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THREADING THE EYE OF THE ERISA NEEDLE: ERISA PREEMPTION AND ALTERNATIVE LEGAL SCHEMES TO FILL THE REGULATORY VACUUM

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I. INTRODUCTION

Popular consensus suggests that the Employee Retirement Income Security Act (ERISA)¹ is a mess, and one of historic, if not mythical, proportions. ERISA's comprehensive reach to protect employer-provided benefits has in practice produced unintended, if not contradictory, results. Legal scholars have employed numerous colorful clichés (some all but worn out) to describe the Act: "a Serbonian bog . . . from which there is no way of extricating oneself";² a "legal Scylla and Charybdis [that trap] personal injury victims";³ a "Hobson's choice" between ERISA's plain language and legislative intent;⁴ "a 'Catch 22' of conflicting ERISA policies";⁵ a Gordian knot "of interlocking definitional provisions" courts need to slice through;⁶ and, of course, a slippery slope feared by business and labor interests opposed to ERISA reform.⁷ Some of this hand wringing may be justified because ERISA really is kind of a mess.⁸

1. Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1461 (2000)). A quick note on reference to the statutory language: the ERISA provisions pertinent to this article are codified in Title 29 of the United States Code—Labor. For ease of readability, reference to these sections will be to the numbering scheme of the precodified Act. For example, section 502 is at 29 U.S.C. § 1132; section 514 of the Act appears at 29 U.S.C. § 1144.

2. Russell Korobkin, *The Failed Jurisprudence of Managed Care, and How to Fix It: Reinterpreting ERISA Preemption*, 51 UCLA L. REV. 457, 534 & n.359 (2003) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 454 & n.1 (3d Cir. 2003) (Becker, J., concurring)) ("A Serbonian bog is a mess from which there is no way of extricating oneself.").

3. David M. Kono, Note & Comment, *Unraveling the Lining of ERISA Health Insurer Pockets—A Vote for National Federal Common Law Adoption of the Make Whole Doctrine*, 2000 BYU L. REV. 427, 428 (2000). Scylla and Charybdis were two monsters that Ulysses faced on his journey. See THOMAS BULFINCH, *BULFINCH'S MYTHOLOGY* 244 (Avenel Books 1978) (describing Ulysses's encounter with the monsters).

4. Russell Korobkin, *The Failed Jurisprudence of Managed Care, and How to Fix It: Reinterpreting ERISA Preemption*, 51 UCLA L. REV. 457, 517 (2003).

5. Charles T. Caliendo, Jr., Note, *Removing the "Natural Distaste" from the Mouth of the Supreme Court with a Criminal Fraud Amendment to ERISA's Anti-Alienation Rule*, 68 ST. JOHN'S L. REV. 667, 720 (1994).

6. Scott Kording, Note, *Slicing Through the Gordian Knot: "Employers," Standing, and Removal Under ERISA*, 2005 U. ILL. L. REV. 1257, 1257 (2005) (describing a Gordian knot as "so complex that unraveling it was considered impossible").

7. Fernando R. Laguarda, Note, *Federalism Myth: States as Laboratories of Health Care Reform*, 82 GEO. L.J. 159, 183 (1993).

8. Cf. Douglas J. Witten, *Regulation of "Downstream" and Direct Risk Contracting*

Congress passed ERISA over thirty years ago as a national measure to protect pensions.⁹ That much is clear on the face of the Act's title, which directly references "Employee Retirement . . . Security";¹⁰ the title, however, fails to reveal the reach of ERISA into employee benefits beyond pensions.¹¹ Thus, the uninitiated must first get past any confusion created by the title of the Act to begin to appreciate all of the areas ERISA "messes" with. Unfortunately, many in the legal profession have the uninformed (but partly accurate) sense that ERISA is a mysterious (that is the accurate part)¹² and esoteric area of law that is not likely to be confronted because pension litigation is outside one's area of practice. The problem is that ERISA also regulates *non-pension* plans, including the standard health insurance of millions of workers and their dependents who are covered under employer-provided plans.¹³ These benefits come under the "welfare benefit" provisions of the Act.¹⁴ The Act elaborately defines welfare benefit,¹⁵ and in essence, if an employer pays for

by *Health Care Providers: The Quest for Consumer Protection and a Level Playing Field*, 23 AM. J.L. & MED. 449, 467 n.161 (1997) (characterizing the regulatory environment for health provider-sponsored organizations as "just kind of a mess").

9. See, e.g., Matthew O. Gatewood, Note, *The New Map: The Supreme Court's Guide to Curing Thirty Years of Confusion in ERISA's Savings Clause Analysis*, 62 WASH. & LEE L. REV. 643, 647 (2005) (discussing the history of ERISA).

10. See Pub. L. No. 93-406, 88 Stat. 829 (providing that the "Act may be cited as the 'Employee Retirement Income Security Act of 1974'").

11. Kelly M. Loud, Comment, *ERISA Preemption and Patients' Rights in the Wake of Aetna Health Inc. v. Davila*, 54 CATH. U. L. REV. 1039, 1068 n.174 (2005) ("The long title of ERISA as originally introduced in the Senate was 'To Strengthen and Improve the Protection and Interests of Participants and Beneficiaries of Employee Pension and Welfare Benefit Plans.'"); see also 119 CONG. REC. 130 (1973) (introducing the bill as "[a] bill to strengthen and improve the protections and interests of participants and beneficiaries of employee pension and welfare benefit plans").

12. See Cameron Krier, Comment, *One Step Forward, Two Steps Back: The Impact of Aetna Health Inc. v. Davila on ERISA and Patients' Rights*, 38 TEX. TECH L. REV. 127, 131 (2006) ("ERISA, notorious for its complexity and ambiguity, is a 700-page federal statute with 3600 pages of published regulations.").

13. See, e.g., James W. Kim, Note, *Managed Care Liability, ERISA Preemption, and State "Right to Sue" Legislation in Aetna Health, Inc. v. Davila*, 36 LOY. U. CHI. L.J. 651, 660 (2005) ("Over the years, the vast increase in health insurance coverage through employment-based insurance has defined ERISA as a primary means of regulation for health benefits for millions of Americans.").

14. If you are seeking scholarly treatment of ERISA pension matters, this article is not for you.

15. ERISA § 3, 29 U.S.C. § 1002(3) (2000). Section 3 of ERISA provides:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan,

insurance to cover health care or provides other fringe benefits, such as disability insurance, paid vacation, or even day care, ERISA law comes into play. So, what does that mean?

What better place to find a legal problem vividly illustrated than in a John Grisham story? One ERISA commentator has succinctly summed up the plot of *The Rainmaker*:¹⁶

A young man, Donny Ray, discovers that he has acute leukemia. The insurance company refuses to qualify him for the only treatment that would cure him, a bone marrow transplant As a result, Donny Ray spends months [lying] in his own bed at home, untreated, and finally dies from the disease, even though his family had been dutifully paying his insurance premiums month after month. The insurance company denies coverage for no legal reason: the plan contract includes the procedure, but the company simply refuses to pay the \$175,000 that the treatment would cost, in the hopes of making as much profit as possible. The company is playing the odds that Donny Ray's family will not seek legal help. At trial, the jury awards Donny Ray's family \$50 million in punitive damages for the company's bad faith, leading to a stream of other lawsuits brought by other insureds and eventually driving the company out of business.¹⁷

The Rays bought the policy "from a door-to-door salesman."¹⁸ Were Grisham an ERISA specialist, he could have taken the story in an entirely different direction by illustrating what would have happened in court if Donny's insurance had been an employer-provided plan.¹⁹ ERISA would have preempted the claim, shut

fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in § 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

16. JOHN GRISHAM, *THE RAINMAKER* (1995).

17. Stacy Rogers Sharp, Note, *ERISA Preemption and MCO Liability: The Court's Search in Aetna Health Inc. v. Davila for Congress's Elusive Intent*, 84 TEX. L. REV. 1347, 1347 (2006) (paraphrasing the storyline in John Grisham's novel and the movie *The Rainmaker*).

18. *Id.* at 1348.

19. *See id.* at 1348 n.4 (pointing out that 88% of Americans get health care coverage

off the \$50 million in punitive damages, and confined equitable relief to no more than the \$175,000 that the covered medical treatment would have cost in the first place.²⁰ But there is a reason the writer did not use an ERISA-driven plot in *The Rainmaker*: it would have preempted the feel-good ending for the novice lawyer who won the case and brought justice to a small part of the world. Such happy judicial endings in real-life ERISA litigation, however, are often enjoyed by health care corporations and not the insured. Why? Because that is what Congress, whether intentionally or not, hath wrought.

II. THE ERISA PREEMPTION SCHEME

Congress passed ERISA in 1974 to protect the rights of employees who benefit from employer pension and welfare benefit plans.²¹ It did so with a series of regulations that promote uniformity in litigation across the various states through “strong preemption language.”²² Legislative history of the Act indicates that the “uniformity of decision which [ERISA] is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.”²³

The goal of uniformity arguably benefits workers, in that the imposition of regular standards of conduct may lend predictability to the scope of litigation, or its venue, and lead to some consistency in the process. But if uniform enforcement goes awry,

from work (citing Timothy S. Jost, Pegram v. Herdrich: *The Supreme Court Confronts Managed Care*, 1 YALE J. HEALTH POL'Y L. & ETHICS 187, 187 (2001)).

20. See *id.* at 1348 (“If Donny Ray were a patient in 2006 who had received his coverage through his employee benefit plan, the company would have owed his family only the cost of the bone marrow transplant and would profitably continue to deny medically necessary coverage to patients whose plans promised it.”).

21. See, e.g., Elizabeth Khoury, Comment, *HMO Liability After Aetna Health Inc. v. Davila: Are Patients' Rights at Risk*, 91 IOWA L. REV. 1621, 1623 (2006) (stating one of the purposes of ERISA that benefited employees). To help out employers, Congress provided tax incentives. Leonard A. Nelson, *Aetna v. Davila/Cigna v. Calad: A Missed Opportunity*, 31 WM. MITCHELL L. REV. 843, 845–46 (2005).

22. Elizabeth Khoury, Comment, *HMO Liability After Aetna Health Inc. v. Davila: Are Patients' Rights at Risk?*, 91 IOWA L. REV. 1621, 1623 (2006) (quoting Jeffrey W. Stempel et al., *Doctors, HMOs, ERISA, and the Public Interest After Pegram v. Herdrich*, 36 TORT & INS. L.J. 687, 698 (2001)).

23. H.R. REP. NO. 93-533, at 12 (1973), as reprinted in 1974 U.S.C.C.A.N. 4639, 4650.

then the beneficiaries under that program may uniformly suffer. Put another way, some claim that ERISA has not entirely lived up to its initial purpose of providing workers a safety net.²⁴ The so-called safety net, in fact, has often become a barrier that fences off plaintiffs from the possibility of make-whole relief on claims that welfare benefits have been denied or mismanaged. ERISA's preemption feature has produced the negative consequence of changing what were meant to be benefits into barriers.²⁵

Preemption, the mechanism in ERISA that herds claims into the federal law corral—and sometimes exclusively into the federal courthouse—drives much of the current angst that litigators, especially plaintiffs' attorneys, experience. The preemption doctrine itself is relatively straightforward. Congress, finding authority in the Supremacy Clause,²⁶ has the power to invalidate state laws that conflict with federal laws. But the application of this doctrine to particular legislative language, i.e., ERISA's "strong preemption language" referenced above,²⁷ can get messy.²⁸

24. See, e.g., Cameron Krier, Comment, *One Step Forward, Two Steps Back: The Impact of Aetna Health Inc. v. Davila on ERISA and Patients' Rights*, 38 TEX. TECH L. REV. 127, 129 (2006) ("[N]ow HMOs have no incentive to provide adequate health care coverage."); Scott Rhodes, Comment, *ERISA Strikes Back: Aetna Health, Inc. v. Davila's Use of ERISA to Strike Down the Texas Healthcare Liability Act*, 57 BAYLOR L. REV. 481, 505 (2005) ("[T]he evolution of HMOs from fee-for-service to utilization review processes, coupled with the Supreme Court's interpretation of the preemptive scope of ERISA and remedies available therefrom, appears to leave plan beneficiaries inadequately protected under federal law.").

25. Matthew O. Gatewood, Note, *The New Map: The Supreme Court's Guide to Curing Thirty Years of Confusion in ERISA Savings Clause Analysis*, 62 WASH. & LEE L. REV. 643, 647 (2005) ("In order to facilitate [uniformity], Congress designed ERISA to preempt state laws governing employee benefits.").

26. U.S. CONST. art. VI, § 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the *supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. (emphasis added).

27. Elizabeth Khoury, Comment, *HMO Liability After Aetna Health Inc. v. Davila: Are Patients' Rights at Risk?*, 91 IOWA L. REV. 1621, 1623 (2006).

28. See, e.g., Note, *New Evidence Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1606 (2007) (pointing out that the "relate to" language in ERISA section 514 has uncertain meaning in different contexts).

Although rigid in its terms, ERISA nonetheless gives plaintiffs some litigation choices and defendants some defense options. Sections 502 and 514 comprise the two components of the ERISA preemption scheme.²⁹ Application of the scheme logically begins with section 514(a), which provides that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”³⁰ Courts give the “relate to” term in this provision broad effect,³¹ but what does that mean?³² The court in *Pilot Life Insurance Co. v. Dedeaux*³³ tried to clarify the phrase as follows:

In [two precedent cases], we noted the expansive sweep of the preemption clause. In both cases “[t]he phrase ‘relate to’ was given its broad common-sense meaning, such that a state law ‘relate[s] to’ a benefit plan ‘in the normal sense of the phrase, if it has a connection with or reference to such a plan.’”³⁴

More helpful is the effort by the district court judge in *Lippard v. Unumprovident Corp.*,³⁵ relying on *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,³⁶ who put into categories the areas in which state law claims typically succumb to preemption:

Congress intended to preempt at least three categories of state law under section 514: (1) laws that mandate employee benefit structures or their administration, (2) laws that bind employers or plan administrators to particular choices or preclude uniform administrative practices, and (3) laws that provide alternative enforcement mechanisms to ERISA’s civil enforcement provisions

29. Elizabeth Khoury, Comment, *HMO Liability After Aetna Health Inc. v. Davila: Are Patients’ Rights at Risk?*, 91 IOWA L. REV. 1621, 1623 (2006) (“ERISA’s preemptive force is outlined in sections 502 and 514.”).

30. ERISA § 514(a), 29 U.S.C. § 1144(a) (2000).

31. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (explaining that case law has given “relate to” a broad common-sense meaning).

32. See *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (holding that the Court resigned itself to the reality that it “must go beyond the unhelpful text and the frustrating difficulty of defining [section 514(a)’s] key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive”).

33. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

34. *Id.* at 47 (citations omitted).

35. *Lippard v. Unumprovident Corp.*, 261 F. Supp. 2d 368 (M.D.N.C. 2003).

36. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

[i.e., section 502].³⁷

Looking at it another way, what is *not* preempted, under the *Travelers* approach, are general health care laws that have historically been the subject of local regulation.³⁸ Additionally, ERISA includes a savings clause at section 514(b)(2)(A) that saves from preemption state laws that may regulate explicitly in the areas of insurance, banking, or securities.³⁹

With these rules of the road in mind, a typical plaintiff who seeks redress in state court for denial of benefits by a workplace insurance provider, such as improper handling of an insurance claim, and who files state statutory and common law claims,⁴⁰ faces a section 514(a) roadblock because the defendant can raise the defense that ERISA preempts the claim.⁴¹ To keep the action alive in state court, the plaintiff would have to replead the claims under the concurrent jurisdiction components of ERISA's civil enforcement scheme⁴² or face dismissal of the action for want of jurisdiction due to ERISA preemption.⁴³ Or, a plaintiff could

37. *Lippard*, 261 F. Supp. 2d at 374–75 (fashioning categories from the explanation provided in *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 658–59 (1995)).

38. Cameron Krier, Comment, *One Step Forward, Two Steps Back: The Impact of Aetna Health Inc. v. Davila on ERISA and Patients' Rights*, 38 TEX. TECH L. REV. 127, 135 (2006) (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995)).

39. See Kelly M. Loud, Comment, *ERISA Preemption and Patients' Rights in the Wake of Aetna Health Inc. v. Davila*, 54 CATH. U. L. REV. 1039, 1047–49 (2005) (“[W]hile a state law that regulates an HMO may ‘relate to’ an employee benefit plan, the law may also ‘regulate insurance’ and therefore may be saved from preemption.”).

40. ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1) (2000) (“The term ‘State law’ includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.”). Typical claims against a health care plan provider might include breach of contract, negligence, breach of the duty of good faith, or deceptive trade practices. Note that each of these claims “relates to” conduct regarding the health care plan, and none of the laws on which they are based fit into the savings clause because the laws do not *directly* regulate insurance.

41. See *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1294 (5th Cir. 1989) (“Because of the breadth of the preemption clause and the broad remedial purpose of ERISA, ‘state laws found to be beyond the scope of [section 514] are few.’” (quoting *Jackson v. Martin Marietta Corp.*, 805 F.2d 1498, 1499 (11th Cir. 1986))).

42. ERISA § 502(a)(1)(B), (e), 29 U.S.C. § 1132(a)(1)(B), (e) (2000) (granting concurrent jurisdiction (1) to recover plan benefits, (2) to enforce plan rights, or (3) to clarify rights to future benefits). The federal courts have exclusive jurisdiction over any other ERISA claims besides these. *Id.* § 502(e).

43. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (holding that federal law preempts state law claims of improper processing of benefits under an ERISA plan);

choose to stay clear of the state courts by filing in federal district court to pursue ERISA—as opposed to state law—claims,⁴⁴ which would provide the limited individual equitable remedies available under section 502(a)(3).

This brings us to the analysis of section 502, the civil enforcement mechanism. Section 502(e)(1), which covers jurisdiction, defines the claims that are within the exclusive jurisdiction of the federal courts and those that can be filed in state courts with concurrent jurisdiction.⁴⁵ In a nutshell, “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy”⁴⁶ must be brought in federal court *unless* the action—brought by an individual, for example (rather than a state)⁴⁷—is: (1) “to recover benefits . . . under the terms of his plan”; (2) “to enforce his rights under the terms of the plan”; or (3) “to clarify his rights to future benefits under the terms of the plan.”⁴⁸ Put simply, if a plaintiff’s claim falls within section 502(a)(1)(B), the plaintiff can shop forums and choose to file the

Gorman v. Life Ins. Co. of N. Am., 811 S.W.2d 542, 547, 549 (Tex. 1991) (holding that claims for breach of fiduciary duty, punitive damages, and mental anguish under an ERISA plan come outside of section 502(a)(1)(B) and are preempted).

44. See Kelly M. Loud, Comment, *ERISA Preemption and Patients’ Rights in the Wake of Aetna Health Inc. v. Davila*, 54 CATH. U. L. REV. 1039, 1050 (2005) (discussing that defendant would not be able to remove the state law action to federal court because, under the well-pleaded complaint rule, section 514(a) presents only a federal defense, not a basis for federal jurisdiction).

45. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (2000). Section 502(e)(1) provides that:

Except for actions under subsection (a)(1)(B) of [section 502], the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, [or] fiduciary State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under [subsection (A)(1)(B) of this section].

Id.

46. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209 (2004).

47. See ERISA § 502(a)(7), 29 U.S.C. § 1132(a)(7) (2000) (providing concurrent jurisdiction to states “to enforce compliance with a qualified medical child support order”).

48. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2000). If these look like contract enforcement tools, do not be surprised to learn that the remedies available under ERISA are equitable in nature, i.e., no tort or extra-contractual damages are awarded. See, e.g., Elizabeth Khoury, Comment, *HMO Liability After Aetna Health Inc. v. Davila: Are Patients’ Rights at Risk?*, 91 IOWA L. REV. 1621, 1624 (2006) (“[A] plaintiff who is wrongfully denied coverage for a hospital stay will be reimbursed for the cost of any care wrongfully denied, but not for any consequences suffered due to such a denial.”).

action in either state or federal court.⁴⁹

A claim subject to section 502(a)(1)(B)—even though not labeled as such—and filed in state court is, of course, subject to removal to federal court by the defendant.⁵⁰ The Supreme Court in *Metropolitan Life Insurance Co. v. Taylor*⁵¹ explained some of the removal niceties as they pertain to ERISA section 502 claims.⁵² Ordinarily, federal preemption is just a defense to a claim and does not itself generate federal jurisdiction.⁵³ This is because the well-pleaded complaint rule requires that the basis for jurisdiction appear on the face of the complaint⁵⁴—and a defense obviously cannot satisfy that requirement. In some instances, however, congressional intent to completely preempt an area of law is so manifest that a state law claim pled by a plaintiff changes by operation of law to a federal claim.⁵⁵ ERISA performs this magic.⁵⁶ Thus, for section 502(a)(1)(B) claims—whether pursued in state or federal court, and whether labeled as such or not—federal ERISA law will control. For all the other section 502 claims, federal law controls and the claims must be heard exclusively in federal court.

Sections 514 and 502 do not work as a seamless web. For instance, a claim that sidesteps a section 514(a) challenge because it does not relate to⁵⁷ the employee's benefit plan (e.g., it may be excepted from preemption under the section 514(b)(2)(A) savings

49. Cf. *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (“[T]he party who brings a suit is master to decide what law he will rely upon.”).

50. ERISA § 514(a), 29 U.S.C. § 1441(a) (2000).

51. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

52. *Id.* at 63.

53. *Id.*

54. *Id.*

55. *Id.* at 64–66. This is known as the complete preemption doctrine. See, e.g., *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23–24 (1983) (discussing the power of the preemptive force, in that “if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily ‘arises under’ federal law,” even if a plaintiff pleads only a state cause of action).

56. See ERISA § 502(f), 29 U.S.C. § 1132(f) (2000) (“The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.”).

57. See ERISA § 514(a), 29 U.S.C. § 1141(a) (2000) (“[ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”).

clause) will not survive section 502(a) preemption if it seeks benefits outside of ERISA's exclusive remedies.⁵⁸

So what's the problem? Can't a plaintiff file suit in federal court—thus avoiding the hassles of getting removed—and seek the remedies available under ERISA? One commentator lays out the stark reality of the restricted payoff in such a suit:

Once complete preemption is implicated in a benefits-coverage issue, section 502(a) provides for an exclusive federal remedy. The remedy allows the [insured] two options: (1) an injunction to stop the [insurer] from wrongfully denying benefits; and (2) "other appropriate equitable relief." Under the "equitable remedy," persons affected by wrongful denials may receive the benefit that the [insurer] wrongfully denied under the plan, but they may not receive damages for the injuries suffered. The courts have further interpreted ERISA's "equitable relief" provision to prevent [an insured] from obtaining "make-whole relief." Make-whole relief includes expenses that [an insured] may have incurred due to the wrongful denial of benefits, such as physical harm or suffering.⁵⁹

Another author, speaking in the role of an HMO, summed up the prospects of limited damages in ERISA actions somewhat more cynically: "So what if we deny the benefit to this patient, the worst that can happen is they file suit and a court makes us pay it later."⁶⁰

58. See Kelly M. Loud, Comment, *ERISA Preemption and Patients' Rights in the Wake of Aetna Health Inc. v. Davila*, 54 CATH. U. L. REV. 1039, 1049 (2005) (explaining ERISA preemption). Loud states:

Though section 514 serves to preempt all laws that "relate to" an employee benefit plan, the civil enforcement provisions of section 502(a) carry an even stronger preemptive power. An action brought pursuant to a state law that provides remedies in excess of those provided for in section 502(a), or an action brought under a state law that could have been brought under section 502(a) will not be saved by section 514(b)(2)(A), regardless of its relation to insurance.

Id.

59. Elizabeth Khoury, Comment, *HMO Liability After Aetna Health Inc. v. Davila: Are Patients' Rights at Risk?*, 91 IOWA L. REV. 1621, 1631 (2006) (footnotes omitted).

60. Cameron Krier, Comment, *One Step Forward, Two Steps Back: The Impact of Aetna Health Inc. v. Davila on ERISA and Patients' Rights*, 38 TEX. TECH L. REV. 127, 129 (2006) (quoting Theodore W. Ruger, *The United State Supreme Court and Health Law: The Year in Review*, 32 J.L. MED. & ETHICS 528, 529-30 (2004)). ERISA scholars have lamented that the equitable remedies available under the Act have not only limited the availability of monetary relief, they may also have contributed to diminished levels of medical care. See, e.g., Elizabeth Khoury, Comment, *HMO Liability After Aetna Health Inc. v. Davila: Are Patients' Rights at Risk?*, 91 IOWA L. REV. 1621, 1644 (2006) ("In fact,

ERISA sections 502(a)(1)(B) and 502(a)(3) list the six—and only six—types of relief available to successful plaintiffs, all of which are equitable. The provisions are succinctly listed and summed up, as follows:

Under ERISA section 502(a), a participant or beneficiary may (i) recover benefits due under an ERISA plan; (ii) enforce rights under the terms of an ERISA plan; (iii) clarify rights to future benefits; (iv) seek redress on behalf of the plan for losses as a result of a breach of fiduciary duty; (v) enjoin acts violating ERISA or the plan; and (vi) obtain equitable relief to redress violation of the plan or enforce the terms of the plan. As the U.S. Supreme Court stated in *Pilot Life*: “The policy choices reflected in the inclusion of certain remedies and exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.” This principle is applied, regardless of whether the effect of preemption will leave the plaintiff without a remedy.⁶¹

Try as they might, plaintiffs' attorneys have been unsuccessful in spinning this equitable straw into gold. That battle was waged long ago in *Massachusetts Mutual Life Insurance Co. v. Russell*,⁶² where the Court considered ERISA's “voluminous legislative history,” and noted that congressional committee reports contemplated “the full range of legal and equitable [relief]” as ERISA remedies, but by the time the bill came out of the conference committee “the reference to legal relief was deleted.”⁶³ Until Congress says otherwise, litigants can rely only on equitable options for relief.⁶⁴

From a plaintiff's perspective, money damages can, of course, make a lawsuit more worthwhile than one that offers injunctive

because HMOs need not fear tort damages for wrongful denials of care, HMOs might have more of an incentive to provide less coverage for care.”).

61. Gary S. Pancer et al., *Recent Developments in Medicine and Law*, 40 TORT TRIAL & INS. PRAC. L.J. 677, 686–87 (2005) (footnotes omitted).

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

63. *Id.* at 145–46 (“The six carefully integrated civil enforcement provisions found in [section] 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.”).

64. *See Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208 (2004) (choosing not to deviate from the “comprehensive legislative scheme” set forth in *Russell*, which found only equitable remedies available as part of ERISA enforcement).

relief alone. And, to state the obvious, the prospect of money damages makes litigation economically feasible. Congress, however, bargained this chip away in balancing the interests of insureds' claim settlement procedures with the public's interest in having employers provide workers' benefits.⁶⁵

III. EVOLUTION OF ERISA IN THE COURTS

Courts have worked for decades to map out, or find detours around, the various preemption hazards faced in ERISA litigation over welfare benefits. This has largely been a struggle to mesh judicial interpretation of congressional intent with plaintiffs' expectations, or at least hopes, of receiving make-whole relief. Numerous law review articles trace that history⁶⁶—a tale that

65. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (describing the balancing approach between civil enforcement and public policy). The *Pilot Life* opinion reads:

[T]he detailed provisions of [section] 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Id. While much of the scholarly literature focuses on the plight of the plaintiff to secure make-whole relief (including the instant article), the business interests that safeguard the general availability of employer-provided benefits should not be overlooked. Christopher F. Robertson, Note, *Closing the Massachusetts Mutual v. Russell Gap: Monetary Damage Awards Under ERISA Section 502(a)(3)*, 48 WASH. & LEE L. REV. 691, 721 (1991).

The availability of extracontractual compensatory or punitive damages under ERISA could have a significant impact on both the cost and availability of pension plans. Extracontractual damage awards could undermine the statute because a principle purpose of the statute is to continue to allow pension systems to be cost effective. . . . If court costs and damage awards exceed the benefit that employers receive from the government in the form of favorable tax treatment, employers, due to the prohibitive costs, may no longer provide employee benefit plans.

Id. (footnote omitted).

66. See, e.g., Matthew O. Gatewood, Note, *The New Map: The Supreme Court's Guide to Curing Thirty Years of Confusion in ERISA's Savings Clause Analysis*, 62 WASH. & LEE L. REV. 643, 649 (2005) ("[T]here was 'no indication in the legislative history that Congress was aware of the new prominence given the saving[s] clause in light of the rewritten pre-emption clause.'" (quoting *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 745 (1985))); see also Scott Rhodes, Comment, *ERISA Strikes Back: Aetna Health, Inc. v. Davila's Use of ERISA to Strike Down the Texas Healthcare Liability Act*, 57 BAYLOR L. REV. 481, 486 (2005) ("As the Supreme Court has addressed the issues of preemption and

leads to the recent case of *Aetna Health, Inc. v. Davila*.⁶⁷

The *Davila* opinion (a relatively painless read for an ERISA case) is a good starting place for the reader who seeks an introduction to, and working familiarity with, the current perils of preemption. The case turns on the medical misfortunes of two insureds from Texas: Juan Davila and Ruby Calad.⁶⁸ Each had employer-provided health care coverage plans, which ERISA regulates.⁶⁹ Mr. Davila alleged that his insurer refused to pay for arthritis medication prescribed by his doctor.⁷⁰ Ms. Calad alleged that her carrier should not have limited her hospital stay to one day following a hysterectomy when her physician recommended a longer stay.⁷¹ In both instances, counsel for the individuals brought suit in Texas state court—not under ERISA, of course—but for violations of the Texas Health Care Liability Act (THCLA).⁷² The charge: tortious “failures to exercise ordinary care in the handling of coverage decisions, in violation of a duty imposed by the [THCLA].”⁷³ Counsel for Davila and Calad transparently engaged in what some call “artful pleading” to avoid removal, for which the courts have fashioned the artful pleading doctrine. This “allows removal where federal law completely preempts an asserted state-law claim, for a claim of that preempted character is . . . from its inception, a claim that can arise only under federal, not state, law.”⁷⁴ Defendant HMOs predictably removed the cases to the federal courts, which denied

remedies, the lower courts have shown increasing frustration in trying to reconcile the Court's precedent with Congress's intent.”); Stacy Rogers Sharp, Note, *ERISA Preemption and MCO Liability: The Court's Search in Aetna Health Inc. v. Davila for Congress's Elusive Intent*, 84 TEX. L. REV. 1347, 1358 (2006) (explaining that past Court decisions regarding claims by the injured against MCOs have been inconsistent).

67. *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004).

68. See *Roark v. Humana, Inc.*, 307 F.3d 298, 302 (5th Cir. 2002) (consolidating multiple actions for consideration of common ERISA issues).

69. *Davila*, 542 U.S. at 204.

70. *Davila v. Aetna U.S. Healthcare, Inc.*, No. 4:00-CV-1855-Y, 2001 WL 34354948, at *1 (N.D. Tex. June 29, 2001).

71. *Calad v. Cigna Healthcare of Tex., Inc.*, No. 3:00-CV-2693-H, 2001 WL 705776, at *3 (N.D. Tex. June 21, 2001).

72. *Davila*, 542 U.S. at 204 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 88.001-.003 (Vernon Supp. 2004)).

73. *Id.*

74. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 471 (1998) (emphasis added) (citation omitted). This doctrine is a perfect fit with ERISA section 502(a) claims.

both plaintiffs' motions to remand the causes back to state court.⁷⁵ Both the *Davila* and *Calad* trial courts also granted motions to dismiss the actions with prejudice, on grounds that plaintiffs showed no inclination to replead the claims under the rules of the game imposed by ERISA.⁷⁶ The parties appealed to the Fifth Circuit, got the dismissals reversed,⁷⁷ but ended up at the United States Supreme Court on petition from the health care companies.⁷⁸

The narrow legal issue in the consolidated cases (put in context of the preemption controversy) is whether ERISA completely preempted the state-law tort claims (that could have reaped money damages) and made the actions removable to federal court, which required that the claims be recast under ERISA for equitable relief only—with little or no cash rewards available.⁷⁹ *Davila* and *Calad* both lost.⁸⁰

In its analysis, the Court went through a standard “well-pleaded complaint” inquiry⁸¹ and found the federal question of jurisdiction under the exception that comes into play when comprehensive federal legislation has completely displaced state law.⁸² In contrast, the Fifth Circuit held that the tort claims brought under the THCLA for negligent care⁸³ did “not duplicate the causes of action listed in ERISA section 502(a)”⁸⁴ and thus, the claims were

75. *Davila*, 2001 WL 34354948, at *3; *Calad*, 2001 WL 705776, at *6.

76. *Davila*, 2001 WL 34354948, at *3; *Calad*, 2001 WL 705776, at *6.

77. *Roark v. Humana, Inc.*, 307 F.3d 298, 315 (5th Cir. 2002).

78. *Davila*, 542 U.S. at 200.

79. *Id.* at 204.

80. *Id.* at 221.

81. *Id.* at 207, 211–14; see also *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987) (discussing federal preemption as an affirmative defense). The *Metropolitan Life* case states:

Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. . . . [I]t does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.

Id. at 63–64 (citation omitted).

82. *Davila*, 542 U.S. at 207–09.

83. See Donald T. Bogan, *ERISA: State Regulation of Insured Plans After Davila*, 38 J. MARSHALL L. REV. 693, 711 (2005) (“The targets of the Texas statute are entities that make medical judgments in the context of insurance coverage determinations.”).

84. *Roark v. Humana, Inc.*, 307 F.3d 298, 310–11 (5th Cir. 2002).

not preempted. The Supreme Court saw ERISA preemption in much broader terms than merely what remedies may or may not be duplicated when comparing ERISA's equitable relief with measures offered by other statutes that give patients heavier artillery to go after managed care organizations for failure to exercise ordinary care. That is, *Davila* did not focus on the failure of the managed care entity in the exercise of due care in treatment (as does the THCLA); rather, it looked to the alleged failures in administration of the relevant health care plan to *cover* requested treatment.⁸⁵ The Court said:

[A] managed care entity could not be subject to liability under the THCLA if it denied coverage for any treatment not covered by the health care plan that it was administering.

Thus, interpretation of the terms of respondents' benefit plans forms an essential part of their THCLA claim, and THCLA liability would exist here only because of petitioners' administration of ERISA-regulated benefit plans.⁸⁶

The take-home message from *Davila*, then, is that if an insured seeks recovery from the benefits provider for problems in treatment—as *Davila* and *Calad* did in alleging their HMOs “controlled, influenced, participated in and made decisions which affected the quality of the diagnosis, care, and treatment provided”⁸⁷—the duty owed can ultimately be traced back to the benefits promised under the plan.⁸⁸ And if it is an ERISA-regulated plan, the claims will be preempted and limited to ERISA's limited equitable remedies.⁸⁹ In that event, the state causes of action come within section 502(a) and are completely preempted.⁹⁰

This spells bad news for plaintiffs. One author summed up the *Davila* holding, as follows:

85. *Davila*, 542 U.S. at 212–13.

86. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 213 (2004).

87. *Id.* at 212 (quoting Petition for Writ of Certiorari, Appx. H at 69a, *Davila*, 542 U.S. 200 (No. 02-1845)).

88. *See id.* at 214 (“Hence, respondents bring suit only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA.”).

89. *See id.* at 215–16 (highlighting preemption of state cause of action when equitable remedy was converted into a legal remedy).

90. *See id.* at 215–16, 221 (holding that ERISA section 502(a) remedies preempt state causes of action).

The Court's decision in *Davila* is appropriate only in the sense that it closely follows precedent. Yet, the implications of the decision are troubling. There is no check on the HMO's decision to deny care. Justice Thomas, writing for the Court, stressed that the plaintiffs only complained of denials of coverage that were provided under their health insurance plans. Accordingly, Justice Thomas noted that *Davila* and *Calad* "could have paid for the treatment themselves and then sought reimbursement through a section 502(a)(1)(B) action, or sought a preliminary injunction." However, Justice Thomas offered an unreasonable alternative for patients to pursue. ERISA's purpose was to provide a "uniform regulatory regime," not to deprive patients of their right to receive proper medical care. The Court's logic defeats the purpose of ERISA, to protect workers' rights. In essence, patients must provide their own benefits and hope that one day, after an intense appeals process, they will be reimbursed.⁹¹

In dicta, the *Davila* Court readily dismissed any notion that because the THCLA regulates insurance, the section 514(b)(2)(A) savings clause⁹² would allow plaintiffs a way around preemption.⁹³ The Court reiterated that "ERISA [section] 514(b)(2)(A) must be interpreted in light of the congressional intent to create an exclusive federal remedy in ERISA [section] 502(a)."⁹⁴ One author has questioned the reasoning of *Davila* in dismissing the savings clause argument so easily with regard to the THCLA—which regulates insurance⁹⁵—by pointing out that the

91. Elizabeth Khoury, Comment, *HMO Liability After Aetna Health Inc. v. Davila: Are Patients' Rights at Risk?*, 91 IOWA L. REV. 1621, 1642–43 (2006) (footnotes omitted).

92. See Kelly M. Loud, Comment, *ERISA Preemption and Patients' Rights in the Wake of Aetna Health Inc. v. Davila*, 54 CATH. U. L. REV. 1039, 1049 (2005) (discussing the ERISA savings clause).

93. *Davila*, 542 U.S. at 216–18.

94. *Id.* at 217.

95. See Leonard A. Nelson, *Aetna v. Davila/Cigna v. Calad: A Missed Opportunity*, 31 WM. MITCHELL L. REV. 843, 874–75 (2005) (noting that THCLA regulates insurance). Nelson writes:

In *KAHP*, the Court held that a state law regulates insurance if (1) it is specifically directed toward entities engaged in insurance and (2) it "substantially affect[s] the risk pooling arrangement between the insurer and the insured." THCLA section 88.002(a) imposes liability against "[a] health insurance carrier, health maintenance organization, or other managed care entity." In *Rush Prudential*, the Court held that an HMO is an insurer for insurance savings clause purposes. Therefore, THCLA should satisfy the first *KAHP* requirement. THCLA almost certainly meets the second *KAHP* requirement as well because THCLA mandates that managed care entities, rather than insureds, must incur the tort damages that ensue from insurers'

precedent relied on in *Pilot Life* did not concern a state law that regulated insurance.⁹⁶

IV. GLIMMERS OF HOPE FOR PLAINTIFFS

Post-*Davila*, are plaintiffs insured through work doomed never to collect money damages for a negligent health care decision that has ERISA fingerprints on it? Not necessarily.

In Texas, two notable cases have entered the fray, sidestepping the result reached in *Davila*. The first is *Stiles v. Memorial Hermann Healthcare System*,⁹⁷ a case brought by hospital employee Mattie Stiles after she was injured on the job.⁹⁸ She alleged that she entered into a "Release of Claims and Covenant Not to Sue" with the hospital (Memorial), so long as it would pay her medical expenses.⁹⁹ Stiles claimed Memorial refused to pay, and she sued in state court for breach of contract and fraud.¹⁰⁰

There is no question that the release specifically made reference to Memorial's Occupational Health Plan in terms of Stiles agreeing that "*any claim I may have for benefits under the Plan is not affected by this Release.*"¹⁰¹ There it is, right there in bold type in the previous sentence: ERISA fingerprints. Any defense counsel would deny the claim, argue lack of jurisdiction by the state court, and file to remove the matter to federal court.¹⁰² And

failure to exercise ordinary care when making health care treatment decisions. Because the statute shifts this risk between the parties, THCLA should fall within the *KAHP* criteria for the insurance savings clause.

Id. (footnotes omitted).

96. Donald T. Bogan, *ERISA: State Regulation of Insured Plans After Davila*, 38 J. MARSHALL L. REV. 693, 717 n.110 (2005) ("Recall that the *Pilot Life* Court ruled that the state law at issue in that case was not a law that regulates insurance; consequently, the *Davila* Court's heavy reliance on *Pilot Life* is particularly misplaced.")

97. *Stiles v. Mem'l Hermann Healthcare Sys.*, 213 S.W.3d 521 (Tex. App.—Houston [1st Dist.] 2001, pet. filed).

98. *Id.* at 524. As of the date of this article, the Texas Supreme Court has yet to rule on the petition for review.

99. *Id.* at 524–25.

100. *Id.*

101. *Id.* at 525, 529.

102. Whether the state court had subject matter jurisdiction is a thorny matter that involves inquiry into complete preemption versus ordinary or conflict preemption, and the matter of concurrent jurisdiction. See *Stiles*, 213 S.W.3d at 527 & n.3 (recognizing the intricacies of preemption and removal). Counsel for Memorial later backed off of the jurisdictional defense.

that is exactly what counsel for Memorial did.¹⁰³ Stiles requested that the federal trial court remand the matter back to Texas state court, which it did, citing lack of federal jurisdiction because “substantial doubt remains as to whether [Stiles’s] claim does in fact fall within the preemptive scope of ERISA.”¹⁰⁴ Meanwhile, back in state court, the judge granted Memorial’s motion to dismiss the suit, “concluding that Stiles’s state law claims for breach of contract and fraud were ‘addressed by’ and ‘related to’¹⁰⁵ the Plan, that ERISA ‘completely preempted’ Stiles’s state law claims, and that it had no subject matter jurisdiction over the claims.”¹⁰⁶

Stiles appealed to the First Court of Appeals in Houston, which rejected the trial court’s ERISA preemption argument.¹⁰⁷ While acknowledging *Davila*’s mandate that the “ERISA preemptive provision is to be broadly construed,”¹⁰⁸ the Texas appellate court nonetheless found the claim for breach of contract and fraud, based on allegations of noncompliance with the terms of the release, too tenuous to constitute an ERISA claim:

Here, the release reflects that Stiles bargained for a distinct and independent promise from Memorial to pay her medical bills in consideration of her release of any claims against Memorial arising from the incident. We conclude that the underlying conduct complained about in this case, breach of contract and fraud, can be “divorced from its connection to the employee benefit plan.”¹⁰⁹

It must first be noted that Memorial’s arguments on rehearing are distinct from the arguments it made in its original briefing. In its original briefing, Memorial argued that because Stiles sought a remedy to which she was not entitled, her claims were “completely preempted” and, as a result, the trial court “lacked subject matter jurisdiction.” Memorial now concedes on rehearing that the trial court did not lack jurisdiction and asserts, for the first time, that “the correct outcome in this appeal is a remand to the trial court for adjudication of Stiles’s state law complaints re-characterized as claims for benefits under 29 U.S.C. § 1132(a).

Id. at 529.

103. *Id.* at 525.

104. *Id.*

105. See ERISA § 514(a), 29 U.S.C. § 1144(a) (2000) (“[T]he provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .”).

106. *Stiles*, 213 S.W.3d at 525.

107. *Stiles v. Mem’l Hermann Healthcare Sys.*, 213 S.W.3d 521, 532–33 (Tex. App.—Houston [1st Dist.] 2001, pet. filed).

108. *Id.* at 526.

109. *Id.* at 532 (quoting *Hook v. Morrison Milling Co.*, 38 F.3d 776, 783 (5th Cir.

Chalk one up for the *Stiles* plaintiff. Sections 502 and 514, the Scylla and Charybdis of ERISA preemption, were avoided.

A more intriguing post-*Davila*¹¹⁰ case is *Smelik v. Mann*.¹¹¹ The basics of the case are succinctly summed up as follows:

In *Smelik v. Mann*, the plaintiff sued his wife's physicians and HMO under the Texas HMO Act, the Texas Deceptive Trade Practices Act, and the Texas Insurance Code after she died from problems associated with kidney failure. The plaintiff argued that Humana, the HMO, breached its nondelegable duty to supervise the quality of care provided to his wife. More specifically, the plaintiff claimed that Humana did not properly inform his wife of her diagnosis and treatment options, furnish access to appropriate tests, provide a physician who specialized in kidney disease, or supply the proper Humana disease management programs her condition warranted.

The district court awarded \$9 million in total damages of which Humana was responsible for \$4.2 million. The jury determined Humana was thirty-five percent negligent, placing the remaining sixty-five percent of liability on the physicians and physicians' group. Jon Powell, an attorney for the plaintiff, distinguished the issue presented to the court in *Smelik* from *Davila* by asserting, "[was] not a denial-of-benefits case. This [was] a mismanagement-of-managed care [case]." In *Smelik*, the plaintiff did not allege that Humana failed to pay for his wife's medical treatment, but instead argued the Humana was negligent in the coordination and supervision of her care. This type of argument protected the case from ERISA preemption and the Supreme Court's holding in *Davila*.¹¹²

This is one perspective, but the case has a few twists to it.

1994)).

110. While the *Smelik* case commenced in 2003 prior to the issuance of the 2004 *Davila* opinion, the parties cite *Davila* in their post-trial briefing on ERISA preemption issues.

111. *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. July 27, 2005); see also *Humana Health Plans of Tex., Inc. v. Smelik*, No. 04-05-00738-CV, 2006 WL 467987 (Tex. App.—San Antonio Mar. 1, 2006, no pet.) (mem. op., not designated for publication) (granting joint motion to settle case); *In re Humana Health Plan of Tex., Inc.*, No. 04-05-00382-CV, 2005 WL 1629924 (Tex. App.—San Antonio July 13, 2005) (orig. proceeding) (mem. op., not designated for publication) (granting mandamus relief from trial court's granting of a motion to compel discovery of documents).

112. Cameron Krier, Comment, *One Step Forward, Two Steps Back: The Impact of Aetna Health Inc. v. Davila on ERISA and Patients' Rights*, 38 TEX. TECH L. REV. 127, 151-52 (2006) (alteration in original) (footnotes omitted).

Joan Smelik benefited from an ERISA-regulated health plan through her husband's employer.¹¹³ Humana Health Plans of Texas administered the plan under which Smelik received covered kidney treatment.¹¹⁴ When she died from renal failure, Smelik's husband and adult children brought suit against Humana and various treating physicians along with their medical groups.¹¹⁵ In their petition, they alleged various state law claims including wrongful death, negligence, gross negligence, fraud, and violations of the Texas Deceptive Trade Practices Act, the Texas HMO Act, and the Texas Insurance Code.¹¹⁶ Significantly, the Smeliks alleged "in the alternative only" ERISA section 502(a)(1)(B) claims.¹¹⁷ Some might call this artful pleading.¹¹⁸

Inexplicably, counsel for Humana did *not* raise an ERISA defense in their answer to the petition.¹¹⁹ Humana waited until after it suffered a \$4.2 million jury verdict¹²⁰ to float an ERISA defense in a Judgment Notwithstanding the Verdict (JNOV) motion. The motion made the bold assertion that "[p]laintiffs' claims obviously 'relate to'¹²¹ an ERISA plan."¹²² From this

113. See Motion to Disregard Jury Findings & for Judgment Notwithstanding the Verdict Based on ERISA Preemption at 2, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. July 27, 2005) ("Joan Smelik was a beneficiary under her husband's employer-furnished health care plan administered by Humana, a health maintenance organization.").

114. See Plaintiffs' Second Amended Original Petition at 13, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. July 27, 2005) (alleging that Humana made representations that it would provide adequate medical care to plan members).

115. *Id.* at 2.

116. See generally Plaintiffs' Second Amended Original Petition, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. July 27, 2005) (asserting several state law claims).

117. *Id.* at 23.

118. See, e.g., James W. Kim, Note, *Managed Care Liability, ERISA Preemption, and State "Right to Sue" Legislation in Aetna Health, Inc. v. Davila*, 36 LOY. U. CHI. L.J. 651, 673 n.146 (2005) ("[W]e must scrutinize the complaint for 'artful pleading,' and then refer to section 502(a) itself and determine whether the actual alleged wrongdoing underlying the cause of action could have formed the basis of a suit under that section."). The fact that plaintiffs pleaded ERISA in the alternative should have been a strong hint to defendants of an available preemption defense.

119. Motion to Disregard Jury Findings & for Judgment Notwithstanding the Verdict Based on ERISA Preemption at 5, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. May 27, 2005) ("In its answer, Humana did not plead ERISA preemption.").

120. See Final Judgment at 4-5, *Smelik v. Mann*, No. 2003-CI-06936 (224th Dist. Ct., Bexar County, Tex. July 27, 2005) (awarding \$4.2 million in damages).

121. See ERISA § 514(a), 29 U.S.C. § 1144(a) (2000) (stating that ERISA supersedes

point of departure, Humana argued that the case was ERISA preempted¹²³ and jurisdictionally barred for lack of state court subject matter jurisdiction.¹²⁴ Humana looked to *Davila* as authority, noting the similarities between plaintiff Smelik's claims and those in *Davila* where "ERISA plan participants and beneficiaries sued their health maintenance organizations for violating the Texas HMO Act by failing to exercise ordinary care."¹²⁵

As an initial proposition, common sense suggests that a trial judge will be skeptical of a claim that the court lacks subject matter jurisdiction if that claim is raised for the first time after a jury trial has concluded. Litigation, however, is an unpredictable competition that unfolds over time and develops as adversaries act and react in different ways to their opponents' theories of the case. Indeed, one of Humana's trial attorneys was also counsel in the companion case to *Davila*.¹²⁶ Given that the plaintiffs in *Smelik* and *Davila* ultimately had opposite outcomes from their litigation, it is apparent that strategies successfully put into play in one case may fall short in another.

Plaintiffs' response to the JNOV motion was anything but a surrender to the weighty *Davila* precedent relied on by Humana. The response challenged Humana to pinpoint precisely what specific ERISA section supports the JNOV motion.¹²⁷ Only four options, plaintiffs argued, are possible: (1) the claims fall outside of ERISA; (2) the claims fall within section 502(a)(1)(B); (3) the claims fall within section 514; or (4) the claims fall within section 502(a)(2)-(a)(9).¹²⁸ Plaintiffs contended that Humana's JNOV motion must fail under the first three options, and that the fourth

state laws insofar as they "relate to any employee benefit plan").

122. Motion to Disregard Jury Findings & for Judgment Notwithstanding the Verdict Based on ERISA Preemption at 1, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. May 27, 2005).

123. *Id.* at 5.

124. *Id.* at 10.

125. *Id.* at 6.

126. Plaintiffs' Response to Defendant Humana Health Plan of Texas, Inc.'s Motion to Disregard Jury Findings & for Judgment Notwithstanding the Verdict Based on ERISA Preemption at 10, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. May 27, 2005).

127. *Id.* at 1-2.

128. *Id.* at 2.

option could not be proven.¹²⁹ Turning the artful pleading doctrine on its head,¹³⁰ they also charged in their response that Humana's JNOV motion artfully attempted to plead its way around specifying what particular provisions of ERISA section 502(a)(2)–(a)(9) would have given the federal courts exclusive subject matter jurisdiction in this matter.¹³¹ To prove the point, plaintiffs endeavored to “deconstruct” Humana's ERISA defense, raised for the first time on appeal.¹³²

The Smeliks' argument is simple but effective—traits not often seen in ERISA litigation. If, under option one, the claims fall outside of ERISA, the absence of preemption proves itself and the state law causes of action proceed as in a typical civil action. Under option two, even if the claims fall within section 502(a)(1)(B), a preemption defense fails under the procedural posture of this case because Humana did not plead preemption as an affirmative defense, so it was waived. A jurisdictional defense is not available because section 502(a)(1)(B) does not strip a state court of jurisdiction; rather, it offers choice-of-law preemption to the defendant who wishes to remove the case to federal court—a path Humana chose not to take.¹³³ Turning to option three, section 514 is a defensive tool, and one that, again, Humana chose not to use in its pleadings responding to Plaintiffs' complaint. Because it does not provide the federal courts with jurisdiction, its

129. *Id.*

130. *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 471 (1998) (discussing artful pleading).

131. Plaintiffs' Response to Defendant Humana Health Plan of Texas, Inc.'s Motion to Disregard Jury Findings & for Judgment Notwithstanding the Verdict Based on ERISA Preemption at 2, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. May 27, 2005).

132. *Id.* at 3. Plaintiffs' counsel's notion of “deconstruction” is not so much in the sense of the Jacques Derrida philosophy that challenges the concept of uniformity in the meaning of language; rather, the term is used more to describe the way a contractor would demolish a building.

133. *See Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 (Tex. 1991) (holding that ERISA's preemptive effect is an affirmative defense which may be waived).

A number of federal courts have held that ERISA preemption, when it operates to displace state law in favor of federal law, is waived if not timely asserted as an affirmative defense. We are in accord and hold that, where ERISA's preemptive effect would result only in a change of the applicable law, preemption is an affirmative defense which must be set forth in the defendant's answer or it is waived.

Id. (citations and footnotes omitted).

force, according to Plaintiffs, is “irrelevant” at the post-trial stage.¹³⁴ The question of relevance aside, it is hard to give a defendant the benefit of a “waivable” defense that was not pleaded.

For complete preemption that can be raised at any time, Plaintiffs pointed Humana to the fourth and last option, proof of one of the provisions of section 502(a)(2)–(9)—none of which, according to Plaintiffs, could be proven in this action.¹³⁵ The causes of action contemplated by these provisions include (a)(2) breach of fiduciary duty, (a)(3) claims for equitable relief, (a)(4) relief for improper filing of tax information, (a)(5) claims of equitable relief by the Secretary of Labor, (a)(6) collection of civil penalties by the Secretary of Labor, (a)(7) enforcement of child support by the State, (a)(8) suits by an employer or the Secretary of Labor based on disclosure and reporting requirements, and (a)(9) action for breach of fiduciary duty in the purchase of insurance contracts or annuities.¹³⁶

The provision from this list that could have borne fruit for Humana is section 502(a)(2), the breach of fiduciary duty provision. Plaintiffs urged in their response that no such breach was pled because no “plan administrator, in breach of his or her fiduciary duties, stole money from the plan and went to Las Vegas and lost it at the gaming tables.”¹³⁷ This attempt to so categorize a section 502(a)(2) claim may have elevated absurdity over substance, but the trial court apparently considered the point in a favorable light. Counsel for Humana might have been well advised to develop the argument that *Davila* casts the role of an ERISA fiduciary in the traditional context as an administrator and decision maker under the plan—a broader role than someone who

134. Plaintiffs' Response to Defendant Humana Health Plan of Texas, Inc.'s Motion to Disregard Jury Findings & for Judgment Notwithstanding the Verdict Based on ERISA Preemption at 23, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist.Ct., Bexar County, Tex. May 27, 2005).

135. *Id.* at 13–15.

136. See ERISA § 502(a)(2)–(9), 29 U.S.C. § 1132(a)(2)–(9) (2000) (listing the parties who have standing to bring a suit under the statute).

137. Plaintiffs' Response to Defendant Humana Health Plan of Texas, Inc.'s Motion to Disregard Jury Findings & for Judgment Notwithstanding the Verdict Based on ERISA Preemption at 15, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. May 27, 2005).

holds onto the purse strings.¹³⁸

In a lackluster reply to plaintiffs' response, Humana dodged any specific discussion on the waiver question and reasserted in general terms that sections 514 and 502(a) have "powerful preemptive force."¹³⁹ Humana only briefly touched on the fiduciary duty provision of section 502(a)(2) and quoted key language from *Davila* that "benefits determinations involving medical judgments are, just as much as any other benefits determinations, actions by plan fiduciaries."¹⁴⁰ The extent of the argument was that Humana agents were not treating physicians who could be held vicariously liable (indicating that they must be fiduciaries); "[t]herefore, [p]laintiffs could have brought a claim under section 502(a)(2) for breach of fiduciary duty."¹⁴¹ The trial court did not buy it. The judge denied the JNOV motion in a form order with no analysis.¹⁴²

Therefore, the message from *Smelik* is *not* that it is a breakthrough precedent for ERISA plaintiffs, as one hopeful commentator believes.¹⁴³ Procedurally, the case lacks

138. See *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 220 (2004) (discussing the attributes of plan fiduciaries under ERISA).

139. Defendant's Reply to Plaintiffs' Response to Defendant Humana Health Plan of Texas, Inc.'s Motion to Disregard Jury Findings & for Judgment Notwithstanding the Verdict Based on ERISA Preemption at 1, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. May 27, 2005).

140. *Davila*, 542 U.S. at 220.

141. Defendant's Reply to Plaintiffs' Response to Defendant Humana Health Plan of Texas, Inc.'s Motion to Disregard Jury Findings & for Judgment Notwithstanding the Verdict Based on ERISA Preemption at 5, *Smelik v. Mann*, No. 2003-CI-06936 (57th Dist. Ct., Bexar County, Tex. May 27, 2005).

142. Order Denying Defendant Humana Health Plan of Texas, Inc.'s Motion to Disregard Jury Findings & for Judgment Notwithstanding the Verdict Based on ERISA Preemption at 1, *Smelik v. Mann*, No. 2003-CI-06936 (224th Dist. Ct., Bexar County, Tex. Oct. 7, 2005).

143. Cameron Krier, Comment, *One Step Forward, Two Steps Back: The Impact of Aetna Health Inc. v. Davila on ERISA and Patients' Rights*, 38 TEX. TECH L. REV. 127, 152 (2006). The author writes:

Smelik is groundbreaking because it shows that HMOs will not be protected by ERISA in all circumstances. But there are many who believe *Smelik* will not stand after review by an appellate court. Charles Rhodes, a professor at South Texas College of Law, stated, "If all you have to do is prove negligence and you are around ERISA, then the Supreme Court's opinion in *Davila* doesn't mean anything." Rhodes further added, "In the end, this is just too easy a way to circumvent the Supreme Court's decision in *Davila* by simply saying it's a negligence claim, and it's not based on a denial of coverage." Even if an appellate court reverses the holding in *Smelik*, this case provides a strong example of one way plaintiffs' attorneys are

precedential significance because the parties settled the matter while the appeal was pending.¹⁴⁴ And, as of the date of this article, other published opinions have not rushed to cite *Smelik*. Thus, the case has little wholesale value. That is not to diminish on a retail level the good work plaintiffs' counsel did in the case, securing a multimillion dollar verdict in a suit brought on behalf of an insured in a wrongful death and survival action against an ERISA-regulated HMO. Based on that alone, the case garnered national attention, and rightly so.¹⁴⁵

From a plaintiff's lawyer's perspective, one must pay attention to HMOs that care for ERISA beneficiaries.

[D]etailed standards of care [are] spelled out in multiple documents including Member Handbooks, Physician Handbooks, Policies and Procedures, Pharmacy Guidelines and many more. The non-delegable duty of HMOs to be the ultimate guarantor of the quality of care means that their failure to meet their own standards is strong evidence of negligence in caring for patients, especially those with multiple complex chronic diseases. To prevail in a wrongful death case like *Smelik*, plaintiff attorneys must be prepared to fight the discovery battles necessary to obtain the HMOs' own administrative and informational materials and scrupulously avoid any mention of denial of benefits.¹⁴⁶

attempting to circumvent ERISA preemption and endeavoring to hold HMOs accountable in their management of health care.

Id. (footnotes omitted).

144. *Humana Health Plans of Tex., Inc., v. Smelik*, No. 04-05-00738-CV, 2006 WL 467987 (Tex. App.—San Antonio Mar. 1, 2006, no pet.) (mem. op., not designated for publication) (granting joint motion to settle case).

145. See Linda P. McKenzie, *Eligibility, Treatment, or Something In-Between?: Plaintiffs Get Creative to Get Past ERISA Preemption*, 23 J. CONTEMP. HEALTH L. & POL'Y 272, 272-74 (2007).

The [*Smelik*] case garnered national attention largely because of its unusual outcome with respect to Humana. . . . The outcome of the *Smelik* case was significant to the extent that it appeared to carve out this previously unrecognized exception to the application of ERISA. For reasons not disclosed, however, Humana settled the case with Joan Smelik's family while its appeal was pending. Because so many managed care organizations employ medical case management, it will likely be only a matter of time before another plaintiff claims that his or her HMO's failure to provide these services caused damages. Perhaps a future case will result in an appellate opinion addressing whether ERISA preemption applies in this circumstance.

Id. (footnotes omitted).

146. E-mail from Brant Mittler, M.D., J.D., to Bernard Reams, Professor of Law, St. Mary's Univ. (Jan. 8, 2007, 07:46:00 CST) (on file with the *St. Mary's Law Journal*).

As is typical in ERISA litigation, the *Smelik* action concerned complex issues, multiple parties, competing regulatory and economic interests, and, in this lawsuit, a family's tragic loss. The lawyers involved were capable advocates who worked on the case for four years before ultimately settling the matter. The page limitations of the instant article preclude the effort to explore every facet of the case, but hopefully, the authors have captured the flavor of the proceedings that can be gleaned from the public documents.

V. CONCLUSION

So what will happen in the ERISA arena next? It is of no small significance that the *Davila* case was a unanimous decision. The great legal minds from the highest court in the land, spanning the spectrum of judicial philosophies, agree that in the pursuit of state law remedies, ERISA today stands for all of the things plaintiffs' counsel wish they could say are just not so. And even though Justice Ginsburg, in her *Davila* concurrence, joined "the rising judicial chorus urging that Congress and [the Supreme] Court revisit what is an unjust and increasingly tangled ERISA regime,"¹⁴⁷ only one other member of the Court, Justice Breyer, went along for the ride.¹⁴⁸ Thus, there can be little optimism that the Court will be the agent of change. Congress could more efficiently expand the relief available under section 502(a) to include monetary damage—if that is its will. But no such political winds appear on the horizon. This article, then, ends where it began, with ERISA still stuck in a Serbonian bog.

147. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring)).

148. *Id.*

