

Chicago-Kent College of Law

Scholarly Commons @ IIT Chicago-Kent College of Law

Louis Jackson National Student Writing
Competition

Institute for Law and the Workplace

1-1-2006

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

Charlotte Johnson

Brigham Young University, J. Reuben Clark Law School

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/louis_jackson



Part of the [Law Commons](#)

Recommended Citation

Johnson, Charlotte, "Justice Ginsburg's Fiduciary Loophole: A Viable Achilles' Heel to HMO's Impenetrable ERISA Shield" (2006). *Louis Jackson National Student Writing Competition*. 29.
https://scholarship.kentlaw.iit.edu/louis_jackson/29

This Article is brought to you for free and open access by the Institute for Law and the Workplace at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Louis Jackson National Student Writing Competition by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

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

I. INTRODUCTION

Although at first he only felt weak, Juan Davila was rushed to the emergency room to find severe internal bleeding that nearly took his life. With seven units of blood, five days in critical care, and a subsequent hospital stay, he barely cheated death, but not unscathed. Against his primary physician's medical recommendation that he treat his severe rheumatoid arthritis pain with Vioxx, a gentler medication absorbed through the stomach, Aetna (his HMO) refused to cover Vioxx and would only cover a less expensive pain killer, Naproxen. With neither the time nor the means to appeal Aetna's decision, Davila went ahead with the covered treatment. As a result of his HMO's poor medical necessity decision, Davila barely escaped imminent death, leaving him in a state where he can no longer take any oral medication, including Vioxx.¹

Sadly enough, Juan Davila is just one tragic example of many working Americans whose medical treatment is effectively subject to the whim of the godlike HMOs that dominate today's health care industry. What is almost equally tragic is that legally the courts' hands are tied. Under the federal Employee Retirement Income Security Act [hereinafter ERISA], the courts cannot provide compensatory, or make-whole, relief for victims like Juan Davila. Or so the courts have interpreted ERISA historically.²

In reality, the U.S. Supreme Court has inadvertently painted itself into a corner by interpreting ERISA in a manner that is incompatible with employer-based HMO plans. Originally, Congress intended ERISA to provide uniformity in administration of employee benefit plans. Thus, to preserve uniformity, ERISA expressly provides that any claims related to

¹ Aetna Health, Inc. v. Davila, Brief for Respondents, 2004 WL 177030 (U.S.).

² See 29 U.S.C. § 1132 (2005). Courts and other sources often use both the term "make-whole" relief and "compensatory" relief interchangeably. Make-whole relief is often in the form of monetary compensatory damages.

an employer plan under state laws are preempted by ERISA. However, at the time of its creation, employer-based HMOs were hardly known. And, because ERISA was created before the rise of HMOs, Congress could not anticipate the extent ERISA would affect HMO liability. In specific, the U.S. Supreme Court, under Justice Scalia, has interpreted the statutory language to indicate that Congress intended to only provide traditional equitable relief for claims brought against ERISA plans. What this means, in part, is that those injured due to delay or denial of benefit coverage do not receive compensatory relief. In effect, the law initially enacted to protect plan participants is thus turned against them in the HMO context.

Finally, Justice Ginsburg, in a concurring opinion of the recent *Aetna Health, Inc. v. Davila* decision, referred to the Government’s amicus brief, in which it mentioned a specific uncharted area of the law that may potentially provide monetary relief to ERISA plan members.³ She pointed out that the Supreme Court had not yet precluded “make-whole” relief under a breach of fiduciary duty claim.⁴ In other words, this is one area that had not yet been specifically tested against ERISA. Justice Scalia and his followers interpret ERISA’s remedial scheme to protect only ERISA plans and preclude individual relief for breach of fiduciary duty. And, it would seem that Justice Scalia has set into motion a strict literalist trend among most courts in ERISA interpretation. However, mounted on his white horse, Justice Stevens and his followers have countered with a more employee-friendly alternative approach, based on common law trust principles that would award individual compensatory relief under ERISA for breaches of fiduciary duty. Indeed, when this issue of ERISA damages for HMO breach of fiduciary duty finally makes it before the Supreme Court, which side will prevail is difficult to predict.

One may question if perhaps this is the long-awaited claim for relief—the light at the end

³ *Aetna Health, Inc. v. Davila*, Brief for the United States, 2003 WL 23011479 (U.S.).

⁴ *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 223 (2004) (Ginsburg, J., joined by Breyer, J., concurring).

of the tunnel—that will finally survive under ERISA. That depends on a delicate balance that exists among the Supreme Court justices. How that balance may impact the compatibility of the breach of fiduciary duty claim, in the HMO context, with ERISA is the theme of this paper. The first section provides a background of ERISA and its application in HMO liability. The next section discusses the significant case history, in which Justice Scalia and Justice Stevens clashed on this issue. The third section outlines the views of the Scalia camp and the Stevens camp. Finally, the last section explores the potential viability in the courts of Justice Ginsburg’s fiduciary “loophole” to HMOs’ protective ERISA shield, particularly in light of the two opposing approaches of the Court toward ERISA remedies.

II. ERISA BACKGROUND

ERISA first made its way into congressional limelight upon the closing of the Studebaker South Bend, Indiana factory; the company defaulted on pension payments because its pension plan was not adequately funded to compensate all of its vested pension obligations.⁵ This case catalyzed long-awaited Congressional action in pension reform.⁶

In all too many cases the pension promise shrinks to this: “If you remain in good health and stay with the same company until you are 65 years old, and if the company is still in business, and if your department has not been abolished, and if you haven’t been laid off for too long a period, and if there is enough money in the fund, and if that money has been prudently managed, you will get a pension.”⁷

United Auto Workers (UAW) proposed legislation to protect employee benefits from default risk by creating a pension reinsurance.⁸ This marked the beginning of a series of employee benefit

⁵ James A. Wooten, “The Most Glorious Story of Failure in the Business”: The Studebaker-Packard Corporation and the Origins of ERISA, 49 BUFF. L. REV. 683 (2001).

⁶ *Id.* at 684.

⁷ Pension & Welfare Plans: Hearing Before the Subcommittee on Labor, Committee on Labor & Public Welfare, United States Senate, July 25, 1968, 90th Cong., 2d Sess. 217 (1968) (testimony of Asst. Sec. Thomas R. Donahue).

⁸ Wooten, *supra* note 5, at 684.

reforms that comprise ERISA, enacted in 1974.⁹

Congress wanted to create a comprehensive scheme to regulate employee benefit plans—both pension plans and welfare plans.¹⁰ ERISA was intended to provide uniform regulation of employee benefit plans¹¹ and to “protect the interests of plan participants . . . by providing appropriate remedies, sanctions, and ready access to the Federal courts.”¹² ERISA’s provisions ensure, in general:¹³ (1) adequate funding of pension plans, (2) vesting of benefits for plan participants, and (3) fiduciary obligations for plan administrators, arguably based in trust law, as will be explained later.¹⁴

Because ERISA is a lengthy statute, the following sections will explore only those portions that seem most relevant to the issue of individual monetary relief for breach of fiduciary duty, after a brief overview of HMOs and how they relate to ERISA.

I. HMO BACKGROUND IN ERISA CONTEXT

Since the time of ERISA’s enactment, the health care industry has changed dramatically. Managed care systems (HMOs) did not exist then as we know them as today—massive giants that dominate the industry. At that time, in a fee-for-service program, physicians billed insurers after treating patients, whereupon insurers made retrospective coverage decisions. If insurers denied coverage for treatments, patients could seek benefits due under ERISA §502(a).¹⁵ In this age, however, managed care employee benefit plans are now quite prevalent among the

⁹ *Id.*

¹⁰ *See generally* DiFelice v. AETNA U.S. Healthcare, 346 F.3d 442, 454 (3d Cir. 2003).

¹¹ *Davila*, 542 U.S. at 208 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)).

¹² 29 U.S.C. § 1001(b) (2005).

¹³ Pamela D. Perdue, Overview of ERISA’s Legislative and Regulatory Scheme, SJ068 A.L.I.-A.B.A. 1, 5 (Feb. 26–28, 2004).

¹⁴ *See Davila*, 542 U.S. at 224 (Ginsburg, J., joined by Breyer, J., concurring) (citing John H. Langbein, *What ERISA Means by “Equitable”: the Supreme Court’s Trail of Error in Russell, Martens, and Great-West*, 103 COLUM. L. REV. 1317, 1319 (2003)).

¹⁵ *DiFelice*, 346 F.3d at 464.

American workforce—three of four workers have such a plan.¹⁶ In contrast to the fee-for-service practice in the past, HMOs now determine treatment coverage prospectively—based on a utilization review board’s determination of medical necessity—before any treatment takes place as a cost-saving measure.¹⁷

Unfortunately, a wrongful delay or denial in coverage can cause injurious, even tragic, consequences. In reality, the HMO’s coverage decision in a medical emergency “*de facto* determines a patient’s *actual treatment* along with his eligibility for benefits, . . .”¹⁸ With the time and inconvenience to appeal coverage denial, most patients under urgent circumstances do not attempt to appeal the denial of coverage. Instead, they opt, in haste, to pay out of pocket, forego the treatment, or use a less expensive treatment.¹⁹ As will be discussed later, ERISA does not permit compensatory damages, according to the Supreme Court—a tragedy for the plan participant who becomes injured from the HMO’s negligence.²⁰

In the context of ERISA, HMOs should owe a fiduciary duty to the plan participants. One of the primary purposes behind ERISA is to enforce the fiduciary duties of plan administrators.²¹ The Court in *Davila* explained that a fiduciary under ERISA is any person “to the extent . . . he has any discretionary authority or discretionary responsibility in the administration of [an employee benefit] plan.”²² Therefore, HMOs are generally regarded as plan fiduciaries when they use their discretion, as part of their plan administrative duties, to make eligibility decisions for plan benefits, though that line is not always clear.²³ Once the court determines that an HMO

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

²¹ *See Davila*, 542 U.S. at 2504 (Ginsburg, J., joined by Breyer, J., concurring) (citing Langbein, *supra* note 14, at 1319)).

²² *Id.* at 2501–02 (citing ERISA § 3(21)(iii), 29 U.S.C. § 1002(21)(A)(iii)).

²³ *Id.*

is acting as a fiduciary, the issue then lies primarily in the relief available under ERISA for an HMO's breach of fiduciary duty.

Most claims against HMOs are typically brought under state law claims to avoid ERISA's strict remedial scheme. As a result, Congress included a preemption provision in order to maintain uniformity in regulation of employee benefit plans.²⁴ Since most claims for recovery or improper management of plan benefits are made under various state causes of action, Congress provided the preemption mechanism whereby ERISA supersedes any state laws that relates to employee benefit plans.²⁵

2. § 502(a)(1)(B) Civil Enforcement Provisions

In terms of HMO liability, the remedies provided in the ERISA Civil Enforcement Provisions, contained in § 502, are the culprit behind most of the debate. ERISA § 502(a)(1)(B) provides that a plan participant or beneficiary may bring civil action “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.”²⁶ Additionally, § 502(a)(2) allows the plan participants, beneficiaries, or fiduciaries to bring civil action “for appropriate relief under [§ 409] of this title.”²⁷ And, § 502(a)(3) allows them to bring a civil action “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of

²⁴ 29 U.S.C. § 1132(a), 1144 (2005).

²⁵ Alden J. Bianchi, *ERISA and Health Plans: Selected Court Decisions – Focus on ERISA Preemption* Kentucky Association of Health Plans v. Miller, Davila v. AETNA, Hawaii Management Alliance Association v. Insurance Commissioner, SK064 ALI-ABA 1035, 1042 Feb. 17–19, 2005.

²⁶ 29 U.S.C. §1132(a)(1)(B) (2005).

²⁷ “Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.” 29 U.S.C. § 1109(a).

this subchapter or the terms of the plan.”²⁸

The central debate stems from the judicial interpretation of “appropriate equitable relief” in §502(a)(3). The Supreme Court, under Justice Scalia, feared that the phrase could potentially cover all types of relief, “render[ing] the modifier [‘equitable’] superfluous.”²⁹ Therefore, the Court limited the scope of that relief in the landmark *Mertens* decision to “those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).”³⁰

3. § 502(a) Exclusive list of remedies - Pilot

Unfortunately for plaintiffs, Justice Scalia has made it clear that ERISA was intended to provide a “comprehensive civil enforcement scheme.”³¹ In other words, plaintiffs are limited to the remedies expressly provided for in the “plain” language of ERISA itself. Indeed, according to the Court in *Pilot Life*, plan participants would “undermine” the policy reasons Congress adopted in order to carefully select the provisions contained in §502(a), such as uniformity in plan administration, if they “were free to obtain remedies under state law that Congress rejected in ERISA.”³² Thus, “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.”³³ Unfortunately, Justice Scalia’s narrow scope of remedies, combined with ERISA’s preemption clause, has left most injured ERISA plan participants empty-handed in what has been termed a “regulatory vacuum.”

4. Regulatory Vacuum

²⁸ 29 U.S.C. § 1132(a)(3).

²⁹ *Mertens*, 508 U.S. at 256–57.

³⁰ *Id.* at 256.

³¹ *Id.* at 251; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

³² *Pilot*, 481 U.S. at 54.

³³ *Davila* 542 U.S. at 222 (ERISA’s “carefully crafted and detailed enforcement scheme provides ‘strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.’” *Pilot*, 481 U.S. at 54 (quoting *Mass. Mutual Life Insur. Co. v. Russell*, 473 U.S. 134, 146–47 (1985)).

In essence, the Court’s interpretation of ERISA has created a “regulatory vacuum.” ERISA’s broad preemptive power strips the plaintiff of state remedies. But, ERISA’s “comprehensive and reticulated scheme” fails to replace them with federal remedies that are of much use to a plaintiff physically injured due to delay or denial of medical treatment coverage.³⁴ The Court has made abundantly clear that there is no compensatory relief available under ERISA for consequential injury.³⁵ If the most an HMO would have to provide as an ERISA remedy would be an injunction or the cost of the denied treatment, it stands to reason that an HMO would seek preemption.³⁶ In most cases, unless the plaintiff seeks a preliminary injunction or reimbursement for denied treatment he or she has already paid for out of pocket, the plaintiff is simply out of luck, while the HMO is let off the hook.³⁷ Under ERISA’s liability shield, there seems little to stop HMOs from unbridled harm to ERISA plan members.³⁸

Thus, perhaps the Court, in its strict formalist approach for consistency, has lost sight of ERISA’s mission to protect the interests of plan participants. Indeed, the Court indicated that the drafters of that provision “were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of the individual beneficiary.”³⁹

Furthermore, ERISA participants’ desperate attempts to circumvent ERISA’s remedial

³⁴ See *Davila* 542 U.S. at 222 (Ginsburg, J., joined by Breyer, J., concurring).

³⁵ *Mertens*, 508 U.S. at 256.

³⁶ See 29 U.S.C. §1132 (2005).

³⁷ *Davila* 542 U.S. at 211.

³⁸ See *DiFelice*, 346 F.3d at 453–54 (“However, with the rise of managed care and the Supreme Court’s series of decisions holding preempted any action for damages against HMOs, ERISA has evolved into a shield that insulates HMOs from liability for even the most egregious acts of dereliction committed against plan beneficiaries, a state of affairs that I view as directly contrary to the intent of Congress. Indeed, existing ERISA jurisprudence creates a monetary incentive for HMOs to mistreat those beneficiaries, who are often in the throes of medical crises and entirely unable to assert what meager rights they possess.”).

³⁹ *Russell*, 473 U.S. at 142.

scheme have met with little success in the courts.⁴⁰ Those claims that do squeak by tend to be the exception, rather than the rule.⁴¹ Instead of trying to get around ERISA preemption, Justice Ginsburg offered a unique approach to this dilemma, suggesting “if you can’t beat ERISA, join it.” In her concurrence of the recent *Davila* decision, she proposed the breach of fiduciary duty claim as a potential source of relief available under ERISA’s § 502(a)(3) “other appropriate equitable relief” provision. Though the Court has not yet ruled on that exact issue in the HMO context, this next section introduces a series of cases that illustrate the tug-of-war within the Court for the “appropriate” scope of ERISA § 502(a)(3).

III. “APPROPRIATE EQUITABLE RELIEF” REVEALED

Beginning with *Russell* in 1985, a sharp division arose in the Court as to the scope of “equitable” relief available to individual ERISA plan beneficiaries. The plaintiff in *Russell* sought compensation for her disability plan’s wrongful denial of benefits.⁴² Justice Stevens’s *Russell* decision ruled against individual relief under § 409(a) and § 502(a)(2), which allowed relief only to the plan for breach of fiduciary duty.⁴³ Nevertheless, Justice Scalia read this to extend to § 502(a)(3) relief, as well, in his decision in *Mertens* and *Great-West*.⁴⁴ What is more, Justice Stevens read ERISA to be so “comprehensive and reticulated” that the Court is precluded from inferring remedies that are not there because, according to Stevens, Congress had actually intended to omit them.⁴⁵ It was this opinion that seemed to spark Justice Scalia’s restrictive *Mertens* opinion.

The *Russell* concurrence by Justice Brennan was quick to catch Justice Stevens’s

⁴⁰ See, *supra* nn.6–10, and accompanying text.

⁴¹ *Id.*

⁴² *Russell*, 473 U.S. at 136–37.

⁴³ *Id.* at 144, 145.

⁴⁴ *Mertens*, 508 U.S. at 254; *Great-West Life v. Knudson*, 534 U.S. 204, 209 (2002).

⁴⁵ *Russell*, 473 U.S. at 146.

misstatement. Instead of a comprehensive statute, the legislative history demonstrated that ERISA was intended to provide a general skeletal scheme to be further developed by case law.⁴⁶ This will be highlighted in greater detail in section IV of this paper.

Gleaning from Justice Stevens's dicta in *Russell*, Justice Scalia's *Mertens* opinion in 1993 took an awkwardly narrow approach of "equitable" relief. In this case, the plaintiff was unable to recover all of his accrued benefits from either his insolvent employer or the ERISA plan's termination insurance program.⁴⁷ The plaintiff sought compensatory damages against an actuarial firm for its involvement with the plan accounts and failure to reveal their underfunding.⁴⁸ Because ERISA was intended to be an all-inclusive legal package, according to *Russell*, then "equitable" relief in § 502(a)(3) against a non-fiduciary must not include outside trust law, which the Court considered over-inclusive. The Court reasoned that "[e]quitable" relief must mean *something* less than *all* relief."⁴⁹ Instead, it must only refer to those remedies "typically available" in equity from the days of the divided bench.⁵⁰ Those remedies included injunction, mandamus, and restitution, but expressly excluded compensatory damages.⁵¹

In a surprising about face of loyalty from the strict formalist Scalia camp to the more functionalist side, Justice Stevens switched from his majority opinion in *Russell* against individual compensatory relief under § 502(a)(2), to the dissent in *Mertens*, favoring individual compensatory relief under §502(a)(3).⁵² He, along with Justices White, O'Connor, and Chief Justice Rehnquist, joined Justice White's dissent. Here, the dissent argued that monetary

⁴⁶ See *Russell*, 473 U.S. at 152–53 n.6, 155, 156–57 (Brennan, J., concurring); see also, *infra* n.183, and accompanying text.

⁴⁷ *Mertens*, 508 U.S. at 250.

⁴⁸ *Id.*

⁴⁹ *Id.* at 259, n.8.

⁵⁰ *Id.* at 256–57.

⁵¹ *Id.*

⁵² *Russell*, 473 U.S. 134; *Mertens*, 208 U.S. at 263 (White, J., joined by Rehnquist, C.J., and Stevens and O'Connor, JJ., dissenting).

compensatory damages to “make the victims of the breach whole” are an acceptable form of equitable relief traditionally awarded in trust common law.⁵³ Thus, the majority under Justice Scalia was mistaken in precluding all forms of compensatory damages.

Just when it seemed there was no hope for any kind of practicable relief for injured individual ERISA plan participants, along came the *Varity* decision in 1996, in which the Supreme Court functionalist camp finally prevailed, throwing out a life saver to those plaintiffs.⁵⁴ In this case, the plan fiduciaries purposefully misled the employees under the plan.⁵⁵ The Court distinguished *Russell*, holding that, even though individual relief for breach of fiduciary duty is not available under § 409(a) and § 502(a)(2), it is available under § 502(a)(3).⁵⁶ According to the majority, there was no reason why Congress would have denied relief under those circumstances.⁵⁷

Naturally, the formalist camp contended this result. Justice Thomas’s lengthy dissent reiterated a strict, confined statutory construction—arguing in true formalist style against any remedy not expressly included in the statute.⁵⁸ It maintained that *Russell* should also apply to § 502(a)(3), especially since ERISA was not intended to follow the trust common law definition of fiduciary duty to protect plan participants, but to protect the integrity of the plan itself.⁵⁹ In short, there should be no recovery for breach of fiduciary duty under ERISA § 502(a)(3).

Lastly, in 2002, the pendulum swung back in favor of the formalist side in *Great-West*, where Justice Scalia basically supported its earlier *Mertens* decision. An ERISA plan was the plaintiff in this case, seeking subrogation from the participant, who had recovered damages from

⁵³ *Mertens*, 208 U.S. at 266–67 (White, J., joined by Rehnquist, C.J., and Stevens and O’Connor, JJ., dissenting).

⁵⁴ *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

⁵⁵ *Id.* at 494.

⁵⁶ *Id.* at 515.

⁵⁷ *Id.* at 513.

⁵⁸ *Id.* at 516–22.

⁵⁹ *Id.* at 522–25.

a third party tortfeasor, for benefits it had paid.⁶⁰ Again, the majority under Justice Scalia reiterated the same argument used in *Mertens* for a narrow scope of “appropriate equitable relief”—those “typically available in equity”—due to the comprehensive nature of ERISA’s construction.⁶¹ The Court ruled that a plan participant may not hold the defendant personally liable for restitution in equity, but only recover particular identifiable funds in the defendant’s possession.⁶² In other words, the plaintiff can only claim that which can be identified as belonging to him or her.⁶³ However, the Court held against recovery for the ERISA plan because the settlement funds were not in the defendant’s possession.⁶⁴

Then Justice Ginsburg led the pack in dissent, joined by Justices Stevens, Souter, and Breyer. First, she blasted the majority for relying on an unjustifiable definition of “equitable” relief that, not only has been abandoned since the 1930s, but also contradicts “Congress’ stated goals in enacting ERISA.”⁶⁵ Instead, she supported the flexible definition, based in trust law, adaptable for each case to provide the “appropriate equitable relief.”⁶⁶

Also, it is worth noting some critical flaws, pointed out by Professor John H. Langbein, a notable author, in Justice Scalia’s position in *Great-West* on restitution as it applies to § 502(a)(3). First, Scalia had to amend his views of restitution as an appropriate form of relief in order to maintain his position against monetary damages.⁶⁷ Accordingly, he distinguished restitution in law and in equity. The plaintiff could not impose personal liability on the defendant, as such would constitute restitution in law.⁶⁸ Yet, had he paid more attention to the

⁶⁰ *Great-West*, 534 U.S. at 208.

⁶¹ *Id.* at 209–10.

⁶² *Id.* at 214.

⁶³ *Id.* at 213.

⁶⁴ *Id.*

⁶⁵ *Id.* at 225–28 (Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting).

⁶⁶ *Id.* at 229 (Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting).

⁶⁷ Langbein, *supra* note 14, at 1357.

⁶⁸ *Great-West*, 534 U.S. at 214.

same text he relied on to revive the antiquated definition of equity in *Mertens*, he would find that the plan, as the “equitable assignee” in subrogation cases, should have a right to restitution of repaid funds in equity.⁶⁹ Another significant problem lies in the fact that neither restitution nor mandamus existed in equity before the divided bench, only quasi-contract and constructive trusts.⁷⁰ This brings into question of the validity of his *Mertens* opinion that originally included restitution as a form of relief “typically available in equity.”⁷¹ Also, Justice Scalia’s inflexible interpretation would permit plan beneficiaries, such as the defendant in this case, to use ERISA as an “instrument of fraud” against their plan.⁷² These are some serious flaws that seem to call Justice Scalia’s whole logic into question.

Of course, Justice Stevens also had to add his own two cents against this decision. He pointed out that *Mertens* applied only to § 502(a)(3)(B) for “other appropriate equitable relief,” not to the instant case seeking injunction under § 502(a)(3)(A).⁷³ Essentially, he saw no reason why Congress would create a cause of action and not provide a remedy for plan participants.⁷⁴ Thus, it stands to reason that the majority had no basis for insisting that Congress intended to preclude compensatory remedies to plan participants, other than their historical analysis of an obsolete court system.⁷⁵

Thus we see from the Court’s complicated history, the future of individual compensatory relief for breach of fiduciary duty under § 502(a)(3) is nearly impossible to predict. On the one end of the tug-of-war is Scalia’s formalist camp, insisting on a limited interpretation of § 502(a)(3) that leaves most injured ERISA plan participants without compensatory relief. On the

⁶⁹ Langbein, *supra* note 14, at 1358.

⁷⁰ *Id.* at 1357.

⁷¹ *Id.*

⁷² *Id.* at 1358.

⁷³ *Id.* at 222 (Stevens, J., dissenting).

⁷⁴ *Id.* at 223 (Stevens, J., dissenting).

⁷⁵ *Id.* (Stevens, J., dissenting).

other end is Steven’s functionalist camp, relying on common law trust principles to provide a broader make-whole standard for compensatory relief under § 502(a)(3). The replacement of two swing voters on this issue—former Chief Justice Rehnquist and Justice O’Connor—could potentially tip the scales in either direction.

A. PEGRAM: DAVILA PRECURSOR

Pegram v. Herdrich was a noteworthy precursor in 2000 that helped set the stage for the *Davila* decision.⁷⁶ Like *Davila*, this case concerned HMO liability in the treatment of its employee plan participants. The HMO in this case, Carle Care, was owned by physicians that provided prepaid medical care under employer contracts.⁷⁷ Petitioner physician required respondent to wait eight days to have an ultrasound of her abdomen.⁷⁸ It was during this delay that her appendix burst, resulting in peritonitis.⁷⁹

The Supreme Court considered whether treatment decisions made by HMO physician employees of an ERISA-regulated plan constituted fiduciary acts, and, therefore, the claims would be preempted by ERISA.⁸⁰ The “threshold question” for ERISA breach of fiduciary duty is “not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary’s interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.”⁸¹ In other words, an ERISA plan administrator may wear many hats, but he or she must wear only one hat at a time, meaning he or she is a fiduciary for the purposes of ERISA when he or she acts in that capacity.⁸² Indeed, to argue otherwise would put the cart before the horse.

⁷⁶ 530 U.S. 211 (2000).

⁷⁷ *Id.* at 215.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 214

⁸¹ *Id.* at 226.

⁸² *Id.*

The Court distinguished this case where Carle’s physicians made mixed treatment and eligibility decisions from pure eligibility decisions.⁸³ According to the Court, pure eligibility decisions were strictly administrative actions—clearly part of ERISA fiduciary duty.⁸⁴ However, mixed treatment and eligibility decisions were not fiduciary decisions.⁸⁵

Indeed, the Court believed that to allow ERISA preemption of mixed eligibility decisions would erode the distinction between state malpractice and federal ERISA actions.⁸⁶ Such an allowance would render any medical malpractice claims of HMO physicians in state court superfluous, clogging the federal courts with litigation.⁸⁷ In reality, federal judges would have to integrate medical malpractice standards into ERISA fiduciary cases if mixed decisions were considered fiduciary acts.⁸⁸ Obviously, the Court explained, Congress did not intend ERISA to have such far-reaching ramifications.⁸⁹ Therefore, the Court unanimously concluded that mixed decisions were not fiduciary actions.⁹⁰ Because the physician’s decision in this case did not constitute a fiduciary act, there was no need to determine whether there had been a breach of fiduciary duty and, more importantly, no need to completely preempt the claim, either.⁹¹

Finally, in 2004, the *Davila* case presented the Court with claims for breaches of fiduciary duty against HMOs.

B. DAVILA

In *Aetna Health, Inc. v. Davila*, the U.S. Supreme Court decided to combine two ERISA

⁸³ *Id.* at 228–29.

⁸⁴ *See id.*

⁸⁵ *Id.* at 229.

⁸⁶ *DiFelice*, 346 F.3d at 450 (citing *Pegram*, 530 U.S. at 235–36).

⁸⁷ *Pegram*, 530 U.S. at 235.

⁸⁸ *Id.* at 236.

⁸⁹ *Id.* at 237.

⁹⁰ *Id.*

⁹¹ *Id.*

preemption cases.⁹² In one case, described at the beginning of this paper, Aetna’s denial of coverage for Vioxx pain medication compelled Juan Davila to resort to a less expensive pain medication that Aetna would cover—a decision that led to severe intestinal bleeding and damage.⁹³ The other respondent, Ruby Calad, suffered complications when CIGNA cut her post-surgery hospital stay short—a decision which resulted in rehospitalization.⁹⁴ Both sets of respondents alleged in state court that denial of coverage for recommended treatment constituted a breach of ordinary care in making treatment decisions under the Texas Health Care Liability Act (THCLA) and was the proximate cause of their injuries.⁹⁵

Reversing the Fifth Circuit’s decision, the Supreme Court held that ERISA completely preempts the THCLA claim for breach of ordinary care.⁹⁶ Since the respondents’ claims were in regard to merely the administration of their benefits, that is, coverage denial, then their claims fell within the scope of ERISA §502(a)(1)(B) fiduciary duties.⁹⁷ Moreover, the Court reasoned it would undermine Congressional intent that §502(a)(1)(B) causes of action remain exclusive if it permitted state law to supplement ERISA §502(a) remedies.⁹⁸

Relying on the Court’s reasoning in *Pegram*,⁹⁹ respondents contended that their cases should not be preempted since they did not relate to employee benefits.¹⁰⁰ The Court distinguished its holding in *Pegram* from the instant cases. It limited *Pegram* to mixed eligibility cases where the treating physician also made benefit administration decisions—that is, where the

⁹² 542 U.S. 200 (2004).

⁹³ *Id.* at 205.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 214.

⁹⁷ *Id.*

⁹⁸ *Id.* at 216.

⁹⁹ 530 U.S. 211.

¹⁰⁰ *Davila* 542 U.S. at 218.

plan coverage “eligibility decision and the treatment decision were inextricably mixed.”¹⁰¹ In contrast, the plan administrators in these instant cases were “neither respondents’ treating physicians nor the employers of respondents’ treating physicians.”¹⁰² Furthermore, the respondents only claimed recovery for denial of benefits—a pure eligibility decision.¹⁰³ Therefore, since pure eligibility decisions are fiduciary acts under *Pegram*,¹⁰⁴ these cases fall under ERISA fiduciary regulation¹⁰⁵ and should be completely preempted.¹⁰⁶

The Court mentioned the United States’ suggestion that §502(a)(3) could potentially provide “make-whole” relief to the respondents.¹⁰⁷ However, because respondents failed to amend their pleadings to include §502(a), the Court did not address the issue concerning the scope of §502(a) or the remedies thereby available.¹⁰⁸ Accordingly, the cases were remanded for further proceedings, but, unfortunately, the parties did not pursue the case further.¹⁰⁹

Justice Ginsburg, in her sympathetic concurrence, encouraged Congress and the Court to correct ERISA’s “regulatory vacuum,” which generally leaves plan participants without relief.¹¹⁰ In light of that, she elaborated more on “make-whole” relief the Court mentioned might be available under ERISA¹¹¹—a potential loophole to the seemingly hopeless “regulatory vacuum.”¹¹² More specifically, the United States pointed out in its amicus brief that, although the Court has precluded recovery against a non-fiduciary for injuries, there may still be make-whole

¹⁰¹ *Id.* (citing *Pegram*, 530 U.S. at 235).

¹⁰² *Id.* at 221.

¹⁰³ *Id.*

¹⁰⁴ 530 U.S. at 228–29.

¹⁰⁵ *Davila*, 542 U.S. at 218.

¹⁰⁶ *Id.* at 220. The Court also held that these state claims are not saved from preemption if the state law regulating insurance generally duplicates or supplements ERISA §502(a) because of the overpowering comprehensiveness intended with § 502(a). *Id.* at 216.

¹⁰⁷ *Id.* at 221, n.7.

¹⁰⁸ Scott Rhodes, Note, *ERISA Strikes Back: AETNA Health, Inc. v. Davila’s Use of ERISA to Strike Down the Texas Health Care Liability Act*, 57 BAYLOR L. REV. 481, 499 (2005) (citing *Davila*, 542 U.S. at 221, n.7).

¹⁰⁹ *Calad v. CIGNA Healthcare of Texas, Inc.*, 388 F.3d 167 (5th Cir. 2004).

¹¹⁰ *Davila*, 542 U.S. at 222 (Ginsburg, J., joined by Breyer, J., concurring).

¹¹¹ *Id.* at 221 n.7.

¹¹² *Id.* at 222 (Ginsburg, J., joined by Breyer, J., concurring).

compensatory relief for breach of fiduciary duty, since such equitable relief existed “at the time of the divided bench.”¹¹³ This loophole will be the topic of discussion for the rest of this paper.

IV. SCALIA V. STEVENS: TEXT OR PURPOSE

The aforementioned series of cases illustrates the sharp division within the Court over the scope of § 502(a)(3) relief, which makes it difficult to predict what may happen when the Court is finally faced with a case where a plan participant specifically claims § 502(a)(3) relief against an HMO. Claiming to use a strict textual approach, Justice Scalia’s camp supports a narrow interpretation of “equitable relief” only for the plan itself. On the other side, Justice Stevens’s camp applies trust common law principles to award a broader range of make-whole compensatory damages to individuals, as well as the plan. But with the past dynamics in the delicate balance that exists among the Supreme Court and the recent turnover in justices, this tug-of-war could go either way.

At present, the Supreme Court has not yet precluded compensatory damages against an ERISA fiduciary. The plaintiffs in the *Varity* case, which was decided in between *Mertens* and *Great-West*, were awarded equitable relief against a fiduciary—in the form of reinstatement, not monetary damages.¹¹⁴ As the Government pointed out in their amicus brief in *Davila*, both the *Mertens* and *Great-West* decisions involved claims against non-fiduciaries.¹¹⁵ In addition, the mixed decisions at issue in *Pegram* were also considered non-fiduciary acts.¹¹⁶ And finally, the Court again missed the opportunity to address damages against a fiduciary in *Davila* because the plaintiffs did not pursue any issues beyond complete preemption.¹¹⁷ Thus, whether trust law

¹¹³ *Id.* at 223 (Ginsburg, J., joined by Breyer, J., concurring) (citing Brief for United States as *Amicus Curiae* 27-28, n. 13).

¹¹⁴ *Varity*, 516 U.S. 489.

¹¹⁵ *Mertens*, 508 U.S. at 249; *Great-West*, 534 U.S. at 221.

¹¹⁶ *Pegram*, 530 U.S. at 237.

¹¹⁷ *Davila*, 542 U.S. at 221, n. 7.

remedies “typically available in equity,” such as make-whole compensatory relief, against a breaching fiduciary will pass Supreme Court muster under ERISA § 502(a)(3) remains uncertain.

Although the Supreme Court has not yet precluded *compensatory* damages for individual plan beneficiaries for breach of fiduciary duty, Justice Scalia’s generally unwavering treatment confined strictly to language of § 502(a)(3) suggest it is inevitable, if he has anything to do with it. First, the Court set the stage in *Russell* by expressing its reluctance to “tamper” with a “comprehensive and reticulated” enforcement scheme so carefully crafted in ERISA.¹¹⁸ Not only that, but ERISA’s fiduciary liability provision and corresponding enforcement provision were intended to protect the plan as a whole, rather than the individual plan beneficiaries.¹¹⁹

Second, the Scalia camp attributes its interpretation generally out of strict allegiance to clear congressional intent. In particular, as Justice Scalia aptly put it, “It is, however, not our job to find reasons for what Congress has plainly done; and it *is* our job to avoid rendering what Congress has plainly done (here, limit the available relief) devoid of reason and effect.”¹²⁰ Indeed, he insisted that if Congress had intended to authorize compensatory damages, it would have simply said so in the statute.¹²¹ Or, another example of the Court’s blind obedience is in part of Justice Stevens’s rationale for denying relief to a plan participant for detrimental delay in benefit claims processing—“the text of ERISA does not explicitly regulate ‘the possible consequences of delay in the plan administrators’ processing of a disputed claim.’”¹²² Although Justice Stevens since made an about face in his views, Justice Scalia was still convinced in *Mertens* that trust law would provide too broad of a range of remedies than Congress intended.¹²³

¹¹⁸ *Russell*, 473 U.S. at 146–47; *see also Pilot*, 481 U.S. at 54.

¹¹⁹ *Russell*, 473 U.S. at 142.

¹²⁰ *Great-West*, 534 U.S. at 217–18.

¹²¹ *Id.* at 218. One could also argue the opposite: that if Congress had intended such a narrow definition of “other appropriate equitable relief,” it would have expressly said so.

¹²² Langbien, *supra* note 14, at 1328 (quoting *Russell*, 473 U.S. at 144).

¹²³ *Mertens*, 508 U.S. at 257–58.

Hence, Justice Scalia’s side insists that Congress intended his narrow construction of § 502(a)(3).

Last, and more importantly, the Court’s insistence in *Mertens* that compensatory damages are not “appropriate equitable relief” as contained in ERISA § 502 in the non-fiduciary context will likely carry over to the fiduciary context.¹²⁴ To be sure, *Great-West* seemed to reinforce that the Scalia Camp would not vary its interpretation of § 502 depending on the context, carving out one narrow exception—only “restitution traditionally available in equity,” not as legal relief. In other words, “for restitution to lie in equity,” the plaintiff cannot impose personal liability on the defendant, as it would be considered legal relief, except to recover identifiable money in the defendant’s possession that “in good conscience” belongs to the plaintiff.¹²⁵ Interestingly, Justice Breyer’s *Varity* opinion indicated that § 502(a)(3) does cover breaches of fiduciary duty.¹²⁶

Nonetheless, weighing in on this issue in his dissenting opinion, Justice Thomas, writing for the Scalia camp, even stated that “§§ 409 and 502(a)(2) [] provide the exclusive mechanism for bringing claims of breach of fiduciary duty”—indicating rather clearly that he opposed individual relief for breach of fiduciary duty.¹²⁷ And, hidden in a footnote at the end of the *Great-West* decision, Justice Scalia emphasized the limited spectrum of equitable remedies available under § 502(a)(3), even in the fiduciary context.¹²⁸ Furthermore, even some lower

¹²⁴ See *Russell*, 472 U.S. at 145 (holding that § 409 only authorizes extra-contractual damages to the plan itself, not to plan beneficiaries); *Mertens*, 508 U.S. at 256 (limiting the scope of “other appropriate equitable relief” in § 502(a)(3) to “those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)); *Great-West* 534 U.S. at 221 (holding that § 502(a)(3) does not authorize legal relief). “Almost invariably ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant’s breach of legal duty.” *Bowen v. Mass.*, 487 U.S. 879, 918-919 (1988) (Scalia, J., dissenting). And “[m]oney damages are, of course, the classic form of legal relief.” *Mertens*, 208 U.S. at 255.

¹²⁵ *Great-West*, 534 U.S. at 213–14.

¹²⁶ *Varity*, 516 U.S. at 510.

¹²⁷ *Id.* at 520 (Thomas, J., joined by O’Connor and Scalia, JJ., dissenting).

¹²⁸ *Great-West*, 534 U.S. at 221, n.5 (clarifying its decision in *Varity*, 516 U.S. 489, a breach of fiduciary duty case where the Court allowed reinstatement as appropriate equitable relief under § 502(a)(3).)

courts have reasoned that “the status of the defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute ‘appropriate equitable relief’ under § 502(a)(3).”¹²⁹ Indeed, Judge Newman of the Second Circuit summed it well, “Despite the sweep of the language from the Restatement supporting actions in equity against fiduciaries for breach of their duties . . . , I am persuaded that the Supreme Court's dictum in *Great-West* sends a signal that should not be ignored.”¹³⁰ Therefore, it seems the fiduciary context would likely present a distinction without a difference for the Scalia camp in its narrow application of § 502(a)(3).

On the other end of the spectrum, Justice Stevens’s camp would likely include make-whole remedies under its broad interpretation of “appropriate equitable relief” for breach of ERISA fiduciary duty. First and foremost, one of the primary purposes of ERISA was to protect the “interests of plan participants.”¹³¹ It is actually written into the text of the statute. From this and the fact that ERISA was originally conceived of from common law trust principles, it was obvious to the Stevens camp that Congress actually intended ERISA to provide a broad frame under which the courts could apply make-whole relief. Second, also written in the text are monetary damages for breach of fiduciary duty. After the *Russell* decision, the Court pointed out in *Varity* that § 502(l) of ERISA provides for payment of civil penalties by breaching fiduciaries to plan participants and beneficiaries, as well as the plan, for claims brought under § 502(a)(5), which is nearly identical to § 502(a)(3).¹³² So, contrary to its prior *Russell* opinion, ERISA does

¹²⁹ *Callery v. U.S. Life Insur. Co.*, 392 F.3d 401, 409 (10th Cir. 2004) (citing *McLeod v. OR Lithoprint, Inc.*, 102 F.3d 376, 378 (9th Cir. 1996); see also *Calhoun v. Trans World Airlines*, 400 F.3d 593, 598 (8th Cir. 2005) (“[T]he statutory language does not condition available remedies on the defendant's identity, but simply states that ‘a participant, beneficiary, or fiduciary’ may bring a civil action ‘to obtain other appropriate equitable relief’ to enforce the act or the plan.”).

¹³⁰ *Pereira v. Farace*, 413 F.3d 330, 346 (2d Cir. 2005) (Newman, J., concurring).

¹³¹ 29 U.S.C. § 1001(b) (2005).

¹³² *Varity*, 516 U.S. at 510. *But see Varity*, 516 U.S. at 525 (Thomas, J., joined by O’Connor and Scalia, JJ., dissenting) (reasoning that § 502(l) is not an indication that Congress intended individual relief under § 502(a)(3) for breach of fiduciary duty because § 502(l) was enacted over a decade later); *Mertens*, 508 U.S. at 260–61 (indicating that § 502(l) penalties are only awarded when there has been a transfer to the plan of money or property). It should

not preclude individual recovery for breach of fiduciary duty. Third, as Justice Ginsburg has pointed out, the only cases claiming individual relief under § 502(a)(3) were against non-fiduciaries.¹³³ And fourth, restitution, like that the Scalia majority ruled as “appropriate” in both *Mertens* and *Great-West*, is a form of monetary relief in equity.¹³⁴ Hence, the Stevens camp would likely support monetary damages under § 502(a)(3) for individual plan beneficiaries for breach of fiduciary duty.

A. *Uncertain Future in the Supreme Court*

The future of available “equitable” relief in the Supreme Court may seem a bit foggy. In fact, looking back at its major cases deciding the scope of § 502(a)(3), one can clearly see a tug-of-war in the Court on the issue. On one end is Justice Scalia, the original magician that made long-abandoned definition of “equity” reappear. Joined by Justice Thomas, Scalia adopts a narrow interpretation of “appropriate equitable remedies.”¹³⁵ And on the other end, other justices, like Justices Breyer and Stevens, maintain a broader definition based in trust principles.¹³⁶ The other remaining justices, such as the classic swing-voters, Justices O’Connor and Kennedy, have played on both teams.¹³⁷ Justice Stevens actually switched sides between the *Russell* and *Mertens* decision.¹³⁸ Also, *Mertens* and *Great-West* were both narrow five-to-four

be noted that *Varity* was decided after *Mertens*, so the later ruling should stand. *Mertens* is based on a proposed regulation, *Pension and Welfare Benefits Administration*, 55 Fed. Reg. 25,288, 25,289, & n.9 (June 20, 1990). Even if an agency’s proposed regulation held any weight, it should not after the *Varity* decision. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S.Ct. 2688, 2700 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).

¹³³ See *Davila*, 542 U.S. at 223 (Ginsburg, J., joined by Breyer, J., concurring)

¹³⁴ *Great-West*, 534 U.S. at 215.

¹³⁵ See *Mertens*, 508 U.S. 248.

¹³⁶ See *Varity*, 516 U.S. 489.

¹³⁷ See *id.*; see also *Mertens*, 508 U.S. 248; *Great-West*, 534 U.S. 208.

¹³⁸ *Russell*, 473 U.S. 134; *Mertens*, 508 U.S. at 263 (White, J., joined by Rehnquist, C.J., and Stevens and O’Connor, JJ., dissenting).

wins for the Scalia camp.¹³⁹ *Varity* was a broader six-to-three victory for the Stevens camp.¹⁴⁰ And *Davila*, though unanimous, never addressed the issue of remedies.¹⁴¹ With two new justices joining the bench to replace two middle-ground justices, the former Chief Justice Rehnquist and Justice O'Connor, the future of this issue is uncertain.

V. CONGRESSIONAL INTENT: AND THE WINNER IS...

Though the Court's ultimate outcome in this tug-of-war over § 502(a)(3) "equitable" relief may seem uncertain, one thing is certain: Justice Stevens's camp clearly has a more appropriate approach. Under his approach, courts should award ERISA plan participants at least make-whole compensatory damages for breach of fiduciary duty. First, ERISA expressly indicates one of its primary purposes—to impose duties on the plan fiduciaries to protect the individual plan participants and beneficiaries. Second, since ERISA was indisputably based on common law trust principles, it stands to reason that Congress intended the courts to apply those trust principles to ERISA claims, rather than Scalia's abandoned principles from the divided bench. Indeed, Scalia would leave plan participants without any meaningful remedies, especially given the fact that ERISA preempts any claims related to benefit plans. Finally, when one puts all of the pieces together, this may not be the best approach to HMO fiduciary liability, to be honest, but it is the only approach that would make sense under ERISA as it now stands. ERISA's far-reaching and complex impact on HMO liability is beyond anything Congress fathomed upon the statute's creation, and therefore, deserves further consideration by Congress, its creator, not further creativity in the courts.

This next section will discuss one of Justice Stevens's strongest justifications, which is to support the purposes Congress expressly included in the statute. Then, in light of that, since

¹³⁹ See *Mertens*, 508 U.S. 248.

¹⁴⁰ See *Varity*, 516 U.S. 489.

¹⁴¹ See *Davila*, 542 U.S. 200.

ERISA is founded in trust law, it is important to consider its application in the trust law context.

A. Comprehensive Language

Like most laws, ERISA was not created in a vacuum. Courts have other sources to help shed light on that troublesome little phrase “other appropriate equitable relief.” The Supreme Court basically debated whether Congress intended to base ERISA § 502(a)(3) remedies for breach of fiduciary duty on well-established trust law or on remedies available in equity during the obsolete practice of separate courts of law and of equity. Justice Stevens’s functionalist bloc relied on the overall purposes behind ERISA to support the former theory, whereas Justice Scalia’s literalist bloc supported the latter theory solely on a textual basis of one word in the statute: “equitable.” Justice Stevens, writing for the Court, emphasized in *Varity*, “We should expect that courts, in fashioning ‘appropriate’ equitable relief, will keep in mind the ‘special nature and purpose of employee benefit plans,’ and will respect the ‘policy choices reflected in the inclusion of certain remedies and the exclusion of others.’”¹⁴² Indeed, Justice Stevens did just that, finding ample support for his assertions, not only in the text of the statute, but also in the legislative history.

As already mentioned, ERISA itself indicates it was intended to “provid[e] appropriate remedies” to its participants.¹⁴³ The text of the statute contains the general purposes Congress intended it to promote—namely,

“to protect . . . the interests of participants . . . and . . . beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries . . . and . . . providing for appropriate remedies . . . and ready access to the Federal courts.”¹⁴⁴

What is more, ERISA fiduciaries are expected to act “solely in the interest of the participants and

¹⁴² *Varity*, 516 U.S. at 512 (citing *Pilot*, 481 U.S. at 54 and *Russell*, 473 U.S. at 147).

¹⁴³ 29 U.S.C. § 1001(b).

¹⁴⁴ *Id.*

beneficiaries.”¹⁴⁵

Along with those direct statements, ERISA’s language also contains more subtle indications that Congress intended to enforce fiduciary obligations under ERISA. To begin with, comparing ERISA’s pension plan provisions to non-pension welfare benefit plans also suggests the concern Congress had in fiduciary regulation of ERISA plan administration. ERISA covers both pension plans and non-pension welfare benefit plans, which include medical, surgical, accident, and health programs. As for pension plans, Title I of ERISA provides strict rules in such areas as funding, vesting, an anti-cutback rule, plan termination insurance for the employer, and fiduciary duties in managing the plan benefits. In contrast, Congress excluded welfare benefit plans from these Title I rules with the notable exception of fiduciary duty in managing the plan benefits—a strong indication of the import fiduciary law holds in welfare benefit plan administration.¹⁴⁶ Another subtle example of fiduciary enforcement is the aforementioned civil penalties in § 502(I), awarded to the plan and to participants for breach of fiduciary duty under § 502(a)(2) and § 502(a)(5), which is nearly identical to § 502(a)(3).¹⁴⁷

Thus, even if the Court were to go strictly by the “comprehensive” language of the statute, it clearly would reach the same result as Justice Stevens’s camp did. Even the legislative history also indicates Congress intended to provide broad remedies for breach of fiduciary duty.¹⁴⁸ Indeed, “[g]iven these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries

¹⁴⁵ 29 U.S.C. § 1144(a) (2005).

¹⁴⁶ Langbein, *supra* note 14, at 1323–24 (citing ERISA §§ 201(1), 301(a)(a), 4021(a)(1)).

¹⁴⁷ *Varity*, 516 U.S. at 510; *see also* n.132 and accompanying text.

¹⁴⁸ *Varity*, 516 U.S. at 512 (citing S. REP. NO. 93-127, at 35 (1973), U.S.C.C.A.N. 4838, 4871 (1974), 1 Leg. Hist. 621 (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, 2 Leg. Hist. 2364 (1973), U.S.C.C.A.N. 4639, 4655 (1974) (describing Senate version in identical terms)).

a remedy.”¹⁴⁹

The *Mertens* majority, led by Justice Scalia, relied on the usage of both the terms “equitable” and “legal,” as well as “equitable” and “remedial” together, in a few other provisions of the statute as distinguishing factors.¹⁵⁰ From that, Scalia somehow inferred § 502(a)(3) to include only those remedies “typically available in equity” from the days of the divided bench.¹⁵¹ However, not only was this a practice long-retired from the court system, but also the dissent pointed out that those provisions it relied on made the distinction out of necessity because it had no trust law analogue to refer to.¹⁵² Hence, Scalia missed the mark by narrowly deciphering the word “equity” in the wrong context with the rest of the statute—failing to consider those purposes Congress actually wrote into the text of the statute.

B. Trust Law Foundation

Fiduciary duties have an undeniable foundation in trust law. For instance, the fiduciary duties described in ERISA, such as duty of loyalty,¹⁵³ duty of prudence,¹⁵⁴ and benefit determinations,¹⁵⁵ obviously parallel trust law language.¹⁵⁶ And, in the HMO context, the

¹⁴⁹ *Varity*, 516 U.S. at 513.

¹⁵⁰ *Mertens*, 508 U.S. at 258–59

¹⁵¹ This system, which typically did not award legal, or monetary, damages, has been abandoned since the 1930s. The rarified rules underlying this rigid and time-bound conception of the term “equity” were hardly at the fingertips of those who enacted § 502(a)(3). “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.” *Great-West*, 534 U.S. at 224–25 (Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting).

¹⁵² *Mertens*, 508 U.S. at 269–70 (White, J., joined by Rehnquist, C.J., and Stevens and O’Connor, JJ., dissenting). Although the majority claims it has such an analogue, *Id.* at 259, n.9, the dissent points out it is quite tenuous, at best. *Id.* at 269, n.3.

¹⁵³ “[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries.” 29 U.S.C. § 1104(a)(1)(A), ERISA § 404 (a)(1)(A). “The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.” RESTATEMENT (SECOND) OF TRUSTS, § 170(1) (1959).

¹⁵⁴ An ERISA fiduciary is to exercise “the care, skill, prudence, and diligence” of a “prudent man acting in a like capacity.” 29 U.S.C. § 1104(a)(1)(A), ERISA § 404 (a)(1)(B). “The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property . . .” (Restatement (Second) of Trusts, § 174).

¹⁵⁵ 29 U.S.C. § 1133 (requiring ERISA plans to follow written claims procedures for benefit denial, to give reasons

Supreme Court looked at plan benefits as a “medical trust.”¹⁵⁷

Although there is little doubt that ERISA was originally derived from trust law principles,¹⁵⁸ there is some question as to what extent trust law is reflected in ERISA.¹⁵⁹ Yet, another look at the Court’s own case law, the legislative history, and even the statute itself clearly provide the answer: courts should use trust common law—which is settled and contemporary—as the template to deciding the scope “appropriate equitable relief,” rather than referring to Scalia’s antiquated system. Put plainly in *Firestone Tire & Rubber Co. v. Bruch*, the Court stated, “Given this language and history, we have held that courts are to develop a ‘federal common law of rights and obligations under ERISA-regulated plans.’”¹⁶⁰ In this case, the Court applied trust law to fill in the blank for the appropriate standard to review denial of benefits, unanimously holding that *de novo* review was the appropriate standard.¹⁶¹ As Professor Langbein indicated in his landmark article, “The core fallacy of the majority opinion in *Russell*, which has carried over to *Mertens* and *Great-West*, is to confuse applying with implying.”¹⁶² In other words, Scalia’s camp mistakenly inferred that Congress intentionally omitted certain remedies from ERISA, rather than applying the trust law principles to fashion “appropriate equitable

for denials, and to provide for review of denials “by the appropriate named fiduciary”).

¹⁵⁶ Langbein, *supra* note 14, at 1325–29; *see also* *Pegram*, 530 U.S. at 223–24.

¹⁵⁷ *Davila*, 542 U.S. at 219.

¹⁵⁸ *See, e.g., Mertens*, 508 U.S. at 248.

¹⁵⁹ Langbein, *supra* note 14, at 1324. “All assets of an employee benefit plan shall be held in trust by one or more trustees.” 29 U.S.C. § 1103(a). In addition to the trustees, ERISA also provides that fiduciary duties apply to any of those that administer the plan, or exercise any discretion over the plan benefits. *Id.* at § 29 U.S.C. § 1002(21)(A).

¹⁶⁰ 489 U.S. 101, 110 (1989) (citing *Pilot*, 481 U.S. at 54) (emphasis added); *see also* *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n.26 (1983) (“[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.”) (quoting 129 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)). “ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions, 29 U.S.C. § 1101–14, ‘codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.’” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (citing H.R. REP. NO. 93-533, at 11 (1973), U.S.C.C.A.N. 4639, 4649 (1974)).

¹⁶¹ 489 U.S. 101, 111, 115 (1989).

¹⁶² Langbein, *supra* note 14, at 1343. “Accordingly, interpreting Congress’s term “appropriate equitable relief” to cover so predictable and recurrent a case as fiduciary breach resulting in consequential injury entails applying the cause of action Congress created, not implying a cause of action that Congress omitted.” *Id.* at 1344.

remedies,” as Congress intended. For instance, ERISA § 404(a) fiduciary duty description and the § 502(a)(3) “catchall” remedy provision were only generally described. And, as Professor Langbein pointed out, Congress also left out a statute of limitations, a jury trial requirement, a standard of review, when attorney fees are appropriate, and whether punitive damages are permissible.¹⁶³ Indeed, “when enacting ERISA Congress was transposing the trust model into regulatory law for the newly federalized field of pension and employee benefit plans.”¹⁶⁴

Therefore, unless otherwise expressly indicated in the statute, trust common law should apply by default to develop “appropriate equitable relief” for breaches of fiduciary duty.¹⁶⁵ Trust law traditionally provides “make-whole” relief in many instances. It stands to reason that such remedies could apply to ERISA fiduciary liability cases. Scalia even stated that “the meaning [of §502(a)(3) relief] remains a question of interpretation in each case which meaning is intended.”¹⁶⁶ The make-whole standard, a “core principal” of trust remedy law, “restores the victim to the positions that he or she would have had ‘if there had been no breach of trust.’”¹⁶⁷ Trust law also allows for specific performance, restitution, and monetary damages.¹⁶⁸ In fact, the Uniform Trust Code provides that “[t]o remedy a breach of trust . . . the court may . . . compel the trustee to redress a breach of trust by paying money . . .”¹⁶⁹ Thus, trust law does include compensatory damages as an available equitable remedy.

¹⁶³ *Id.* at 1344. The courts have addressed some of these issues and “filled in the blanks.” *See, e.g., Firestone*, 489 U.S. at 108-09 (stating that courts have adopted the arbitrary and capricious standard of review); *see also Russell*, 473 U.S. at 144 (holding that fiduciaries are not liable for punitive damages).

¹⁶⁴ Langbein, *supra* note 14, at 1343-44.

¹⁶⁵ *Mertens*, 508 U.S. at 264-65 (White, J., joined by Rehnquist, C.J., and Stevens and O’Connor, JJ., dissenting) (citing *Firestone*, 489 U.S. at 110).

¹⁶⁶ *Id.* at 256-57.

¹⁶⁷ Langbein, *supra* note 14, at 1335 (citing 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 205, at 237 (4th ed. 1988) (12 vols., 1987-1991)).

¹⁶⁸ *Great-West*, 534 U.S. at 213 (“[A] plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant’s possession. *See* 1 D. DOBBS, LAW OF REMEDIES § 4.3(1), at 587-588 (2d ed. 1993); RESTATEMENT OF RESTITUTION, § 160, Comment *a*, at 641-42 (1936); 1 G. PALMER, LAW OF RESTITUTION § 1.4, at 17; § 3.7, at 262 (1978)).

¹⁶⁹ UNIF. TRUST CODE § 1001(b)(3) (amended 2001), 7C U.L.A. 221 (Supp. 2003).

Nevertheless, ignoring those aspects of the trust remedy law as “other appropriate equitable relief” under ERISA,¹⁷⁰ Scalia’s nonsensical “categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)” effectively provide no relief at all to most victims wrongfully denied or delayed benefits by HMOs.¹⁷¹ And a “crime” (breach of fiduciary duty, in this case) with no punishment is no crime at all.

What this really does, by including a cause of action in ERISA for breach of fiduciary duty that preempts other claims, yet denies individual relief, is create a vehicle for HMOs to defraud. With no enforceable liability outside of injunction and restitution, it provides further incentive for HMOs to deny or short-change medical coverage to ERISA plan participants—legitimizing a practice HMOs are already quite fond of. One reason Scalia’s approach is attractive to HMOs is because the participants in the midst of medical crisis are generally in no position to appeal their beneficiary rights. Another reason is because, with only “equitable” consequences under ERISA, as interpreted by the courts, the most that could happen is the HMO would be forced to cover the medical treatment in question. Often by then, the plaintiff is seeking damages, not coverage, which are supposedly unavailable under ERISA’s § 502(a) civil enforcement provisions. Thus, one could say an HMO can literally get away with murder.

One is left to wonder why Justice Scalia would limit thus “other appropriate equitable relief”—especially since most claims seeking payment to the plaintiff—whether by judgment, by declaration, or by injunction—are “[a]most invariably” for loss caused by defendant’s breach of legal duty, or legal damages.¹⁷² All that remains of “typically equitable” remedies after *Great-*

¹⁷⁰ See ERISA § 502(a)(3); see also *Mertens*, 508 U.S. 248, 256 (1993) (identifying appropriate remedies for breach of trust as those “typically available at equity”) (emphasis omitted).

¹⁷¹ *Id.* at 256.

¹⁷² *Bowen*, 487 U.S. 879, 918–919 (1988) (Scalia, J., dissenting).

West is “(1) injunction, for which Congress did not need to provide ‘other appropriate equitable relief’ in [§] 502(a)(3), having already expressly authorized injunction earlier in the same sentence; and (2) restitution for cases that might have been brought as constructive trust actions before fusion.”¹⁷³ Indeed, Professor Langbein was puzzled at why the drafters would hide the ball by calling it “other appropriate equitable relief,” if what they had really intended was just a constructive trust.¹⁷⁴

Justice Scalia’s response: ERISA § 502(a) was intended to protect the plan, not the plan beneficiaries. His reasoning referred back to Justice Stevens’s concept of a comprehensive enforcement scheme in his *Russell* decision. Since §§ 409 and 502(a)(2) were the only places that expressly addressed breaches of fiduciary duty, then that was the only way Congress intended the courts to approach the issue.¹⁷⁵ And, from the *Russell* decision, those sections will not provide individual relief for breaches of fiduciary duty. In addition, in a further effort to protect plan assets, he rejected the application of current trust law principles as too expansive (and expensive).¹⁷⁶ With nothing else to turn to—no legislative history, no case law, not even the trust law ERISA was based on—Justice Scalia unearthed ancient principles from the obsolete practice of a divided bench to reach a narrow definition of “equitable” that would favor protection to ERISA plans. In effect, Scalia’s strict textual approach was actually more of a stretch—rejecting the “vague notion” of protecting plan beneficiaries for protection of the plan assets themselves.¹⁷⁷ In opposition to Justice Scalia’s baseless inferences, Justice Stevens stated

¹⁷³ Langbein, *supra* note 14 , at 1360.

¹⁷⁴ *Id.*

¹⁷⁵ *Great-West*, 534 U.S. at 221, n.5.

¹⁷⁶ However, it is worth noting that restitution, like that upheld in *Mertens*, is based in trust law, further implicating the weakness of his stance against the application of trust law. 508 U.S. at 256. In *Great-West* Justice Scalia tried to cover his oversight by distinguishing restitution in equity from that in law. 534 U.S. at 213.

¹⁷⁷ *Varity*, 516 U.S. at 538–39 (Thomas, J., joined by O’Connor and Scalia, JJ., dissenting) (“Although Congress sought to guarantee that employees receive the welfare benefits promised by employers, Congress was also aware that if the cost of providing welfare benefits rose too high, employers would not provide them at all.”); *see also*

appropriately,

The Court is no doubt correct that “vague notions of a statute's ‘basic purpose’ are . . . inadequate to overcome the words of its text regarding the specific issue under consideration.” But when Congress' clearly stated purpose so starkly conflicts with questionable inferences drawn from a single word in the statute, it is the latter, and not the former, that must give way.¹⁷⁸

However, with the recent emergence of HMOs, the vast intricacies of HMO administration, and the fact that the stakes are much higher when dealing with people's health, then this perhaps elevates HMOs to a higher level than ordinary ERISA fiduciaries. Thus, ERISA's application to HMO plans deserves a closer look.

C. HMO Considerations

Despite Justice Scalia's questionable justification behind his narrow definition of equity, his theory may have some redeeming qualities in the context of emerging HMO liability issues. Some would argue that shifting focus of fiduciary duty of loyalty from the plan to individual plan beneficiaries would inevitably lead to costly consequences and confusion. In fact, Justice Scalia has mentioned increasing liability may induce higher costs, discouraging employers from offering private benefit plans.¹⁷⁹ Furthermore, as illustrated by the amici cited in *Varity*, plan administrative decisions will favor payment to the beneficiaries over preserving plan assets, hiking costs for ERISA plans.¹⁸⁰ Non-expert courts may place plan administrators' “technical decisions” under the microscope for closer supervision.¹⁸¹ And, plaintiffs may cloak their ordinary benefit claims as fiduciary duty claims.¹⁸² Thus, some, including Justice Scalia, reason that Congress must have intended this restrictive remedial scheme for ERISA HMO plans.

Mertens, 508 U.S. at 262 (“Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves.”)

¹⁷⁸ *Great-West*, 534 U.S. at 228–29 (Stevens, J., dissenting) (quoting *Mertens*, 508 U.S. at 261) (emphasis deleted).

¹⁷⁹ See *Varity*, 516 U.S. at 538–39 (Thomas, J., joined by O'Connor and Scalia, JJ., dissenting).

¹⁸⁰ *Id.* at 513–15.

¹⁸¹ *Id.*

¹⁸² *Id.*

However, this is all speculative, especially in the HMO context. In fact, none of these arguments were made in terms of HMOs and the climbing medical costs that burden this country today. Without any support of this theory precipitated anywhere, such as in the legislative history, this theory does not hold much weight to justify how Congress intended to apply ERISA's § 502 remedial scheme in HMO liability claims relating to employee benefit plans. Because HMOs, in the form they exist today, did not dominate the health care industry at the time ERISA was created, Congress could not have anticipated the extent of the effects of HMO liability under ERISA benefit plan regulation. What ERISA's legislative history *does* demonstrate is that Congress intended to word the statute broadly ("other appropriate equitable relief") in order to provide flexibility in employment benefit plan regulation, thereby leaving the federal courts to "fine-tune ERISA's remedial scheme" based on trust common law tradition.¹⁸³

Or, as Professor Langbein summarized Justice Stevens's approach:

To expect express statutory regulation in ERISA concerning such details of sound fiduciary practice misconceives how Congress constructed ERISA. What Congress did in ERISA was (1) to mandate the trust device for all plan assets; (2) to make every person an ERISA fiduciary who exercises any discretion over plan assets or plan administration; and (3) to prescribe the core principles of trust fiduciary law, loyalty and prudence, to govern all aspects of plan administration. In consequence, Congress had no need to spell out the details, and considerable reason not to do so when legislating for a *new field whose contours were not yet fully known*.¹⁸⁴

Though Justice Stevens's camp should have the winning approach, it is simply not enough. The HMO liability problem is much bigger than could be adequately covered by ERISA as it now stands. To begin with, lumping HMOs into ERISA regulation has resulted in a

¹⁸³ *Russell*, 473 U.S. at 152–53 n.6, 155, 157 (Brennan, J., concurring) (citing several references in the legislative history indicating a clear intent to extend trust fiduciary principles to employee benefit plans). For example, Senator Jacob Jarvis, one of the principle authors of ERISA, reported to the Senate Committee on Labor and Public Welfare that "[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Id.* at 156 (quoting 120 Cong. Rec. 29,942 (1974) (statement of Sen. Javits)). *But see infra* note 118 and accompanying text.

¹⁸⁴ Langbein, *supra* note 14, at 1325–29 (footnotes omitted) (emphasis added).

regulatory vacuum that needs to be addressed. Injured plan participants have no effective relief, under Justice Scalia's approach to ERISA's remedial scheme. Along with that are complex cost issues, such as how to balance the costs of providing benefits to plan participants, as Justice Stevens would suggest, with avoiding higher plan costs that may result from increased HMO liability, as Justice Scalia would suggest. Also, as demonstrated by the *Pegram* and *Davila* cases, ERISA fiduciary duty is not always so black and white in HMO benefit administration.¹⁸⁵ Eligibility decisions are inescapably steeped in medical treatment considerations, implying a more complex set of standards than ERISA "comprehensive and reticulated scheme" envisioned. Thus, the many judges who have spoken out have the right idea, though they feel bound by *Mertens*, by invoking Congress or the high courts to reconsider § 502(a) in response to "regulatory vacuum" that has resulted.¹⁸⁶

VI. CONCLUSION

Had Juan Davila actually claimed § 502(a)(3) remedies for breach of fiduciary duty, instead of limiting himself to appealing the lower court's decision for ERISA preemption of his state law claims, the viability of Justice Ginsburg's loophole would no longer be a mystery. Perhaps Davila's attorneys had too much faith in his preemption appeal alone. Or, perhaps they had no faith in obtaining relief under § 502(a)(3) in Davila's case. Thus far, lower federal courts generally do not grant such relief after the Supreme Court's *Mertens* decision. However, the U.S. Supreme Court is actually split over the matter. If the Court were to rule in accordance with the purposes ERISA was intended to fulfill, the success of his claim would be certain.

According to Justice Stevens's functionalist camp, an increasing problem where

¹⁸⁵ *Pegram*, 530 U.S. 211; *Davila*, 542 U.S. 200. "[W]hen an HMO guarantees medically necessary care, determinations of coverage in an emergency situation 'cannot be untangled from physicians' judgments about reasonable medical treatment.'" *Rush*, 536 U.S. at 383 (citing *Pegram*, 530 U.S. at 229).

¹⁸⁶ *Davila*, 542 U.S. at 222 (Ginsburg, J., joined by Breyer, J., concurring) (quoting *DiFelice*, 346 F.3d at 456).

employers were defaulting on their private pension payments led Congress to enact ERISA to protect the employee plan participants and to provide uniformity in the regulation of employee pension and welfare benefits plans. ERISA was based on the idea that the plan benefits are being held in trust for the employees. As such, Congress based much of ERISA on common law trust principles. However, with this being a new area of law, it provided a basic structure, with the expectation that the courts would use trust common law to develop their own “federal common law” for ERISA.¹⁸⁷

Unfortunately, the more formalist camp of the Court, led by Justice Scalia, took a different approach. Scalia believed that ERISA has a “comprehensive” remedial scheme that should be applied only to protect the plan itself, not the employee participants. From that, he inferred § 502(a)(3) “other appropriate equitable relief” to encompass only “those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).”¹⁸⁸

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

¹⁸⁷ “I believe that, in resolving this and other questions concerning appropriate relief under ERISA, courts should begin by ascertaining the extent to which trust and pension law as developed by state and federal courts provide for recovery by the beneficiary above and beyond the benefits that have been withheld; this is the logical first step, given that Congress intended to incorporate trust law into ERISA’s equitable remedies. If a requested form of additional relief is available under state trust law, courts should next consider whether allowance of such relief would significantly conflict with some other aspect of the ERISA scheme. In addition, courts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA—enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries.” *Russell*, 473 U.S. at 157–58 (Brennan, J., joined by White, Blackmun, and Marshall, JJ., dissenting) (footnotes omitted).

¹⁸⁸ *Mertens*, 508 U.S. at 256.

“appropriate equitable relief.” In fact, what he said is that ERISA provides a cause of action for breach of fiduciary duty and even has exclusive jurisdiction of related claims, but his narrow interpretation of § 502(a)(3) provides no compensatory relief to those injured individual plaintiffs. Of course, this sort of “immunity” encourages HMOs to deny coverage to plan participants.

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