knudson*¹³⁸ and *Sereboff v. Mid Atlantic Medical Services, Inc.*¹³⁹ To

129. *See* *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996).

130. 508 U.S. 248 (1993).

131. *Id.* at 250.

132. *Id.* at 251.

133. *Id.* at 261–62.

134. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002) (“the days of the divided bench” refers to a time in American jurisprudence when there were separate courts of law and equity).

135. *Mertens*, 508 U.S. at 256. The Court’s interpretation is especially inexplicable because mandamus was never a remedy in equity and restitution did not exist during the days of the divided bench. *See* Langbein, *supra* note 3, at 1353–54.

136. *Mertens*, 508 U.S. at 255.

137. Plan reimbursement clauses in the self-insured health plan context are similar to subrogation clauses in the insured plan context. The difference, however, is that whereas in a subrogation claim the insurance company may sue the tortfeasor directly, in a reimbursement claim the participant must first sue and recover from the third-party tortfeasor before the plan has a claim for reimbursement. *See* *FMC Med. Plan v. Owens*, 122 F.3d 1258, 1260 & n.1 (9th Cir. 1997).

138. 534 U.S. 204, 213–14 (2002).

139. 547 U.S. 356, 362–63 (2006). There is an argument that *Sereboff* actually might signal a retreat from *Great-West*, by perhaps limiting *Great-West* to its facts. *See* Posting of Colleen Medill to Workplace Prof Blog, *Sereboff* and the Future of ERISA Remedies, <http://>

prevail under a theory of equitable restitution, an ERISA plaintiff must show that the funds that the plan seeks to have reimbursed are specifically identifiable funds in the possession of the defendant that rightfully belong to the plaintiff.¹⁴⁰ It is hard to believe that that was what the ERISA drafters meant in providing for “appropriate equitable relief.”¹⁴¹

One question that still remains undecided is whether individuals suing for breach of fiduciary duty under section 502(a)(3) may recover make-whole damages like back pay.¹⁴² It is clear, on the one hand, that individual plaintiffs may seek to bring fiduciary claims for individual equitable relief under *Varity Corp. v. Howe*.¹⁴³ The forms of appropriate equitable relief permitted in these cases, on the other hand, are debatable because the *Varity* case itself included a concession by the employer that the requested remedy was equitable.¹⁴⁴

It is therefore unclear whether the payment of a monetary award to make the victims of the breach whole would be considered an equitable remedy under section 502(a)(3).¹⁴⁵ Also, there is some question under wrongful discharge and retaliation cases under section 510 as to whether participants may get back pay as a type of make-whole, equitable relief.¹⁴⁶

lawprofessors.typepad.com/laborprof_blog/2006/05/sereboff_and_th.html (May 20, 2006, 11:06 pm) (“After *Sereboff*, . . . the scope of potential remedies that could qualify as ‘equitable’ under Section 502(a)(3) is going to broaden out considerably, having been freed of strict compliance with all of the possible (ancient) technical requirements for relief imposed by a chancery court of equity.”).

140. *Sereboff*, 547 U.S. at 362–63.

141. As Professor Langbein aptly put it, *Russell, Mertens, and Great-West* were “greeted with despair in the scholarly and practitioner literature.” Langbein, *supra* note 3, at 1320; *see, e.g.*, Randall J. Gingiss, *The ERISA Foxtrot: Current Jurisprudence Takes One Step Forward and One Step Back in Protecting Participants’ Rights*, 18 VA. TAX REV. 417, 433 (1998); Muir, *supra* note 4, at 439; Karl J. Stoecker, *ERISA Remedies After Varity Corp. v. Howe*, 9 DEPAUL BUS. L.J. 237, 243 (1997); Paul O’Neil, *Protecting ERISA Health Care Claimants: Practical Assessment of a Neglected Issue in Health Care Reform*, 55 OHIO ST. L.J. 723, 745–46 (1994); Larry J. Pittman, *ERISA’s Preemption Clause and the Health Care Industry: An Abdication of Judicial Law-Creating Authority*, 46 FLA. L. REV. 355, 435–36 (1994); Jayne Elizabeth Zanglein, *Closing the Gap: Safeguarding Participants’ Rights by Expanding the Federal Common Law of ERISA*, 72 WASH. U. L.Q. 671, 673–74 (1994).

142. Back pay generally refers to restoring a plaintiff to the “status quo ante”; that is, to the position he or she would have occupied had his or her ERISA rights not been violated. *See* Lorraine Schmall & Nathan Ihnes, *Failure of Equity: Discriminatory Plant Closings as an Irremediable Injury Under ERISA*, 55 CATH. U. L. REV. 81, 117–18 (2005). *But see* *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1257–59 (10th Cir. 2004) (rejecting the argument that back pay is available as an equitable remedy under ERISA simply because it is considered equitable under Title VII, reasoning that ERISA protects the integrity of pension and health care plans generally whereas Title VII is a make-whole statute).

143. 516 U.S. 489, 515 (1996).

144. *Id.* at 508.

145. *See* *Aetna Health Inc. v. Davila*, 542 U.S. 200, 223–34 (2004) (Ginsburg, J., concurring).

146. For an argument that the *Great-West* decision does not permit back pay for wrongful termination as an equitable remedy under section 502(a)(3), *see* *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1257–59 (10th Cir. 2004), which holds that back pay as equitable relief is not available under section 502(a)(3) for violation of section 510. For criticisms of this approach and holding, *see*

Some Justices have even beseeched Congress to clarify these issues by legislating in this area.¹⁴⁷

In all, then, the combination of limited remedies for denial of benefits claims and the narrow construal of breach of fiduciary claims and other types of claims for ERISA violations has meant that the Supreme Court has largely been successful in limiting the remedies available for plaintiffs under ERISA.

II. THE ERISA INTERSECTIONALITY PROBLEM

Having set forth the roots of the intersectionality problem through a discussion of the current state of ERISA preemption and remedies in Part I, this Part first seeks to examine the matter in which intersectionality cases arise, with a focus on the concepts of complete preemption and conflict preemption. Second, it explores a number of cases that demonstrate this problem in action.

A. THE CHARACTERISTICS OF ERISA INTERSECTIONALITY PROBLEMS

The recognition of intersectionality problems has existed at least since Judge Stanley Birch dissented in the 1992 case of *Sanson v. General Motors Corp.*¹⁴⁸ There, Judge Birch noted that the combined impact of ERISA's broad preemption provisions and its limited remedial provisions act together to defeat the primary purpose of ERISA to protect employee benefits.¹⁴⁹ Both the doctrines of complete preemption and conflict preemption contribute to the ERISA intersectionality problem. Complete preemption operates so that states are not free to pass laws that would add additional remedies to the current ERISA remedial scheme.¹⁵⁰ Under conflict preemption, plaintiffs are forced out of state court to seek relief for wrongful acts of employers and plan administrators and must bring their claims under the narrow ERISA remedial framework.¹⁵¹ Finally, conflict preemption works to help preempt state laws that are otherwise saved as laws regulating insurance

Schmall & Ihnes, *supra* note 142, at 118, and see also Harthill, *supra* note 14, at 723.

147. *Davila*, 542 U.S. at 222 (Ginsburg, J., concurring).

148. 966 F.2d 618, 623 (11th Cir. 1992) (Birch, J., dissenting).

149. *Id.* at 625 (“[T]he combination [of the employee’s] state cause of action [being] preempted by ERISA even while ERISA denies him any alternative remedy . . . is disappointingly pernicious to the very goals and desires that motivated Congress to enact pension laws in the first place.”).

150. *Davila*, 542 U.S. at 216 (“Congress’ intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA § 502(a) remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim.”)

151. *Id.* at 217–18 (“Under ordinary principles of conflict pre-emption, . . . even a state law that can arguably be characterized as ‘regulating insurance’ will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA’s remedial scheme.”)

under ERISA's saving clause.¹⁵² In short, once intersectionality analysis is applied in all of its dimensions, there is little left for ERISA plaintiffs except for the exclusive, limited, and ineffectual remedial scheme under section 502(a).

I. Complete Preemption and Intersectionality

Starting with the case of *Metropolitan Life Insurance Co. v. Taylor*,¹⁵³ the Supreme Court developed the doctrine of complete preemption within the ERISA context. *Taylor* explains, in the context of a state-law claim for disability benefits, that Congress intended to so completely preempt employee benefits law through enactment of ERISA that any state-law complaint raising a claim for denial of employment benefits is necessarily federal in character.¹⁵⁴ This means that such state denial of benefits claims can be removed to federal court and treated like an ERISA claim.¹⁵⁵ Put differently, "the ERISA civil enforcement mechanism is one of those provisions with such 'extraordinary preemptive power' that it 'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'"¹⁵⁶

For example, in *Pilot Life Insurance Co. v. Dedeaux*, the Supreme Court held that Mississippi common law claims for tort, contract, and bad faith were preempted by ERISA.¹⁵⁷ A secondary, but equally important, holding of that case created a connection between ERISA's broad preemption scheme and its limited remedial provisions.¹⁵⁸ In this vein, the Court concluded that allowing plaintiff's common law claims would undermine ERISA's remedial scheme under section 502(a).¹⁵⁹ The majority in *Pilot Life* argued that Congress intended ERISA to serve as the exclusive means of remedying violations under ERISA.¹⁶⁰ In other words, permitting the plaintiff's state law claims was inconsistent with the "comprehensive and reticulated" nature of these provisions as discussed in *Russell* a couple of years before:

152. See 29 U.S.C. § 1144(b)(2)(A).

153. 481 U.S. 58 (1987).

154. *Id.* at 66-67.

155. This doctrine does not usually apply outside of a few areas of the law because the "well-pleaded" complaint rule requires normally that the federal question be in the plaintiff's complaint, not in the defendant's answer. See *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9-10 (1983). Professor Medill has aptly referred to complete preemption as the "really badly pleaded complaint exception" to the "well pleaded complaint rule." See MEDILL, *supra* note 103, at 511.

156. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004) (quoting *Taylor*, 481 U.S. at 65-66).

157. 481 U.S. 41, 48 (1987).

158. See *id.* at 54.

159. *Id.* at 57.

160. *Id.*

The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive. This conclusion is fully confirmed by the legislative history of the civil enforcement provision.¹⁶¹

For reasons discussed elsewhere, this is not a plaintiff-friendly development because plaintiffs would rather not have to bring their claims under section 502(a)(1)(B), with its procedural difficulties and its remedies being limited to the value of the benefits denied.¹⁶²

2. *The Savings Clause, Preemption, and Intersectionality*

But even where ordinary preemption does not exist for a claim under section 514(a), because that claim is under a state law that regulates insurance, complete preemption can still be utilized to remove the claim from state court to federal court under ERISA. For example, in *Aetna Health Inc. v. Davila*, in which a claim was brought under an alternative remedial scheme against HMOs under Texas law, the state-law claim was found to be completely preempted and removal of the claim to federal court was permitted.¹⁶³ Thereafter, even though the state-law claim was saved, the Court found that a conflict preemption override operated to invalidate the state law claim because that claim expanded the remedies otherwise available under section 502(a)(1)(B).¹⁶⁴ The conflict preemption override exists so that additional remedies are not available under state law and so that the fundamental purpose of creating a uniform body of federal law to govern employee benefits plans can be maintained.¹⁶⁵ This state of affairs also leads to only limited remedies being available under ERISA, which by extension means the subsidiary purpose of ERISA—to keep the costs of adopting employee benefits plans inexpensive for employers—is also furthered.¹⁶⁶

So, the Court in *Davila* appeared to be making a connection between limited ERISA remedies and the secondary policy of keeping plan costs low for plan sponsors. Although the Court paid lip service to the primary purpose of protecting employee benefits, its devotion to keeping plan costs low meant that it could not accept a structural interpretation of ERISA which would lead to broader remedies for plan

161. *Id.* This last sentence about legislative history is just not accurate, as explored *infra* note 204.

162. *See supra* Part I.B.1.

163. 542 U.S. 200, 204 (2004).

164. *Id.* at 217–18 (“Under ordinary principles of conflict pre-emption, then, even a state law that can arguably be characterized as ‘regulating insurance’ will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA’s remedial scheme.”).

165. *Id.* at 217.

166. *Id.* at 215 (“The limited remedies available under ERISA are an inherent part of the ‘careful balancing’ between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.” (quoting *Pilot Life*, 481 U.S. at 55)).

participants and beneficiaries. In short, complete preemption, conflict preemption, limited remedies, and the elevation of a secondary purpose of ERISA all work together to keep employees from receiving adequate relief under either state law or ERISA.

3. *Intersectionality Problems Under Sections 502(a)(2) and 502(a)(3)*

Although not as common, even outside of section 502(a)(1)(B) and complete preemption, preemption can act to force state-law claims into federal court where they will be treated as federal claims under ERISA. In other words, even though the lower courts are divided over whether complete preemption even applies to sections 502(a)(2) and 502(a)(3),¹⁶⁷ the intersectionality problem still potentially exists under sections 502(a)(2) and 502(a)(3).¹⁶⁸ So, for instance, if a state-law claim is brought for misconduct against a plan fiduciary and the claim can be recast as one for a breach of fiduciary duty claim, or if a wrongful discharge claim is brought and can be recast as a discrimination claim relating to benefits under section 510, such claims can be found to “relate to” employee benefits plans.¹⁶⁹ As such, they are also conflict preempted into ERISA’s limited remedial scheme.

B. CASE EXAMPLES OF THE ERISA INTERSECTIONALITY PROBLEM

The impact of this state of affairs can be seen in numerous harsh decisions by lower federal courts. *Pilot Life* and its progeny now stand for the broader proposition that state common law claims having a connection with an employee benefits plan are preempted. Consequently, this principle has been relied on in defeating state law claims for both plan administrators wrongfully denying or delaying claims made under an employee benefits plan and for wrongful discharge claims related to participants’ exercise of their rights under an employee benefits plan.

167. Compare *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994) (finding complete preemption for state law claims under section 502(a)), with *Lupo v. Human Affairs Int’l, Inc.*, 28 F.3d 269, 270 (2d Cir. 1994) (finding no complete preemption for state law claims).

168. There is no removal issue under sections 502(a)(2) and 502(a)(3) because section 502(e) provides for exclusive jurisdiction in federal court for these types of claims. See 29 U.S.C. § 1132(e) (2006). On the other hand, federal and state courts have dual jurisdiction under section 502(a)(1)(B). See *id.*

169. See, e.g., *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 7 (1st Cir. 1999) (preempting negligence claims as “alternative enforcement mechanisms” for section 502(a)(2)); *Romney v. Lin*, 94 F.3d 74, 81 (2d Cir. 1996) (preempting state collections law because section 502(a)(3) already provided a means for collecting delinquent ERISA contributions).

I. Intersectionality and Denial of Benefits Claims

As far as wrongful denial of benefits claim scenarios, few are better known than the case of *Corcoran v. United Healthcare, Inc.*¹⁷⁰ In *Corcoran*, a health plan denied a female plan participant extended hospital stay services for a high risk pregnancy.¹⁷¹ The participant ended up losing her baby, and she and her husband sued the plan for wrongful death and under other tort theories of law.¹⁷² The court held, however, that they could only bring a section 502(a)(1)(B) claim under ERISA because the health plan's decision to deny the requested benefits was an employee-benefits-related eligibility determination, not a medical decision which could be subject to a medical malpractice claim.¹⁷³ Hence, the application of both ERISA preemption and the exclusive nature of the limited remedial scheme jointly prevented the parents from bringing a state tort claim for compensatory and punitive damages for the loss of their child.¹⁷⁴

Corcoran thus provides a jarring example of the intersectionality problem and how ERISA civil enforcement and preemption provisions work in tandem to deny employee benefits plan participants meaningful relief for their losses caused by wrongful benefits decisions.¹⁷⁵ Even the judges deciding the case recognized the horrible inequities involved in a case like this:

This [case outcome] is troubling for several reasons. First, it eliminates an important check on the thousands of medical decisions routinely made in the burgeoning utilization review system. With liability rules generally inapplicable, there is theoretically less deterrence of substandard medical decisionmaking. Moreover, if the cost of compliance with a standard of care (reflected either in the cost of prevention or the cost of paying judgments) need not be factored into utilization review companies' cost of doing business, bad medical judgments will end up being cost-free to the plans that rely on these companies to contain medical costs.¹⁷⁶

Corcoran is not alone in causing injustice in the denial-of-benefits context where consequential injuries are involved.¹⁷⁷ In fact, the Supreme

170. 965 F.2d 1321 (5th Cir. 1992). Professor Muir also discusses this case as evidence of the need for better remedies under ERISA. See Muir, *supra* note 4, at 440.

171. 965 F.2d at 1324.

172. *Id.*

173. See *id.* at 1338 ("The result ERISA compels us to reach means that the Corcorans have no remedy, state or federal, for what may have been a serious mistake.").

174. *Id.*

175. See Medill, *supra* note 4, at 843 ("The remedy offered by Section 502(a)(1)(B) in managed care cases provides cold comfort to the widow or widower of the participant, and effectively no compensation for the participant who has incurred personal injury or economic loss as a result of the wrongfully denied claim for medical treatment.").

176. *Corcoran*, 965 F.2d at 1338.

177. For another heart-wrenching example, see *Cicio v. Does*, 321 F.3d 83, 87–88 (2d Cir. 2003), where the plan's refusal to pre-authorize a medical treatment for cancer—recommended by a

Court case of *Aetna Health Inc. v. Davila*¹⁷⁸ illustrates another less tragic but nonetheless recurrent scenario. Remember that in *Davila* the plaintiffs sought consequential damages under state law for wrongful denial of their claims by their HMOs which allegedly caused serious injuries to them.¹⁷⁹ The Supreme Court held that even if the Texas state HMO law were saved from complete preemption, that law was still preempted based on conflict preemption override.¹⁸⁰ So rather than receiving consequential damages for the benefits decisions that led to harmful consequences, the plaintiffs were stuck under section 502(a)(1)(B) and could only obtain the inadequate value of the services initially denied.¹⁸¹ All of this was done in the name of keeping remedies under ERISA limited so that employers would continue to offer employee benefits plans.¹⁸² In other words, the Supreme Court in *Davila* promoted a secondary purpose of containing plan costs (not in ERISA) over the primary purpose of protecting employee benefits (directly in the statute), and in the process, continued to construe the remedial sections of ERISA in a way that is inconsistent with ERISA's clear legislative history.¹⁸³

2. Intersectionality and Wrongful Discharge Claims

A similar cruel reality exists for claims brought for interference with ERISA rights under section 510. Section 510 prohibits discriminating against, retaliating against, or interfering with an employee's exercise of his or her rights under ERISA.¹⁸⁴ Such claims require that the plaintiff establish that the defendant has the intent to interfere with rights protected by ERISA.¹⁸⁵ Relief for violations of section 510 is available under section 502(a)(3) for "appropriate equitable relief."¹⁸⁶

participant's treating physician—led to the deterioration of the participant's physical condition to the point where the recommended treatment was no longer a viable medical option by the time it was finally authorized, and the patient died shortly thereafter.

178. 542 U.S. 200 (2004).

179. Mr. Davila's injuries resulted from Aetna's refusal to pay for his Vioxx and the severe allergic reaction he suffered when he took Naprosyn instead, which subsequently required extensive treatment and hospitalization. *Id.* at 205. Ms. Calad, on the other hand, underwent surgery and, although her treating physician recommended an extended hospital stay, CIGNA refused the request and she allegedly experienced postsurgery complications forcing her to return to the hospital. *Id.*

180. *Id.* at 217–18.

181. *See id.* at 221. On the other hand, a state law providing for independent review of benefits denials in *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379–80 (2002), did not provide additional remedies outside ERISA and, therefore, was saved from preemption as a law regulating insurance. So it appears states can provide additional procedural protection through laws that regulate insurance, but not additional remedies for the consequences of benefits denial.

182. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981) (noting that ERISA's primary goal was to benefit employees and that a secondary goal was to contain costs); *see also* 29 U.S.C. § 1001(b) (2006).

183. *See supra* note 13 and accompanying text.

184. 29 U.S.C. § 1140.

185. *See Schmall & Ihnes, supra* note 142, at 107 ("A plaintiff's claim under ERISA section 510

Yet a number of cases involving state law claims for wrongful discharge relating to employee benefits matters have been found completely preempted and limited to the sections 510/502(a)(3) framework.¹⁸⁷ For example, in *Anderson v. Electronic Data Systems Corp.*, the plaintiff brought a tort claim in Texas state court based on wrongful discharge in violation of public policy when his employer demoted and discharged him for his refusal to commit illegal acts and for reporting the activities of another employee, both in relation to a pension plan.¹⁸⁸ Under the doctrine of complete preemption, the defendants removed the claim to federal court and the district court dismissed it because the complaint only contained a state law claim.¹⁸⁹

Relying on *Ingersoll-Rand Co. v. McClendon*,¹⁹⁰ which also involved a state court action alleging wrongful discharge based on the employer's desire to avoid making contributions to his pension plan,¹⁹¹ the court found that the state action would conflict with the express and carefully crafted enforcement provisions found in the ERISA statute, specifically sections 510 and 502(a)(3).¹⁹² Thus, applying the complete preemption principle to these claims, the court found the state court action was properly removed to federal court and then dismissed.¹⁹³ In a last observation, the *Anderson* court noted that "such a finding of preemption does not hinge on whether ERISA provides the remedy the

must demonstrate specific intent by the employer to interfere with an employee's benefits" (citing *Rush v. United Techs.*, 930 F.2d 453, 457 (6th Cir. 1991)).

186. See *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 144 (1990).

187. See, e.g., *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674, 679 (3d Cir. 2000) (finding allegations that Prudential discriminated against Wood by terminating his employment to avoid paying benefits completely preempted by section 510).

188. 11 F.3d 1311, 1312 (5th Cir. 1994).

189. *Id.* at 1315. Although the court dismissed the case in *Anderson*, state claims may be treated as federal claims under ERISA section 502(a) and analyzed as such. See *Wood*, 207 F.3d at 682 (Stapleton, J., dissenting) ("If a claim based on state law is completely preempted, however, it is treated as a federal claim; a district court has federal question removal jurisdiction to entertain it, and the claim, after removal, should go forward in the district court as a federal claim."). Of course, one problem then from the plaintiff's standpoint is that the claim may be stale. See *Watson v. Hartford Life & Accident Ins. Co.*, 589 F. Supp. 2d 452, 455-56 (D. Del. 2008) (dismissing completely preempted section 502(a) claim for failing to meet the applicable ERISA statute of limitations). Another problem is that he or she may not be able to get a desirable remedy under the limited ERISA remedial scheme. See *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir. 1992) ("The acknowledged absence of a remedy under ERISA's civil enforcement scheme for medical malpractice committed in connection with a plan benefit determination does not alter our conclusion. . . . [T]he lack of an ERISA remedy does not affect a pre-emption analysis.").

190. 498 U.S. 133 (1990).

191. See *supra* notes 37-43 and accompanying text.

192. *Anderson*, 11 F.3d at 1314.

193. *Id.* ("*McClendon* compels us to conclude that *Anderson's* wrongful discharge claim is preempted insofar as it is based on his refusal to carry out violations of ERISA, and reporting such violations to management."). *But see* *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 428 (4th Cir. 2003) (criticizing *Anderson* because "[w]e simply do not agree that the language of section 510 can be 'fairly construed' to extend to [intra-office reports in a whistleblower context]").

plaintiff seeks or any remedy at all for the alleged wrong.”¹⁹⁴ To paraphrase, the *Anderson* court saw its function as mechanistically applying the existing law of preemption and civil enforcement under ERISA. And if deserving plaintiffs were left with a right without a remedy, then so be it.

Because it is the central theme of this Article that Congress enacted ERISA to provide “appropriate remedies” for employee benefits plan violations that impact participants and beneficiaries,¹⁹⁵ the following two Parts propose both judicial and legislative fixes to this intersectionality problem that leads to an unjust “right without remedy” statutory ruse.

III. THE JUDICIAL FIX: EMBRACING THE REMEDIAL NATURE OF ERISA

The current split on the Court over the meaning and scope of ERISA’s remedial provisions provides an opportunity for future courts in these types of ERISA intersectionality cases. Assuming that expansive ERISA preemption will continue to lead to the preemption of state-law claims, this Article focuses on the current, and erroneous, interpretation of ERISA remedies as being limited. By reviewing the debate between the literalist and remedialist Justices in the section 502(a) context since *Russell*, the hope is to persuade the Supreme Court to recognize how the broad remedialist view is more consistent with ERISA’s purpose, its text, its structure, and its legislative history.

This Part is divided into two sections. Section A reviews the arguments put forth by the literalist and remedialist Justices in ERISA preemption and civil enforcement cases. Section B makes the argument that the literalist Justices’ view based on “the days of the divided bench”¹⁹⁶ should be discarded and the Court should instead embrace a broad remedial scheme, derived from the common law of trusts.¹⁹⁷

194. *Anderson*, 11 F.3d at 1314; see also *Corcoran*, 965 F.2d at 1333; *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 979 (5th Cir. 1991) (“This Court has held that ERISA’s preemption provision bars state law causes of action even though such preemption may leave a victim . . . without a remedy.”).

195. See 29 U.S.C. § 1001(b) (2006) (“It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies . . .”); see also *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (“We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act’s purposes, and pre-existing trust law.”).

196. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002).

197. See Langbein, *supra* note 3, at 1319 (“ERISA is, in its most important dimension, federal trust law.”).

A. STATUTORY INTERPRETATION AT THE HEART OF THE INTERSECTIONALITY PROBLEM

I. Russell and the Literalist Versus Remedialist Debate

As discussed above,¹⁹⁸ almost from the very first case dealing with the civil enforcement provisions of section 502(a) of ERISA, a division has existed on the U.S. Supreme Court between a group of Justices who follow a literalist approach based on textual and structural arguments and a group of Justices who follow a remedialist approach based on the common law of trusts and the remedial nature of ERISA. Some Justices have changed sides over the years (e.g., Justice Stevens), and different groups have been successful in different cases over the years, but the divide persists.

Recall that *Massachusetts Mutual Life Insurance Co. v. Russell*, a section 502(a)(2) case, involved the question of whether the plaintiff could seek compensatory and punitive damages for breach of fiduciary duty beyond the receipt of retroactive benefits.¹⁹⁹ The court was unanimous that such remedies did not exist,²⁰⁰ but it became a pivotal case because of the deep division it engendered between different groups of Justices on why such damage remedies were not available.

The literalists, led by Justice Stevens, found first that based on the language of ERISA sections 502(a)(2) and 409, only the plan was able to receive relief, not an individual participant.²⁰¹ Going further, Justice Stevens examined the structure of 502(a) and found that there were “six carefully integrated civil enforcement provisions” and that these provisions were an “interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a ‘comprehensive and reticulated statute.’”²⁰² As such, Justice Stevens concluded that Congress purposefully left out including any other types of remedies under section 502(a).²⁰³

The remedialist Justices, led by Justice Brennan, could not have disagreed more with the majority. Even putting to one side Justice Stevens’s claim concerning the purported legislative history of the drafting of ERISA,²⁰⁴ Justice Brennan believed that trust law should be

198. See *supra* notes 104–11 and accompanying text.

199. 473 U.S. 134, 136–38 (1985).

200. *Id.* at 148.

201. *Id.* at 140.

202. *Id.* at 146 (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)).

203. *Id.* at 147 (“We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.”).

204. See *id.* at 145–46. Although Justice Stevens was aware of the “voluminous legislative history of the Act,” see *id.* at 145, his subsequent statement about that history calls into doubt whether he was aware of all the relevant language in that record. In particular, he failed to note that both the House and Senate Committee reports indicated that the enforcement provisions were intended to “provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing

the starting point for the interpretation of these remedial provisions since Congress intended to incorporate trust law into ERISA's equitable remedies.²⁰⁵ The remedialist view would require "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."²⁰⁶

This view is also consistent with the statutory text and the characterization of ERISA as a remedial statute. As for the literalist view on the text, Justice Brennan's concurrence in *Russell* examined section 502(a)(3) and noted that by its very terms, it allowed for "appropriate equitable relief" to "redress" "any act or practice which violates any provision of this title or the terms of the plan."²⁰⁷ As for the structure of section 502(a), the remedialists maintained that, far from being a carefully-calibrated, limited remedial scheme, ERISA called for the development of a federal common law to "fine-tune" ERISA's remedial provisions.²⁰⁸

2. *The Back-and-Forth Debate from Mertens to Sereboff*

The literalists had the votes and won the first battle in this war of ERISA statutory interpretation in *Russell*, but that debate continues with mostly different Justices (Justice Stevens being the only one left from *Russell* and now on the side of the remedialists).

In *Mertens v. Hewitt Associates*,²⁰⁹ discussed in detail in Part I.B, the issue was whether or not a nonfiduciary service provider could be held liable under section 502(a)(3) for money damages for assisting in a fiduciary's breach of fiduciary duty.²¹⁰ The Court, with Justice Scalia now writing for the literalist majority, ruled five-to-four that damage remedies could never be "appropriate equitable relief" under section 502(a)(3)

violations of [ERISA]." See S. REP. NO. 93-127, at 35 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4871; H.R. REP. NO. 93-533, at 17 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4655; see also Robert N. Eccles & David E. Gordon, *Great-West Life & Annuity Ins. Co. v. Knudson: Supreme Court Announces That It Was Not Kidding in Mertens v. Hewitt Associates*, ERISA LITIG. REP., Feb. 2002, at 6-8 (quoting an e-mail from Michael Gordon, one of the chief legislative architects of ERISA, in which he maintained that references to "legal" relief were taken out of the final version of Section 502(a) to avoid "creat[ing] another cross for ERISA to bear as opponents of ERISA were . . . looking for any opportunity at hand to stop the bill's enactment.").

205. *Russell*, 473 U.S. at 157 (Brennan, J., concurring).

206. *Id.*

207. *Id.* at 153.

208. *Id.* at 155-57 ("ERISA's legislative history also demonstrates beyond question that Congress intended to engraft trust-law principles onto the enforcement scheme, and a fundamental concept of trust law is that courts 'will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests.' Thus ERISA was *not* so 'carefully integrated' and 'crafted' as to preclude further judicial delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that courts shall undertake it." (citation omitted) (footnote omitted) (quoting 3 A. SCOTT, LAW OF TRUSTS § 199, at 1638 (1967))).

209. 508 U.S. 248 (1993).

210. *Id.* at 249-50.

because “[m]oney damages are, of course, the classic form of *legal* relief.”²¹¹ Instead, only those remedies typically available in equity, “injunction, mandamus, and restitution,” were available.²¹²

In coming to this conclusion, Justice Scalia rejected the law of trust as a starting point and dubiously relied on “the days of the divided bench”²¹³ before the merger of the law and equity courts to conclude that no type of monetary damages, even if incidental to equitable relief, were available under section 502(a)(3).²¹⁴ This interpretation was consistent with the literalist Justices’ structural views of ERISA’s enforcement scheme as being a well-crafted, limited statute and it being necessary to differentiate between the equitable relief available under section 502(a)(3) and the legal relief available under other parts of the statute.²¹⁵ Of course, why it is necessary to go back hundreds of years to determine the meaning of “equitable” in a statute passed in 1974 is anyone’s guess.²¹⁶

The four remedialist justices,²¹⁷ supported by the solicitor general and following Justice Brennan’s lead in *Russell*, found that under the common law of trusts, relief for breach of a trust had historically included make-whole money damages:

[T]here being no common-law tradition either in law or in equity to which Congress might direct the courts, it is not at all surprising that Congress would refer to both legal and equitable relief in making clear that the courts are free to craft whatever relief is most appropriate. It seems . . . a treacherous leap to draw from these sections a congressional intention to foreclose compensatory monetary awards under § 502(a)(3) notwithstanding that such awards had always been considered “appropriate equitable relief” for breach of trust at common law.²¹⁸

It was inequitable, in the dissent’s view, that the majority’s approach “stripped ERISA trust beneficiaries of a remedy against trustees and third parties that they enjoyed in the equity courts under common

211. *Id.* at 255.

212. *Id.* at 256. Langbein has shown the folly of this statement, especially with regard to the fact that neither mandamus nor restitution was typically available in equity. *See* Langbein, *supra* note 3, at 1353–54.

213. *See* *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002).

214. *Mertens*, 508 U.S. at 256–57.

215. *Id.* at 258–59.

216. *See* *Great-West*, 534 U.S. at 224–25 (Ginsburg, J., dissenting) (“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. Those rules instruct: ‘There shall be one form of action’ cognizable in the federal courts.” (quoting FED. R. CIV. P. 2)).

217. The remedialists included Justice White, writing in dissent, but for the first time included former literalists: Chief Justice Rehnquist, Justice O’Connor, and Justice Stevens. *See Mertens*, 508 U.S. at 249. On the other hand, Justice Blackmun joined the literalists in this opinion and Justice Souter started out as one. *See id.*

218. *Id.* at 269 (White, J., dissenting) (footnote omitted).

law.”²¹⁹ In other words, ERISA was enacted to increase protections of employee benefits, not to diminish those protections.

Instead, the focus of the literalists seemed to be on making sure that sponsoring employee benefits plans was not expensive so that employers would continue to provide them to their employees.²²⁰ The lowering of administrative costs for plan sponsors is a “subsidiary” goal under ERISA,²²¹ but not one that is mentioned in the statute and clearly, therefore, not on the same par as the primary purpose of providing benefits to wronged employees. Yet in limiting the relief under section 502(a)(3), the literalists appear set on limiting remedies in order to meet this all-important subsidiary goal of containing the costs of sponsoring employee benefits plans, even though this interpretation of ERISA necessarily undermines the primary purpose of the statute: to provide appropriate sanctions to protect the employee benefits of participants and their beneficiaries.²²²

Three years later, in *Varity Corp. v. Howe*,²²³ the remedialists²²⁴ gained the upper hand, albeit arguably limiting the section 502(a)(3) remedy further by defining the term “appropriate” in “appropriate equitable relief.”²²⁵ *Varity* involved a breach of fiduciary duty, and the issue was whether individuals could advance a claim for breach of fiduciary duty under section 502(a)(3).²²⁶ In the six-to-three decision, written by Justice Breyer, the Court held that ERISA authorized an individual action for breach of fiduciary duty under section 502(a)(3).²²⁷ The remedialists characterized this section as a “‘catchall’ remedial section,” which provides remedies beyond those found in section 502(a)(2).²²⁸

219. *Id.* at 263.

220. *Id.* at 262–63 (majority opinion) (“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. There is, in other words, a ‘tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs.’” (alteration in original) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981))).

221. *Id.*

222. *See supra* note 3.

223. 516 U.S. 489 (1996).

224. The remedialists now consisted of Justice Breyer, who wrote the majority opinion in *Varity*; Justices Souter and Kennedy, who changed sides; Chief Justice Rehnquist; and Justices Ginsburg and Stevens. *See id.* at 491. Justice O’Connor went back to the literalist side with Justices Scalia and Thomas. *See id.*

225. *Id.* at 515.

226. *Id.* at 495–96.

227. *Id.* at 515.

228. *Id.* at 512. As section 502(a)(2) is the only provision that permits individuals to sue for fiduciary breach, the majority in *Varity* concluded that the plaintiffs had a claim and that such a claim would play an important deterrent function in protecting against wrongful conduct by fiduciaries. *Id.* at 510–12. In this vein, the majority found it “hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy.” *Id.*

Interestingly, the remedialists turned the structural argument against the literalists, finding that although sections 502(a)(1)(B) and 502(a)(2) claims focused on specific areas, section 502(a)(3) was more general in providing for “appropriate equitable relief” for “any” statutory violation.”²²⁹ However, in coming to this conclusion, the majority found that the word “appropriate” suggests that a remedy can only be had under section 502(a)(3) if section 502 does not elsewhere provide for an adequate remedy.²³⁰ Thus, although the opinion expands the notion of equitable relief available to individuals under ERISA, it also limits the statute’s scope by first asking whether any of the specific remedial provisions apply. Three literalist Justices dissented from the majority opinion, believing that such a catchall provision was inconsistent with their analysis in *Russell* and with the carefully crafted structure of section 502(a).²³¹

As it turns out, the remedialist victory was short-lived, as the literalists were back in control a mere six years later with the throw-back cases of *Great-West Life & Annuity Insurance Co. v. Knudson*²³² and *Sereboff v. Mid Atlantic Medical Services, Inc.*²³³ Both of these cases involved plan reimbursement scenarios in which service providers were seeking reimbursement from participants for medical payments already made in third-party tort-recovery scenarios.²³⁴ For instance, in *Great-West*, the issue was whether Great-West, a stop-loss insurer, could obtain reimbursement from the plan beneficiary after she collected money both from Great-West and from the third-party tortfeasor who had caused her car accident injuries.²³⁵ In both cases, the literalists pushed their analysis

at 513.

229. *Id.*

230. *Id.* at 515 (“[T]he statute authorizes ‘appropriate’ equitable relief. . . . [W]here Congress elsewhere provided adequate relief for a beneficiary’s injury, there will likely be no need for further equitable relief, in which case such relief normally would not be ‘appropriate.’”). *But see* Medill, *supra* note 4, at 886–87.

231. *Varity*, 516 U.S. at 519 (Thomas, J., dissenting) (“Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.”).

232. 534 U.S. 204 (2002).

233. 547 U.S. 356 (2006).

234. The participants had received third-party tort recoveries, and thus the service providers were seeking reimbursement for those damages already received from third parties. *See Sereboff*, 547 U.S. at 360; *Great-West*, 534 U.S. at 207–08.

235. *Great-West*, 534 U.S. at 208–09. Janette Knudson was rendered quadriplegic by a car accident in June 1992. *Id.* at 207. Her husband’s health plan covered \$411,157.11 of her medical expenses. *Id.* Relying on a reimbursement provision in the plan, Great-West sought to require the Knudsons to pay the Plan \$411,157.11 from any proceeds recovered from third parties. *Id.* at 207–08. In fact, in late 1993, the Knudsons filed a tort action in California state court and a \$650,000 settlement was negotiated with the perpetrator of the car accident: \$256,745.30 to a special-needs trust to provide for Ms. Knudson’s medical care; \$373,426 for attorney’s fees and costs; \$5000 to reimburse the California Medicaid program; and \$13,828.70 to satisfy Great-West’s claim under the reimbursement provision of the Plan. *Id.*

even further and divided the analysis between legal restitution and equitable restitution, with only the latter being available under section 502(a)(3).²³⁶ So, in *Great-West*, the plan could not seek reimbursement under section 502(a)(3) because the funds were in a special-needs trust and not in the possession of the defendant.²³⁷ However, in *Sereboff*, such funds could be recovered (as an equitable lien by agreement) because there were specifically-identifiable funds in the possession of the defendant that rightfully belonged to the plaintiff service provider.²³⁸ In all, though, “[t]he spectrum of § 502(a)(3) relief contracted further in *Great-West*”²³⁹ and in *Sereboff*.

The dissent in *Great-West* again criticized the anachronistic nature of the majority’s statutory interpretation, objecting that the analysis was not apt for “a distinctly modern statute Congress passed in 1974.”²⁴⁰ Instead, the dissenting remedialist Justices said that the policy goals would have been met by allowing the reimbursement clause to have been enforced under section 502(a)(3) without having to worry about “antiquarian” notions of restitution law.²⁴¹

Great-West’s twisted reasoning, going back to the days of equity, causes even seasoned ERISA practitioners to refer to its holding as “revolutionary.”²⁴² On the one hand, it embraces the *Mertens* analysis about “the days of the divided bench” and suggests that restitution may not be available for individual claims for fiduciary breach if there is not unjust enrichment.²⁴³ On the other hand, in a footnote, it suggests that equitable relief in the form of back pay may be available for claims of discrimination under a section 510 retaliation claim, but also that, “Title VII has nothing to do with this case.”²⁴⁴ Not surprisingly, then, it has been rightfully criticized as carrying out an erroneous historical analysis of equitable remedies and applying an incorrect mode of statutory interpretation to a modern remedial statute.²⁴⁵

236. *Sereboff*, 547 U.S. at 362; *Great-West*, 534 U.S. at 212–13.

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

238. *Sereboff*, 547 U.S. at 362–63.

239. *Amschwand v. Spherion Corp.*, 505 F.3d 342, 345 (5th Cir. 2007).

240. *Great-West*, 534 U.S. at 233 (Ginsburg, J., dissenting) (“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.”).

241. *Id.* at 233–234.

242. *See, e.g.*, Eccles & Gordon, *supra* note 204, at 28.

243. *See Great-West*, 534 U.S. at 212–14.

244. *Id.* at 218–19 n.4.

245. *See, e.g.*, Langbein, *supra* note 3; Medill, *supra* note 4; Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343 (2002); Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577 (2002); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003); Schmall & Ihnes, *supra* note 142; Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063 (2003).

Most recently, the Court had a chance to make another statement about the remedial scope of section 502(a)(3) in *Amschwand v. Spherion Corp.*, which asks whether a participant or beneficiary in an ERISA health benefits plan may sue for the insurance benefits that would have been available but for a violation of a plan administrator's duty.²⁴⁶ The Fifth Circuit had held that they were constrained by *Great-West* from granting make-whole relief under section 502(a)(3) for a breach of fiduciary duty.²⁴⁷ The case would have effectively teed up the issue of "make-whole relief" in an individual claim of fiduciary breach under ERISA. Yet, even though the Solicitor General recommended granting certiorari in *Amschwand*,²⁴⁸ the Supreme Court did not take the case,²⁴⁹ and the issue remains very much alive at the time of the writing of this Article.

In short, a tension very much remains between the remedialist focus on the ability of courts to craft federal common law to decide issues not expressly reached by the text of ERISA and the literalist emphasis on the need to defer to the "carefully integrated"²⁵⁰ civil enforcement scheme. To this point, and not surprisingly because of the general majority the literalists have enjoyed on the Court since the 1985 *Russell* decision, lower courts have basically continued to engage in a literalist analysis of ERISA's remedial provisions.²⁵¹ But as one exasperated jurist recently put it, these types of cases "scream out for a remedy beyond the simple return of premiums."²⁵²

Considering this inequitable state of affairs under ERISA, the next section argues that reconsideration of the primary purpose of ERISA, as evidenced by its text, structure, and legislative history, inexorably lead to the conclusion that section 502(a)(3) should be interpreted by the Supreme Court to permit traditional trust law remedies of "make-whole" relief to rectify any act or practice that violates any provision of ERISA.²⁵³

246. 505 F.3d 342, 343 (5th Cir. 2007).

247. *Id.*

248. See Posting of Paul M. Secunda to Workplace Prof Blog, SG Urges Cert. in *Hulteen* and *Amschwand*, Not *Gulino*, http://lawprofessors.typepad.com/laborprof_blog/2008/05/sg-urges-cert-i.html (May 28, 2008); see also Brief for the United States as Amicus Curiae, *Amschwand v. Spherion Corp.*, 128 S. Ct. 2995 (2008) (No. 07-841).

249. *Amschwand*, 505 F.3d 342, cert. denied, 128 S. Ct. 2995 (2008).

250. See *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

251. See, e.g., *Amschwand*, 505 F.3d at 348 ("Because the remedy sought here was not typically available in pre-fusion courts of equity, we are obliged to follow the Supreme Court's decision in *Great-West* and deny § 502(a)(3) relief.").

252. *Id.* at 348-49 (Benavides, J., specially concurring). Judge Benavides continued, "Regrettably, under existing law it is not available." *Id.* at 349.

253. At least two members of the current Court have signaled their willingness to reconsider the availability of consequential damages under section 502(a)(3). See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 223 (2004) (Ginsburg, J., concurring) ("[F]resh consideration of the availability of

B. EMBRACING THE REMEDIALIST APPROACH OF *VARITY*

To return to the primary purpose of protecting employee benefits, a rather simple approach exists for expanding the scope of equitable relief by following the *Varity* case and limiting both *Great-West* and *Sereboff* to their facts as plan reimbursement cases.²⁵⁴ This approach is convincing because it resonates with ERISA's primary purpose of providing a remedy for participants and beneficiaries. From a textual standpoint, the language of section 502(a)(3), as Justice Brennan pointed out almost twenty-five years ago, clearly contemplates equitable relief for "any" act or practice that violates "any" provision of ERISA.²⁵⁵ From a structural standpoint, six Justices agreed with Justice Breyer that although some of the remedial provisions are specific, section 502(a)(3) is a catchall provision that intimates the availability of a type of general relief to make the plaintiff whole.²⁵⁶ Finally, as far as the legislative history goes, not only are the Senate and House Committee Reports clear that the remedial provisions were to be interpreted broadly, but Michael Gordon, a chief architect of ERISA as a congressional staffer in the 1970s,²⁵⁷ has written, "[Justice] Scalia is off the mark in holding fast to the myth that the ERISA authors only intended to enact 'typical' equitable remedies and that they rejected the law-equity merger process, then at its peak."²⁵⁸

All in all, and as Professor Langbein persuasively puts it, ERISA was meant to "replicate the core principles of trust remedy law, including the make-whole standard of relief."²⁵⁹ The time has certainly come for

consequential damages under § 502(a)(3) is plainly in order.").

254. In this regard, one of the more bizarre aspects of both *Great-West* and *Sereboff* was the almost complete absence of any mention of the importance of protecting the plan benefits promised to plan participants. Of course, the plaintiffs in these cases were insurance companies seeking reimbursement from participants, see *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 207–09 (2002); *Sereboff v. Mid. Atl. Med. Servs., Inc.*, 547 U.S. 356, 359–61 (2006), so maybe the Court was disinclined to place these policy issues into the mix. That fact may also make it easier for future courts to distinguish participant and beneficiary cases (relying on the *Varity* model) from insurance company subrogation and reimbursement cases (relying on the *Mertens* model). But see *Amschwand*, 505 F.3d at 347 ("Amschwand's proposed distinction among defendants has been rejected by many of our sister circuits. There is no textual argument for drawing this distinction under § 502(a)(3). Under *Great-West*, only the nature of the claim and the relief sought—not the status of the litigants—determine the scope of available § 502(a)(3) recovery.").

255. *Russell*, 437 U.S. at 153 (Brennan, J., concurring in the judgment).

256. See *supra* Part III.A.2.

257. See Mary Williams Walsh, *Pensions: Big Holes in the Net*, N.Y. TIMES, Apr. 12, 2005, at G1.

258. See MEDILL, *supra* note 103, at 580–81 (citing e-mail from Michael Gordon in Eccles & Gordon, *supra* note 204). Gordon has been widely recognized as one of the most influential Congressional staffers during the enactment of ERISA and as minority counsel to the Senate Committee on Labor and Public Welfare from 1970–1975. *Id.* at 15–16 & n.c. He is reported to have played a role in nearly every political issue addressed during ERISA's enactment. See *id.* at 15 n.c.

259. See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 224 (2004) (Ginsburg, J., concurring) (quoting Langbein, *supra* note 3, at 1319).

the Court to “revisit what is an unjust and increasingly tangled ERISA regime.”²⁶⁰

IV. LEGISLATIVE FIXES: PROPOSED SECTIONS 3(43) AND 502(A)(11)

Additionally, Congress should reevaluate section 502(a)(3) and interpret it to provide remedies that will more likely meet ERISA’s primary goals of protecting employees’ benefits. In this vein, Congress should provide a definition for “appropriate equitable relief” in section 502(a)(3) and, more dramatically, add language similar to that of the Civil Rights Act of 1991,²⁶¹ and permit capped compensatory and punitive damages under ERISA in certain types of cases. This Part considers each of those possibilities.

A. AMENDING THE REMEDIAL LANGUAGE OF SECTION 502(A)(3)

To better provide protection for employees’ benefits, Congress should amend ERISA to more specifically define the nature of the equitable relief available under section 502(a)(3).²⁶² Additionally, so that these remedies are not limited to scenarios where other remedies under section 502(a)(1)(B) for benefits or section 502(a)(2) are otherwise not available, additional language should be added to define the relationship between section 502(a)(3) and the other remedial sections.

More specifically, ERISA section 3, the definitional section, should be amended to add proposed section 3(43) to define the phrase “appropriate equitable relief” in section 502(a)(3). The idea here would be to provide a definition based on familiar equitable language found in other federal employment law statutes. In fact, in the *Mertens* decision, the majority acknowledged that the Court in the past had used similar equitable language in Title VII of the Civil Rights Act of 1964.²⁶³

Consistent with some lower federal courts,²⁶⁴ this reference to similar remedial language in Title VII forms the basis for the definition set forth in proposed section 3(43), and makes it possible by extension

260. *See id.* at 222 (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring)).

261. 42 U.S.C. § 1981a (2006).

262. This amendment should expressly state that it only applies to single-employer plans under ERISA. Both multiemployer plans (involving union trust funds) and multiple employer plans (involving the pooling of resources of smaller employers) raise other important issues not addressed by this Article and should be considered separately to determine whether these new provisions should apply to them.

263. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (“And though we have never interpreted the precise phrase ‘other appropriate equitable relief[.]’ [in ERISA,] we have construed the similar language of Title VII of the Civil Rights Act of 1964 (before its 1991 amendments)”); *see also* *Civil Rights Act of 1964*, 42 U.S.C. §§ 2000e to 2000e-17 (2006). *But see* *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218–19 n.4. (2002) (making a textualist argument that back pay is not actually a form of equitable relief under Title VII).

264. *See, e.g., Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 145–47 (2d Cir. 1999).

for ERISA plaintiffs to obtain make-whole relief in appropriate cases.²⁶⁵ That section would simply state: “The term ‘appropriate equitable relief’ means the same type of equitable relief available under section 706(g)(1) of Title VII of the Civil Rights Act of 1964.”

Section 706(g)(1), in turn, states in pertinent part:

[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.²⁶⁶

Over the years, this language has been interpreted to allow for a wide range of equitable remedies, including various forms of “make-whole” relief such as reinstatement, back pay, and front pay.²⁶⁷ Such a provision would also have the advantage of relying on an established provision that has been consistently interpreted over the years.

At the same time, an additional sentence should be added to proposed section 3(43) to make clear that the awarding of equitable relief under section 502(a)(3) does not require that there be no relief available under any other remedial sections, as the *Varity* case currently suggests.²⁶⁸ This is especially important for denial of benefits claims that include requests for consequential damages. In this regard, the second sentence of this proposed section should read: “Relief under section 502(a)(3) does not require that there be no other relief available under other provisions of section 502(a), only that the relief be ‘appropriate’ for the harm suffered by the plaintiff.”

This second sentence is an important addition also because of judicial developments in the case of *LaRue v. DeWolff, Boberg & Associates, Inc.*²⁶⁹ Although the holding of the case is that individual 401(k) account holders can sue to make their accounts whole for wrongful conduct under section 502(a)(2),²⁷⁰ there was an attempt by Chief Justice Roberts in his concurrence to limit access to relief under

265. *Accord* Langbein, *supra* note 3, at 1319 (“Congress . . . intended ERISA to replicate the core principles of trust remedy law, including the make-whole standard of relief.”).

266. 42 U.S.C. § 2000e-5(g)(1).

267. *See* *Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 572 (1990); *see also* *Curtis v. Loether*, 415 U.S. 189, 197 (1974).

268. *See* *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996).

269. 128 S. Ct. 1020 (2008).

270. *Id.* at 1026. I initially believed that the Court would also decide whether *LaRue* could bring his breach of fiduciary claim under section 502(a)(3) for “appropriate equitable relief.” *See* Posting of Paul Secunda to Workplace Prof Blog, Reflections on the *LaRue* Decision, http://lawprofessors.typepad.com/laborprof_blog/2008/02/reflections-on.html (Feb. 20, 2008). Although that was the provision under which *LaRue* filed his case, the Court decided that it was not necessary to address issues about whether make-whole relief was available under section 502(a)(3) in order to come to a decision in the case. *Larue*, 128 S. Ct. at 1023.

502(a)(2).²⁷¹ Specifically, Justice Roberts, joined by Justice Kennedy, questioned whether relief could be had under section 502(a)(2) before a plaintiff goes through the more tricky procedural roller coaster of a denial of benefits claim under section 502(a)(1)(B).²⁷² The argument is that the *LaRue* case is really not a fiduciary breach case under section 502(a)(2), but rather a denial of benefits case under section 502(a)(1)(B), subject to exhaustion and *Firestone* discretion.²⁷³ Consequently, the concurrence suggests that lower federal courts in the future should consider whether section 502(a)(1)(B) applies in a case like this and, if so, whether there must be exhaustion of internal remedies before the section 502(a)(2) issue is reached, if at all.

Although it is highly doubtful that *LaRue* is a benefits case being mischievously recast as a fiduciary one,²⁷⁴ to the extent lower federal courts follow Chief Justice Roberts's concurrence, it has the potential to undermine the holding of the *LaRue* majority and further restrict remedial relief for ERISA plaintiffs. Combined with the language in *Varity* that suggests that "appropriate" in "appropriate equitable relief" means that section 502(a)(3) relief is only available if no other remedy exists,²⁷⁵ the presence of the second sentence in proposed section 3(43) is imperative.

B. THE ERISA CIVIL RIGHTS ACT: SECTION 502(A)(11)

In addition to the proposed section 3(43) amendment, Congress should attack the intersectionality problem in ERISA by making a legislative move that it has previously made in the employment-discrimination law context. To the extent that reinstatement, back pay, and other equitable "make-whole relief" is insufficient to provide adequate relief caused by denials of benefits, breaches of fiduciary duty, or wrongful discharges,²⁷⁶ Congress could pass an ERISA Civil Rights

271. *Id.* at 1026 (Roberts, C.J., concurring).

272. *Id.*

273. *Id.* at 1026–27 ("If *LaRue* may bring his claim under § 502(a)(1)(B), it is not clear that he may do so under § 502(a)(2) as well. Section 502(a)(2) provides for 'appropriate' relief. Construing the same term in a parallel ERISA provision, we have held that relief is not 'appropriate' under § 502(a)(3) if another provision, such as § 502(a)(1)(B), offers an adequate remedy.").

274. The problem with Chief Justice Roberts's argument is that there were no benefits to be had. In a 401(k) plan, a participant is only entitled to his account balance, which *LaRue* had already received. See Respondents' Motion to Dismiss the Writ at 2, *LaRue*, 128 S. Ct. 1020 (No. 06-856) ("[W]hile the case was still pending before the Fourth Circuit, [*LaRue*] withdrew all of his funds from his account.") *LaRue* first needed to establish that there had been a breach of fiduciary duty in order to get his lost earnings into the plan before he could make a claim for benefits. It would help in these cases if Congress would clarify that circumstances involving both a breach of fiduciary duty and a claim for benefits can be combined into one suit.

275. *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996).

276. Consider the pitfalls of solely relying on reinstatement or back pay for these types of claims. Reinstatement is often impossible because by the time it is ordered, the employee has long since taken

Act based on the Civil Rights Act of 1991.²⁷⁷ Importantly, such legislation would permit ERISA plaintiffs to receive consequential damages in appropriate cases. This is significant because equitable relief, even when including back pay and other make-whole relief, does not compensate for the significant consequential damages of job loss or loss of benefits (e.g., health insurance expenses, mortgage foreclosure, family disruption caused by inability to pay school expenses, or the necessity of moving the family to take a new job).²⁷⁸

A reconsideration of the *Corcoran* case from Part II, in which Mrs. Corcoran lost her baby because of a benefits determination by her managed care company, illustrates the problem with merely relying on an expanded equitable relief definition. In *Corcoran*,²⁷⁹ Mrs. Corcoran had to settle for the value of the hospital services she was denied under section 502(a)(1)(B) and was not able to bring a wrongful death claim for the death of her child because that claim was preempted under the holding of *Pilot Life Insurance Co. v. Dedeaux*.²⁸⁰

Under the proposed amendment to section 3(43), a future Mrs. Corcoran might be able to obtain “make-whole” relief under an expanded definition of equity under section 502(a)(3). Yet, although her economic loss would be addressed, it is unclear how Mrs. Corcoran can receive the relief she deserves for pain and suffering without the ability to receive substantial consequential damages, in the form of both compensatory and punitive damages, for the loss of her child. In short, only the addition of monetary damages in the form now available under employment discrimination laws would serve that need. However, to keep this new legislation consistent with the primary purposes of ERISA,

another job. See Charlie J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL'Y J. 317, 338–39 (1998) (citing Elvis C. Stephens & Warren Chaney, *A Study of the Reinstatement Remedy Under the National Labor Relations Act*, 25 LAB. L.J. 31 (1974)). Even when reinstatement is a possibility, studies indicate that employees may be fired shortly after being reinstated for “other” reasons or may just quit because of the hostility they face in the workplace. *Id.* Moreover, years of delay between the wrongful discharge and the reinstatement give the employer the benefit of its illegal conduct. As to back pay, the expense of litigation eats up the entirety of a back pay award for all but the most highly-compensated employees and thus makes it difficult for employees to find legal representation. The Author would like to thank Professor Richard A. Bales for these insights.

277. 42 U.S.C. § 1981a (2006). Another version of this idea of combining ERISA’s remedial scheme with the capped damage remedies of the Civil Rights Act of 1991 has been suggested by Professor Dana Muir. See Dana Muir, *ERISA Remedies: Chimera or Congressional Compromise*, 81 IOWA L. REV. 1, 52 (1995). Professor Muir’s initial insight makes even more sense in light of the intervening fourteen years of preemption and remedies cases since her article on section 510 remedies.

278. Following Professor Medill’s example, I limit make-whole relief here to “a monetary award calculated to restore the plaintiff’s economic losses.” See Medill, *supra* note 4, at 926. Back pay would be one such remedy. On the other hand, I limit compensatory damages to mean a “monetary award designed to compensate the plaintiff for physical and emotional pain and suffering.” See *id.*

279. See 965 F.2d 1321 (5th Cir. 1992).

280. See 481 U.S. 41 (1987); see also *supra* notes 170–74.

these types of damages would only be awarded if available equitable relief would not provide a meaningful remedy. Thus, although Mrs. Corcoran would be eligible for compensatory damages for pain and suffering and punitive damages, if the necessary reckless disregard and malice were proven, other plaintiffs like Mr. LaRue and Mr. Dedeaux would be limited to appropriate equitable damages unless they could show that the wrongful conduct caused consequential damages not sufficiently addressed by equitable relief.

In order to make this distinction more clear, such compensatory claims could only be brought under section 502(a)(3) alone or combined with section 510. Section 502(a)(3) alone would address claims for denial of benefits and breach of fiduciary duties which lead to consequential damages, while section 502(a)(3) combined with section 510 would address similar claims for relief in the wrongful discharge and retaliation context. In order to make these consequential claims consistent with employment discrimination law, and not suffer from the same enforcement weaknesses associated with current section 510 claims,²⁸¹ the proposed section will require that the plaintiff establish that the defendant has the intent to interfere with rights protected by ERISA. Focusing eligibility for compensatory and punitive damages on intent determinations would have the advantage of being able to use the well-established proof schemes from employment-discrimination law to ferret out the necessary intent from circumstantial evidence.²⁸²

Within these parameters, the proposed ERISA Civil Rights Act would mimic the Civil Rights Act of 1991 in important respects. The ERISA Civil Rights Act would provide under proposed section 502(a)(11):

- (a) In an action brought by a complaining party under section 502(a)(3) alone, or in conjunction with section 510, of the Employee Retirement Income Security Act of 1974 (ERISA) against a respondent who has unlawfully denied benefits, breached fiduciary duties, or interfered with the protected rights of an ERISA participant or beneficiary, any of which causes consequential damages, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any appropriate

281. The weakness of the current section 510 regime is highlighted by the case of *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991). In *McGann*, an employer reduced the lifetime coverage amount under a health plan for HIV/AIDS from \$1 million to \$5000 after it discovered that one of its employees had contracted the disease. *Id.* at 403. The court reasoned that this was not a discriminatory act under section 510 because: (1) there was no promise that the employer would keep the high coverage limit forever and the plan contemplated that it could be modified or terminated at any time, (2) the change in coverage would apply to all participants and not just to the participant who currently had the disease, and (3) ERISA does not prohibit health plan discrimination between or among different category of diseases. *Id.* at 406-08.

282. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

relief authorized by section 502(a) of ERISA, from the respondent. Plan assets may not be used for the payment of these damages.²⁸³

Subsection (b), in turn, would provide:

(b) Compensatory and punitive damages.

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent if the complaining party demonstrates that the respondent unlawfully denied benefits, breached fiduciary duties, or interfered with protected rights under ERISA, with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of equitable relief authorized under section 502(a) of ERISA.

To assuage employers' concerns about large liability awards, which might cause them not to voluntarily sponsor employee benefits plans, the same compensatory and punitive damage caps in the Civil Rights Act of 1991 would be implemented. These caps would be based on the size of the employer being sued:

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has fewer than 101 employees, \$100,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees, \$200,000;

(C) in the case of a respondent who has more than 200 and fewer than 501 employees, \$350,000; and

(D) in the case of a respondent who has more than 500 employees, \$500,000.²⁸⁴

Finally, because employees would have the right to sue for compensatory and punitive damages, the Seventh Amendment requires that plaintiffs under proposed section 502(a)(11)(c) be able to demand a jury trial.²⁸⁵ Not only would the ability to have a jury trial be consistent

283. This last sentence is necessary because it could prove very problematic if a court held that a 401(k) plan improperly denied benefits and had to satisfy that judgment with plan assets.

284. I approximate higher caps here to take inflation into account since the passage of the Civil Rights Act of 1991.

285. See 42 U.S.C. § 1981a(c) (2006) (providing right to jury trial in employment discrimination actions seeking compensatory or punitive damages); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (interpreting Seventh Amendment right to jury trial to extend to statutory claims that involve "legal rights and remedies, enforceable in an action for damages in the ordinary courts of law").

with the framework of the Civil Rights Act of 1991,²⁸⁶ but it would also provide employees and their beneficiaries with the opportunity to explain the inequities of their situation to their peers and try to prove their right to consequential damages.

Now, some may object that such a scheme would cause employers to no longer sponsor employee benefits plans.²⁸⁷ But this is highly unlikely both because of the substantial tax benefits that would be lost by the employer and because such employers would be at a competitive disadvantage compared to competitor employers who continued to offer such benefits plans.²⁸⁸ Additionally, this proposed amendment would most likely just cause employers to write their plans even more explicitly and give even greater consideration to the denial of a claim. And unlike in the Title VII context where plaintiffs can go beyond the damage caps by relying on other federal laws, like § 1981,²⁸⁹ or parallel state antidiscrimination law,²⁹⁰ the presence of broad federal preemption would make the availability of consequential damages beyond the designated caps very unlikely. Furthermore, punitive-damage language similar to that of the Civil Rights Act of 1991 would mean that the proposed amendment would be interpreted under the *Kolstad v. American Dental Ass'n*²⁹¹ line of cases, with the likely result that punitive damages would only be awarded in cases where the employer did not act in good faith to comply with ERISA.²⁹²

286. See 42 U.S.C. § 1981a(c).

287. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262–63 (1993).

288. Another possibility, which would make this problem disappear, is requiring a mandatory pay-or-play system for employer sponsorship of all employee benefits plans. Such a scheme is currently being considered as part of President Obama's health care reform proposal. See Sarah Barr, *Health Care: Senate HELP Bill Would Cost \$611 Billion; Democrats Unveil More Coverage Provisions*, BNA DAILY LAB. REP., July 6, 2009, at A-8 (“The employer mandate included in the amendment would require employers with 25 or more employees to offer adequate insurance coverage and contribute at least 60 percent to the cost of monthly premiums—or face a penalty. Employers would be charged \$750 annually for each full-time employee and \$375 annually for each part-time employee without coverage, a provision that would generate \$52 billion over 10 years, according to CBO and the Joint Committee on Taxation.”).

289. See 42 U.S.C. 1981 (2006).

290. See Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1, 4–5 (2006) (discussing circumvention of Title VII damage caps through state law causes of action).

291. 527 U.S. 526 (1999) (consistent with 42 U.S.C. § 1981a(b)(1), holding that employment discrimination plaintiffs may seek punitive damages where an employer has engaged in “discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”). Under *Kolstad*, the focus is “on whether an employer discriminated against an employee in the face of a perceived risk that its actions would violate federal law.” See Paul M. Secunda, *A Public Interest Model For Applying Lost Chance Theory To Probabilistic Injuries In Employment Discrimination Cases*, 2005 WIS. L. REV. 747, 778 n.184.

292. *Id.* at 545 (“[I]n the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s ‘good-faith efforts to comply with Title VII.’” (quoting *Kolstad v. Am. Dental Ass’n*,

Perhaps most importantly, and the best response to potential critics, is that the availability of meaningful remedies for plaintiffs under the law would finally act as an effective deterrent against employers, plan administrators, and insurance companies wrongfully denying or delaying benefits for employees, breaching fiduciary duties, and wrongfully discharging employees for exercise of their rights under ERISA.²⁹³ In the end, because of the availability of consequential damages, ERISA's primary purpose of protecting employee benefits would more likely be vindicated.

CONCLUSION

The current unsatisfactory state of affairs for employee participants and their beneficiaries under ERISA is not a consequence of litigation tactics or what is wrought by a proper interpretation of ERISA, but can better be attributed to ERISA's intersectionality problem of broad preemption and limited remedies. It is at this intersection of the interpretation of ERISA's preemption and remedial provisions that the Court has been most effective in shielding employers from employee benefits liability.

To rectify this situation, this Article proposes a number of different solutions from both judicial and legislative perspectives. Judicially, the Supreme Court should embrace the remedial nature of ERISA and find that equitable relief may include "make whole" relief available in other employment statutes and, more generally, under the common law of trusts. Additionally, Congress should add a new definitional section, proposed section 3(43), to define "appropriate equitable relief," which would expand the relief available under section 502(a)(3) and turn that section into a true "catch-all" regardless of what other relief is available under other provisions of section 502(a). Finally, to restore fairness to the most harsh case outcomes under ERISA, this Article proposes adding section 502(a)(11), which would provide recovery of capped compensatory and punitive damages in those cases that require consequential damages for employees to receive an effective remedy.

In short, only by undertaking to provide these types of expanded remedies will ERISA once more become an employee security act and cease being a shelter from legal accountability for unscrupulous employers, plan administrators, and other fiduciaries.²⁹⁴

139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)).

293. See *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (noting that a 502(a)(3) claim for individual relief for breach of fiduciary duty would be important deterrent against wrongful conduct by fiduciaries).

294. See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 223 (2004) (Ginsburg, J., concurring) ("'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 'start[s] over' or Congress 'wipe[s] the slate clean'") (alteration in original) (quoting *Cicio v. Does*, 321 F.3d 83, 106-07 (2d Cir. 2003) (Calabresi, J., dissenting in part)).