

---

October 2015

## Enforcing Recoupment Provisions after *Great-West Life & Annuity Insurance Company v. Knudson*: A Suggested Method of Analysis for Reviewing Courts

Dennis J. Wiley

Follow this and additional works at: <https://via.library.depaul.edu/jhcl>

---

### Recommended Citation

Dennis J. Wiley, *Enforcing Recoupment Provisions after Great-West Life & Annuity Insurance Company v. Knudson: A Suggested Method of Analysis for Reviewing Courts*, 9 DePaul J. Health Care L. 1195 (2006)  
Available at: <https://via.library.depaul.edu/jhcl/vol9/iss3/3>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Health Care Law by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

**ENFORCING RECOUPMENT PROVISIONS AFTER  
GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY V.  
KNUDSON: A SUGGESTED METHOD OF ANALYSIS FOR  
REVIEWING COURTS**

*Dennis J. Wiley\**

**INTRODUCTION**

Subrogation<sup>1</sup> and reimbursement<sup>2</sup> provisions within health care policies have become commonplace as plan fiduciaries struggle to contain costs in the face of growing health care expenditures.<sup>3</sup> These clauses, collectively called recoupment provisions, are written into health care contracts to allow a plan fiduciary to recover money from an injured plan participant who obtains damages from a third-party tortfeasor, through either a settlement or judgment.<sup>4</sup> Any money

---

\* 2006 J.D. candidate, University at Buffalo Law School. I would like to extend thanks to Professor James Wooten for his guidance and careful, constructive assistance in this undertaking. I am forever indebted to my wife for her unwavering support, insight, and encouragement.

<sup>1</sup> Dan B. Dobbs defines subrogation as the substitution of one person for another. It may be required by contract or acts as a remedy to prevent unjust enrichment. 1 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* 604-05 (2d ed. 1993).

<sup>2</sup> Reimbursement is simply defined as repayment. BLACK'S LAW DICTIONARY 1290 (7th ed. 1999). Subrogation and reimbursement are terms that are often used interchangeably in the context of contractual agreements, but that is inaccurate. *See* THOMAS H. LAWRENCE & JOHN M. RUSSELL, *ERISA SUBROGATION: ENFORCING RECOUPMENT PROVISIONS IN ERISA-COVERED HEALTH AND DISABILITY PLANS* 4 (2000). The distinction is that subrogation is not available to a plan fiduciary after a plan participant has already recovered funds from the third party. *See, e.g., Community Health Plans of Ohio v. Mosser*, 347 F.3d 619, 623-24 (6th Cir. 2003).

<sup>3</sup> LAWRENCE & RUSSELL, *supra* note 2, at 2-3 (describing these provisions as "essential elements of [a Plan's] overall cost-containment efforts"). It is fairly understandable why plan fiduciaries wish to recoup money to control costs. Health care expenditures now account for 16% of the gross domestic product of the United States. *See* The Henry J. Kaiser Family Foundation, *U.S. Health Care Costs*, [http://www.kaiseredu.org/topics\\_im.asp?imID=1&parentID=61&id=358](http://www.kaiseredu.org/topics_im.asp?imID=1&parentID=61&id=358) (last visited Feb. 27, 2006). The trend of increasing health care costs is expected to continue for the foreseeable future unless fundamental changes occur in the way health care in the United States is financed and made available. *See* Bradley C. Strunk et al., *Trends: Tracking Health Care Costs: Trends Turn Downward in 2003*, HEALTH AFFAIRS (June 9, 2004), <http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.354v1>.

<sup>4</sup> *See* LAWRENCE & RUSSELL, *supra* note 2, at 2-3.

recovered by these contractual methods is used to repay the plan for medical expenses the plan incurred after the participant was injured.<sup>5</sup>

Today, approximately 160 million Americans under age sixty-five receive their health care benefits from their employer.<sup>6</sup> Employer-sponsored health plans commonly contain a recoupment provision for cost-containment purposes and attempts to enforce these provisions can be very controversial.<sup>7</sup> Imagine being an injured employee who, after successfully achieving a sense of “justice” in a tort action and the potential funds to pay a possible lifetime of medical expenses, must now face his benefit plan reaching into those funds to repay past medical benefits. Not surprisingly, lawsuits often arise challenging the enforceability of recoupment provisions.

Yet the enforceability of these provisions, despite their popularity, has been unclear since 2002. The confusion emanates from the Supreme Court’s holding in *Great-West Life & Annuity Insurance Company v. Knudson*<sup>8</sup> that the Employee Retirement Income Security Act (“ERISA”)<sup>9</sup> precluded enforcement of reimbursement provisions under section 502(a)(3).<sup>10</sup> Successive circuit and district court decisions have centered on the majority’s definition of restitution and the distinction it drew between legal restitution and equitable restitution. The *Knudson* decision and its reasoning quickly generated a

---

<sup>5</sup> See Lisa N. Bleed, *Comment: Enforcing Subrogation Provisions As “Appropriate Equitable Relief” Under ERISA Section 502(a)(3)*, 35 U.S.F.L. REV. 727, 727 (2001).

<sup>6</sup> U.S. DEP’T OF HEALTH AND HUM. SERVICES, HEALTH: UNITED STATES 346 (2004), available at <http://www.cdc.gov/nchs/data/hus/hus04trend.pdf> (indicating in a table that as of 2002, 160.3 million employees in the United States obtained private insurance through their workplace).

<sup>7</sup> The Department of Labor, which regulates employee benefit plans, clearly supports the use of these provisions as a means for health benefit plans to maintain financial stability. See generally Brief for Elaine L. Chao, Secretary of the United States Department of Labor, as Amicus Curiae Supporting Appellee Requesting Affirmance, *Bombardier Aerospace Employee Welfare Plan v. Ferrer*, 354 F.3d 348 (5th Cir. 2003).

<sup>8</sup> *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204, 209-21 (2002).

<sup>9</sup> Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2005).

<sup>10</sup> ERISA’s civil enforcement provisions, divided into six sections, are found in § 502(a), codified as 29 U.S.C. § 1132(a). They are the exclusive remedial provisions for plan fiduciaries, participants, and beneficiaries alike. See ERISA: THE LAW AND THE CODE 2-95 (Janet Song & Michael Kushner eds., 2002) (discussing the text of ERISA and these subsections).

great deal of scholarly criticism for inaccuracies, faulty analysis, and for seemingly reopening law/equity distinctions.<sup>11</sup>

Whether correct or not, however, what is most noteworthy is the subsequent inconsistent and confusing application of *Knudson* by appellate courts.<sup>12</sup> Circuit splits have emerged as courts grapple with the meaning of ERISA's remedial provisions in light of *Knudson* and other Supreme Court precedent.<sup>13</sup> This has subsequently undermined ERISA's goal of uniformity, resulted in forum shopping, and led to an increase in creative pleading by plaintiffs' attorneys.<sup>14</sup> The unpredictability and the vagueness of court decisions throughout multiple jurisdictions have many attorneys, plans, participants, and courts scratching their heads in confusion.<sup>15</sup> This inconsistency has perhaps been best demonstrated by recent decisions of the Sixth Circuit. Within one year, the court shifted away from its initial reasoning of *Knudson* and now appears to disfavor the use of

---

<sup>11</sup> In his much often-cited article, Professor Langbein accused the Supreme Court of failing to sufficiently recognize ERISA's roots in trust law when determining the extent and scope of remedies permitted under the federal law. See John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1321-22 (2003). See also Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577 (2002); Tracy A. Thomas, *Forum: Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063 (2003). In an unusually poignant opinion, District Court Judge Kravitz stated that despite "Justice Scalia's cheery assurance ... the Supreme Court's decision [in *Knudson*] has created real challenges for those of us who have little training, let alone experience, in the subtleties of ancient writs." *Scholastic Corp. v. Kassem*, 389 F. Supp. 2d 402, 403 (D. Conn. 2005).

<sup>12</sup> "Nowhere does such confusion seem more prevalent than in opinions discussing the very issue at the heart of [*Knudson*]. . . ." Roger C. Siske et al., *What's New in Employee Benefits: A Summary of Current Cases and Other Developments*, SK023 ALI-ABA 1, 269-70 (2004).

<sup>13</sup> See *id.* at 266 (stating that the "myriad of cases" that have emerged post-*Knudson* raise as many questions as they answer). See *infra* note 126 (providing a list of the circuits and where each stands on this issue).

<sup>14</sup> "Better facts (or at least better pleading) were at work in three [subsequent] reimbursement/subrogation cases where [*Knudson*] was held to not restrict recovery." Robert N. Eccles & David E. Gordon, *Great-West Life—The First 100 Days*, 10 ERISA LITIG. REP. 1 (2002).

<sup>15</sup> See Justice Burke, *Decision of Interest: Right of Reimbursement Does Not Attach to Recovery in Wrongful Death Claim*, N.Y. L.J., Nov. 30, 2004, at 19 (stating that prior to 2002, various federal courts sustained the right of reimbursement by ERISA plans, but following the Supreme Court decision in *Knudson* precluding these suits there is no clear answer whether the suits would be permitted in state court due to the preemptive reach of ERISA).

recoupment provisions—a testament to the utter lack of clarity in this area of law.<sup>16</sup>

This comment, while acknowledging the criticisms surrounding the interpretations of ERISA (particularly the civil enforcement provisions), examines how a reviewing court should analyze an enforcement action in a contractual recoupment dispute. It will argue why a reviewing court must fully appreciate the concept of equity and the principles of restitution in light of the *Knudson* decision, and how this understanding will provide a degree of clarity. It is a modest attempt at identifying the best methodology for analyzing an enforcement action brought by an ERISA-governed health care plan under section 502(a)(3) against an injured participant who has recovered funds from a tortfeasor.

Part I of this comment will discuss the remedies permitted under ERISA, focusing specifically on the Supreme Court decisions that have limited the remedies available under section 502(a)(3). Part II analyzes the Supreme Court's reasoning in *Knudson* and discusses the traditional notions of restitution. It will clarify restitution in light of *Knudson*, and the resulting implications for enforcing recoupment provisions. Part III discusses how the Fifth, Sixth, and Ninth Circuits have interpreted the *Knudson* decision, and finally, Part IV concludes that only the three-step test of the Fifth Circuit is the proper application of the Court's holding in *Knudson*.

## I. ERISA SECTION 502(A)(3): A BRIEF HISTORY

An ambitious statute that required ten years to enact,<sup>17</sup> ERISA was created by Congress to protect pension and benefit participants and beneficiaries and established a uniform body of regulation under federal law controlling employer-sponsored benefit programs.<sup>18</sup> ERISA

---

<sup>16</sup> Cf. *Community Health Plan of Ohio*, 347 F.3d 619 (denied recoupment because there was no identifiable fund), *with QualChoice, Inc., v. Rowland*, 367 F.3d 638 (6th Cir. 2004), *cert. denied*, 125 S.Ct. 1639 (2005) (denied recoupment because the action is legal and thus precluded by *Knudson*).

<sup>17</sup> See Langbein, *supra* note 11, at 1321-22.

<sup>18</sup> The Supreme Court has resoundly acknowledged that Congress intended ERISA to abolish the checkered state laws governing pension plans prior to ERISA's enactment in 1974, and has held that ERISA's remedial provisions are the exclusive vehicle for enforcing plans. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52-56 (1987). For further reading of the goals of ERISA, the interested reader may see Michael S. Gordon, *Overview: Why Was ERISA Enacted?, The ERISA of 1974: The First*

was the first comprehensive federal statute governing private employee benefits.<sup>19</sup> It established federal minimum standards that aimed to “ensure that ‘all American working men and women actually receive the pension benefits that they have earned.’”<sup>20</sup>

To accomplish this goal, Congress—through ERISA’s expansive preemption clause—swept aside all previous state laws pertaining to private-sector employee benefit plans,<sup>21</sup> established standards that set a code of conduct for plans, and provided federal causes of action and remedies available to participants, beneficiaries, and fiduciaries.<sup>22</sup> There has been a significant amount of litigation over the last thirty years as plans, employers, insurers, and participants have attempted to figure out exactly how ERISA works.<sup>23</sup> In particular, ERISA’s civil enforcement provisions, which limit the remedies available to plan participants, beneficiaries, and fiduciaries in disputes regarding violations of employee-benefit plans, have been a continuing source of litigation.<sup>24</sup>

One of the most significant sources of confusion has been section 502(a)(3). This section provides:

---

*Decade, An Informational Paper of the U.S. Senate Special Committee on Aging*, 98th Cong., 2d Sess. 1, 6-24 (Comm. Print 1984).

<sup>19</sup> See Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1, 4-5 (1995).

<sup>20</sup> Note: *The Right to Jury Trial in Enforcement Actions under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 737 (1983) (quoting Sen. Bentsen). Professor George Flint stated that before the codification of ERISA, the obstacles plan participants had to overcome to receive relief due to fiduciaries’ violations were numerous, and resulted in few actually recovering their benefits. See George Lee Flint, Jr., *ERISA: Extracontractual Damages Mandated For Benefit Claims Actions*, 36 ARIZ. L. REV. 611 (1994). See generally JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* (2004) (providing an in-depth discussion of the legislative history and societal influences upon the creation of ERISA against the will of the business community and labor unions).

<sup>21</sup> § 514(a) provides that ERISA shall “supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” ERISA’s preemption clause has been interpreted as expansive in scope, and is not limited to only those situations in which a state cause of action precisely duplicates a cause of action under ERISA section 502(a). See, e.g., *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207-11 (2004); *Ky. Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003).

<sup>22</sup> See Flint, *supra* note 20, at 612-13.

<sup>23</sup> See Siske, *supra* note 12, at 8.

<sup>24</sup> Over the last twenty years, the Court has interpreted ERISA’s civil enforcement provisions as providing limited relief and has been criticized as producing decisions whose meanings are difficult to discern. See generally Langbein, *supra* note 11.

(a) Persons empowered to bring a civil action. A civil action may be brought—

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;  
 ....<sup>25</sup>

Specifically, debate has centered upon the scope of section 502(a)(3)—a “catchall” provision—and the meaning of “appropriate equitable relief.” The Supreme Court has largely interpreted ERISA’s civil enforcement provisions as providing exclusive, limited relief.<sup>26</sup> These decisions, although generating uncertainty and subsequent scholarly debate and criticism, form the groundwork upon which *Knudson* was decided.<sup>27</sup>

### A. *Russell-Mertens-Varity*: An Interpretive Roadmap

The foundation for the Supreme Court’s interpretation of equitable relief under ERISA was set in *Massachusetts Mutual Life Insurance Company v. Russell*.<sup>28</sup> *Russell* did not directly address the interpretive definition of section 502(a)(3)(B) because the plaintiff did not seek redress under that section. Justice Stevens, however, wrote in dicta that since extra-contractual damages (in this case, money) were not condoned by ERISA or its legislative history, the only remedies permitted were those incorporated explicitly within the statute.<sup>29</sup> The

<sup>25</sup> § 502(a)(3), codified as 29 U.S.C. § 1132 (a)(3).

<sup>26</sup> See *infra* Part I.A–B.

<sup>27</sup> Very recently, Judge Kravitz correctly observed that—due to Supreme Court precedent regarding ERISA civil enforcement schemes—“no less than six circuits have provided markedly different answers to the identical question posed by [*Knudson*].” *Kassem*, 389 F. Supp. 2d 402, 403. Justice Ginsburg herself lamented on the lack of clarity in the majority’s decision in *Knudson*. See *Knudson*, 534 U.S. at 232. See also Langbein, *supra* note 11, at 1361; Eccles & Gordon, *supra* note 14, at 1 (describing a category of court decisions as those who do not understand *Knudson*).

<sup>28</sup> *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). The plaintiff sought compensatory and punitive damages against her insurance plan for temporarily interrupting her medical benefits. *Id.* at 136-37.

<sup>29</sup> See *id.* at 145-49. This has been termed the “deletion myth” by Professor Flint, whereby Justice Stevens, in noting that the term “legal” had been deleted in the final version of the ERISA bill adopted by the Conference Committee, contemplated in

Court reinforced this conclusion by citing its previously stated belief that ERISA was a “comprehensive and reticulated statute.”<sup>30</sup> The majority was reluctant to “tamper with an enforcement scheme crafted with such evident care as the one in ERISA.”<sup>31</sup> The Court’s opinion of the historical roots of ERISA has been refuted as incorrect and inconsistent with the legislative history of ERISA’s development.<sup>32</sup> Stevens’s dictum in *Russell* subsequently predisposed the Supreme Court and lower courts to significantly limiting remedies available under section 502(a)(3).<sup>33</sup>

This presupposition against permitting remedies that were not explicitly stated in the statute took a step further eight years later when the Supreme Court—in a 5-4 decision in *Mertens v. Hewitt Associates*—limited section 502(a)(3) to only those remedies that were “typically available in equity.”<sup>34</sup> In *Mertens*, a class of former employees who participated in the Kaiser Steel Retirement Plan sued the plan’s actuary for failing to change the plan’s actuarial assumptions, which resulted in a vast under-funding of the plan and eventual plan

---

dicta that this gave no support to the assertion that Congress intended legal relief. See Flint, *supra* note 20, at 621-22. Rather than an innocuous occurrence, when combined with the “six carefully integrated civil enforcement provisions,” this finding gave strong support that Congress did not intend to authorize extra-contractual damages in ERISA’s remedial provisions. *Russell*, 473 U.S. at 146.

<sup>30</sup> *Id.* at 146 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)).

<sup>31</sup> *Id.* at 147.

<sup>32</sup> See Flint, *supra* note 20, at 638. Professor Flint named the Court’s conclusion that ERISA is a well-written and thorough statute as the “specificity myth.” *Id.* Professor Langbein also noted that the Court is inconsistent in its view of ERISA’s draftsmanship, and has failed to acknowledge that the writers of ERISA likely left gaps in the law such that courts of law could fill as needed. See Langbein, *supra* note 11, at 1344-45.

<sup>33</sup> See Flint, *supra* note 20, at 621 (stating that many lower courts have taken the dicta in *Russell* verbatim, without independently examining the legislative history of ERISA). Since *Russell*, Justice Stevens has subsequently joined the dissent in *Mertens* and *Knudson*, two cases that resulted in a limitation of the remedies available under section 502(a)(3). See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 263 (1993) (White, J., dissenting); *Knudson*, 534 U.S. at 221 (Stevens, J. & Ginsburg, J., dissenting). In *Knudson*, Stevens wrote a separate dissent whereby he advocated that the Court should be guided by “the historic presumption favoring the provision of remedies for violations of federal rights” when interpreting statutory remedies, rather than construing and defining an ambiguous term. *Knudson*, 534 U.S. at 223. This seemingly indicates that Stevens never intended for his dictum in *Russell* to be so pervading.

<sup>34</sup> *Mertens*, 508 U.S. at 256 (1993).



termination.<sup>35</sup> The employees were seeking monetary relief from Hewitt Associates—an actuarial consulting firm—to recoup all of the losses the plan sustained as a result of Kaiser’s breach of fiduciary duties. They contended that the relief sought would constitute “other appropriate equitable relief” within the meaning of 502(a)(3).<sup>36</sup> Writing for the majority, Justice Scalia argued that the employees were merely seeking compensatory damages—relief traditionally viewed as non-equitable—and dismissed the suit.<sup>37</sup>

Although the Supreme Court had never formally interpreted the precise meaning of “appropriate equitable relief,” the majority in *Mertens* asserted that this decision was consistent with previous determinations of what “equitable relief” constituted.<sup>38</sup> Equitable relief as termed in the statute could mean “whatever relief a court of equity is empowered to provide in the particular case at issue.”<sup>39</sup> This would have included situations where a court of equity could grant legal remedies, such as the compensatory damages the employees were seeking.<sup>40</sup> However, to permit this broad interpretation of “equitable” within section 502(a)(3)(B) would render the modifier “equitable” meaningless.<sup>41</sup> That, the majority argued, would void the distinction Congress intended between “remedial” and “equitable” relief when it drafted other sections of ERISA.<sup>42</sup> Thus, section 502(a)(3)(B) could only permit those remedies “that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)” (emphasis in original).<sup>43</sup>

Clearly, *Mertens* would not the end of the debate on the scope of “equitable relief,” particularly with respect to restitution. Distinguishing between *legal* restitution and *equitable* restitution can

---

<sup>35</sup> See *id.* at 248.

<sup>36</sup> *Id.* at 253-55.

<sup>37</sup> See *id.* at 255.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 256.

<sup>40</sup> Courts of equity have historically been able to award monetary relief, but it was largely done in instances of fiduciary violations or abuse under trust law, a jurisdiction where equity reigns. See generally, POMEROY A TREATISE ON EQUITY JURISPRUDENCE 181, 257 (5th ed. 1941); GEORGE E. PALMER, 1 THE LAW OF RESTITUTION 33-40 (1978).

<sup>41</sup> See *Mertens*, 508 U.S. at 257-58.

<sup>42</sup> *Id.* at 258. Professor Langbein pointed out that this is another example of the “specificity myth” the Court continues to propagate. See Langbein, *supra* note 11, at 1354.

<sup>43</sup> *Mertens*, 508 U.S. at 256.

be very difficult for a court to discern<sup>44</sup> because restitution has traditionally been characterized as both a “legal” and an “equitable” remedy.<sup>45</sup> One scholar remarked that “the distinction between equitable restitution and legal restitution is a difficult one to determine in application because it is based primarily upon historical happenstance and is further complicated by the fact that relief may be categorized as equitable for one purpose and legal for another purpose.”<sup>46</sup> Prior to embarking upon that task in *Knudson*, however, the Court would take a different interpretive approach to ERISA’s framework in a dispute between a plan fiduciary and plan participants in *Varity Corporation v. Howe*.<sup>47</sup>

In *Howe*, a group of employees and retirees sued Varity Corporation after a new commercial division they had recently joined became insolvent, resulting in a loss of health benefits for the plan participants.<sup>48</sup> The district court found that the company had deliberately misrepresented information to its employees and retirees, with full knowledge that the new division would fail and the plan participants would subsequently lose their benefits, saving the company money in the process.<sup>49</sup>

The Supreme Court decided, inter alia, that under “appropriate equitable relief” the plan participants were permitted to seek individual relief because section 502(a)(3) was created as a “catchall” provision, offering relief when other civil enforcement provisions of ERISA were inadequate.<sup>50</sup> Justice Breyer and the majority concluded that ERISA’s

---

<sup>44</sup> Justice Scalia, in a footnote in *Mertens*, agreed with the dissent that the “distinction between ‘equitable’ and [legal] relief is artless,” but he did not agree that it was therefore irrelevant. Scalia argued that due to the structure and composition of the statutory language, “[e]quitable relief must mean *something* less than *all* relief.” *Mertens*, 508 U.S. at 258 n.8 (original emphasis).

<sup>45</sup> 1 DOBBS, *supra* note 1, at 570, 586.

<sup>46</sup> Muir, *supra* note 19, at 36.

<sup>47</sup> See *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

<sup>48</sup> See *id.* at 492-94.

<sup>49</sup> *Id.* The company induced its employees to voluntarily switch to the new company division, and unilaterally assigned retirees to the new division. The acts of the parent company were, from a public policy standpoint, egregious to put it mildly. See *Varity Corp. v. Howe*, 5 ERISA LITIGATION REPORTER 11, 11-12 (1996) [hereinafter *Varity Report*] (stating that “[s]uccessive levels of federal courts couldn’t think of much that wasn’t bad to say about Varity Corporation and its Project Sunshine” and describing how the Chairman of the Board of Varity Corp. boasted at a party how his company defrocked their employees and saved a great deal of money).

<sup>50</sup> See *Varity*, 516 U.S. at 512.

basic purposes, drawn “from the common law of trusts,”<sup>51</sup> lent credence to the argument that plan participants should be provided with a remedy and that individualized relief was therefore “appropriate.”<sup>52</sup>

This analysis—looking at the purpose of the law—is striking. Earlier court decisions in *Russell* and *Mertens* sought to limit section 502(a)(3), and in rejecting the influences of the common law of trusts the *Russell* and *Mertens* majorities had refused to imply a cause of action that was not explicitly provided within the remedial provisions.<sup>53</sup> This statutory interpretation utilized by the previous Court was in stark contrast to Breyer’s “loose” analysis, which looked to statutory purpose rather than “literal readings of statutory language.”<sup>54</sup>

In sum, *Varity* effectively identified “other appropriate equitable relief” as a flexible remedy that would be limited by the presence of other alternative remedies, policy choices made by Congress when it created ERISA, and the “special nature and purpose of employee benefit plans.”<sup>55</sup> This broader interpretation was short-lived, however. As *Knudson* demonstrated, in attempting to define restitution as “equitable relief,” the Court has seemingly shifted away from the *Varity*-analysis and retreated towards a more restricted reading of ERISA’s statutory civil remedies.

### **B. *Great-West Life & Annuity Insurance Company v. Knudson***

In 2002, the Supreme Court majority distinguished between legal and equitable restitution in claims for relief fashioned under section 502(a)(3)(B) in *Great-West Life & Annuity Insurance Company v.*

---

<sup>51</sup> *Id.* at 496.

<sup>52</sup> *See id.* at 513.

<sup>53</sup> *See Mertens*, 508 U.S. at 254-55; *Russell* 473 U.S. at 146-47. Justice Scalia refers to this type of statutory analysis as “textualism.” *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997) (providing more information on Scalia’s beliefs and use of textualism in the Supreme Court). It has had far-reaching effects on the “micro”-issues at stake (e.g., law/equity distinctions) in the ERISA-line of cases. *See* Henry P. Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 35-36 (2004).

<sup>54</sup> *Varity Report*, *supra* note 49, at 14 (describing the majority’s opinion in *Varity Corp.* “almost polar opposite to Justice Scalia’s” previous opinion in *Mertens*). The differing styles of interpretation by the majority in the *Russell* and *Mertens* line of 5-4 decisions and the 6-3 *Varity Corp.* decision requires careful consideration when interpreting their implications in the post-*Knudson* environment.

<sup>55</sup> *Varity*, 516 U.S. at 515.

*Knudson*.<sup>56</sup> Respondent Janette Knudson received health benefits from her husband's plan and Great-West following an auto accident.<sup>57</sup> The plan included a reimbursement clause which gave the benefit plan "first lien upon any recovery, whether by settlement, judgment or otherwise" that Knudson would receive if she took action against a tortfeasor.<sup>58</sup> Great-West signed a separate agreement with the benefit plan, and that agreement assigned to Great-West all of the plan's rights to any claim under the reimbursement provision.<sup>59</sup>

Knudson negotiated a settlement with the manufacturer of the car she was riding in at the time of her accident. Under the terms of the settlement, funds were set aside to satisfy Great-West's reimbursement claim.<sup>60</sup> Great-West refused to accept the payment, however, alleging that the amount was greatly inadequate and instead attempting to enforce its rights to full reimbursement under section 502(a)(3) of ERISA.<sup>61</sup> It sought injunctive and declaratory relief from the court and requested that the Knudsons repay the entire sum of medical benefits received, a total of \$411,157.11.<sup>62</sup>

Reiterating that ERISA is a comprehensive statutory scheme and that the Supreme Court is reluctant to make substantive changes to ERISA's remedial provisions, the majority determined that Great-West had not stated a claim for relief under section 502(a)(3).<sup>63</sup> Justice Scalia, who authored the majority's opinion, quickly dismissed Great-West's request for injunctive relief under section 502(a)(3)(A) because an injunction to compel the payment of money past due under a

---

<sup>56</sup> See generally *Knudson*, 534 U.S. 204. This has been a much criticized Court decision, particularly for its reliance upon the faulty presumptions put forth by the *Mertens*-court in defining equity, as well as the failure of the majority to adequately define restitution. See generally Langbein, *supra* note 11; Murphy, *supra* note 11; Thomas, *supra* note 11. The criticisms have had little practical value to courts and litigants, however, as *Knudson* has seemingly created an enigma for the lower courts.

<sup>57</sup> See *Knudson*, 534 U.S. at 207. Great-West Life & Annuity Insurance Company provided what is known as "stop-loss" insurance, which provides coverage for a self-insured employer above a certain level of risk absorbed by the plan. *Id.* Great-West agreed to pay for aggregate medical expenses covered by the Knudson's benefit plan that were greater than \$75,000. *Id.*; see *American Medical Security, Inc. v. Bartlett*, 111 F.3d 358, 361-62 (4th Cir. 1997) (explaining stop-loss insurance purchased by ERISA governed plans).

<sup>58</sup> *Knudson*, 534 U.S. at 207.

<sup>59</sup> *Id.*

<sup>60</sup> See *id.* at 207-208.

<sup>61</sup> *Id.* at 208.

<sup>62</sup> *Id.*

<sup>63</sup> See *id.* at 209.

contract was not typically available in equity.<sup>64</sup> Furthermore, in response to Great-West's argument that it was seeking restitution, a form of equitable relief permitted under section 502(a)(3)(B), the Court held that the insurer's claim was not equitable because it sought to "impose personal liability on [the] respondents for a contractual obligation to pay money—relief that was not typically available in equity."<sup>65</sup> This effectively foreclosed Great-West's ability to enforce the contractual reimbursement provisions under section 502(a)(3).

## II. RECONCILING *KNUDSON* WITH RESTITUTION: AN ANALYTICAL FRAMEWORK

In its analysis of Great-West's restitution claim, the *Knudson* court recognized that restitution straddles the legal and equitable worlds and that the distinction is dependent upon "the basis for [the plaintiff's] claim and the nature of the underlying remedies sought."<sup>66</sup> But after a review of the classic definitions of legal and equitable restitution proffered by Dan B. Dobbs, Arthur L. Corbin, and George Palmer,<sup>67</sup> the majority concluded that *legal* restitution required a plaintiff who was without means to assert title or did not have possession of the desired property to offer "just grounds" to impose a legal judgment of personal liability upon a defendant.<sup>68</sup> This judgment required the defendant to pay "some benefit" owed to the plaintiff.<sup>69</sup> In contrast, the court determined that *equitable* restitution involved an action, normally in "the form of constructive trust or an equitable lien," where a plaintiff readily identified or traced money or property in the defendant's possession.<sup>70</sup> The plaintiff then had to assert that the money or property, in good conscience, belonged to him.<sup>71</sup>

The majority's definition of restitution appears misleadingly simplistic, as restitution has been identified as a broad and substantive

---

<sup>64</sup> See *id.* at 210-11. This comment does not explore the Supreme Court's interpretation of injunction in the context of ERISA's remedial provisions.

<sup>65</sup> *Knudson*, 534 U.S. at 210.

<sup>66</sup> *Id.* at 212-13 (quoting J. Posner in *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994)).

<sup>67</sup> See *Knudson*, 534 U.S. at 212-14.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> *Id.* at 213-15.

<sup>71</sup> See *id.*

subject that has been largely unstudied in recent years<sup>72</sup> and characterized as a “label that courts and legislatures have given to ... [several] monetary remedies.”<sup>73</sup> In the 1930s—due to recognition of the growing field and sophistication of restitution—the Restatement of Restitution was developed to provide a more satisfactory description of this area of law.<sup>74</sup> Restitution has long been a source of debate in previous Court decisions,<sup>75</sup> and this debate is not unjustified as historically distinctions between equitable and legal restitution were complex.<sup>76</sup> How one defines the field of restitution today continues to be an area of scholarly debate.<sup>77</sup>

To understand the implications of *Knudson*, it is helpful to briefly focus on the possessory requirement of *Knudson* and the framing of an equitable claim—traditionally a precursor to obtaining equitable jurisdiction. Restitution will be discussed in light of *Knudson*, specifically: (1) the dual nature of restitution; (2) the granting of monetary relief under the guise of equity; and (3) the consequence of statutory preclusion upon the availability of judicial remedies, and the ability of a court to grant an alternative recourse.

---

<sup>72</sup> Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989).

<sup>73</sup> Murphy, *supra* note 11, at 1577.

<sup>74</sup> See Laycock, *supra* note 72, at 1278; see also Warren A. Seavey & Austin W. Scott, *Restitution*, 54 LAW Q. REV. 29, 29 (1938). See generally, RESTATEMENT OF RESTITUTION (1937).

<sup>75</sup> See, e.g., *Curtis v. Loether*, 415 U.S. 189 (1974); *Teamsters v. Terry*, 494 U.S. 558 (1990).

<sup>76</sup> See Murphy, *supra* note 11, at 1598.

<sup>77</sup> See *id.* Restitution’s historical roots in both courts of equity and law are a source of confusion. *Id.* The dilution of the distinctions between law and equity since the merger of the courts with the advent of the Federal Rules of Civil Procedure is another source. Justice Scalia, in an effort to describe the differences between equitable relief and legal relief (of which restitution is both), wrote that “[a]s memories of the divided bench, and familiarity with its technical refinements, recede further into the past, the [traditional] meaning [of equity] becomes, perhaps, increasingly unlikely....” *Mertens*, 508 U.S. at 256-57. Professor Laycock explains that improper use of terminology in modern courts, and lack of familiarity with the subject of restitution have contributed to its misunderstanding. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 565 (3d ed. 2002) [hereinafter LAYCOCK REMEDIES].

### A. Defining Equitable Restitution in Light of *Knudson*: The Possessory Requirement and the Framing of an Equitable Claim

Dan B. Dobbs has referred to restitution as an amorphous topic with ill-defined borders,<sup>78</sup> but it does have some core ideas. “The moral basis of restitution”—the idea that the defendant had something which in good conscience belonged to the plaintiff and thus must be made to disgorge it—is the central attribute of restitution and surprisingly was the same in courts of law and courts of equity.<sup>79</sup> Concepts of “unjust enrichment” and “restoration of what the defendant has gained in a transaction” are common characteristics of restitution.<sup>80</sup> In *Knudson*, insurer Great-West argued strenuously that the Knudsons were unjustly enriched by the settlement and restitution offered a means by which it could recover money that in good conscience belonged to the plan.<sup>81</sup>

However, Justice Scalia observed that in its pleadings, Great-West put forth a claim of entitlement of the proceeds from the settlement and found it was “contractually entitled to *some* funds for benefits Great-West conferred.”<sup>82</sup> He concluded that since the funds Great-West sought were not in the possession of the Knudsons—and as such there was no claim to *specific, traceable property* for the imposition of a constructive trust—the relief Great-West sought was not equitable, even though the funds may in good conscience have belonged to the insurer.<sup>83</sup> The majority emphasized that the possession of the plaintiff’s property by the defendant and the specific identification of this property distinguished an equitable restitutionary action from a legal action. Indeed, many circuit courts have adopted this possessory requirement as the “litmus” test in determining if a restitutionary claim is equitable.<sup>84</sup>

---

<sup>78</sup> See DAN B. DOBBS, REMEDIES: DAMAGES—EQUITY—RESTITUTION 222 (1973).

<sup>79</sup> See 1 DOBBS, *supra* note 1, at 62.

<sup>80</sup> *Id.* at 550-51; see Laycock, *supra* note 72, at 1279 (“[b]oth usages are part of any complete definition of restitution.”).

<sup>81</sup> See Oral Argument, Great-West Life & Annuity Ins. Co. v. Knudson, No. 99-1786, 2001 WL 1182732, at \*6-7 (U.S. Oct. 1, 2001) (Mr. Jordan, for the petitioners).

<sup>82</sup> *Id.*

<sup>83</sup> *Knudson*, 534 U.S. at 214-215.

<sup>84</sup> See *infra* note 126 and accompanying text. The constructive trust, a tool of equity courts, requires possession of the specific property the trust seeks to recover. RESTATEMENT OF THE LAW, RESTITUTION § 160 (1937). Dissenting Justice Ginsburg responded by stating that if the determinative factor was possession, then whether relief was equitable would depend entirely on the designation of the defendant, a seemingly untenable rule. See *Knudson*, 534 U.S. at 225-26 (Justice Ginsburg stated

Justice Scalia carefully implied in his opinion that even at the start of the legal dispute over the funds, Great-West was not seeking an equitable remedy.<sup>85</sup> This is an important observation because traditionally a plaintiff seeking equitable jurisdiction had to “frame” the complaint as one sounding in equity and prove there was no adequate remedy at law.<sup>86</sup> It is arguable that differences between law and equity did in fact rest on how the claim was framed,<sup>87</sup> and the *Knudson*-majority felt that strict adherence to the framing of the claim was necessary for Great-West to prevail. The failure of Great-West to identify the property in the Knudsons’ possession doomed its claim from the start.

This strict adherence to principles of equity emphasizes that a court must look beyond the specific relief requested and alternatively base its decision upon the nature of the underlying relief sought.<sup>88</sup> In

---

she “resist[s] this ‘rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy.’”).

<sup>85</sup> First, Justice Scalia stated that whether equitable relief was sought is dependent upon the basis of the claim and the nature of the relief requested. See *Knudson*, 534 U.S. at 213 (citing *Continental Casualty Co.*, 33 F.3d at 756). Later, he stated that since the basis of Great-West’s complaint was the recovery of *some* funds and not particular funds that in good conscience belong to Great-West, the kind of restitution Great-West sought was legal. See *id.* at 214.

<sup>86</sup> Generally, a plaintiff has to come within the jurisdiction of equity courts to receive equitable jurisprudence. There were many principles of equity that would determine by-and-large when equitable jurisdiction was available. Among them included the maxims that equity followed the law (legal principles will not be disregarded when they are available), and in a case where there was concurrent jurisdiction of law and equity, the plaintiff needed to plead the relief sought as one of equity and argue that there was no adequate remedy at law. See ALBERT H. PUTNEY, 7 POPULAR LAW LIBRARY: EQUITY JURISPRUDENCE, TRUSTS, & EQUITY PLEADING 11-30 (1908). Restitution was often granted in equity when alternative relief was held to be inadequate. See PALMER, *supra* note 40, at 33-34.

<sup>87</sup> Judge Posner spoke to this soon after *Mertens* was decided. See *Reich v. Continental Casualty Company*, 33 F.3d at 756 (stating “[w]hether [restitution] is equitable depends merely on whether it is being sought in an equity suit”). In *Continental Casualty Co.*, however, a breach of contract claim was absent. Three years later, Judge Posner thoroughly explained that the framing of the relief sought as one sounding in equity or law is dispositive of the question of whether the restitution sought is equitable in the context of ERISA. See *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 710 (7th Cir. 1999). In *Health Cost*, Judge Posner stated that although a breach of contract claim was present, the claim was not on the money but instead sought a constructive trust in the defendant’s claim to the money. *Id.* This view of equitable restitution claim for monetary relief appears to accord with Justice Scalia’s opinion in *Knudson*.

<sup>88</sup> See *Knudson*, 534 U.S. at 225-26.



*Knudson*, the majority felt strongly that Great-West sought to impose *in personam* liability against the Knudsons, which is antithetical to the *in rem* right of imposition of a constructive trust over a fund. Great-West simply did not frame the claim correctly under the majority's definition of restitution and was found to have not sought an equitable remedy.<sup>89</sup>

Therefore, if Great-West's claim were denied because it sought non-equitable relief, the contrapositive notion would be that if Great-West sought equitable relief then its claim would not have been denied. This would support the possibility of achieving equitable restitution in the presence of a breach of contract—an action that is predominantly held as legal (thereby prohibiting any equitable claims)—provided the claim sounds in equity and identifies the specific property in the defendant's possession. To more fully understand this concept, it is helpful to further explore the restitutionary principles as they apply to actions involving contractual recoupment obligations.

### B. Distinguishing Between Law and Equity: Theories of Recovery

The majority's decision to base its holding largely upon the presence of identifiable funds, implies that Great-West would have had an enforceable claim under section 502(a)(3)—if it had only framed its claim appropriately. Viewed in this light, the *Knudson* majority appears to support the notion of equitable restitution as a parallel substantive basis of liability in a breach of contract claim under ERISA.

In general, remedies may be classified as either equitable or legal,<sup>90</sup> and traditionally both courts of law and equity could provide restitution.<sup>91</sup> Restitution served to fill in the gaps where lack of formal title was an obstacle to justice.<sup>92</sup> As restitution evolved, it became possible for a claimant to have two parallel theories for seeking

---

<sup>89</sup> Apparently, Great-West Life & Annuity Insurance Company got the message, and was able to successfully argue for the imposition of a constructive trust in *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F. Supp. 2d 1376 (D. Ga. 2002). See Eccles & Gordon, *supra* note 14, at 2.

<sup>90</sup> See 1 DOBBS, *supra* note 1, at 11. Dobbs states that remedies may also be classified according to the nature and purpose of the relief awarded, but the importance of classifying remedies has largely abated due to the unified treatment of all remedies in courts today. *Id.* at 148.

<sup>91</sup> See *id.* at 62. Professor Laycock explains that restitution was invented by early court systems "to avoid unjust results in specific cases." Laycock, *supra* note 72, at 1278.

<sup>92</sup> See DOBBS, *supra* note 78, at 240.

recovery of such a claim (for example, a plaintiff might have a breach of contract claim and a simultaneous claim for restitution).<sup>93</sup>

It is important to note that—conceptually—restitution has been described as a substantive theory of liability based on *unjust enrichment* of the defendant or as a remedy that forces a defendant to disgorge his gain in response to the finding of liability.<sup>94</sup> Thus, depending upon the claim, restitution has two meanings: it may be a *form* of liability or the *remedy* provided upon a finding of liability. One scholar explains this duality as “simply a feature of [restitution’s] development under the common law writ system in which the claim or writ designated the specific remedy.”<sup>95</sup>

The dual nature of “restitution” makes it difficult for a modern court to discern the pragmatic applications of restitution.<sup>96</sup> Focusing on those claims which, like *Knudson*, are based upon allegations of unjust enrichment, restitution may successfully be used as a substantive basis for liability.<sup>97</sup> Hence, a plaintiff who proves that the defendant was unjustly enriched would be entitled to the defendant’s gain.<sup>98</sup>

---

<sup>93</sup> See Murphy *supra* note 11, at 1582. Professor Murphy states that using restitution as a basis of liability parallel to contract or tort has been called “freestanding restitution.”

<sup>94</sup> See *id.* at 1582-83. In an insightful article, Professor Murphy describes the differing restitutionary theories of Professors Andrew Kull, Peter Birks, and Douglas Laycock and the difficulties the Supreme Court has had in defining monetary remedies as restitution. *Id.* To lessen confusion, she recommended that monetary restitution be defined more precisely in the new Restatement (Third) of Restitution and Unjust Enrichment. *Id.* at 1638-39.

<sup>95</sup> See Thomas, *supra* note 11, at 1066. Professor Laycock offers a more inclusive definition of restitution by agreeing that while restitution is a source of liability as well as a measure of the defendant’s liability, it is also a “restoration remedy.” The Restatement of Restitution terms this third facet of restitution as “specific restitution,” and it is defined by Laycock as a remedy that either “restore[s] to the plaintiff the specific thing he lost” or “undo[es] disrupted transactions and restore[s] both parties to their original positions in kind.” Laycock, *supra* note 72, at 1280-81.

<sup>96</sup> Professor Laycock described how restitution can appear to be substantively similar to other remedies and thus be indistinguishable. Restitution, like injunctions and specific performance, also “grant[s] specific relief and [each of these remedies are] premised on the inadequacy of substitutionary remedies such as damages.” *Id.* at 1283. Thus, it can be difficult for a court to understand the purpose of restitution. Laycock states that restitution should be viewed as a restorative remedy, whereas injunction and specific performance are more preventative remedies. *Id.*

<sup>97</sup> Professor Laycock argued that restitution can be an effective basis for a claim. See *id.* at 1293.

<sup>98</sup> See 1 DOBBS, *supra* note 1, at 566 (“[r]estitution is measured by the defendant’s ‘benefits’ in the relevant transactions”); Murphy, *supra* note 11, at 1589; Laycock,

In *Knudson*, however, the issue was not solely whether Great-West could seek restitution in the presence of a breach of contract claim, but also whether Great-West could seek *equitable* restitution and recover *money*. Historically, plaintiffs who were seeking restitution in the form of monetary relief had to assert their claims at law and seek “legal restitution.”<sup>99</sup> Thus, a claim of equitable restitution becomes much more complicated when, as in *Knudson*, the defendant’s gain is monetary<sup>100</sup> and there are other legitimate theories of recovery available to the plaintiff.<sup>101</sup> The plaintiff can recover in an action at law, negating the need for equitable restitution.

Yet courts of equity would often entertain monetary claims by acting on the *in personam* power coupled with a flexible standard of

*supra* note 72, at 1283-85. See Muir, *supra* note 19, at 33 (discussing the necessary elements to prove an unjust enrichment claim).

<sup>99</sup> *Knudson*, 534 U.S. at 213 (quoting 1 DOBBS, *supra* note 1, at 587-88). In the absence of a contract but with the presence of a promise, courts of law would impose the quasi-contract to prevent unjust enrichment. See DOBBS, *supra* note 78, at 234-35.

<sup>100</sup> Money, in the form of profits, was sometimes awarded in equity when a defendant profited from ill-gotten proceeds taken from the plaintiff. See Murphy, *supra* note 11, at 1600, n.116. But if profit gains of the defendant were absent and the legal relief adequate, generally when the relief sought was money in the presence of a breach of contract claim a court of law would most often provide legal relief in the form of damages. *Id.* at 1603-04. Judge Posner, in a case decided soon after *Knudson*, stated in dictum that a plaintiff could sue in equity under section 502(a)(3) to recover interest a plan fiduciary gains by wrongfully withholding benefits, “because it is the amount by which the plan has unjustly enriched itself, and unjust enrichment is a basis, indeed the usual basis, for imposing a constructive trust on a sum of money.” *May Dept. Stores Co. v. Federal Ins. Co.*, 305 F.3d 597, 603 (7th Cir. 2002).

<sup>101</sup> A plaintiff may have underlying tort or contract claims against a defendant, in addition to a claim of unjust enrichment. Professor Laycock describes an example where a person steals a hundred dollar bill: the tort of conversion also makes the defendant unjustly enriched by one hundred dollars. See Laycock, *supra* note 72, at 1283. This duality of claims complicates the issue because monetary judgments are largely the domain of courts of law, not equity. *Id.* at 1283; see Murphy, *supra* note 11, at 1589. Rather than discern the specific applications of unjust enrichment, Professor Laycock offers limited situations in which restitutionary claims are available:

The restitutionary claim matters in three sets of cases: (1) when unjust enrichment is the only source of liability; (2) when plaintiff prefers to measure recovery by defendant’s gain, either because it exceeds plaintiff’s loss or because it is easier to measure; and (3) when plaintiff prefers specific restitution, either because defendant is insolvent, because the thing plaintiff lost has changed in value, or because plaintiff values the thing he lost for nonmarket reasons.

Laycock, *supra* note 72, at 1284.

what a court would consider “good conscience.”<sup>102</sup> Courts of law utilized the common law writ of assumpsit that required a plaintiff to convince a court that the defendant’s gain was rightfully the plaintiff’s property.<sup>103</sup> Both systems justified the remedy by unjust enrichment, measured by the defendant’s benefit and combined with the lack of formal title.<sup>104</sup> Alas, in a situation such as this, whether the relief sought is money appears not to offer a conclusive answer to the “legal or equitable restitution” question. Justice Scalia acknowledged this truism in *Knudson* as he argued that the dissent’s assertion of looking to the “substance” of the relief requested to determine if the claim is equitable was not as determinative as the dissent would have it.<sup>105</sup>

Rather, Justice Scalia asserted that the definitive interpretation of restitution is based on the “legal theory under which it is awarded.”<sup>106</sup> For example, a plaintiff (as in *Knudson*) may have a claim of liability grounded in breach of contract and may also have a parallel claim of unjust enrichment. Generally, a recovery in equity is not permitted if the plaintiff has an adequate remedy at law, such as in a breach of contract claim.<sup>107</sup> A court will arrive at this conclusion by noting that it is the breach of contract that makes the defendant’s enrichment unjust—he broke the contract and is keeping the gains.<sup>108</sup> The breach of contract, as the basis of the action, offers a legal remedy and equitable restitution would not be awarded. However, the analysis changes somewhat if there is no adequate remedy at law—i.e., the legal

---

<sup>102</sup> See 1 DOBBS, *supra* note 1, at 587.

<sup>103</sup> See generally *id.* at 578, 581-83.

<sup>104</sup> Cf. 1 DOBBS, *supra* note 1, at 587 (describing the equity courts’ ability to ignore legal title) with 1 DOBBS, *supra* note 1, at 579 (describing development of assumpsit and quasi-contract where there was no contract between the parties). See Muir, *supra* note 19, at 36 (stating that the distinction between legal and equitable is based on “historical happenstance” and is a difficult one to make).

<sup>105</sup> See *Knudson*, 534 U.S. at 216.

<sup>106</sup> *Id.* Professor Murphy also supports this distinction when attempting to characterize the monetary remedy as one for damages, as in a contract claim, or restitution. Even if there are more than one legitimate theory of recovery, the grounds for liability remains the distinguishing factor. See Murphy, *supra* note 11, at 1589.

<sup>107</sup> Professor Laycock defines the adequacy rule as “[a] legal remedy is adequate only if it is complete, practical, and efficient as the equitable remedy.” DOUGLAS LAYCOCK THE DEATH OF THE IRREPARABLE INJURY RULE 22 (1991).

<sup>108</sup> See Laycock, *supra* note 72, at 1286. This relegates the substantive unjust enrichment liability claim to secondary status, and restitution is transformed to remedial form whereby the defendant’s enrichment is recognized as an alternate measure of recovery for the underlying wrong. *Id.*

remedies are precluded by statute. The statutory preclusion shifts a court to permitting an equitable remedy.

This is exactly the scenario *Knudson* provided: the plan participant broke a contractual agreement requiring the participant to give money acquired from third-party tortfeasors to the plan, and was unjustly enriched as a result.<sup>109</sup> As stated above, plaintiffs asserting restitutionary claims for money historically still had to assert the claim at law, even if a plaintiff is able to identify a particular fund in possession of the defendant as his.<sup>110</sup> In some instances, however, a court may provide equitable relief—including monetary—if there was no adequate remedy at law and the relief sought was equitable in nature. Arguably, this is what the Supreme Court alluded to in *Knudson*.

The likelihood of the majority in *Knudson* providing for the availability of an alternative remedy when a plaintiff has no adequate remedy at law, particularly if the absence of a remedy is due to a statutory preclusion such as ERISA, historically has support.<sup>111</sup> Generally, courts may view a statute as taking away a right and thereby denying relief, or may view a law as prohibiting one avenue of relief but granting another means for relief.<sup>112</sup> Clearly, section 502(a)(3) of ERISA has been interpreted as granting only “equitable relief.” Legal relief (i.e., money damages) is not permitted for claims brought under this section. The *Knudson* majority appears to hold that since Great-West failed to follow the correct procedure for the imposition of a constructive trust—an equitable remedy—by not identifying specific funds under the Knudsons’ control in its claim, the Supreme Court was not in a position to issue an *in personam* order requiring the Knudsons

---

<sup>109</sup> See generally *Knudson*, 534 U.S. 204.

<sup>110</sup> See Murphy, *supra* note 11, at 1603. See also LAYCOCK REMEDIES, *supra* note 77, at 569.

<sup>111</sup> As stated previously, traditionally to obtain relief from a court of equity, a plaintiff first must prove that the relief sought is framed as equitable, and there is no adequate remedy at law. See PUTNEY, *supra* note 86. Professor Murphy, citing Andrew Kull as supporting authority, argued that in *Knudson* the unjust enrichment claim “seems secondary, for the contract theory more conventionally describes the basis of liability.” Murphy, *supra* note 11, at 1618.

<sup>112</sup> This doctrine was espoused in an 1814 decision in Massachusetts, whereby “Mill Acts,” laws designed to promote the creation of mill commerce, precluded common law suits for damages against mill property owners whose actions occasionally flooded adjoining properties. “If it should be said that the legislature itself has not the constitutional authority to deprive a citizen of a remedy for a wrong ... the answer is obvious, that [rather the legislature has] a right to substitute one [remedy] for another ...” *Stowell v. Flagg*, 11 MASS. REP. 364, 365 (1814).

to transfer legal rights to the funds to Great-West.<sup>113</sup> To do so would create a legal remedy,<sup>114</sup> thereby contravening section 502(a)(3) and previous Court decisions limiting the relief available under this section. Furthermore, the Court appears to hold that the equitable relief sought must strictly conform to the restitutionary tools historically known as constructive trust or equitable lien. The Court does not appear to be unilaterally denying all forms of monetary relief to claimants who sue for equitable remedial action under section 502(a)(3), but rather emphasized that equitable relief will be granted if it appears to the Court that it is indeed truly equitable.

### C. In Summary: The Melding of *Knudson* and Restitution

Thus, at its most basic level, *Knudson* appears to say that without the existence of an identifiable, traceable fund, a plan fiduciary cannot seek equitable relief in the presence of a breach of contract claim against a participant who recovers money from a third party tortfeasor. Arguably the most significant lessons are not what *Knudson* explicitly stated, but what we have discussed above. First, a plan fiduciary may likely enforce recoupment provisions, even in the presence of breach of contract, provided the claim sounds in equity and does not seek to impose *in personam* liability. Second, the Court perhaps has let its intentions be known that if a plan fiduciary seeks restitution as a parallel basis of liability, rather than suing on the basic contract claim, it will impose stringent requirements on the plaintiff to ensure that it is not in fact trying to impose personal liability.

Finally, it is important to note that the majority was explicit in limiting the reach of this decision. Specifically, it announced that it was only ruling on the particular issue at hand, and refused to discuss alternative remedies that might have been available to Great-West, such as state contract actions or direct actions. The Court also did not say if Great-West would have had a successful equitable restitution claim

---

<sup>113</sup> See 1 DOBBS, *supra* note 1, at 590-91 (“[T]he constructive trust plaintiff who proves his claim ... wins an *in personam* order that requires the defendant to transfer legal rights and title of specific property or intangibles to the plaintiff.”); see also *Reynolds v. South Central Regional Laborers*, 306 F. Supp. 2d 646, 652 (W.D. La. 2004) (interpreting the implication of *Knudson* to the instant case).

<sup>114</sup> Without the presence of property, the remedy would impose personal liability upon a defendant to pay a sum of money. The remedy for a quasi-contractual obligation – a legal action.

against the Special Needs Trust.<sup>115</sup> Rather, it stated that there may have been other forms of legal relief available to Great-West and reserved any opinions regarding other remedies aside from restitution and injunction.<sup>116</sup>

The Court's reluctance to expand the remedial provisions in *Knudson* is in line with the Court's previous rulings in *Russell* and *Mertens*, which limited the remedies available under section 502(a)(3), although it is inapposite to the Court's willingness in *Varity* to follow a much "looser" interpretation of the ERISA remedial provisions. The presence of this interpretative dichotomy is reinforced in the seemingly opposite stances taken by Justices Ginsburg and Scalia as to the nature of restitution in the context of ERISA. The dissent in *Knudson* argued that the requirement of an identified fund implied a rigid-like condition that served as a distinction between equitable and legal restitution.<sup>117</sup> Equity was a tool by which courts could fill in the gaps left by courts of law, which utilized formal title as a method of awarding relief.<sup>118</sup> In

---

<sup>115</sup> See *Knudson*, 534 U.S. at 220. There has been some dispute about the scope of *Knudson* regarding this question. See *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439 (5th Cir. 2002) (holding that because the present case has facts almost identical to Great-West, the plaintiff's declaratory judgment claim was not permitted against the Special Needs Trust as a form of equitable relief). See generally *Givens v. Wal-Mart Stores, Inc. & Assoc. Health & Welfare Plan*, 327 F. Supp.2d 1057, 1061 (D. Neb. 2003) (holding that although the funds are not in the control of the defendant, the Plan could none-the-less impose a constructive trust due to the flexible nature of these trusts).

<sup>116</sup> See *Knudson*, 534 U.S. at 220. However, during oral argument the Court did acknowledge that the looming presence of preemption by ERISA would likely make it very difficult for a plan fiduciary to assert a state contract claim. See generally *Oral Argument, Great-West Life & Annuity Ins. Co. v. Knudson*, No. 99-1786, 2001 WL 1182732, at \*30-38 (Mr. Taranto, for the respondents). But see *Providence Health Plan v. McDowell*, 385 F.3d 1168 (9th Cir. 2004) (holding that a direct action by a plan fiduciary seeking reimbursement from a plan participant based on breach of contract was not preempted by ERISA). There have been additional recent Federal Appellate Court decisions that have evaluated and subsequently interpreted the Supreme Court's non-answer to the issue of other remedies. For example, in *Cooperative Benefit Administrators, Inc. v. Ogden*, the Fourth Circuit held that the Supreme Court did not endorse the existence of a federal common law remedy when it stated in *Knudson* that "there may have been other means for [Great-West] to obtain the essentially legal relief that they seek." *Cooperative Benefit Administrators, Inc. v. Ogden*, 367 F.3d 323, 332 (4th Cir. 2004).

<sup>117</sup> See *Knudson*, 534 U.S. at 228. Justice Ginsburg noted that the flexibility permitted under equity was to be used to give effect to legislative policy, and that Justice Scalia's rationale ran counter to both the traditional nature of equity as well as the desired effect of ERISA by policy makers at its inception.

<sup>118</sup> See *supra* text accompanying notes 90-92.

keeping with this understanding, restitution is not a system of rigid rules with determinative bright line tests.<sup>119</sup> Yet, the majority tells us that in order to have a successful claim for equitable relief under section 502(a)(3)(B), a plaintiff must assert that it is entitled to identifiable funds possessed by the defendant that in good conscience belong to the plaintiff.<sup>120</sup>

As argued by the dissent, this is antithetical to the spirit of *Varity*, which viewed section 502(a)(3) as a “catchall” provision, and if read in this broad manner would have likely provided relief to Great-West in spite of the vagueness of its pleading.<sup>121</sup> Perhaps an explanation for the distinction lies in the presence of the breach of contract claim in this case, where the legal relief in contract law would have historically dominated over the equitable principles of trust law in the absence of the limitation of remedies by ERISA section 502(a)(3). Whereas in *Varity* the absence of a contract in the midst of fiduciary misrepresentation sounded the bells of trust law and equity more clearly, the majority in *Knudson* was only willing to extend relief to a fiduciary under section 502(a)(3) if it truly framed the relief sought as equitable—that is—if the fiduciary claimed a right to traceable assets.

Thus, in summary, a reviewing court should recognize that restitution may provide a basis for liability that is parallel to contract and tort.<sup>122</sup> Possession of the funds is not the sole determinative factor, but rather a court should first look to ascertain if the remedy sought was legal or equitable, a distinction that turns on the presence of traceable funds,<sup>123</sup> the framing of an equitable claim, and whether or not there is an adequate remedy at law. To systematically apply *Knudson* to similar scenarios and base the decision largely upon possession is a failure to appreciate the nuances of restitution, the underlying distinctions between law and equity, and the self-acknowledged limits of *Knudson*.

Subsequent to this decision, circuit splits and scholarly criticism over the exact holding of *Knudson* have abounded.<sup>124</sup> Much of the confusion and criticism lies in the Supreme Court’s seeming

---

<sup>119</sup> See *Knudson*, 534 U.S. at 228 (Ginsberg, J., dissenting).

<sup>120</sup> See *id.* at 214.

<sup>121</sup> Justice Stevens wrote that he found it “difficult ... to understand why Congress would not have wanted to provide recourse in federal court for the plan violation disclosed by the record” in *Knudson. Id.* at 223.

<sup>122</sup> See *supra* notes 92-99 and accompanying text.

<sup>123</sup> See *Bauhaus*, 292 F.3d at 451 (Wiener, J., dissenting) (“the Court’s test hinged not on who possessed the disputed funds, but rather on what kind of remedy would enable the plaintiff to recover those funds.”).

<sup>124</sup> See *supra* note 11.



petrification of equitable restitution and the role of monetary relief within the context of ERISA. For a reviewing court, this has likely been compounded by the likelihood that, as generally stated previously, “restitution is a relatively neglected ... part of the law.”<sup>125</sup>

### III. SIGNIFICANT LOWER COURT DECISIONS POST- *KNUDSON*: A PATH TO FOLLOW?

The fallout of the majority’s holding in *Knudson* can be seen as the lower courts have attempted to apply it in cases involving subrogation and reimbursement clauses where money was obtained by the plan participants in third party tort actions. Inconsistent holdings in similar subrogation actions have appeared in lower courts within the same circuit<sup>126</sup> and at the appellate level, the circuit courts are divided roughly into two camps—each espousing a different interpretation of *Knudson*.<sup>127</sup> The Sixth Circuit’s recent decision in *Qualchoice, Inc. v.*

---

<sup>125</sup> Laycock, *supra* note 72, at 1277. Professor Laycock goes on to say that when confronted with an area of law as complex as restitution, a lawyer’s understanding of the subject likely “consists largely of blank spaces with undefined borders” and “scattered patches of familiar ground.” *Id.* See also Murphy, *supra* note 11, at 1581 (quoting Professor Andrew Kull’s statements published in the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, Reporter’s Introductory Memorandum, xvi (Discussion Draft, Mar. 31, 2000)).

<sup>126</sup> For example, in the Second Circuit, a district court in New York has held *Knudson* precludes monetary relief under § 502(a)(3), but the Connecticut Supreme Court has held that subrogation should be permitted in ERISA matters. *Bona v. Barasch*, 2003 WL 1395932 (S.D.N.Y. Mar. 20, 2003); *Gaunlett v. Webb*, 2003 WL 22079536 (Conn. Super. Ct. Aug. 13, 2003).

<sup>127</sup> The Fifth Circuit, in *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer*, has been joined by the Fourth and Seventh Circuits in holding that an equitable restitution claim may stand if the plan fiduciary can identify specific funds in the possession and control of the defendant. See, e.g., *Bombardier*, 354 F.3d at 348; *Primax Recoveries, Inc. v. Young*, 2003 WL 22973630 (4th Cir. Dec. 18, 2003); *Admin. Comm. of the Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003). The Eighth Circuit has held that only equitable remedies, such as constructive trust, injunction, and restitution, are available in recoupment actions. *N. Am. Coal Corp. v. Roth*, 395 F.3d 916, 917 (8th Cir. 2005). The Ninth Circuit, recently joined by the Sixth Circuit, holds that a plan administrator’s suit to recover proceeds from an insured’s settlement with a third-part tortfeasor is nothing more than a breach of contract claim, which is a classic action at law and prohibited by section 502(a)(3). See, e.g., *QualChoice*, 367 F.3d 638; *Weststaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002). The First, Second, Third, Tenth, Eleventh Circuits have not yet rendered definitive decisions with respect to the enforceability of recoupment provisions. However, district court decisions in the First, Third, Fourth, Tenth, and Eleventh Circuits appear to fall in line with the Fifth

*Rowland* is an example of the difficulty the courts are having with *Knudson*. The following briefly introduces the analyses various appellate courts have adopted post-*Knudson*.

### A. The Three-step Test of the Fifth Circuit

The Fifth Circuit, in *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer*, was presented with a law firm and a participant of the Bombardier Aerospace Employee Welfare Benefits Plan (“the Plan”) who appealed from a district court’s decision to grant summary judgment in favor of the Plan.<sup>128</sup> Essentially, the Plan was seeking to enforce its reimbursement provision against a participant who had negotiated a settlement with the responsible tortfeasor.<sup>129</sup>

The question before the court was whether the Plan, although characterizing the relief sought in its claim as equitable, was actually seeking to impose personal liability upon the participant by enforcing the participant’s contractual obligations.<sup>130</sup> On its face, this claim was similar to the claim at issue in *Knudson*. However, the Fifth Circuit distinguished *Knudson* by noting that while the relief sought was monetary and the obligation originated in contract, the relief was granted not from the personal resources of the participant but from a traceable fund.<sup>131</sup> Citing *Knudson*, the Fifth Circuit stated that the relevant inquiry asks whether “the Plan seeks to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the defendant.”<sup>132</sup> Since the funds were held in an identifiable account and the participant’s attorney, acting as his agent, was merely holding the funds for the participant, the Plan was able avoid the issue of untraceable funds that was detrimental to Great-West’s case.<sup>133</sup> The court determined that upon the basis of the signed reimbursement

---

Circuit’s interpretation of *Knudson*. See, e.g., *Mank v. Green*, 323 F. Supp. 2d 115 (D. Me. 2004); *Carpenters Pension and Annuity Fund of Philadelphia v. Banks*, 271 F. Supp. 2d 639 (E.D. Pa. 2003); *Admin. Comm. of the Wal-Mart Assoc. Health & Welfare Plan v. Willard*, 302 F. Supp. 2d 1267 (D. Kan. 2004); *B.P. Amoco Corp. v. Connell*, 320 F. Supp. 2d 1368 (M.D. Ga. 2004).

<sup>128</sup> See *Bombardier*, 354 F.3d at 356.

<sup>129</sup> See *id.* at 350-52. The Plan sought to impose a constructive trust over the settlement funds. *Id.* at 351.

<sup>130</sup> *Id.* at 355.

<sup>131</sup> See *id.* at 356.

<sup>132</sup> *Id.* at 356.

<sup>133</sup> See *id.*

agreement between the Plan and the participant, a portion of the funds recovered from the tortfeasor did in fact belong in good conscience to the Plan.<sup>134</sup>

### **B. The Ninth Circuit: Look To The Substance of The Relief**

The Ninth Circuit has employed a broader reading of *Knudson* and has held that regardless if traceable funds are present, an action against a plan participant is not actionable under section 502(a)(3)(B).<sup>135</sup> In *Westaff (USA) Inc., v. Arce*, the facts were very similar to *Bombardier*: an injured plan participant subsequently recovered money from a tortfeasor and was sued by a fiduciary of her health plan for the amount of benefits paid.<sup>136</sup> The tort settlement money was held in an escrow account, and the Plan sought a declaratory judgment and requested equitable relief in enforcing the reimbursement provision in the contract.<sup>137</sup>

The Ninth Circuit held that in determining whether the relief requested was legal or equitable, it would look to the “substance of the remedy sought ... rather than the label placed on that remedy.”<sup>138</sup> Because the basis of the Plan’s claim for monetary relief was the enforcement of a contractual obligation, the Ninth Circuit asserted that it would look past the pleadings in determining if the claim was for equitable or legal relief.<sup>139</sup> Since a breach of contract action to recover money was a classic action at law, the “action remains one for money damages” and therefore the Plan’s relief was legal and not permissible under section 502(a)(3)(B).<sup>140</sup>

### **C. The “Flip-Flop” of the Sixth Circuit**

The Sixth Circuit, until recently, held that the possession of an identifiable fund—the lynchpin of the test promulgated by the Fifth Circuit in *Bombardier*—was determinative in a recoupment action.<sup>141</sup>

---

<sup>134</sup> See *id.* at 357.

<sup>135</sup> See *Westaff*, 298 F.3d at 1166-67.

<sup>136</sup> See *id.* at 1166.

<sup>137</sup> See *id.*

<sup>138</sup> *Id.* (citing to *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 n.5 (9th Cir. 1993)).

<sup>139</sup> See *id.*

<sup>140</sup> *Id.* at 1167.

<sup>141</sup> See, e.g., *Community Health Plan of Ohio*, 347 F.3d 619; *Professional Claims Management v. Carver*, 88 Fed.Appx. 872 (6th Cir. 2004) (unpublished opinion).

In *QualChoice, Inc. v. Rowland*, the Sixth Circuit established a new interpretative view of *Knudson* by denying the plan equitable relief under section 502(a)(3).<sup>142</sup> Following the Ninth Circuit's lead, it did so on the grounds that the claim was based on a breach of the plan's reimbursement provision, which was a "legal" claim not permitted under ERISA's remedy provisions.

The facts of this case are roughly the same as those previously discussed: a plan fiduciary sought recovery of benefits paid on the behalf of a plan participant who later settled with a third party tortfeasor. When the participant refused to reimburse the plan for money advanced to pay medical costs, the fiduciary sought specific performance of the reimbursement provision and equitable restitution.<sup>143</sup> The plan offered evidence that the participant was in possession of an identifiable fund and that fund belonged in good conscience to the plan.<sup>144</sup>

In its analysis, the Sixth Circuit—noting the circuit split and its own previous holdings—found that a "procedural conundrum" existed in so far as the plan was seeking monetary relief under restitution (traditionally a claim at law) while also seeking equitable restitution in the form of a constructive trust or equitable lien.<sup>145</sup> The court held that the plan's actions, based in contract, were legal and that while monetary relief was sometimes available in equity, in this instance the contractual obligation was the basis of the suit and terming the relief sought as "equitable" did not change the nature of the action.<sup>146</sup> Equitable restitution was developed as means by which plaintiffs who *lacked* formal title could bring an action in a court of equity.<sup>147</sup> Courts of law were traditionally limited to entertaining only those claims where formal title was in dispute.<sup>148</sup> Because the relief sought by *QualChoice* was money ("an intangible"), the problem of formal title in the case was irrelevant.<sup>149</sup>

---

<sup>142</sup> *QualChoice*, 367 F.3d at 638.

<sup>143</sup> *See id.* at 640-41. Initially, *QualChoice, Inc.* sought the remedy of restitution, but later filed an amended complaint that specifically requested "equitable restitution, imposition of a constructive trust or equitable lien" in order to comply with section 502(a)(3). *Id.* The district court dismissed the claim for lack of subject matter jurisdiction and *QualChoice* then appealed. *Id.*

<sup>144</sup> *See id.* at 643.

<sup>145</sup> *Id.* at 649.

<sup>146</sup> *See QualChoice*, 367 F.3d at 649.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

QualChoice, Inc. appealed the decision to the Supreme Court and certiorari was denied.<sup>150</sup> Until the Supreme Court gives a clearer explanation, a question remains as to which analysis is right—or more accurately—who is the most right. The Fifth, Sixth, and Ninth Circuits all have indicated that *Knudson* did not provide the clearest of answers to the question of whether the enforcement of reimbursement provisions by fiduciaries against plan participants is permitted under section 502(a)(3), and have largely differed on the scope and meaning of the majority's holding.<sup>151</sup>

#### IV. DETERMINING THE ENFORCEABILITY OF RECOUPMENT PROVISIONS

##### A. Common Interpretive Factors

There are common factors within each method of analysis of a recoupment provision fact pattern utilized by the Fifth, Sixth, and Ninth circuits. Among these are the recognition of the coexistence of contract and unjust enrichment claims, the presence of an identifiable fund, and the underlying question of ERISA jurisdiction. The first two commonalities are tied to the “equitable” question surrounding section 502(a)(3): whether the claim is one that falls squarely within the purview of “appropriate equitable restitution.” The jurisdictional factor goes to the pragmatic issue of the availability of an adequate remedy, either at law or in equity. Initially, when reviewing a case involving the breach of a recoupment provision, a court must determine if the legal remedy—i.e., the enforcement of the contractual obligation—is available to the fiduciary.

Whether a claim is permitted by section 514 of ERISA as a state law contract action requires an examination and interpretation of the broad preemptive nature of ERISA over state law.<sup>152</sup> Within the

---

<sup>150</sup> *QualChoice*, 367 F.3d at 638, *cert. denied*, 125 S.Ct. 1639 (2005).

<sup>151</sup> *See, e.g., id.* at 648 (“we believe that no clear or binding answer emerges to the question before us”); *Bauhaus*, 292 F.3d at 445 (replying to the majority’s “overly expansive reading of [*Knudson*]” and having “difficulty in discerning the majority’s precise reading”); *Westaff*, 298 F.3d at 1166 (“the Supreme Court has recently affirmed our approach in [*Knudson*]”).

<sup>152</sup> Section 514 preempts “all State laws insofar as they may now or hereafter relate to any employee benefit plan.” *Barber v. UNUM Life Ins. Co. of America*, 383 F.3d 134, at 137 (3d Cir. 2004) (citing 29 U.S.C. § 1144(a)). In *Pilot Life Ins. Co. v. Dedeaux*, the Supreme Court held that the phrase “relate to” included state law claims to enforce a contract. *Pilot Life*, 481 U.S. 41, 54 (1987) (the “policy choices reflected

specific context of *Knudson*-like claims, this availability or lack thereof of a legal remedy in the form of a breach of contract state law claim arguably influences the permissibility of equitable restitution in the presence of the breach. If ERISA is found not to preclude a fiduciary from suing the participant under state contract law, the fiduciary may attempt to enforce the breach of contract claim in state court and seek the traditional legal remedies available therein.<sup>153</sup>

However, ERISA precludes state law in most instances where the claim relates to the plan. Traditionally if a legal remedy is precluded, a court may utilize its equity powers to award relief, provided an equitable remedy is available. Congress—by denying legal relief to fiduciaries under ERISA—alternatively provided an equitable remedial provision in section 502(a)(3)(B). This would appear to favor the granting of relief because Congress substituted equitable relief when it removed legal remedies from the ERISA landscape. Historically, the imposition of equitable relief by the judiciary was strongly dependent upon how the claim was framed. As discussed above, *Knudson* did not deny relief to Great-West on the basis of ERISA preclusion—rather, Great-West failed to state an equitable claim. *Knudson* appears to say that if a fiduciary requests equitable relief, it must adhere strictly to the requirements of constructive trust or equitable lien.

This leads us to the equitable issues of the coexistence of contract and unjust enrichment claims and the presence of an identifiable fund. As stated above, in a suit by a fiduciary to recoup money owed to it by a participant, section 502(a)(3) is the exclusive enforcement provision available under ERISA and permits a court to

---

in the inclusion of [ERISA's civil enforcement scheme and remedies] and the exclusion of others under the federal scheme would be completely undermined if [participants and beneficiaries] were free to obtain remedies under state law that Congress rejected in ERISA.") However, it's unclear if this rule can be expanded to actions initiated by fiduciaries to enforce provisions contained within an ERISA-governed plan. See *McDowell*, 385 F.3d at 1172-73..

<sup>153</sup> As stated previously, remedies available for breach of contract claims were predominantly awarded in courts of law. During oral argument, the *Knudson*-court expressed concern that ERISA, a law written to "protect the assets of workers in plans," would preempt a Plan's actions to recover a contract claim in state court while simultaneously denying legal relief—which recoveries of contract claims are considered. *Great-West Life & Annuity Ins. v. Knudson*, No. 99-1786, 2001 U.S. Trans Lexis 50, at \*30 (U.S. Oct. 1, 2001). This would seemingly leave one to think that the Court would allow an equitable remedy in the form of money on a recoupment provision claim because it's likely "Congress wants the plan to be able to get its money back." *Id.* at 30-31.

award “other appropriate equitable relief.” As previously discussed, in determining if the remedy sought by a fiduciary is “equitable,” the appellate courts have adopted two different analyses. The Sixth and Ninth Circuits have looked to the nature of the *claim* as determinative—a “procedural”-like analysis that ignores the remedy requested. The Fifth Circuit’s analysis is based on assessing the nature of the *remedy* sought—a “substantive” examination of what a plan is asking of the court.

In determining the nature of the *claim*, a court looks to whether the claim sounds in law or equity. This is dependent upon variables such as the presence of a contract, the cause of action stated in the claim, and—as the majority stated in *Knudson*—the legal theory upon which the claim is offered. For example, in instances of breach of contract a court may give great weight to the presence of the contract as the basis of the complaint, regardless if unjust enrichment is claimed as the substantive basis of liability. In doing so, the claim is characterized as legal. Alternatively, a court may recognize and honor the coexistence of an equitable claim (e.g., unjust enrichment) in the presence of a breach of contract, and may deem it equitable.

By looking at the nature of the *remedy* requested, a court asks if the claimant is seeking legal or equitable relief. This can be answered by determining whether the remedy imposes an *in rem* or *in personam* obligation upon the party against whom the claim is made. For a claimant seeking *in rem* relief—an equitable remedy—this requires the presence of an identifiable fund which in good conscience belongs to the claimant. All other claims which fail to adhere to these requirements are deemed as *in personam*, and are characterized as legal. Legal claims are not permitted under section 502(a)(3).

### **B. Looking to the Nature of the Claim: Analysis of the Sixth and Ninth Circuit Decisions Demonstrates They Are Not in Line With *Knudson***

The Ninth Circuit’s position is not in line with the Supreme Court’s holding in *Knudson*. The rationale of *Westaff, Inc.*, in which the court looked to the nature of the claim, was taken from the Supreme Court’s decision in *Mertens*.<sup>154</sup> In *Mertens*, an express reimbursement obligation between the parties was absent—there was no unjust

---

<sup>154</sup> See *Westaff*, 298 F.3d at 1166.

enrichment<sup>155</sup>—and to apply a similar analysis to *Westaff* appears simplistic. Furthermore, the Ninth Circuit’s rationale seems at odds with Justice Scalia’s statement in *Knudson* that “[i]t is doubtful ... that ‘restitution’ ... pertains to the *substance* of the relief rather than to the legal theory under which it is awarded.”<sup>156</sup> Under the Ninth Circuit’s analysis invariably *all* claims that seek monetary relief in the presence of a contractual obligation will be deemed legal, a point that the majority did not expressly make in *Knudson*. Rather, *Knudson* emphasized that a plaintiff could seek legal or equitable restitution for money, but it could only chose equitable restitution as a theory of recovery if the money or property belonged in good conscience to the plaintiff and the plaintiff could clearly trace and identify the funds or property in the defendant’s possession.<sup>157</sup>

The Sixth Circuit’s decision accords with the Ninth Circuit’s determination that the nature of a subrogation claim is legal. Its decision in *QualChoice*, however, turned on the historical distinctions of breach of contract claims in courts of law and equity, rather than on the “substance” of the remedy.<sup>158</sup> It concluded that the monetary relief *Qualchoice, Inc.* sought did not invoke the difficulties of formal title and that the action was analogous to an action for assumpsit, a concept that was created and handled predominantly by courts of law.<sup>159</sup> In support, the Sixth Circuit stated that the reimbursement clause in the benefits agreement required the participant to repay the plan for his covered medical expenses, but it did not give the Plan “a property right in any particular fund.”<sup>160</sup> The nature of the claim did not sound *in rem*-based equitable remedies such as a constructive trust.

In summary, the Sixth and Ninth Circuits look to the nature of the claim as the determinative factor as to what constitutes “equitable” restitution. They appear to say that if the plaintiff’s claim under section 502(a)(3) can be characterized as legal, then section 502(a)(3) does not provide a remedy even if the plaintiff could also (1) plead an equitable

---

<sup>155</sup> The dispute in *Mertens* centered around whether plan participants could sue the plan’s actuary, a nonfiduciary, under section 502(a)(3) for monetary relief due to the actuary’s failure to adequately monitor the Plan’s funds. See *Mertens*, 508 U.S. at 251. The participants were not refusing to repay the plan, thereby becoming unjustly enriched, unlike the tortfeasors in *Knudson* and *Qualchoice*. See *id.*

<sup>156</sup> *Knudson*, 534 U.S. at 216 (emphasis in original).

<sup>157</sup> See *id.* at 213.

<sup>158</sup> See *QualChoice*, 367 F.3d at 649.

<sup>159</sup> See *id.* The Sixth Circuit’s definition of assumpsit and its historical development in legal restitution is accurate. See 1 DOBBS, *supra* note 1, at 571-72.

<sup>160</sup> See *Qualchoice*, 367 F. 3d at 649.



claim such as unjust enrichment and (2) identify specific assets that in good conscience belong to the plaintiff. Under this rule, the remedy requested appears to be irrelevant: it does not matter whether a plaintiff can identify specific assets that in good conscience belong to the plaintiff or whether the plaintiff could have enforced the recoupment provision under state law. Recoupment provisions just appear to be unenforceable.

The difficulty in accepting this analysis lies in the mischaracterization of the determinants of equity and legal restitution. While monetary relief was primarily awarded in courts of law, the Sixth Circuit failed to appreciate that it could also be obtained in a court of equity.<sup>161</sup> It also did not recognize the possibility of a coexistence of parallel theories of liability under restitution and contract, a concept that Justices Scalia and Ginsburg did not mention in *Knudson* but implicitly affirmed by not simply ruling that Great-West had an available remedy at law in its breach of contract claim but was statutorily preempted by ERISA from recovering non-equitable relief.<sup>162</sup>

Furthermore, the Sixth and Ninth Circuits did not adequately confront the consequences of denying relief to a plan based on preclusion of legal relief by statute. This would in effect render a plan seeking to enforce recoupment provisions without an adequate remedy at law. Traditionally, this legislatively-driven preclusion would enable a court to use its equity powers to determine if relief should be awarded. The Sixth and Ninth Circuits' analyses, however, never reach this depth, as the courts appear to be content to prohibit the application of recoupment provisions to plan participants.

Finally, perhaps the most problematic area of the Sixth Circuit's decision was its conclusion that enforcement of a recoupment provision is always a legal action and a fiduciary is thereby precluded from suing the plan participant under section 502(a)(3).<sup>163</sup> It based this conclusion on the argument that monetary relief sought in a breach of contract claim was legal because it was historically awarded in courts of law,

---

<sup>161</sup> See *supra* notes 89-104 and accompanying text (discussing monetary relief in courts of law and equity). Professor Langbein spoke of the Supreme Court's failure to understand that money damages are not exclusively a realm of courts of law. In fact, a court in equity often gave monetary relief, depending upon several factors. See Langbein, *supra* note 11, at 1350-52.

<sup>162</sup> See *supra* Part II.B and accompanying text (providing a parallel theories of recovery under contract and unjust enrichment).

<sup>163</sup> See *QualChoice*, 367 F.3d at 650.

regardless of the possession of an identifiable fund.<sup>164</sup> Determining that in the presence of a breach of contract claim *all* relief sought by a plan is thereby legal, the court may have significantly lessened the power of section 502(a)(3) because it implicitly sends the message that *all* monetary relief based on a breach of contract claim sought under 502(a)(3) is precluded. For example, a broad reading of *QualChoice* would preclude a claim seeking reimbursement of an overpayment to a plan participant.<sup>165</sup>

If this broad reading is accurate, then the Sixth Circuit's holding is at odds with *Varity*, where the Supreme Court stated that 502(a)(3) was created as a "catchall" provision that offers "appropriate equitable relief for injuries caused by violations that section 502 does not elsewhere remedy."<sup>166</sup> By permitting relief under section 502(a)(3)(B) for breach of fiduciary duty, the *Varity* Court was acting in a consistent manner with ERISA's purposes and textual language.<sup>167</sup> A plan participant harmed by Varity Corporation's misrepresentation—a violation of the duty of good faith espoused in trust law—was found to be able to seek equitable relief.<sup>168</sup> But if the Sixth Circuit's conclusion in *QualChoice* is correct, a broad reading seems to say that monetary relief sought under section 502(a)(3) is essentially legal relief

---

<sup>164</sup> *See id.* at 649.

<sup>165</sup> Roger Siske described how the Seventh Circuit has precluded relief in this issue because it is a "legal" claim for a return of money, but also stated that two other district courts found the Plan was entitled to recover the overpayment. *See Siske, supra* note 12, at 283-85 (citing *Leipzig v. AIG Life Ins. Co.*, 362 F.3d 406 (7th Cir. 2004); *Fick v. Metropolitan Life Ins. Co.*, 320 F. Supp. 2d 1314 (S.D. Fla. 2004); *North American Coal Corp. Retirement Savings Plan v. Roth*, 2004 WL 434150 (D. N.D. Mar. 5, 2004)). District courts in the Eleventh Circuit have ruled separately on both the recovery of an overpayment by a fund and the subrogation claims regarding recovery of medical benefits, and appeared to have adopted the analysis of the Fifth Circuit. Consistent and logical rulings resulted. *See, e.g., Onofrietti v. Metro. Life Ins. Co.*, 320 F. Supp. 2d 1250 (M.D. Fla. 2004) (overpayment of funds); *B.P. Amoco Corp.*, 320 F. Supp. 2d 1368 (subrogation claims).

<sup>166</sup> *Varity*, 516 U.S. at 512.

<sup>167</sup> *See id.* at 497, 515 ("we believe that granting a remedy is consistent with the literal language of the statute, the Act's purpose, and pre-existing trust law."); *Varity Report, supra* note 49, at 14 (discussing Justice Breyer's use of legislative history and notions of trust law in interpreting section 502(a)(3) of ERISA).

<sup>168</sup> *See Varity*, 516 U.S. at 515 (finding that section 502(a)(3) permits "individualized equitable relief"). The majority in *Varity* stated that since the plaintiffs could not seek relief under sections 502(a)(1)(B) or 502(a)(2), they needed to "rely on [section 502(a)(3)] or ... have no remedy at all." *Id.* This seems to accord with permitting a court to use its equity powers when other forms of relief are precluded or there is no adequate remedy at law.

and is not permitted. This reading may extend to prohibiting monetary relief in a breach of fiduciary duty, thereby weakening the underlying principles upon which *Varity's* holding was placed.<sup>169</sup> This is not what the Supreme Court appeared to say in *Knudson*.

Justice Scalia, in denying monetary relief to Great-West, aligned *Varity* with the majority's decision by stating that it was "undisputed that the respondents [in *Varity*] were seeking equitable relief."<sup>170</sup> Scalia's strong emphasis upon the lack of identifiable funds possessed by the Knudsons and the request by Great-West for "some funds" were the lynchpins in his argument that the relief sought was legal and thus not within the limits of "other appropriate equitable relief."<sup>171</sup> This importance of identifiable funds suggests that equitable relief could be attained in a claim of unjust enrichment with the presence of a breach of contract. It also recognizes the parallel basis of liability of unjust enrichment and breach of contract, and allows a court to use its equity powers when there is no adequate remedy at law due to statutory preclusion.

Justice Scalia's remarks that the majority's holding in *Knudson* was not in conflict with *Varity* offers further weight to the argument that the determination of restitution lies in the type of relief requested, whether it be legal in the form of assumpsit or equitable in the form of a constructive trust. Under a broad reading of the Sixth Circuit's conclusion, all relief based on a contractual provision which sought monetary funds would likely be precluded in an action by a plan fiduciary to enforce a reimbursement provision.<sup>172</sup>

---

<sup>169</sup> See *id.* The confusion in the wake of *Knudson* has also caused recent inconsistent decisions in cases involving misrepresentation by fiduciaries, similar to that in *Varity*. See Siske, *supra* note 12, at 291-93 (comparing Schaeffer v. Albert Einstein Health Care Network, 2004 WL 1012574 (E.D. Pa. May 3, 2004) (holding that a claim seeking relief for fiduciary misrepresentation cognizable under section 502(a)(3)), with Ramsey v. Formica Corp., 2004 WL 1146334 (S.D. Ohio Apr. 6, 2004) (denying injunctive relief for fiduciary misrepresentation under section 502(a)(3) because the claim was really for money damages)). The Second Circuit, following *Knudson*, reversed its previous determination that breach of fiduciary duty claims were equitable. Gerosa v. Savasta & Co., Inc., 329 F.3d 317, 322 (2d Cir. 2003).

<sup>170</sup> *Knudson*, 534 U.S. at 221.

<sup>171</sup> See *id.* at 212-15.

<sup>172</sup> There is a possibility the Sixth Circuit's holding may be in line with *Knudson* if it can be demonstrated that the determinative factor of a legal/equitable claim has room to permit a "breach of fiduciary duty" claim. The argument could go something like this: the court does not recognize the coexisting breach of contract claim, but the participant could sue under state tort law. Due to the pre-emption of the state law claim, any remaining remedy under section 502(a)(3) is available only if the

### C. The Fifth Circuit is Aligned Most Closely With *Knudson* by Looking to the Nature of the Relief Requested

The Fifth Circuit's analysis and interpretation of *Knudson* in *Bombardier* appear to be the most likely reading and subsequent application of the case.<sup>173</sup> The *Knudson* majority emphasized that for an action to lie in equity the Knudsons would have had to have possession of the funds, and the funds would have to be traceable to an account controlled by the Knudsons.<sup>174</sup> This would have avoided the *in personam* action Great-West was seeking by asking the Court for enforcement of the contract through the securing of a constructive trust or equitable lien. By failing to specify the property it alleged belonged to it, Great-West was in actuality seeking the imposition of personal liability for the repayment of its money. This relief was not permitted under the Court's reading of section 502(a)(3).<sup>175</sup>

Interestingly, the Fifth Circuit had previously ruled on a case involving a subrogation and reimbursement claim similar to that in *Knudson*. In *Bauhaus U.S.A., Inc. v. Copeland*, the Fifth Circuit held that due to the "nearly identical" factual situation to *Knudson*, the court lacked federal jurisdiction over the matter because the funds the plan sought were not in the possession of the plan participants.<sup>176</sup> This holding evoked a rigorous dissent by Judge Wiener, who labeled the ruling overbroad and stated it lacked the appreciation of the distinctions between equitable and legal relief.<sup>177</sup> In support, he pointed to the

---

participant strictly seeks equitable relief in its claim. The Sixth Circuit has not yet been confronted with this scenario, however, and it is unknown if the court interprets section 502(a)(3) as providing recourse for claims involving the recovery of an overpayment of plan funds.

<sup>173</sup> See *Bombardier*, 354 F.3d at 348.

<sup>174</sup> See *Knudson*, 534 U.S. at 214 ("the funds ... are not in the respondent's possession").

<sup>175</sup> *Id.* at 214.

<sup>176</sup> See *Bauhaus*, 292 F.3d at 443. The funds were not in the possession of the Copelands, but rather were held in the registry of the Mississippi Chancery Court. *Id.* at 445. Bauhaus was seeking a declaratory judgment in order to proceed with a subrogation action to take control of the funds. *Id.* at 440.

<sup>177</sup> See *id.* He stated that the majority "implicitly assume[d]" that the court was to "take Bauhaus's prayer for relief at face value, even though the [Federal Rules of Civil Procedure] mandate that in awarding relief, federal courts [should] look beyond the prayer to the underlying claim." *Id.* at 448. Wiener asserted that the majority's decision lacked the spirit needed to try and make sense of the Supreme Court's holding in *Knudson*, and stated that the Court determined that the particular posture of that case did not permit the granting of equitable relief. *Id.* at 449. Also, *Knudson*

equitable nature of declaratory judgment and subrogation actions. Wiener argued that the enforcement of these actions would not create a personal and general money obligation for the plan participants but alternatively enforce an *in rem* action against a fund held by a neutral party.<sup>178</sup> Undoubtedly, this was the implication of *Knudson*.

Judge Wiener revisited this issue one year later in *Bombardier*, where in writing for the majority he formulated the three-step test based upon the rationale utilized by the Supreme Court in *Knudson*.<sup>179</sup> The first and second factors of the test speak to the nature of the constructive trust and equitable lien, as described by Justice Scalia in *Knudson*. The third factor of the test distinguished the facts of *Bauhaus* from *Bombardier* because the defendant in *Bauhaus* was not in control of the funds,<sup>180</sup> and would allow a court to grant a plan fiduciary, participant, or beneficiary monetary relief under section 502(a)(3) of ERISA.

Looking closely at the test in *Bombardier*, the Fifth Circuit appears to say that even if the plaintiff's claim can be characterized as legal, as long as the plaintiff can plead an equitable claim (e.g., unjust enrichment) and identify specific assets that in good conscience belong to the plaintiff, then the plaintiff will be allowed to recover under section 502(a)(3). Under this rule, the nature of the claim—i.e., based on contract—and availability of a legal remedy appear to be irrelevant. That is, it does not matter whether the plaintiff has a legal claim that is enforceable under state law. As long as the plaintiff can plead an equitable claim and identify specific assets that in good conscience belong to the plaintiff, then the plaintiff will be allowed to recover under section 502(a)(3).

This three-step approach is not without potential problems. A court must be cautious in not overextending the application of *Knudson* to dissimilar factual patterns, and must be wary in identifying the

---

explicitly stated that it left several significant issues unanswered. This implicitly called for a careful, narrow reading of *Knudson*. See *id.* at 448-50.

<sup>178</sup> See Siske, *supra* note 12, at 273-74. Judge Wiener makes it clear that *Bauhaus* was not seeking recovery from the defendant's personal monetary account or personal assets, but rather money that was distinct from the defendant resources. See *Bauhaus*, 292 F.3d at 450.

<sup>179</sup> See *Bombardier*, 354 F.3d at 356.

<sup>180</sup> Possession and control is not limited to the defendant's exclusive possession. See *Bombardier*, 354 F.3d at 356. A court may also find that the defendant has agency control over funds. *Id.* at 357 (stating that the court was "unpersuaded by the contention ... that [the defendant] lacks 'possession and control' over" the defendant attorney's trust account).

underlying relief sought by the plan fiduciary as *in rem*, and not *in personam*. However, the Fifth Circuit's decision in *Bombardier* allows a plan fiduciary to pursue the equitable remedy of restitution by following the Supreme Court's conditions that give rise to equitable relief under section 502(a)(3), and most importantly stays within the most likely scope of the holding of *Knudson*, avoiding the over expansive reading the Fifth Circuit had previously held in *Bauhaus*.

#### **D. Enforcing Recoupment Provisions Under State Law**

Lastly, it is important for a reviewing court to note that the Supreme Court did leave open another possibility for the enforcement of recoupment provisions: Claims may be executed under state law. Yet it is unclear if a breach of contract claim enforced under state law would be preempted under ERISA, as the Court has never stated that it would or would not be. Assuming that preemption did not occur, if a plaintiff's claim can be characterized as legal (e.g., breach of contract claim) and a legal remedy is available (e.g., the plaintiff can sue under state contract law), then section 502(a)(3) does not provide relief even if the plaintiff can plead an equitable claim and identify specific assets that in good conscience belong to the plaintiff. In a case such as this, the nature of the remedy requested and thus the applicability of the Fifth Circuit's test would appear to be irrelevant. The reason a plaintiff's claim would fail is an adequate remedy at law exists via state court; thus no equitable remedy is necessary.

#### **CONCLUSION**

In its next term, the Supreme Court will revisit the question of whether reimbursement provisions may be enforced under ERISA section 502(a)(3) in *Sereboff v. Mid Atlantic Medical Services*.<sup>181</sup> The Court will hopefully end the increasingly fractured stance assumed by the appellate courts and the confusion surrounding the scope and meaning of *Knudson*.<sup>182</sup> Pending a clear directive from the Court, a reviewing

---

<sup>181</sup> The Supreme Court has granted certiorari in *Sereboff v. Mid Atlantic Medical Services*, a Fourth Circuit case that upheld the subrogation rights of the insurer. *Sereboff v. Mid Atlantic Medical Services*, 407 F.3d 212 (4th Cir. 2005), cert. granted, 2005 U.S. LEXIS 8573 (Nov. 28, 2005). The Fourth Circuit has adopted the "Three-step test" analysis of the Fifth Circuit. *Id.* at 218-19.

<sup>182</sup> The grant of certiorari in *Sereboff* has been long-awaited. As previously stated, the respondents in the Sixth Circuit's decision in *QualChoice, Inc. v. Rowland* appealed their case to the Supreme Court and certiorari was denied. See *QualChoice*, 367 F.3d

court must take a plenary analysis of the implications of the holdings of *Russell-Mertens-Varity-Knudson* and the meaning of equitable restitution. Likely, the Supreme Court will affirm its holding in *Knudson* but assert that it is a narrow ruling which permits a court to afford “equitable relief” to a plan seeking to enforce a reimbursement provision. This would be a logical conclusion, because by Congress limiting relief to only that which is equitable, the Court would likely be permitted to substitute equitable remedies in breach of contract claims—provided the claims are framed as sounding in equity and there is no adequate remedy at law. Such a ruling will lend support to the Fifth Circuit’s interpretation of *Knudson*, and will permit benefit plans to recover money paid out as benefits from those participants who recover from third party tortfeasors.

In addition, the Court will likely have to further distinguish its seemingly expansive reading of section 502(a)(3) in *Varity*, which termed the provision as a “catchall” remedy in a case of breach of fiduciary duty, from the narrower, rigid-like conditions set forth in *Knudson*, and may opt to point out that when finding fiduciary wrongs in the absence of a breach of contract claim, a court may use its equity powers in a more flexible manner based on historical notions of trust law. Nonetheless, should the Court elect to uphold the Fifth Circuit’s interpretation of *Knudson* and thereby explicitly permit plan fiduciaries such as insurers to recover from injured plan participants, the social cost of that potential ruling may be seen as slanting the playing field towards insurers due to the Court’s recent decision in *Aetna Health v. Davila*.<sup>183</sup> With the legislative movement to protect patients’ rights in wrongful benefit denials by amending ERISA’s remedial provisions

---

638 (6th Cir. 2004), *cert. denied*, 125 S.Ct. 1639 (2005). They were not alone: recent decisions by the Sixth and Ninth Circuits were also denied certiorari. *See Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Greater Northern Paper Inc.*, 382 F.3d 587 (6th Cir. 2004), *cert. denied*, 125 S.Ct. 1844 (stating that in the past year alone five other circuits, in addition to the Sixth, have struggled with the meaning of *Knudson*); *McDowell v. Providence Health Care Plan*, 385 F.3d 1168 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 1726 (2005) (holding that all relief sought that is based on contractual obligations are ordinary damages, and not permitted under section 502(a)(3)).

<sup>183</sup> The Supreme Court ruled in June 2004 that participants of health care plans who have been injured as a result of a benefit determination made by a plan are entitled only to recover the cost of the benefit denied, and not any compensation for resulting injury. *See Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004). The ruling in effect overturned state laws designed to protect patients by allowing recovery for money damages, and has been criticized as further insulating health benefit plans from any accountability for wrongful benefit denials in their mission to contain costs. *See id.*

beyond glacial, such a ruling may refocus reform efforts on Capitol Hill. This remains to be seen.



