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## Thoughts on the Latest Battles over ERISA's Remedies

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# THOUGHTS ON THE LATEST BATTLES OVER ERISA'S REMEDIES

*Brendan S. Maher\**

## I. INTRODUCTION

It is extraordinarily unlikely that the drafters of ERISA<sup>1</sup> foresaw the effect the statute would have on federal courts and American economic life. It was originally conceived as a “pension bill of rights”<sup>2</sup> designed to ensure that workers received the fixed monthly pension payment (based on tenure and average salary) that they had been promised.<sup>3</sup>

It grew, however, into the most litigated statute in the United States Code; to govern increasingly popular individual retirement savings accounts, e.g., 401(k) accounts;<sup>4</sup> to be the central statute regulating employment based health insurance, which covers over one hundred and sixty million people;<sup>5</sup> to be one of the most anti-federalist statutes in force, depriving states of large swathes of power to regulate insurance, historically an area of state dominion;<sup>6</sup> and to regulate almost entirely, the group of private arrangements that collectively allocates several

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1. Employee Retirement Income Security Act of 1974, 29 U.S.C. 18 §§ 1001-1461 (2006) (“ERISA”).

2. Ryan P. Barry, *ERISA's Purpose: The Conveyance of Information from Trustee to Beneficiary*, 31 CONN. L. REV. 735, 750 (1999) (citing 120 CONG. REC. S1537, S15743 (1974) (statement of Sen. Javits)).

3. See *id.* at 749-50.

4. See JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* 279 (2004); Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 WASH. U. L. REV. 433, 445, 448-49 (2010) (noting the prevalence of 401(k) arrangements).

5. See Sara R. Collins, Chapin White & Jennifer L. Kriss, *Whither Employer-Based Health Insurance? The Current and Future Role of U.S. Companies in the Provision and Financing of Health Insurance*, THE COMMONWEALTH FUND, Sept. 2007, at 7 fig.1, available at <http://www.commonwealthfund.org/Content/Publications/Issue-Briefs/2007/Sep/Whither-Employer-Based-Health-Insurance—The-Current-and-Future-Role-of-U-S—Companies-in-the-Provis.aspx>.

6. See Brendan S. Maher, *The Benefits of Opt-in Federalism*, 52 B.C. L. REV. 1733, 1756-58 (2011).

trillion dollars for the elderly and the ill.<sup>7</sup>

The importance and reach of the statute, coupled with its expansive preemptive shadow, resulted in an intensified interest in ERISA's remedies, which are often the only remedies a plaintiff may be able to pursue.<sup>8</sup> The United States Supreme Court has repeatedly, if not habitually, addressed itself to the matter of ERISA's remedies.<sup>9</sup> Regrettably, frequent Supreme Court attention has done little to clarify many important questions regarding ERISA's remedies. Below, the latest round of confusion on ERISA's remedies is analyzed, and opinions on a resolution are offered.

Part I offers a brief background on ERISA. Part II examines the pleading confusion that has arisen in response to the Supreme Court's decision in *Varity v. Howe*. Part III considers the Court's recent opinion

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7. In 2006, for example, retirement plans governed by ERISA held more than \$5.5 trillion in assets. BD. OF GOVERNORS OF THE FED. RESERVE SYS., FLOW OF FUND ACCOUNTS OF THE UNITED STATES: FLOWS AND OUTSTANDINGS FIRST QUARTER 2007, 113 (2007), <http://www.federalreserve.gov/releases/z1/20070607/z1.pdf>.

8. ERISA preempts most state laws that regulate private employee benefit agreements, and it expressly preempts state law remedies. See 29 U.S.C. § 1144(a) (2006) (ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-147 (1985). As a result, many observers have expressed concern over the Act's broad preemptive reach coupled with the Supreme Court's historically narrow interpretation of the remedies available under ERISA. As United States Supreme Court Justice Ginsberg put it: "Because the [Supreme] Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the . . . relief[ ] allowable under [ERISA], a 'regulatory vacuum' exists: '[V]irtually all state law remedies are preempted but very few federal substitutes are provided.'" *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 456 (3d Cir. 2003) (Becker, J., concurring)). This has resulted in a call from many observers for congressional reform of the statute's remedial provisions. See, e.g., *Cicio v. Does*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting) ("[T]he injury that the courts have done to ERISA will not be healed until the Supreme Court reconsiders the existence of consequential damages under the statute, or Congress revisits the law to the same end."); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 53 (D. Mass. 1997) ("This case, thus, becomes yet another illustration of the glaring need for Congress to amend ERISA . . . [which] has evolved into a shield of immunity that protects health insurers, utilization review providers, and other managed care entities from potential liability for the consequences of their wrongful denial of health benefits." (footnote omitted)); Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1091 (2001) ("Although the intent of the preemption clause was to provide uniformity regarding the administration of plan benefits, it is now being used as a shield for plan fiduciaries and insurers to limit their liability under these plans. Such a result is inconsistent with ERISA's overall objective to protect participants' rights.").

9. See, e.g., *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011); *Conkright v. Frommert*, 130 S. Ct. 1640 (2010); *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); *Sereboff v. Mid Atlantic Med. Servs.*, 547 U.S. 356 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). See also *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013).

in *CIGNA v. Amara* and the meaning of its holding with respect to the equitable relief now available under section 1132(a)(3) of the statute. Part IV remarks on an emerging battle concerning the scope of ERISA preemption of “saved” state insurance laws.

## II. ERISA: A BRIEF BACKGROUND

The Employee Retirement Income Security Act of 1974 sounds like a modest retiring statute, one given to quietly occupying a small corner of the federal code and addressing itself to an obscure few who know its innocuous-sounding nickname: “ERISA.” Nothing could be further from the truth. ERISA touches the lives of more people than any law apart from the tax code.<sup>10</sup>

The history of the statute is well-told and need not be repeated at length.<sup>11</sup> In the post-war years there was a pension crisis.<sup>12</sup> Companies who promised workers what we now call traditional pensions—a fixed monthly payment based on tenure and average salary—engaged in a series of abuses related to those deals.<sup>13</sup> Pension money was stolen or mismanaged, workers were not paid what they were promised, and in some cases company bankruptcy prevented workers from seeing a penny of their expected pension.<sup>14</sup> Congress spent years studying the appropriate solution to the problem, the legislative result of which was ERISA.<sup>15</sup>

Regarding traditional pensions—which ERISA called “defined benefit” pensions—ERISA took a series of affirmative regulatory steps,

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10. See *supra* note 7 and accompanying text. See also Douglas H. Shulman, Comm’r, Internal Revenue Service, Prepared Remarks before Harvard Kennedy School, Cambridge, Mass. (Nov. 14, 2011) available at <http://www.irs.gov/uac/Prepared-Remarks-of-IRS-Commissioner-Douglas-H.-Shulman-before-Harvard-Kennedy-School,-Cambridge,-Massachusetts> (stating that the IRS touches “almost every adult American.”).

11. For a thorough description of ERISA’s history, see generally WOOTEN, *supra* note 4, at 51-79.

12. See PATRICK PURCELL & JENNIFER STRAMAN, CONG. RESEARCH SERV., RL34443, SUMMARY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) 2 (2011) [hereinafter PURCELL & STRAMAN, SUMMARY OF ERISA].

13. See *id.*

14. See, e.g., James A. Wooten, “The Most Glorious Story of Failure in the Business”: The Studebaker-Packard Corporation and the Origins of ERISA, 49 BUFF. L. REV. 683, 683-84 (2001). The most notorious of these bankruptcies was that of the Studebaker-Packard Corporation. *Id.* This major company had not allocated assets to meet its obligations to pay the pensions of its employees in the event of its financial failure. *Id.* When it did collapse, it defaulted on payment of its employees’ retirement pensions, resulting in devastating harm to the financial security of its former employees. *Id.*

15. See generally WOOTEN, *supra* note 4, at 51-79.

including the strict regulation of funding, vesting, and anti-cutback requirements.<sup>16</sup>

ERISA (including a series of amendments) also governed other retirement bargains made incident to employment, such as 401(k) plans, which are called “defined contribution” plans.<sup>17</sup> ERISA took less affirmative regulatory action with respect to these “defined contribution” arrangements.

Finally, and most significantly, ERISA has governed “welfare plans,” of which the most important was and is health insurance offered by an employer to its employees.<sup>18</sup> As has been said repeatedly by many scholars, the inclusion of health insurance into ERISA—a statute conceived and written to regulate pension promises—was an ill-considered “afterthought.”<sup>19</sup> ERISA provided virtually no affirmative regulation of employment-based health insurance.<sup>20</sup>

However, all three types of arrangement—defined benefit, defined contribution, and health insurance—were subject to ERISA’s remedial scheme, which set forth the rights and remedies that ERISA beneficiaries (among others) could bring to obtain judicial relief.<sup>21</sup> For our purposes, three remedies matter.<sup>22</sup>

The first remedy, provided in section 1132(a)(1)(B), is a remedy to

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16. See 29 U.S.C. §§ 1052-1054 (2006).

17. See PURCELL & STRAMAN, SUMMARY OF ERISA, *supra* note 12, at 3-4. See also 29 U.S.C. §1002(34) (2006).

18. See PURCELL & STRAMAN, SUMMARY OF ERISA, *supra* note 12, at 7. See also 29 U.S.C. §1002(1) (2006).

19. See, e.g., WOOTEN, *supra* note 4, at 281 (“In the political history of pension reform, there was little discussion of employer-sponsored health plans.”); Catherine L. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 165 (1995) (ERISA’s drafters gave “relatively little thought to the problem of health benefits . . .”); David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL’Y L. & ETHICS 23, 29 (2001) (“Health benefits were included in ERISA as an afterthought, with little consideration given to whether the same regulatory framework would work . . .”).

20. In the language of the statute, ERISA governs two kinds of “employee benefit plans.” 29 U.S.C. § 1002(3) (“The term ‘employee benefit plan’ or ‘plan’ means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.”). A pension plan is “any plan, fund, or program . . . established or maintained by an employer” that “provides retirement income” or “results in a deferral of income by employees.” 29 U.S.C. §§ 1002(2)(A)(i)-(ii). Pension plans come in two types: “defined benefit” and “defined contribution” plans. 29 U.S.C. §§ 1002(34) (defined contribution), 1002(35) (defined benefit).

21. See 29 U.S.C. § 1132(a) (2006).

22. See Peter K. Stris & Victor A. O’Connell, *Enforcing ERISA*, 56 S.D. L. REV. 515, 515, 519-20 (2011) (noting that the substantive rules of ERISA are almost exclusively enforced through private civil actions brought under sections 1132(a)(1)(B), (a)(2), and (a)(3)).

obtain benefits that are due under the plan but not paid, i.e., benefit denials.<sup>23</sup> It has serious judicially imposed limitations, including (1) no consequential or punitive damages,<sup>24</sup> (2) a requirement that a benefit denial must be internally appealed to the plan administrator prior to seeking judicial relief, and (3) that the plan administrator is entitled to “deference” in his rulings if the plan language affords the administrator discretion.<sup>25</sup>

The second remedy, provided in section 1132(a)(2) is the “fiduciary breach” remedy.<sup>26</sup> It also has significant limitations, requiring either a loss to the plan or a personal gain to a fiduciary.<sup>27</sup> Specifically, what section 1132(a)(2) effectively authorizes is a derivative suit brought by a plan participant on behalf of the plan to obtain recovery loss to it or personal gain to the fiduciary.<sup>28</sup> The plan is the direct beneficiary of any remedial judicial resolution. Section 1132(a)(2) does not provide any remedy for the participant as an individual.<sup>29</sup>

The third remedy, provided in section 1132(a)(3) is the “catchall” remedy.<sup>30</sup> Section 1132(a)(3) claims permit the recovery of “appropriate equitable relief.”<sup>31</sup> In a strange but true line of decisions, the Supreme Court has held that “appropriate equitable relief” means such relief as was “typically available” in equity in the days of the divided bench.<sup>32</sup> Accordingly, the relief available under section 1132(a)(3) demands a searching historical inquiry; only if there existed at equity a historical analog to the claim being asserted can an 1132(a)(3) claim lie.<sup>33</sup>

How these remedies interact with each other—and with state law that attempts to speak to similar topics—is discussed in more detail below.

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23. See 29 U.S.C. § 1132(a)(1)(B) (2006).

24. See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985).

25. See *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989).

26. See 29 U.S.C. § 1132(a)(2) (2006).

27. See *Massachusetts Mut. Life Ins. Co.*, 473 U.S. at 140.

28. See *id.*

29. See *id.* at 142 (stating that the statute focuses on the entire plan’s participants having a right to relief as opposed to an individual beneficiary).

30. See 29 U.S.C. § 1132(a)(3) (2006). See also *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (describing section 1132(a)(3) as ERISA’s “catchall” remedial provision).

31. See 29 U.S.C. § 1132(a)(3)(B) (2006).

32. See *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878 (2011); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

33. See *CIGNA Corp.*, 131 S. Ct. at 1881; *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 210-11; *Mertens*, 508 U.S. at 257.

III. THE MATTER OF *VARITY*A. *Varity v. Howe*

*Varity v. Howe* involved the question of actionable misrepresentation under ERISA.<sup>34</sup> Defendant *Varity* owned a subsidiary, *Massey-Ferguson*, which included two divisions that were not profitable.<sup>35</sup> *Varity* planned to spin-off those two divisions into a separate subsidiary, *Massey Combines*.<sup>36</sup> *Varity* engaged in a series of misrepresentations regarding the financial health of *Massey-Ferguson* to assure concerned employees that their benefits at *Massey-Ferguson* were safe and secure.<sup>37</sup> The Court, in an opinion written by Justice Breyer, determined that the deliberate misrepresentations made by *Varity* were made while *Varity* was acting as a fiduciary, and such a misleading of beneficiaries amounted to a fiduciary breach.<sup>38</sup> The remedy for such a breach, held Justice Breyer, was found in section 1132(a)(3), which permitted issuance of “*appropriate equitable relief*” for violations of fiduciary duty.<sup>39</sup>

In reaching that holding, Justice Breyer explained how section 1132(a)(3) operated.<sup>40</sup> The provision operated as a “safety net, offering appropriate equitable relief for injuries caused by violations that § [1132] does not elsewhere adequately remedy.”<sup>41</sup> Defendants had expressed worry that a broad construction of (a)(3) would permit simple benefit denial claims to be “repackaged” as (a)(3) claims—and thus avoid the damage limits, administrative exhaustion, and deference requirements that attach to (a)(1)(B) claims.<sup>42</sup> The Court dismissed those concerns, explaining “that where Congress elsewhere provided adequate relief for a beneficiary’s injury, there will likely be no need for further equitable relief, in which case such relief normally would not be ‘appropriate.’”<sup>43</sup> In plain English: one cannot repackage a benefit denial claim under (a)(1)(B) as an (a)(3) claim seeking equitable relief for the breach of fiduciary duty committed in denying the benefit, absent some

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34. *Varity Corp. v. Howe*, 516 U.S. 489, 492 (1996).

35. *Id.* at 493.

36. *Id.*

37. *Id.* at 493-94.

38. *Id.* at 506.

39. *Id.* at 515-16 (emphasis in original).

40. *See id.* at 507-15.

41. *Id.* at 512.

42. *See id.* at 513-14.

43. *Id.* at 515.

special need to do so.

The holding has caused considerable confusion among courts. Several courts have interpreted *Varity* to announce a special *pleading* rule, namely that a plaintiff cannot plead both (a)(1)(B) and (a)(3) claims in the same complaint, apparently under the theory that an (a)(1)(B) claim “cuts off” any (a)(3) claim.<sup>44</sup> That is not the correct interpretation of *Varity*.

Plaintiffs may plead alternative theories of relief.<sup>45</sup> Recall that section 1132(a)(1)(B) claims *must* turn on the content of the plan.<sup>46</sup> If, therefore, a plaintiff asserts a section 1132(a)(3) claim arising from something *other* than the plan, e.g., a misrepresentation about what the plan terms were, then the plaintiff is pleading two different claims arising from different factual predicates. There is nothing in *Varity* that suggests that the *assertion* of a claim about the plan’s content renders unpleadable (a)(3) claims that turn on facts independent of the plan’s language.

The rationale is straightforward: a section 1132(a)(1)(B) claim is akin to a contract claim based on the language of the plan.<sup>47</sup> If the plaintiff is correct about the language of the plan, the plaintiff will win. If the plaintiff is not correct about the language of the plan, the plaintiff will lose. In contrast, if the (a)(3) claim arises from a different asserted factual predicate, e.g., that fiduciaries made a series of oral misrepresentations that the plaintiff relied on to his detriment, then that claim is entirely independent from, and utterly unaddressed by, (a)(1)(B). A court might agree with the defendant on the (a)(1)(B) claim, that is, it might agree that the plan does not provide for the benefit

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44. See, e.g., *Korotynska v. Metropolitan Life Ins. Co.*, 474 F.3d 101, 106 (4th Cir. 2006) (agreeing with those courts who “have not allowed claimants to proceed with § 1132(a)(3) claims where relief was potentially available to them under § 1132(a)(1)(B),”); *Ogden v. Blue Bell Creameries U.S.A., Inc.*, 348 F.3d 1284, 1287 (11th Cir. 2003) (explaining “that an ERISA plaintiff who has an adequate remedy under Section 502(a)(1)(B) cannot alternatively plead and proceed under Section 502(a)(3)”); *Metropolitan Life Ins. Co. v. Palmer* 238 F.Supp.2d 831, 835 (E.D.Tex. 2002) (declaring that “a potential beneficiary, even if ultimately unsuccessful, suing to recover benefits under section 1132(a)(1)(B), may not utilize the “catchall” provision of section 1132(a)(3) to recover equitable relief for breach of fiduciary duty”). The Second Circuit, in contrast, gets it right: *Varity* “did not eliminate the possibility of a plaintiff successfully asserting a claim under both § 502(a)(1)(B), to enforce the terms of a plan, and § 502(a)(3) for breach of fiduciary duty.” *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 89 (2d. Cir. 2001) (holding same in dispute involving alleged misrepresentation of benefits due). See *infra* note 48.

45. See FED. R. CIV. P. 8(a)(3).

46. See 29 U.S.C. § 1132(a)(1)(B) (2006).

47. As noted above, section 1132(a)(1)(B) authorizes participants and beneficiaries to bring suit to “recover benefits due . . . under the terms of [the] plan” or to “enforce . . . rights under the terms of the plan.”



sought, while at the same time agreeing with the plaintiff that the defendant engaged in misrepresentations that, independent of the plan's terms, constituted actionable harm to the plaintiff.<sup>48</sup>

### B. *Cigna v. Amara*

That is precisely what happened in *Cigna Corp. v. Amara*.<sup>49</sup> In *Amara*, the plaintiffs sought relief under (a)(1)(B) and (a)(3).<sup>50</sup> The (a)(1)(B) claim was that the plan entitled the plaintiffs to a pension of a specified amount; the plaintiffs claimed, however, that the particular "plan documents" specifying that entitlement were various summary plan descriptions.<sup>51</sup> On appeal from the Second Circuit, the Supreme Court decisively held that summary plan descriptions are *not* plan documents.<sup>52</sup> As the actual language in the plan was not at issue with regard to the plaintiffs' claim for benefits,<sup>53</sup> the Court found that relief under (a)(1)(B) was inappropriate.<sup>54</sup> The Court, with Justice Breyer writing for a six-justice majority that included Chief Justice Roberts, Justice Alito, and Justice Kennedy, specifically explained that the plaintiffs' (a)(3) claims were live, under at least three equitable theories—surcharge, estoppel, and reformation.<sup>55</sup>

If (a)(1)(B) operated to cut off the pleading of (a)(3), then the *Amara* Court could have simply rejected the plaintiffs' (a)(3) claims on the grounds that such claims were barred by the assertion of an (a)(1)(B) claim. The Court did no such thing and did not even need to explain why; there is no serious question that (a)(1)(B) claims can only possibly bar (a)(3) claims when the latter is simply a repackaging of the former.

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48. If, however, the (a)(3) claim is simply a repackaging of the (a)(1)(B) claim—i.e., "defendant breached his fiduciary duty by violating the terms of the plan and not granting me benefits, and therefore I am entitled to (a)(3) relief"—then *Varity's* language suggests, absent special circumstances, that equitable relief will not be appropriate. It will be a rare case where the pleading will be so clear that the (a)(3) claim is merely a repackaging of the (a)(1)(B) claim. Most of the time, a clever attorney will base an (a)(3) claim on a factual predicate different than a plan violation, and only discovery will reveal whether there is, in fact, a different predicate for the (a)(3) claim. In that case, the appropriate means of dismissal will be a granting of summary judgment.

49. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011). Interestingly enough, *Amara* is a decision well known for something else—expansion of the meaning of "appropriate equitable relief" under section 1132(a)(3)—that has caused confusion in an entirely different way, which will be discussed in the Section III.

50. *See id.* at 1871.

51. *See id.* 1877-78.

52. *Id.*

53. *See id.*

54. *Id.*

55. *See id.* at 1878-80.

If there was a question as to whether a plaintiff could plead both (a)(1)(B) and (a)(3) claims (when the latter is a misrepresentation claim), the Court no doubt would have addressed the issue. It did not.

The *Amara* Court's sanction of "reformation" as an equitable remedy should conclusively resolve confusion as to whether pleading (a)(1)(B) can bar (a)(3) claims in misrepresentation cases; it cannot. The *Amara* Court's holding distilled is that (1) plaintiffs' (a)(1)(B) claim failed because the plan language did not entitle them to the pension they sought, but (2) because of misrepresentations and omissions in the summary plan descriptions, the plaintiffs were entitled to pursue equitable relief under (a)(3) that would "reform" the plan consistent with their expectations.<sup>56</sup> That could not possibly be the case if the pleading of (a)(1)(B) barred (a)(3) relief. The validity of decisions predating *Amara* suggesting otherwise are almost certainly no longer good law.

#### IV. THE MATTER OF *AMARA*

In *Amara*, the dispute involved a cash balance conversion.<sup>57</sup> Prior to 1998, CIGNA promised retiring employees a pension based on length of service and level of pay.<sup>58</sup> In 1998, it converted that entitlement into a "cash balance" to be increased annually by contribution.<sup>59</sup> The plaintiffs alleged that "CIGNA had failed to give them proper notice of changes to their benefits, particularly because the new plan in certain respects provided them with less generous benefits."<sup>60</sup>

Plaintiffs sought relief under both (a)(1)(B) and (a)(3).<sup>61</sup> The district court held that plaintiffs were entitled to relief under (a)(1)(B) and thereafter "reformed the new plan and ordered CIGNA to pay benefits accordingly."<sup>62</sup> The Second Circuit affirmed and adopted the district court's reasoning.<sup>63</sup> The Supreme Court granted certiorari.<sup>64</sup>

The Supreme Court rejected the idea that (a)(1)(B) could help plaintiffs.<sup>65</sup> That provision, the Court explained, is intended to enforce

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56. See *id.* at 1877-80.

57. See *id.* at 1870.

58. See *id.*

59. See *id.*

60. *Id.* at 1871.

61. See *id.* at 1870-71.

62. See *id.* at 1871.

63. See *id.* at 1876.

64. See *id.*

65. See *id.* at 1877.

the terms of the plan as written.<sup>66</sup> In *Amara*, there was no dispute about the actual terms of the plan; the dispute was whether CIGNA had properly noticed plaintiffs of the new terms.<sup>67</sup> The plaintiffs and the Solicitor General had argued that communications about the plan, in particular SPDs, were in effect a part of the plan that could be enforced via recourse to (a)(1)(B).<sup>68</sup> The Supreme Court rejected that argument—communications about the plan are not the plan—and then concluded that the appropriate provision for relief was (a)(3).<sup>69</sup> That provision, explained the Court, justified recovery under historically equitable (and thus cognizable) theories of reformation, estoppel, and surcharge (assuming plaintiffs could show facts establishing the elements of those theories of relief).<sup>70</sup> Because the district court had not articulated its holding through equitable theories cognizable under (a)(3), the Court ordered remand.<sup>71</sup>

Justice Scalia, joined by Justice Thomas, concurred that an (a)(1)(B) claim cannot apply in misrepresentation cases, but attacked the majority's discussion of the equitable remedies available under (a)(3) as dicta.<sup>72</sup> In aftermath of *Amara*, several courts have followed Justice Scalia's lead, concluding that its discussion of cognizable equitable remedies was "dicta."<sup>73</sup> There are two problems with that reasoning: (1) the Court's holding was not dicta, and (2) even if it were, it is difficult to imagine a stronger signal from the Court that lower courts should permit recovery in (a)(3) cases under theories of reformation, estoppel, and surcharge.

"The distinction between dicta and holding is notoriously hard to

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66. *See id.* at 1876-77.

67. *See id.* at 1868.

68. *See id.* at 1877.

69. *See id.* at 1877-78.

70. *See id.* at 1878-80.

71. *See id.* at 1882.

72. *See id.* at 1884 (Scalia, J. dissenting) ("The Court's discussion of the relief available under § 502(a)(3) and *Mertens* is purely dicta, binding upon neither us nor the District Court.").

73. *See, e.g., Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1165 (9th Cir. 2012) ("In dictum, the *Amara* Court stated that, under appropriate circumstances, § 502(a)(3) may authorize three possible equitable remedies: estoppel, reformation, and surcharge."); *DeFazio v. Hollister, Inc.*, 854 F. Supp. 2d 770, 805 (E.D. Cal. 2012) ("In [*Amara*] the Supreme Court discussed, in dicta, the ability to award equitable relief under § 1132(a)(3)." (emphasis in original)); *Sconiens v. First Unum Life Ins. Co.*, 830 F. Supp. 2d 772, 778 (N.D. Cal. 2011) ("the Supreme Court recently blessed the equitable remedy of contract reformation for mistreated ERISA beneficiaries under Section 1132(a)(3), albeit in dicta."); *Kenney v. State St. Corp.*, CIV.A. 09-10750-DJC, 2011 WL 4344452, at \*7 (D. Mass. Sept. 15, 2011) (characterizing *Amara's* discussion of relief available under 1132(a)(3) as dictum).

define.”<sup>74</sup> I need not wade into that debate here. I offer instead a pragmatic view of what occurred in *Amara*, and by that account, it is quite clear that the *Amara* section discussing reformation, surcharge, and estoppel is holding, not dicta.

Before the Court was a dispute over the applicable remedy under ERISA in the case of a misrepresentation. The district court held that the applicable remedy was (a)(1)(B); it refused to consider the applicability of (a)(3).<sup>75</sup> The majority in *Amara* concluded two things: (1) that section (a)(1)(B) is not applicable in misrepresentation cases,<sup>76</sup> and (2) that the district court had erred in finding that it need not consider the applicability of section (a)(3) to the case before it.<sup>77</sup>

Not considering the application of a given statutory provision is only error if there is *some* valid theory under which the provision could provide the plaintiffs relief; otherwise the failure to consider the provision is harmless error. In finding error in the district court’s refusal to consider (a)(3), the Court spelled out three legally valid equitable theories of relief: reformation, surcharge, and estoppel.<sup>78</sup> Prior to this decision, the Court had not acknowledged the vitality of these three theories (and, indeed, the prevailing assumption was that they were not permissible under (a)(3)).<sup>79</sup> Declaring these theories cognizable was obviously part of the Court’s rationale for holding that the district court erred in failing to consider the applicability of (a)(3) to this case.<sup>80</sup> The Court was not offering wise asides about the vicissitudes of life, or speaking in the alternative, or behaving in any tangential way. It was explaining why the district court’s refusal to consider (a)(3) was wrong as a matter of law.

More importantly, dicta hair-splitting aside, the simple fact is that six Supreme Court justices signed onto an opinion expatiating on the validity of reformation, surcharge, and estoppel under (a)(3). By comparison, two of the most important pieces of ERISA remedies law could—and much more strongly than here—be described as dicta. In

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74. Ted Sampson-Jones, *Reviving Saucier: Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725, 758 (2007).

75. See *Amara*, 131 S. Ct. at 1876.

76. See *id.* at 1871.

77. See *id.* at 1882 (“Because the District Court has not determined if an appropriate remedy may be imposed under § 502(a)(3), we must vacate the judgment below and remand . . .”).

78. See *id.* at 1879-80.

79. See *id.* at 1876.

80. The first error was concluding that (a)(1)(B) applied. The second error was refusing to consider (a)(3), even though a request for such relief was before it. The Court in *Amara* reversed both errors.

*Massachusetts Mut. Life Ins. Co. v. Russell*, Justice Stevens said that consequential damages cannot be awarded under any of the 1132(a) remedial provisions, despite that the case involved only the meaning of “appropriate relief” under 1132(a)(2).<sup>81</sup> And in *Firestone Tire & Rubber Co. v. Bruch*, Justice O’Connor said that a plan can alter the standard of review courts must apply in scrutinizing an administrator’s interpretation of a plan, despite that the case involved only the issue of what standard courts should apply.<sup>82</sup> When the Court speaks plainly and directly of the principles that govern, lower courts should take heed.<sup>83</sup>

## V. THE MATTER OF PREEMPTION

ERISA preemption is a cottage industry. The application of ERISA preemption doctrine can be difficult, although the basic parts of the doctrine are simple enough to describe.

Section 514 of ERISA preempts all state laws that “relate to” employee benefit plans.<sup>84</sup> It is one of the broadest preemptive provisions in all of the United States Code.<sup>85</sup> That general grant of preemptive power is constrained by a second section of ERISA, commonly called the “savings clause,” which exempts from preemption state laws of insurance.<sup>86</sup> A third clause, the deemer clause, provides that states cannot “deem” employee benefit plans to be insurers and therefore can never regulate an employee benefit plan directly.<sup>87</sup>

Operating independently from section 514 is the doctrine of conflict preemption, which preempts state law to the degree it conflicts with or frustrates ERISA’s purposes.<sup>88</sup> The exemplar category of such preemption consists of state laws relating to the available remedies for

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81. See 473 U.S. 134, 149-51 (1985) (Brennan, J. concurring).

82. 489 U.S. 101, 115 (1989) (“Neither general principles of trust law nor a concern for impartial decision-making, however, forecloses parties from agreeing upon a narrower standard of review.”).

83. Cf. John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1342 (2007).

84. 29 U.S.C. § 1144(a) (2006).

85. See Andrew Stumpff, *Darkness at Noon: Judicial Interpretation May Have Made Things Worse for Benefit Plan Participants Under ERISA Than Had the Statute Never Been Enacted*, 23 ST. THOMAS L. REV. 221, 229 (2011) (quoting *Cal. Hosp. Assn. v. Henning*, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983)). See also Radha A. Pathak, *Discretionary Clause Bans & ERISA Preemption*, 56 S.D. L. REV. 500, 508 (2011) (noting that “[t]he Supreme Court has repeatedly stated that ERISA’s preemption clause should be read broadly” and collecting cases).

86. See 29 U.S.C. § 1144(b)(2)(A) (2006).

87. See 29 U.S.C. § 1144(b)(2)(B) (2006).

88. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55 (1987).

an improper denial of benefits.<sup>89</sup> Even if such state laws are saved by the savings clause, the Supreme Court has held that they are nonetheless preempted because of an “overpowering federal policy,” e.g., the exclusivity of ERISA’s remedies, that limit the operation of the savings clause.<sup>90</sup>

The Ninth Circuit recently grappled with the issue in *Fossen v. Blue Cross & Blue Shield of Montana, Inc.*<sup>91</sup> In that case, the plaintiffs brought a putative class action alleging, *inter alia*, that the defendants had violated Montana’s unfair insurance practice statutes, which prohibit rate discrimination by insurers in setting group rates.<sup>92</sup>

The plaintiffs were three brothers (the “Fossens”) who owned a small farm and purchased health insurance available to employers who were members of a business association.<sup>93</sup> The plaintiffs alleged that in 2006 and thereafter Blue Cross raised their premiums by an impermissible amount in response to the health conditions of the plaintiffs’ employees or beneficiaries.<sup>94</sup> The Fossens filed suit in Montana state court in 2009.<sup>95</sup> The defendants removed to the District Court for Montana, and the district judge dismissed the case.<sup>96</sup> On appeal to the Ninth Circuit, the panel held, among other things, that the plaintiffs’ unfair-practices claim (and related breach of contract claim) were not preempted by ERISA.<sup>97</sup> The defendants sought review by the Supreme Court, and the petition was identified by SCOTUSblog as a “petition to watch.”<sup>98</sup> After calling for the views of the government, the Court denied certiorari.<sup>99</sup>

Although certiorari was not granted, the larger issue is still open: to what degree do ERISA’s remedies operate to pull into federal court (and likely displace) saved state law? The leading Supreme Court opinion on point is *Aetna Health Inc. v. Davila*.<sup>100</sup> *Davila*, crucially, used careful language to cabin the preemptive holding to state laws that related to

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89. *See id.* at 56.

90. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 216-17 (2004).

91. 660 F.3d 1102 (9th Cir. 2011).

92. *See id.* at 1102.

93. *See id.* at 1105.

94. *See id.* at 1105-06.

95. *See id.* at 1105.

96. *See id.* at 1106.

97. *See id.* at 1114.

98. Matthew Bush, *Petitions to Watch | Conference of June 14, 2012*, SCOTUSBLOG (June 8, 2012, 4:56 PM), <http://www.scotusblog.com/2012/06/petitions-to-watch-conference-of-june-14-2012/>.

99. *Blue Cross & Blue Shield of Montana, Inc. v. Fossen*, 133 S. Ct. 979 (2013).

100. 542 U.S. 200 (2004).

claims for the denial of benefits, i.e., state laws that could be read to “supplement” or “duplicate” (a)(1)(B) claims.<sup>101</sup> Saved state laws that speak to regulatory matters *other than* benefit denials were outside the scope of the Court’s opinion.<sup>102</sup>

The Court’s specific test in *Davila* was a two-part test: (1) if the “individual, at some point in time, could have brought his claim under section 502(a)(1)(b),” and (2) if “there is no other independent legal duty that is implicated by [the] defendant’s actions,” then the saved state law would be completely preempted.<sup>103</sup> A few observations regarding this test and the scope of preemption follow.

Section (a)(1)(B) is a very specific and narrow cause of action: a claim for benefits under the plan.<sup>104</sup> It is a pure remedy; the area of overlapping state law that it will preempt is reasonably well-defined, i.e., state law regarding causes of action and damages. In contrast, (a)(3) is an equitable remedy that redresses any violation of the plan or the statute.<sup>105</sup> It only takes a little bit of bootstrap reasoning to have (a)(3) swallow up virtually the entirety of state law. Consider: because many states use the constructive fiction that all contracts in the state incorporate background law, all of that state’s insurance law becomes terms of the plan and theoretically becomes subject to remedy per (a)(3). Putting aside the second prong of the test, that would require, quite literally, that every insurance regulation in the state could only be enforced in federal court as incorporated state law, and only to the degree the relief sought was cognizable under an equitable theory recognized in the days of the divided bench. That Congress intended, via implicit preemption, to federalize the entirety of insurance regulation beggars belief. Congress does not “hide elephants in mouseholes.”<sup>106</sup> Incorporating the entirety of state insurance law into ERISA via constructive fiction qualifies.

The second part of the *Davila* test—making preemption contingent on the absence of an independent legal duty—confirms this intuition. Insurance has long been an area of state dominion, and much of that regulatory function involves matters that have little to do with remedy—

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101. *See id.* at 221 n. 7.

102. *See id.* at 217-218.

103. *Id.* at 210.

104. *See supra* note 23 and accompanying text.

105. *See supra* note 30 and accompanying text.

106. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 116 (2008) (quoting *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001)).

rate setting, public disclosure requirements, licensing, etc.<sup>107</sup> It would thus be very odd if non-remedial regulatory functions like rate-setting were preempted by a “catch-all” cause of action as nebulous as (a)(3). Faithful application of the independent legal duty requirement in *Davila* will prevent such odd results. Core regulatory insurance functions, by their nature, create independent legal duties unrelated to the existence of an employee benefit plan or ERISA.

## VI. CONCLUSION

Neither ERISA nor the court decisions interpreting the statute are a model of clarity. The latest round of confusion is the last in a series of episodes that have ensnared jurists for almost forty years. One wonders if any statute has sewn as much confusion, with as much frequency, as has ERISA. Let us hope not.

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107. Walter W. Heiser, *Due Process Limitations on Pre-Answer Security Requirements for Nonresident Unlicensed Issuers*, 88 NEB. L. REV. 494, 496 (2010) (“Each state has the power to regulate insurance companies who conduct business within the state’s boundaries.”).